Independent Chief Inspector of Borders and Immigration

Inspection of Country of Origin Information

Thematic Report
(September 2020)

David Bolt

Independent Chief Inspector of
Borders and Immigration

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To help improve the efficiency, effectiveness and consistency of the Home Office's border and immigration functions through unfettered, impartial and evidence-based inspection.

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Foreword

The UK Borders Act 2007 Section 48 (2)(j) states that the [Independent] Chief Inspector [of Borders and Immigration] "shall consider and make recommendations about" … "the content of information about conditions in countries outside the United Kingdom which the Secretary of State compiles and makes available, for purposes connected with immigration and asylum, to immigration officers and other officials."

The Independent Advisory Group on Country Information (IAGCI) is a panel of experts and practitioners, created to assist the Chief Inspector in this task. The IAGCI commissions and quality assures reviews of country information produced by the Home Office's Country Policy and Information Team (CPIT). A list of IAGCI members can be found on the Inspectorate's website.

This report covers a thematic review of CPIT products that deal with claims based on sexual orientation and gender identity or expression. The report and the attached reviews look both at individual Country Policy and Information Notes (COINs) and Information Requests (COIRs) and at these as a body of work. The recommendations cover both.

I have made three overarching recommendations. These flow directly from this review but also repeat concerns that I have expressed previously, regarding the resourcing and oversight of CPIT and the production and accessibility of COI.

The report was submitted to the Home Secretary on 13 October 2020.

D J Bolt
Independent Chief Inspector of Borders and Immigration

1. Scope

1.1 The Independent Advisory Group on Country Information (IAGCI) met via Skype on 31 March 2020 to consider the thematic review of Country of Origin (COI) products dealing with asylum claims based on sexual orientation or gender identity and expression (SOGIE) and the response(s) from the Home Office Country Policy and Information Team (CPIT). The agenda and minutes of the meeting are at Annex A.

1.2 The reviewer, Dr S Chelvan,[1] reviewed the following CPINs:

- Afghanistan: 'Sexual orientation and gender identity' (Jan 2017)
- Albania: 'Sexual orientation and gender identity' (Dec 2019)
- Algeria: 'Sexual orientation and gender identity' (Sept 2017)
- Bangladesh: 'Sexual orientation and gender identity' (Nov 2017)
- Gambia: 'Sexual orientation and gender identity or expression' (Aug 2019)
- Ghana: 'Sexual orientation and gender identity' (Feb 2016)[2]
- India: 'Sexual orientation and gender identity or expression' (Oct 2018)
- Iran: 'Sexual orientation and gender identity or expression' (Jun 2019)
- Iraq: 'Sexual orientation and gender identity or expression' (Oct 2018)
- Jamaica: 'Sexual orientation and gender identity or expression' (Feb 2017)
- Kenya: 'Sexual orientation and gender identity' (Mar 2017)
- Malawi: 'Sexual orientation and gender identity' (Feb 2017)
- Malaysia: 'Country Background Note' (Jan 2019)
- Morocco: 'Sexual orientation and gender identity' (Jul 2017)
- Myanmar: 'Critics of the government' (Jan 2019)
- Namibia: 'Sexual orientation and gender identity or expression' (Nov 2018)
- Nepal: 'Country Background Note' (Aug 2018)
- Occupied Palestinian Territories: 'Background information, including actors of protection, and internal relocation' (Dec 2018)
- Pakistan: 'Sexual orientation and gender identity or expression' (Jul 2019)
- South Africa: 'Sexual orientation and gender identity' (Jul 2017)
- Sri Lanka: 'Sexual orientation and gender identity or expression' (Oct 2018)
- Turkey: 'Sexual orientation and gender identity' (Jun 2017) and 'Military Service' (Sep 2018)
- Uganda: 'Sexual orientation and gender identity or expression' (Apr 2019)
- Ukraine: 'Minority Groups' (Jun 2019)
- Zimbabwe: 'Sexual orientation and gender identity or expression' (Jan 2019)

1 Biography at Annex B.

2 This was a 'Country Information and Guidance' report, having pre-dated the introduction of CPINs.

1.3 Dr Chelvan also reviewed the 'Report of a Home Office fact-finding mission to Vietnam' (Sep 2019), and the following Country of Origin Information Requests (COIRs):

- Cameroon: 'Treatment of gay men' (May 2018)
- Egypt: 'LGBTI persons' (Apr 2019)
- Lebanon: 'Activists, HIV treatment' (Mar 2018)
- Trinidad & Tobago: 'LGBTI persons/Medical issues' (Jun 2018)

1.4 The review also identified those countries for which there was no SOGIE/SOGIE-related CPIN, highlighting those where there was known to have been a SOGIE protection claim and/or relevant legislation/caselaw: Cameroon; Egypt; Ethiopia; Lebanon; Sudan; and Syria.

2. Reviewer's comments and recommendations and CPIT's response

Updates to CPINs

2.1 Dr Chelvan's review, 'Removing the mask: Locating 'The Martyr'' is at Annex C. It includes his assessment of each of the COI products he reviewed, which he banded "Excellent", "Very Good", "Good", "Neutral", "Action Required", "Urgent Action", "Priority Urgent Action". One case (Kenya) was banded "Priority Update", one (India) "Need for internal review", and one (Morocco) "Request for further information".

2.2 IAGCI did not look to endorse or challenge these bandings. However, the CPIT response noted that it was "pleasing" that the reviewer had found over half (17 of 31) of the countries reviewed "Excellent", "Very Good", or "Good", but pointed out that this was the reviewer's "opinion" and that "the absence of any key criteria, scoring system or methodology for how these countries were ranked, makes it difficult for CPIT to … learn anything from this in its current guise".[3]

2.3 Nonetheless, CPIT provided a response for all those countries where the reviewer indicated a need for some level of "Action": Afghanistan, Algeria, Ghana, Malawi, Malaysia, Myanmar and Sri Lanka. CPIT also provided a response to the Kenya review.

2.4 CPIT's responses are at Annex D. CPIT refers to an updated version of the Afghanistan CPIN, issued after the review was completed but before IAGCI met. Since the IAGCI meeting, CPIT has published a further five updated CPINs. In each case, the title of the CPIN has been amended to include "or expression":

- Afghanistan: 'Sexual orientation and gender identity or expression' (Feb 2020)
- Algeria: 'Sexual orientation and gender identity or expression' (May 2020)
- Ghana: 'Sexual orientation and gender identity or expression' (May 2020)
- Kenya: 'Sexual orientation and gender identity or expression' (Apr 2020)
- Malaysia: 'Sexual orientation and gender identity or expression' (Jun 2020)
- Sri Lanka: 'Sexual orientation and gender identity or expression' (Sept 2020)

2.5 As at the beginning of October 2020, CPIT had not published updated CPINs for Malawi or Myanmar. In the case of Malawi, CPIT's response indicated that while it accepted the need to update the CPIN, it did not have the resources to do so, noting that the number of protection cases was "low and declining".

2.6 In the case of Myanmar, CPIT declined to update the CPIN, as it "does not aim to address claims based on SOGIE but rather a person's actual or perceived criticism of the Burmese government". While this is reasonable, its refusal to follow the reviewer's alternative recommendation to publish a related COIR is not. The argument that this is available internally to Home Office staff is a poor one. The Home Office accepts that transparency is important

3 Dr Chelvan subsequently produced an Addendum to his Review explaining the rationale for his banding of countries. This is at Annex E.

and, as a point of principle, the guidance available to decision makers should also be available to claimants and their representatives.

Overall recommendations

2.7 In addition to the individual country reviews, the reviewer made ten overall recommendations:

1. ALL Country of Origin Information ('COI') reports to include Section on 'Risk to Open SOGIE applicants'
2. Identify – The Martyr: to accurately assess real risk – there are very few 'martyrs' in countries where there is well-founded risk (HJ (Iran)[4]). COI reports need to identify sources specifically with respect to those who choose to be, or are identified as, 'open'
3. Separate sections on COI on Lesbians and Bisexual Women, Trans and Intersex
4. The Silence Fallacy: All COI reports to include section on 'Social Norms and Public Opinion'
5. Internal Relocation Alternative: All COI reports should include a section on specifically identified places of suggested internal relocation alternative, if this issue is to be relied on by Home Office decision-makers
6. Knowledge of the Law: All CPIT-undertaken research and drafting of the reports should be done in the knowledge of the approach of the Tribunals and Courts, specifically with respect to binding Country Guidance and reported cases
7. Statistics on SOGIE Claims: Need for on-going data collection for SO claims, to also include protection claims based on Gender Identity or Expression and Intersex claims
8. Publication of Country Bulletin Updates ('CBU')
9. Publication of Responses to Requests for Information
10. Publication of basic country facts: – including population and predominant religion provides useful background context to religious, social and cultural norms and approximate size of SOGIE population expected to be visible if living 'freely and openly without fear of persecution'

2.8 CPIT "accepted" six of the ten recommendations (numbers 1, 2, 3, 4, 6 and 10) and "partially accepted" two (5 and 7). Recommendations 8 and 9 were "not accepted". It wrote in response (Annex F):

1. **Accepted.**
   We already consider the risk to openly gay persons. COI rarely makes the distinction the reviewer seeks and therefore this isn't always possible.
2. **Accepted.**
   We already do this. We collate information about the treatment of LGBTI people generally and, where it is available, about specific 'profiles'. However, the treatment of individuals may not always be representative of that faced by a group more generally – which is what a CPIN aims to cover – and further context may be needed to explain the individual's particular experiences.
3. **Accepted**.
   Where information exists, we will. However, many sources reporting on LGBTI issues tend to use the term generically.

4 https://www.bailii.org/uk/cases/UKSC/2010/31.html

4. **Accepted**.
   We're moving towards this now (it's in our suggested standard ToRs). However, as above, we are sometimes confined by the available information. Therefore, we agree in principle but in practice it is sometimes difficult.
5. **Partially accepted.**
   Disagree that it is for CPIT to dictate; it is as much for DMs to evaluate in individual cases. We will aim to provide information about geographical variation in treatment of LGBTI persons where it is available.
6. **Accepted**.
   CPIT staff receive training on RSD processes. We construct CPINs taking into account relevant country-specific country guidance caselaw. During the production process HO lawyers are consulted for advice on relevant caselaw and that the CPINs are compliant with the law.
7. **Partially accepted**.
   We record data on sexual orientation/expression and we publish it. However, we do not currently record data on gender identity/expression or trans expression. Therefore we are unable to agree to expand the scope of data collection in this area, though we are looking at the potential to do so.
8. **Not accepted**.
   Unclear what is meant or how this is different to what CPINs, COIRs and "Inspired" COIRs and, increasingly, background notes (which we are looking to expand across more countries) do. However, the issue facing CPIT is resources and priorities; not the product – we are not resourced to provide running commentaries on country situations.
9. **Not accepted**.
   a. We already make responses available via the decision letter and/or appeal bundle, which the applicants and the Tribunal get to see
   b. Often there are disclosability issues if the response directly or indirectly provides information about the applicant which prevents wider publication
   c. COIRs contain no stated position by the SSHD
   d. The information is in the very large majority of responses already in the public domain (as can be seen in the responses reviewed)
   e. We are planning to produce more background CPINs on more countries, which will be published and we think are a better vehicle for contextual information about LGBTI persons
   f. Logistically we produce around 1,200+ responses a year and the process of organising, checking and publishing responses becomes a bureaucratic industry in itself – for CPIT and colleagues elsewhere – requiring limited resources with an unclear (if any) benefit
10. **Accepted**.
    As stated above, we are planning to produce more background notes. However, with finite resources and a near endless demand for COI, CPIT has to prioritise accordingly.

2.9 The CPIT response also commented on "repeated references [by the reviewer] to no "template" being provided to the reviewer by CPIT". It explained that: "CPIT does not use a SOGIE- (or any issue-) specific template when previously we did; rather we use a standard Terms of Reference as a starting point to guide research to answer relevant questions. We shared this with the IAGCI in June 2019."

2.10 The issues raised by CPIT's responses are covered in Chapter 3.

Terminology

2.11 The reviewer identified the importance of using the correct terminology when referring to SOGIE matters. IAGCI agreed and recommended that CPINs should be clearer about the search terms used to look for information contained in reports, and the terms that people use to self-identify. It was recognised that this was difficult, as terminology differs from country to country, but it was important for asylum decision makers to phrase their questions so that they make sense to applicants and elicit the most accurate responses, and to be able to navigate and make sense of the relevant country information.[5]

5 See also the European Asylum Support Office Practical Guide 'Researching the situation of lesbian, gay, and bisexual persons (LEGB) in countries of origin'.

3. Independent Chief Inspector's Comments and Recommendations

3.1 CPIT responded relatively quickly (within three months) to update most of the CPINs that the reviewer had identified as requiring "Urgent" or "Priority Action". But, at the time of writing (October 2020), one (Sri Lanka) had only just been published and another (Malawi) was outstanding.

3.2 IAGCI has not had the opportunity to review the updated CPINs or to revert to the reviewer for his comments. However, for the most part, CPIT appears to have addressed the reviewer's specific concerns. The notable exception is the updated Sri Lanka CPIN.

3.3 Here, the reviewer was at pains to point out that the reference in the October 2018 version to the Sri Lankan Supreme Court judgment in Galabada was incomplete and inaccurate, and that the CPIN should better reflect the law in Sri Lanka which, according to the reviewer, states that the only way people can be released from jail is by undergoing conversion therapy. The updated CPIN provides further detail regarding the judgement, but notes:

> "The [Supreme] Court stated in this instance [Galabada] they were affording the offenders an opportunity to reform. It is unclear what was meant by reform in this particular instance and although 'conversion therapy' is available in Sri Lanka there is no evidence that this is forced upon a person by the state or was referred to in the Galabada case (see Conversion therapy)."

The cross-referenced section on 'Conversion therapy' ends:

> "CPIT were unable to find any sources which state that conversion therapy is forced on individuals by the state."

3.4 In the case of Malawi, CPIT had indicated when IAGCI met that an update was unlikely in the near future. As CPIT observed: "the issue facing CPIT is resources and priorities".

3.5 Managing within finite resources will always be a challenge for CPIT, as it is across the whole of the Borders, Immigration and Citizenship System (BICS). Like all business areas, CPIT has to make difficult decisions about priorities and what will and will not get done. However, as ICIBI has pointed out previously,[6] the reduction in staff numbers in 2014 when the functions of the Country Specific Litigation Team (CSLT) and Country of Origin Information Service (COIS) were combined to form CPIT, and more recently the abstractions of CPIT staff to other business areas, has left an already small team looking seriously under-resourced.

3.6 While CPIT has maintained a generally high-quality output in terms of individual CPINs, the intervals between updates are an issue. And, the frequent references in this and previous reviews to the absence of information on points raised by reviewers may say as much about CPIT's capacity to search for relevant information (combined with the lack of funding for

6 https://www.gov.uk/government/publications/an-inspection-of-country-of-origin-information

translations of source material that is not in English) as it does about the existence of such information.

3.7 Overall, this points to an under-investment by the Home Office in COI. Given that the department is dealing with increasing numbers of asylum claims, this is neither sensible nor acceptable.

3.8 In responding to the reviewer's references to there being no template for SOGIE CPINs, CPIT correctly points out that it shared its standard Terms of Reference for COI production with IAGCI in June 2019. However, this ducks the question of whether, when dealing with a cross-cutting theme such as SOGIE, a template might be the better option. A template could be helpful in addressing two key concerns that ICIBI has raised before: whether busy and inexperienced asylum decision makers are able easily to engage with and navigate COI; and, whether silence on a particular point risks being interpreted as evidence of absence, rather than a knowledge gap. For these reasons, the Home Office should look again at its methodology.

3.9 The CPIT response to the reviewer's ten recommendations contains examples of IAGCI and CPIT talking past one another. This is characterised by the latter "accepting" recommendations but not recognising it needs to change something. This is not new, but it happens too often. In making any recommendation a reviewer/IAGCI and ICIBI is saying that some change is needed. If the Home Office, in this case CPIT, responds by saying none is required it is rejecting rather than accepting the recommendation.

3.10 In practice, CPIT is "judge and jury" in this review process and I remain concerned about oversight of CPIT and its output within BICS. In 2018, I recommended that CPIT should be moved under the management of UKVI. This was rejected,[7] and I am not seeking to re-open that argument. But, there is still insufficient senior-level oversight of the work of CPIT, and by extension of the IAGCI review process. While I have tried to remedy this by putting these reviews on the same footing as other ICIBI inspection reports, reflecting their equivalence in terms of ICIBI's statutory remit, it still feels that the Home Office takes too little interest in this key area of its business.

Recommendations

The Home Office should:

1. Review the resources (staffing and budgets) currently allocated to the production and maintenance of Country of Origin Information products (CPINs and COIRs), with a view to building the capacity of the Country Policy and Information Team to a point where it is able to:
   a. review, and where necessary update, all extant CPINs at least every two years
   b. publish an updated version of any extant CPIN within three months where the Home Office agrees that the CPIN requires urgent or significant amendment
   c. carry out (or sponsor and assimilate) sufficient research, including of information that is not available in English, to ensure that references in COI products to the absence of evidence in relation to information that may be material to an asylum decision are not, in reality, knowledge gaps

7 https://www.gov.uk/government/publications/response-to-an-inspection-report-on-the-home-offices-production-and-use-of-country-of-origin-information

2. Ensure that the management structure above the Country Policy and Information Team (CPIT) has the "bandwidth" to engage with the detail of CPIT's work and output, and the "clout" to resist the deprioritising of Country of Origin work in favour of other areas of business
3. With input from asylum decision makers and other regular users of COI, look again at whether information in Country Policy and Information Notes (CPINs) about cross-cutting issues might be better presented using a template or standard format.

D J Bolt
Independent Chief Inspector of Borders and Immigration

Annex A: Meeting of the Independent Advisory Group for Country Information 31 March 2020

Venue: The meeting was conducted via Skype.

IAGCI Members:

Prof Laura Hammond (LH), School of Oriental and African Studies (Chair)
Dr Ceri Oeppen (CO), University of Sussex
Katinka Ridderbos (KR), UNHCR Geneva
Dr Julie Vullnetari (JV), University of Southampton
Harriet Short (HS), Immigration Law Practitioners' Association (ILPA)

Apologies (Members):

Prof Michael Collyer (MC), University of Sussex
Sue Pitt (SP), Upper Tribunal Judge
Prof Giorgia Dona (GD), University of East London
Prof Nando Sigona (NS), University of Birmingham

Attendees:

Sarah Elliot (SE), UNHCR
Charles Bishop (CB), ILPA (alternate for Sonia Lenegan)

ICIBI representatives:

David Bolt (DB), Independent Chief Inspector
Hollie Savjani (HSa), Minute taker

CPIT:

Martin Stares (MS), Head of CPIT
Robin Titchener (RT), CPIT
Jacqueline Niven (JN), CPIT

Commissioned reviewer:

Dr S Chelvan

Agenda item	Discussion	Action
1. Pre-meeting discussion	Apologies: MC, SP, GD LH outline the plan for the meeting – a need to consider the bigger picture and well as specific details. E.g. what are the key points and issues, as well as particular issues in countries; as well as looking at how the country reviews have been categorised (from good, to needing urgent action) by the reviewer. Discussion of ILPA representation at the IAGCI – CB in lieu of SL. Agreed. DB provided an update on December's meeting. There have been delays to publishing his reports – he will be sending his report from the December meeting to the Home Office in the coming days. DB suggested human trafficking as a future thematic for the IAGCI, possibly in collaboration with the Anti-Slavery Commissioner. The group agreed this would be interesting. LH lobbied for a new Chair amongst the current panel to be appointed before the end of October so that the IAGCI is up and running before the new CI starts. One panel member had expressed interest. The idea would be for them to co-chair the next meeting with LH.	
2. Meeting	**<u>Home Office staff and Reviewer (SC) join the meeting.</u>** LH noted the apologies and participants introduced themselves, LH outlined the agenda for the meeting: Part 1 – discussion of part 1 of report, focusing on framing of review, the key issues looked at. There are 10 general recommendations to which HO had responded. Part 2 – look at categorisation of countries. SC had been asked to provide more clarity on how the multiple categories were arrived at. An explanation is included in the addendum to the review. Part 3 – 8 countries identified for urgent update – see below. The HO was asked to respond to top two Recs for each. IAGCI would ask the HO to respond to all recommendations after the meeting, then IAGCI can discuss the report and conclude its recommendations. **<u>Part 1</u>** SC – the starting point was to look at refugee status determination, and the role of COI in determining status – in particular with reference to Sexual Orientation and Gender Identity. The report should assist those involved in deciding whether refugees have a claim based on SOGIE issues. It also sought to differentiate between state persecution and societal persecution, and the issue of whether openly LGBTI people are persecuted and what steps they would need to take to avoid persecution.	

Agenda item	Discussion	Action
2. Meeting (Cont)	SC looked at the background facts for each state, statistics of LGBTI asylum cases, how guidance and CPINs were used in decision-making, case law – particularly in cases where the COI was old, or there was no COI. Then looked at how helpful guidance was in assisting the determination of SOGIE asylum claims – rating them from good to 'in need of action.' The report makes ten general recommendations to which the HO has responded. 6 were fully accepted, 2 partially accepted and 2 rejected. SC was pleased with the responses but has some concerns: HO says it always considers LGBTI issues, but guidance does not always clarify risks to openly LGBTI people – the recommendation seeks to include this explicitly to make reports more user-friendly and avoid divergence in decision-makers' thinking. HO responded that the COI does not generally give a full answer in a case, and that it is not always clear what an 'openly LGBTI' or 'activist' person is and whether they can be identified. HO says information is interpreted in individual cases, but if the CPIN does not explicitly recognise this it leaves people at risk. On decriminalisation, constitutional prohibition on same sex marriage or sex: this can amount to persecution. This should be in CPINs and decision makers should have access to this information. The HO says they are a small team with finite resources and cannot review everything constantly and that information can be Googled. SC pointed out that after a Supreme Court case last year, it is the role of CPIN to provide this information. LH and DB agreed that this requires further discussion. **Part 2** Discussion of countries classified by SC as requiring "urgent action" and "priority action". No questions from panel on the SC's addendum document. **Part 3** Discussion on countries identified for urgent action: Afghanistan February 2020 CPIN has some areas of concern: it says relocation of gay people to Kabul was possible, while this is not true in reality. The HO has said they no longer consider internal relocation.	

Agenda item	Discussion	Action
2. Meeting (Cont)	it does not include any information on trans people, despite that information being available. HO says there is very little information on this. LH felt the risks to trans people should be acknowledged and that SC's claim that such information is available should be followed up. IAGCI expressed relief that the issue of 'bacha bazi' – boys forced to have sex with adult men – had finally been described as criminal child abuse rather than being in any way related to attitudes or practices of homosexuality. This criticism had been raised in several other IAGCI reviews and had not been redressed until now. <u>Algeria</u> The COI could be updated to reflect developments on SOGIE relating to the State's growing pattern of persecution of LGBTI people. A specific section on Gender Identity/Expression and some evidence of investigation of COI relating to intersex/sex characteristic claims was also recommended. CPIT explained that it had had difficulty in finding evidence of such treatment. <u>Ghana</u> Guidance needed to be updated, particularly with regard to the information used by the Upper Tribunal in drafting its negative protection decisions. The evidence cited in such decisions should be used to update the CPIN where other public domain information may not be available. In addition. the report should cover links being made between Coronavirus and the Trans/ Lesbian community in Ghana <u>Kenya</u> The Kenya CPIN is in urgent need of updating. SC asked when new guidance would be issued. CPIT was waiting for clearance so it should be soon. <u>Malawi</u> COI needs to be updated urgently. SC suggested that CPINs that need updating should be removed from the website, especially when the guidance is clearly misleading and out-of-date, as using them might expose individuals to greater risk. CPIT said it intended updating this CPIN but as the numbers of asylum seekers from Malawi is lower now and given resource constraints it may not be treated as a priority.	

Agenda item	Discussion	Action
2. Meeting (Cont)	Malaysia SC called for an urgent update to the Malaysia CPIN, noting that it was encouraging that many SOCIE claims from Malaysia are granted. CPIT said it was about halfway through updating the CPIN, which would be published soon. Myanmar SC noted that there is not a CPIN on SOGIE for Myanmar. This was another example where the HO's review of the information was not publicly available. HO said that a COIR on SOGIE has been updated and is available to decision makers, but it had no plans to publish this and no plans to develop a SOGIE CPIN for Myanmar. Sri Lanka SC reported that the CPIN inaccurately records the 2016 Sri Lankan Supreme Court judgment in Galabada by omitting that part of the sentence (the five years suspension) was based on the requirement to "reform" ("prove straight") and the Upper Tribunal had agreed that this leads to positive determinations on protection claims, and is a clear departure from the 2015 CG case of LH and IP (incorrectly recording that there have been no prosecutions since 1948 independence). HO responded that they will look again at the CPIN and change this reference. SC considered this was inadequate, and that the report needs to better reflect the law in Sri Lanka which states that the only way people can be released from jail is undergoing conversion therapy. The report needs to include more accurate referencing to the legal landscape in Sri Lanka and show these changes robustly. HO said that this will be updated and looked at.	
3. Closing	KR observed that there is a need to discuss what search terms have been used to look for information that has been included in reports, including terms that people use to self-identify. This is difficult as terminology differs from country to country. But, it is important as decision makers need to phrase questions in a way that makes sense to the applicant. DB noted that there were a lot of follow-up actions for CPIT and he was conscious of the latter's limited capacity, which again raised the question of what the 'right-sizing' of CPIT to deal with the volume of work there required to support the asylum system. CPIT noted that some of its team were deployed to other work at the moment, reducing its capacity. LH asked that IAGCI be kept updated on progress.	
Next meeting	Date of next meeting to be agreed, but the aim is to meet before the end of October 2020 (when DB departs).	

Annex B: Biography of the Reviewer

Dr Chelvan

Dr Chelvan is a globally recognised legal expert on refugee and human rights claims based on sexual, or gender identity and expression. He is instructed on cases in the UK up to and including the Supreme Court, and the Strasbourg Court. Chelvan views his role is that of a storyteller and interpreter, translating his client's narratives into the foreign language called the law, but to do so, establishing 'the safe space' in order for the person seeking asylum to be able to tell their stories.

Having practiced in the field of LGBT+ asylum since 2001, Chelvan has been recognised as the leading legal expert by the UK's Legal Directories since 2006, spearheading some of the leading cases since 2005 (Band 1 in Immigration Legal 500 since 2017). Since 2010, Chelvan has been consulted as an internationally recognised expert by the United Nations, the IOM, regional and national governmental organisations and bodies, lawyers and NGOs. His Difference, Stigma, Shame and Harm ('DSSH') model, created by Chelvan in 2011 as a positive tool to determine an LGBT+ asylum claim is used globally, endorsed by the United Nations High Commission for Refugees since 2012, EASO, the IOM, the IARLJ and used by various governments, including the UK's Home Office, since 2015. Newsweek Europe in 2014 described the model as "a simple starting point that cuts across borders". In supporting his 2018 Attitude Magazine Pride award in July, the Nigerian lesbian activist Aderonke Apata, who successfully gained asylum after a 13 year battle after Chelvan was instructed, commented, "the way that he fought .. and they [the Home Office] gave me asylum, that's magical to me". Danila Stepin, another of Chelvan's clients who feared persecution in Russia said, "Chelvan is really an admirable man, he saves peoples lives".

Chelvan's approach to his practice successfully employs a symbiotic approach to litigation, academic research and policy work at both a UK and European level. Chelvan has provided training to Judges, lawyers, NGOs and activists and his public speaking has earned him an international reputation as a charismatic and engaging speaker, including giving the 11th Stonewall Lecture in February 2013 highlighting to a national audience for the first time the extreme lengths gay asylum-seekers were taking to prove their sexual identity. His PhD in Law thesis submitted in August 2018 (viva passed with corrections on 4 December 2018) to King's College London examines the shift in approach in asylum cases in England and Wales from conduct to identity: 'At the End of the Rainbow, Where next for the Queer Refugee?'. Chelvan has published extensively and is regularly interviewed by national and international media outlets (Legal Action Magazine (September 2018) (Sue James) and The Hearing podcast (to be broadcast) (Kevin Poulter)). His cases receive international media attention.

Chelvan was awarded the 2014 Legal Aid Barrister of the Year award, is the highest-ranking lawyer in the 2015 Independent on Sunday Rainbow List, is in the Black Law Directory's Powerlist of the top 34 BAME lawyers, named a Legal Hero for 2015 LegalPride and was shortlisted in 2017 in the Barrister of the Year category for the Lawyer Magazine awards (the only non-QC to be shortlisted). In November 2017, at 43, he was short-listed for interview in the final six for the UN Independent SOGIE expert, the only UK domiciled candidate to be short-listed. He is a Trustee of FREEBAR, and is a Stonewall Ambassador and Role Model, giving the keynote speech at the Stonewall Workplace conference in Manchester in September 2018. In March 2018, Chelvan joined UK Black Pride as the International Rights officer, making clear seeking global change demands engagement of all Queer voices.

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Annex C: Removing the Mask: Locating 'The Martyr'

REMOVING THE MASK:

LOCATING *'THE MARTYR'*

Reviewing UK Home Office Country of Origin Information relating to

Sexual Orientation and Gender Identity or Expression ('SOGIE') Protection Claims

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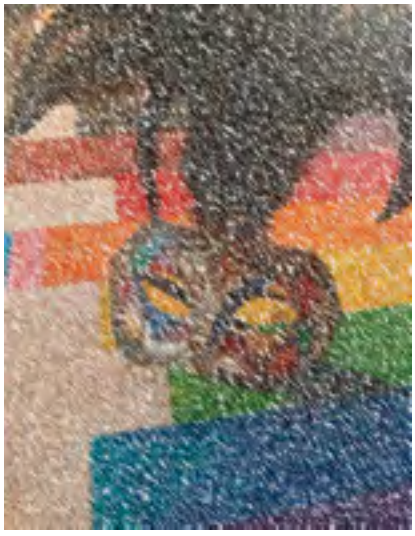
Dr. S. Chelvan, Barrister



'How COI is used for refugee status determination

(second limb of Lord Rodger's binding guidance in HJ (Iran) (para 82).'

Report submitted to the Independent Advisory Group on Country Information

10 February 2020

Ten Reviewer Recommendations

The following ten recommendations are made by the reviewer:

1. **ALL Country of Origin Information ('COI') reports to include Section on 'Risk to Open SOGIE applicants';**

2. **Identify - *The Martyr*: to accurately assess real risk - there are very few 'martyrs' in countries where there is well-founded risk (HJ (Iran)). COI reports need to identify sources specifically with respect to those who choose to be, or are identified as, 'open';**

3. **Separate sections on COI on Lesbians and Bisexual Women, Trans and Intersex;**

4. **The Silence Fallacy: All COI reports to include section on 'Social Norms and Public Opinion';**

5. **Internal Relocation Alternative: All COI reports should include a section on specifically identified places of suggested internal relocation alternative, if this issue is to be relied on by Home Office decision-makers;**

6. **Knowledge of the Law: All CPIT undertaken research and drafting of the reports should be done in the knowledge of the approach of the Tribunals and Courts, specifically with respect to binding Country Guidance and reported cases;**

7. **Statistics on SOGIE Claims: Need for on-going data collection for SO claims, to also include protection claims based on Gender Identity or Expression and Intersex claims;**

8. **Publication of Country Bulletin Updates ('CBU');**

9. **Publication of Responses to Requests for Information.; and**

10. **Publication of basic country facts: - including population and predominant religion provides useful background context to religious, social and cultural norms and approximate size of SOGIE population expected to be visible if living 'freely and openly without fear of persecution'.**

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PART A: REVIEWER'S REPORT

Removing the Mask: Locating '*The Martyr*'

'[R]eview through the prism of how COI is used for refugee status determination (second limb of Lord Rodger's binding guidance in HJ (Iran) (para 82)).'

The Independent Advisory Group on Country Information[1]

'Section 48 (2) (j) of the UK Borders Act 2007 states that the Chief Inspector shall consider and make recommendations about 'the content of information and conditions in countries outside the United Kingdom which the Secretary of State compiles and makes available, for purposes connected with immigration and asylum, to immigration and other officials.'

The IAGCI was established in 2009 to succeed the Advisory Panel on Country Information. IAGCI advises the Independent Chief Inspector of Borders and Immigration (ICIBI) about the content and quality of country information and guidance notes produced by the Home Office and relied upon by decision makers.

IAGCI commissions and quality assures reviews from independent reviewers, typically academics with relevant knowledge and expertise, of selected country information. The work is funded by ICIBI. Following an IAGCI review, the ICIBI sends a report to the Home Secretary with his recommendations.'

[1] https://www.gov.uk/government/collections/the-independent-advisory-group-on-country-information-iagci, last accessed 9 February 2020.

1. INTRODUCTION

1. The need to be recognised as a refugee (via status determination from the asylum-seeker[2] to the refugee) affords people seeking asylum in the United Kingdom, sanctuary.

2. Nearly 70 years since the framing of the 1951 Refugee Convention,[3] the interpretation of international treaties as providing a living instrument for individual protection claims is more powerful now, than it has ever been.

3. The UN Human Rights Committee's 7 January 2020 decision in Ioane Teitota v. New Zealand[4] was based on a claim by Teiote and his family to stop removal to the Republic of Kiribati, as this would lead to return to 'an untenable and violent environment'.[5] The applicant successfully relied on the 'right to life' in Article 6 (1) of the International Covenant on Civil and Political Rights[6] to resist removal, marking a global precedent for 'climate refugees' - expanding definitions and understanding of real risk and sanctuary.

[2] Immigration and Asylum Act 1999 s. 94(1) '"asylum-seeker" means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State by which has not been determined.' Statutory definition still in force from 3 November 2008, as of 9 February 2020.
[3] The Convention Relating to the Status of Refugees, opened for signature, 28th July 1951, 189 U.N.T.S. 150, entered into force, 22nd April 1954, as amended by the Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267, *entered into force*, 4th October 1967. UK's ratification of the 1951 Convention on 11 March 1954 and accession to the 1967 Protocol on 4 September 1968: http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html, last accessed 9 February 2020.
[4] (CCPR/C/127/D2728/2016), 7 January 2020: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f127%2fD%2f2728%2f2016&Lang=en , accessed 9 February 2020.
[5] ibid, page 2, section 2.1.
[6] U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976.

4. In assessing protection claims of Sexual Orientation and Gender Identity or Expression ('SOGIE') and non-SOGIE persons, the UK Supreme Court in 2010 in HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 AC 596 ('HJ(Iran)'), made the following important observations, on why when there is a well-founded fear of persecution the human condition is generally to be forced to conceal identify, noting there may be 'some who risk martyrdom'- '*The Martyr*': (**emphasis added**):

LORD RODGER OF EARLSFERRY [59]:

'Although counsel for the Secretary of State was at pains to draw this distinction between assuming that the applicant would act discreetly to avoid persecution and finding that this is what he would in fact do, the distinction is pretty unrealistic. **Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly**. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution.'

LORD WALKER [97]:

'**There are some countries in which a gay couple who lived together quite openly, and made no attempt to conceal their affection, even in public places, would be 'inviting persecution'** (an expression used in *R v Secretary of State for the Home Department, Ex p Binbasi* [1989] Imm AR 595, p 4). That is an unfortunate expression. **Some people who risk martyrdom have complex motivation and appear to others to be stubborn and wrong-headed**. (John Donne, who was born a Catholic and knew a lot about persecution from his own family's experiences, wrote a prose work entitled Pseudo-Martyr, published in 1610, deploring the intransigence of some loyal Catholics.) **But neither the most courageous nor the most timorous forfeit protection as asylum seekers if, in their different ways, they satisfy the test of a well-founded fear of persecution because of their sexuality**.'

SIR JOHN DYSON SJC, MASTER OF THE ROLLS [123]:

'Thirdly, the Secretary of State seeks to draw a distinction between the decision-maker (i) "requiring" the asylum-seeker to act discreetly on return and (ii) making a finding that the asylum-seeker will in fact act discreetly on return. It is said that the former is impermissible and irrelevant to whether the asylum-seeker has a well-founded fear of persecution, whereas

the latter is not only permissible but highly relevant. **But as Lord Rodger points out, this is an unrealistic distinction. Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly**.'

5. The above passages highlight why the risk assessment, in countries where there is a well-founded fear of persecution, will never be able to address the evidence on 'general risk' to those affected, but address the evidence of those who do not act 'discreetly' by swelling the ranks of martyrs.

6. It is these individuals who are identified by the potential persecutor due to their acts (by choosing visibility rather than concealment) or are identified through their inability to 'prove straight'.

7. This is directly relevant to the need to identify within the Country of Origin Information ('COI') material, adopting the binding guidance of Lord Rodger at paragraph 82 of **HJ (Iran)**, '**the available evidence that [LGBT+] people who lived openly would be liable to persecution in the applicant's country of origin'**.

2. METHODOLOGY

8. Both the earlier 2008[7] and 2014[8] LGBTI thematic reports reviewed the Home Office Country and Information reports ('COI reports') through working from a template provided to them by the Home Office.

[7] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), Emailed copy from IAGCI to the reviewer on 25 October 2019.
[8] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014):

A. 2008 Anisa de Jong review:

9. De Jong in 2008, conducted her review prior to the 2010 UK Supreme Court's guidance in HJ (Iran), striking down the earlier the 'reasonable tolerable discretion test'.

10. At the time of the 2008 thematic review, Lesbian, Gay and Bisexual ('LGB') applicants were being refused at a rate of 98 to 99% purely on the ability to be 'voluntarily discreet' as being 'reasonably tolerable'.[9] The majority of claims at initial decision-making stage overcame credibility and objective risk assessment, only to then be refused on discretion grounds. The actual use of COI was in part an academic exercise, in light of this statistic.

11. The 2008 review of 22 COI reports,[10] provided a comparative summary for each country reviewed by working from a 'template for analysis' for authors of COI, under the following categories:

(a) Legal information;
(b) Treatment by, and attitudes of, state authorities;
(c) Societal treatment and attitudes;
(d) Other relevant information and practicalities of 'discretion'.

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https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

[9] See Laura Millikin Gray, 'Failing the Grade' (May 2010, UK Lesbian and Gay Immigration Group ('UKLGIG'), London)
< https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf> last accessed 9 February 2020. 98-99% of the fifty case studies analysed were refused on exactly the same basis, compared to an overall 73% refusal rate in non-sexual identity claims (the reviewer was the legal consultant for the report).

[10] *De Jong (2008)* (n 7), index at pages 1 to 2. Out of the 22 countries, the following six countries are not addressed in this review: China, Democratic Republic of Congo, Eritrea, Democratic People's Republic of Korea (North Korea), Kuwait and Somalia.

12. Only when there is identification of the religious, cultural and social norms expected from the majority, inflicted through persecution by the potential persecutor where there is transgression, can there be accurate determination of the full scope of risk on return assessment.

13. De Jong's focus on the need for COI to show 'what concretely would an LGBT person need to do in order to prevent prosecution, persecution or other (societal) harm (i.e. by living 'discreetly')?'[11] continues to have significance now in 2020 as it did then in 2008.

14. On 7 October 2008 the review was discussed at the meeting of the 'Advisory Panel on Country Information'. The following minutes are recorded [4.2] (page 12) (emphasis added):

> Ms de Jong briefly set out her methodology for carrying out the review. She said that she had set out a broadly similar template to that provided to COI Service authors, but had also detailed what information would be required under each heading for COI Reports to fully meet their purpose.'

15. For the purposes of this review, the following is recorded with respect to the COI service response (page 14):

> '[4.10] Responding on behalf of COI Service, Mr Swift thanked Ms de Jong for a thorough, comprehensive and very useful review. He said he agreed in principle with most of what she had said. In particular, he acknowledged the importance of the language issue and appreciated the role of training for this aspect. A delegate from COI Service would be attending a course being run by UK Lesbian and Gay Immigration Group and further training may be arranged following this.
>
> [4.11] Mr Swift advised that COI Service had looked into the question of whether COI Reports should explicitly state when source information on a given

[11] *De Jong (2008)* (n 1), page 16.

subject was lacking. He said this might be possible in specific circumstances such as when information could not be found about the implementation of legislation. However, it would not be practicable to do this throughout all the sections of a COI Report. Also, it would be beyond COI Service's remit to speculate about possible reasons for the absence of information.

[4.12] Mr Swift acknowledged the reviewer's point that COI on LGBT issues tended to focus on sexual behaviour rather than sexual identity, but observed that this emphasis reflected the content of the available information. COI Service would include the relevant information in so far as it was available. Mr Rocca said the issue of 'discretion' had to do with both behaviour and identity; it was difficult to split the two. Regarding the concept of discretion, Mr Swift said that it was difficult to envisage how COI Service could provide information about the practical implications of differing 'discretion' levels that may be required in particular countries.

[4.13] Mr Swift said the template developed by Ms de Jong was a useful basis for development of the existing COIS template. However, he cautioned that, in practice, some of the information specified would often not be available.

[4.14] Mr Elliot said that the discussion taking place might serve as a 'warning light' that LGBT issues were perhaps not being adequately dealt with within UKBA. He thanked Ms de Jong and the Panel for their contributions.

16. The 2008 review had the benefit of a template and from this basis proposed changes, as described above. The issue of relevant COI for discretion is addressed in this report, within the detailed recommendations, noting de Jong's recommendation cited above, was not adopted and reflected in subsequent LGBT sections of Home Office COI reports.

B. 2014 Vanessa Leigh review:

17. Leigh in 2014 reviewed the LGBTI sections in 20 COI reports:[12]

> 'The overall purpose of this review is to provide a brief assessment of the information in the … LGBTI sections of 20 COI reports.'

[12] *Leigh (2014)* (n 3), page 3. Out of the 20 countries Leigh reviewed, the following six countries are not addressed in this review: China, Eritrea, Libya, Somalia, Sudan, Syria (Index, page 2).

18. Leigh's approach was based solely on the review of the contents of the COI reports, in isolation from any legal test or guidance. This differs from de Jong's 2008 review, where she linked a clear need to address the COI in line with what was then the 'reasonably tolerable discretion test'.

19. Leigh had the benefit in 2014 of a revised LGBT Issues template (page 6) (emphasis added):

> 'Based on recommendations developed in an earlier review of LGBT Issues conducted by the precursor of the IAGCI, the Advisory Panel on Country Information, in 2008, a revised template for coverage of sexual orientation and gender issues was developed: ….'

20. This template had the main headings outlined in the 2008 report, but with additional sub-headings (from two to ten) cited at page six of her report.

21. In the minutes of the 21 January 2014 IAGCI meeting, the following is recorded (pages 5 to 6):[13]

> 'LH introduced VL the thematic reviewer of the LGBTI content of the COIS and OGN reports. VL gave an overview of her findings. She noted that sometimes there was little information on transgender and nothing on intersex issues.
>
> She suggested that „Spartacus" should not be used as a source of information as it is meant to provide travel information rather than comment on the human rights situation in a given country.
>
> HS provided detailed feedback on the review. She saw that most recommendations had been accepted and that generally it was a positive exchange and a constructive process.
>
> HS wondered about countries that were not included in the top 20 countries that COIS report on. How are they dealt with? Could anything be suggested in generic terms? HS noted that a dearth of sources on LGBTI issues does not necessarily mean a claim is

[13] 'Minutes Arising from the Independent Chief Inspector of the UKBA Independent Advisory Group on Country Information (IAGCI) 1st October 2013, https://webarchive.nationalarchives.gov.uk/20160403150407/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/05/IAGCI-14-21012014-Minutes-FINAL.pdf, the document is incorrectly dated 1 October 2013 when the Minutes show this was the 21 January 2014 meeting, last accessed 8 February 2020.

> unfounded. Can this be made explicit in COI reports? RT said that this would be considered.'

22. There was some discussion with respect to the LGBT section in the COI on Afghanistan, which is cited within this year's review on Afghanistan. [14]

23. The January 2014 minutes then record (page 6):

> 'HS agreed with the VL"s comments on the use of Spartacus. She could see the benefit of using conflicting sources but the credibility of the source has to be considered. Spartacus is a holiday guide for gay travellers, and what a holiday maker can do in a country may well differ from what a citizen of that country can do.
>
> It was pointed out that guidance on how to cover Intersex issues was not included on the COIS template. It is important that, if we refer to LGBTI that we consider L, G, B, T and I. If we only refer to LGBT we should only describe it as LGBT etc. If no information on a certain group has been found this finding should be included.
>
> EFQ asked if "Asexual" individuals should be considered as well? She gave an example of where such a person might have an asylum claim e.g. someone being forced into an arranged marriage who did not wish to marry.
>
> RT [from the Home Office] responded that such claims were not common and were thus not likely to be addressed as a matter of course, but might be dealth with in information requests.
>
> AJ stated that it was important to recognise the importance of these thematic reviews. It"s a very good way of deciding whether COI is good. Where there has been a previous report there is a direct opportunity to see whether COIS have acted on things. Therefore the thematic review is very useful.'

24. Leigh also conducted further detailed reviews on specific Home Office SOGI COI reports for the IAGCI, for example on India and Uganda.[15] Those reports are not

[14] Part B: Afghanistan, pages 3 to 4, paragraphs 4 to 5.

[15] Vanessa Leigh, 'Review of the UK Home Office Country Information and Guidance – India: Sexual Orientation and Gender Identity (updated 16 May 2014), March 2015: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/559704/IAGCI-Review-India-Sexual-Orientation-and-Gender-Identity.pdf last accessed 9 February 2020. For Uganda March 2015 review, Vanessa Leigh, 'Review of the UK Home Office Country Information and Guidance – Uganda: Sexual Orientation and Gender Identity (August 2014), March 2015: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/559811/IAGCI-Review-of-the-UK-Home-Office-Country-Information-and-Guidance-----Uganda-Sexual-Orientation-and-Gender-Identity.pdf, last accessed 9 February 2020.

addressed in this report, on the basis this 2020 review addresses COI reports post-dating those reviews.

C. Independent Chief Inspector October 2014 report on Handling SO claims:

25. In February 2014, the Observer newspaper published an article highlighting examples from the November 2013 line of questioning of a bisexual Nigerian asylum-seeker by a Home Office interviewing officer in Haslar Detention Centre, near Portsmouth.[16] The inappropriate sexually explicit questions included, "what attracts you about a man's backside?, Did you ejaculate in him, or Did he ejaculate in you?'[17] This method of questioning was highly inappropriate and caused an expected public outcry, leading to various NGOs contacting the Home Office for to a meeting to urgently discuss the issue.

26. The then Home Secretary Theresa May's statement, highlighted during the 28 March 2014 Channel 4 news item, made clear the approach,[18] was not one to be followed, and

[16] Diane Taylor and Mark Townsend, 'Gay asylum seekers face humiliation' The Observer (London 8 February 2014), The Observer www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office, last accessed 9 February 2020: " …S Chelvan, … said the interview, which was conducted with no lawyer present, was "shockingly degrading". He added: "I'm horrified by the nature of the questions that have been highlighted. It's more like an interrogation than an interview. It is exceptionally troubling that there were questions like whether an individual ejaculated or whether they used a condom. This is an unacceptable investigation of a gay asylum claim. Clearly, something is going terribly wrong here."

[17] See also Colin Yeo, 'Questions to a bisexual asylum seeker whilst in detention', Freemovement blog (24 January 2014): https://www.freemovement.org.uk/questions-to-a-bisexual-asylum-seeker-in-detention/, last accessed 9 February 2020.
Questions, sequentially cited in the blog article, include: 'How often did you have intercourse together?; Is that every day?; Did you put your penis into x's backside?; When x was penetrating you did you have an erection?; Did you ejaculate?; Did x ejaculate inside you?; Why did you use a condom?; How did you feel when having sex? …'.

[18] The reviewer appeared on this news piece on LGB asylum claims on Channel 4 News on 28 March 2014 as a legal consultant highlighting a higher standard of proof being applied to gay asylum claims. The Home Secretary's announcement of the review on LGB claims was announced that evening, with contact made between Cordelia Lynch and the Home Office earlier in the week on the Tuesday, with the development regarding the review announced on the Friday evening: 'We have to accept that it is up to the asylum seeker to prove their claim. What I have an issue with a lot of decisions the Home Office decision-maker is applying top high a standard of proof. Now we have this battlefield saying prove that you are gay?' (reviewer). The piece also had an interview with a Nigerian lesbian seeking

should be '[A]t interview through questions about sexual orientation, not sexual behaviour … we may not have followed our guidance in at least one case'. [19]

27. The Home Secretary made clear in the statement that she had contacted John Vine CBE QPM, the then Independent Chief Inspector of Borders and Immigration, to investigate the Home Office's handling of claims based on sexual orientation.

28. 'An investigation into the Home Office's Handling of Asylum Claims made on the Grounds of Sexual Orientation: March-June 2014' ('the Vine report') was published in October 2014, , focussing on a sample of 117 asylum cases, highlighting the defects in determining asylum claims based on sexual identity.[20]

29. Of the 112 interviews, 10 % of the interviews contained 'intrusive or unsatisfactory questions' on sex lives.[21] There existed a clear high percentage of overturn of negative decisions on appeal, specifically within the Detained Fast-track appeal process.

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asylum, Aderonke Apata ('Apata'), who had been refused asylum having initially arrived ten years earlier in May 2004, and her partner 'H' who had been granted refugee status. Apata's case is addressed in the Nigeria review in this report.

[19] The reviewer appeared on this news piece on LGB asylum claims on Channel 4 News on 28 March 2014 as a legal consultant highlighting a higher standard of proof being applied to gay asylum claims. The Home Secretary's announcement of the review on LGB claims was announced that evening, with contact made between Cordelia Lynch and the Home Office earlier in the week on the Tuesday, with the development regarding the review announced on the Friday evening: 'We have to accept that it is up to the asylum seeker to prove their claim. What I have an issue with in a lot of decisions the Home Office decision-maker is applying top high a standard of proof. Now we have this battlefield saying prove that you are gay?' (reviewer). The piece also had an interview with a Nigerian lesbian seeking asylum, Aderonke Apata ('Apata'), who had been refused asylum having initially arrived ten years earlier in May 2004, and her partner 'H' who had been granted refugee status. Apata's case is addressed in the Nigeria review in this report - see Part B: Nigeria, paragraph 12, pages 182 to 183.

[20] John Vine CBE QPM, 'An investigation into the Home Office's Handling of Asylum Claims made on the Grounds of Sexual Orientation: March-June 2014' (October 2014, Independent Chief Inspector of Borders and Immigration, London) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547330/Investigation-into-the-Handling-of-Asylum-Claims_Oct_2014.pdf, accessed 19 August 2018.

[21] See also Alan Travis, 'Gay asylum seekers face "intrusive" sexual questions' The Guardian (23 October 2014): https://www.theguardian.com/uk-news/2014/oct/23/gay-asylum-seekers-sexual-questions-uk-immigration, last accessed 9 February 2020.

30. The following was highlighted in the report, specifically with respect to COI material: Section 5.3 (page 31) (emphasis added):[22]

> 'Our file sample showed that COI had been referred to in 90 cases (77% of all cases) and 27 (77%) from the total of 35 female cases. Among staff, we found a general feeling that it did not provide comprehensive coverage of sexual orientation issues and, in particular, issues relating to the treatment of lesbians and bisexual women. Provision of COI is currently under review by the Home Office.'

31. Using a Case Example, the Vine report highlighted a positive use of COI to determine internal relocation for a gay man from India (page 35):

> **'Figure 12: Case study of a refusal of asylum where sexual orientation was accepted but internal relocation was considered possible:**
>
> **The Applicant (an Indian male):**
>
> Made an asylum claim at ASU [Asylum Screening Unit] on the basis of sexual orientation while in the UK on a Tier 4 student visa.
>
> **The Home Office:**
>
> - accepted the applicant's sexual orientation as claimed;
> - used the COI to assess that the applicant could relocate within his home country and live free from persecution;
> - issued a decision document including the following –
>
> 'You have chosen to live openly as a gay man in the United Kingdom. It is therefore considered reasonably likely that you would choose to live openly as a gay man in India.' 'It is noted that there is discrimination against gay people in India, however the available background information indicates that there is an emerging gay movement in larger cities of India and that it is possible for gay men and women to live open homosexual relationships. It is noted that you have never been to Delhi or Mumbai, and therefore have not experienced what it is like to be a gay man in these cities. It is considered that you could internally relocate to Mumbai and live as an openly gay man.'
>
> **Chief Inspector's Comments This is an example of effective use of the available country of origin information to make a sustainable decision**.'

[22] Section 5.4 refers to the IAGCI (pages 31 to 32, at 32):
'[The IAGCI] provides thematic coverage of the COI material and it has been decided to continue having a thematic report on sexual orientation.'

32. Recommendation 8 of the October 2014 Vine report was (page 10):

> 'Ensures that future thematic examination of asylum claims made on the grounds of sexual orientation makes use of a wide evidence base.'

33. Importantly, prior to eighth recommendation, the fourth recommendation made was:

> 'Ensures that all asylum claims made on grounds of sexual orientation are accurately recorded as such.'

34. The first published statistics on SO claims were published in November 2017 (see 'Previous Reviews and Statistics' in Part 3 '2020 SOGIE Review Template' section below for analysis).[23]

35. The Home Office October 2014 response to these two recommendations, recorded acceptance of both points, highlighting (pages 4 to 5) (emphasis added):[24]

> '4.1 Accepted
>
> 4.2 Information on the basis of an asylum claim is not usually recorded but the Home Office has made arrangements to record this data for LGB cases on our Case Information Database. However, as the Inspector notes, recording compliance rates have been low. To address this, the Home Office has recently conducted a data cleansing exercise to retrospectively apply the recording flag to LGB asylum cases.
>
> 4.3 As part of the ongoing monitoring of LGB cases, 100% of LGB cases are subject to a second pair of eyes check until at least the end of 2014. We will ensure that CID data quality is also reviewed as part of this process and we will remind all staff of the importance of maintaining data quality through the senior caseworker forum.

[23] Home Office Official Statistics, 'Asylum claims based on sexual-orientation' (UK Home Office, 30 November 2017) https://www.gov.uk/government/statistics/asylum-claims-on-the-basis-of-sexual-orientation last accessed 8 February 2020.
Cf S Chelvan, 'Comment: sexual-orientation asylum statistics are good news' (Free movement blog, 4 January 2018)
<https://www.freemovement.org.uk/guest-post-sexual-orientation-asylum-statistics-are-good-news/> last accessed 8 February 2020.

[24] The Home Office, 'The Home Office response to the Independent Chief Inspector's report: "An investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation" March-June 2014' (23 October 2014)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/365654/ResponseAsylumClaimsBasisSexualOrientation.pdf, last accessed 9 February 2020.

…

8.1 Accepted

8.2 In line with our response to recommendation 4, we will ensure that all asylum claims made on the grounds of sexual orientation are accurately identified on our database. This will enable us to randomly select a larger number of relevant cases to be included within any future thematic audit of asylum claims based on sexual orientation.'

D. No SOGIE CPIN Template for the 2020 review:

36. The reviewer was awarded the tender on 21 October 2019 following the original 12 March 2019 in invitation to tender, closing on 10 April 2019.[25]

37. The focus of the review was summarised by the reviewer in an email sent to the IAGCI the day the tender was awarded, in October 2019:[26]

> **'[R]eview through the prism of how COI is used for refugee status determination (second limb of Lord Rodger's binding guidance in HJ (Iran) (para 82)).'**

38. Unlike the 2008 and 2014 reviews, there was no template provided to this reviewer for covering sexual orientation and gender issues by the Country Policy and Information Team ('CPIT'), following a request made to them, via the IAGCI, on 29 October 2019.[27]

[25] IAGCI, 'The IAGCI invites tenders to evaluate the UK Home Office Country Information Products', 12 March 2019: https://www.gov.uk/government/news/the-iagci-invites-tenders-to-evaluate-the-uk-home-office-country-information-products--3, last accessed 9 February 2020.

[26] Email from reviewer to IAGCI on 21 October 2019:

> 'Regarding the framework for the report – [LH] and I spoke about this in our conversation noting the proposal I submitted focussed on the review through the prism of how COI is used for refugee status determination (second limb of Lord Rodger's binding guidance in HJ (Iran) (para 82)).'

[27] Email from the reviewer to IAGCI (dated 29 October 2019): 'Would it be at all possible to forward me the following two additional docs: (i) The current CPIT template used for SOGIE CPINs;….?'

39. Following a telephone conversation with IAGCI on 6 November 2019, the reviewer had been informed CPIT had stated there was no specific SOGIE template, the reviewer requested a general template for CPINs[28] A repeat request was made on 5 December 2019 by email to the IAGCI.

E. 2020 Reviewer's Template:

40. The lack of a specific SOGI/SOGIE CPIN template in 2019/2020 raises concern with respect to why the earlier versions have been abandoned? Nevertheless, the lack of even a general template being forwarded by CPIT, via the IAGCI, has afforded the reviewer to approach the review from a completely different angle from the earlier reviews.

41. In total, 31 countries were identified for this review, where there existed either a CPIN, a CIG or a Country Background Note or Fact-finding mission where there was some COI on SOGIE claims (i.e. the reviewer researched all the countries listed on the Home Office COI website on 25 October 2019 [44 countries in all, reduced to 42 countries by 25 January 2020]) [**see Table Four: Full Country List**], Part A, page 76.[29]

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[28] Email from reviewer to IAGCI, 6th November 2019 following telephone conversation: ' … (a) CPIN Template – [CPIT] has indicated to you they don't have a SOGI specific template – so it would therefore be helpful to be provided the 'general' CPIN template used when producing the SOGI CPINs/CIGs etc….; …?'

[29] The reviewer acknowledges and cites the very helpful thematic review at the end of October 2019, emailed to him by ARC/ARC International on 2 December 2019, highlighting the following:

'Home Office CPIN notes and themes

"SOGIE"

As of the end of October 2019, there were 24 SOGI/SOGIE CPINs (24 countries).

All 24 CPINs had a distinct section for 'Legal context' and 'Societal attitudes'. There was only 1 CPIN that mentioned 'treatment by non-state actors' (Iran) but 19 CPINs that had a section named 'societal violence', 1 CPIN that mentioned SOGI issues in relation to 'military service' (Turkey), 1 CPIN that mentioned SOGI issues in relation to 'reproductive and adoptive rights' (Namibia), and 1 CPIN that mentioned SOGI issues in relation to 'children and adolescents' (Iran).

There were few distinguishing sections for bisexuals (in only 1 CPIN, Bangladesh), lesbians (in only 5 CPINs) and gay men (5 CPINs). While there were 9 CPINs that detailed (the rights of) transgender and transsexual persons, only 3 CPINs discussed gender reassignment: Namibia, Sri Lanka and Turkey.

42. This led to the countries being divided into either CPIN, CIG or Other report, totalling when re-reviewed on 25 January 2020, 27 countries. The reviewer additionally identified 15 countries where he was aware there would be a SOGIE protection link [see **Table Three: Country Reports (42 Countries (25/1/20), Part A, page 75**].

43. Based on the above Table with respect to the 15 countries, and in-conjunction with the August 2019 'experimental statistics' (see next section of report) and the reviewer's own anecdotal experience in litigating SOGIE protection claims, on 7 November 2019, the reviewer emailed a request to the IAGCI for any 'COI Response to Information Requests' for the following five countries (noting these would be internal Home Office documents, not available on-line to the reviewer):

    (i) Cameroon;
    (ii) Egypt;
    (iii) Lebanon;
    (iv) Malaysia (ranked fourth in countries with 103 initial Home Office decisions made in 2018 (54 grants and 49 refusals); and
    (v) Sudan.

44. This request was repeated on 5 December 2019, with the response documents for Egypt and Lebanon forwarded on 16 December 2019. Noting the 47% grant rate in 2018 for Trinidad and Tobago (see statistics section below), the reviewer emailed IAGCI requesting any unpublished response from CPIT, on 17 January 2020.

45. The reviewer additionally requested any documents used as COI for Malaysia SOGIE claims, noting the only source document located on-line was the January 2019 Malaysia, Country Background Note.[30]

Notable absences of SOGIE-related issues include: SOGIE in minority groups, IDPs, disabled persons; sexual education; LGBTIQ+ visibility in culture, films, literature etc; gender identity / fluidity; cross-dressing / drag.'

[30] Email from the reviewer to IAGCI (17 January 2020):

46. On 21 January 2020, the Home Office 'responses to information requests' for Cameroon and Trinidad and Tobago were emailed to the reviewer.[31] No additional COI document to the January 2019 Background Note is available for Home Office decision-makers.

47. When the Home Office 'Country Policy and Information Notes' full list of countries was checked on 23 January 2020, Liberia and Mali were deleted from the country lists (archived from 26 November 2019), so were not reviewed for the final version of this review [see **Table Four, Part A, page 76**].

'(1) Malaysia grants of refugee protection at decision stage – November 2018 published stats record a 43% grant rate for Malaysia sexual orientation applications at decision stage (decisions 1 July 2015 and 31 March 2017) – there is no published SOGIE CPIN/CIG – only a Jan 2019 general background note where sections 13.1, 13.1.6-13.1.7 refer to LGBT – is this the only source COI for decision-makers to grant protection …?; and

(2) Whilst you are asking colleagues about Malaysia – Trinidad and Tobago - 47% grant rate – there is no published COI at all on T&T – where would decision-makers go to for COI material for these claims.'

Notification of a Cameroon CPIN about to be published was conveyed to the reviewer in the reply email on 17 January 2020, having been informed on 16 December 2019:

'[CPIT] are currently working on a SOGIE CPIN for Cameroon which is currently out for comment and they hope to publish this in the new year and also have a SOGIE CPIN in progress but it is not yet close to completion.'

As of 9 February 2020, the Cameroon SOGIE CPIN is not published on the Home Office website, 'Cameroon: country policy and information notes',
accessed 9 February 2020: https://www.gov.uk/government/publications/cameroon-country-policy-and-information-notes.

The reviewer was also informed in the 17 January 2020 email the Malaysia and Trinidad and Tobago documentation would be emailed to him on the Monday (27 January).

[31] Email from IAGCI to the reviewer:

- Cameroon - we had hoped the SOGIE CPIN would have been published early in the New Year, but it has been held up for various reasons. We expect publication within the next 2 weeks. In its absence, case workers have access to a COI response from May 2018 – see attached.
- Malaysia – The most recent COI is contained in the Background note of January 2019 which is published on GOV.UK. We are in the process of developing a SOGIE CPIN but this is at an early drafting stage.
- Trinidad & Tobago – we produced a COI response in June 2018, see attached.'

48. The policy position behind their deletion was forwarded from CPIT to the reviewer by the IAGCI, in an email dated 23 January 2020 (emphasis added) (**additional emphasis added**):[32]

> '[W]e've archived both the Liberia and Mali CPINs as part of an ongoing review to ensure that we are making the best use of our resources (they are not available on Horizon either). Both are low intake countries – single or low double digit numbers of claims each year - from which we receive, **based on the experimental SOGIE stats which I presume the reviewer has looked at, very few if any SOGIE claims.**'

49. From the above, there is clear reliance by CPIT in linking the raw (experimental) statistical data as a source to provide force to policy positions taken on whether the best use of resources are used to continue to publish specific CPIN reports.

50. For this final report, 31 countries were in total reviewed. 27 of these countries have some form of publicly available published COI documents and 4 countries, whilst having no publicly available COI, have been the subject of internal requests for information and form part of the basis of this review (Cameroon, Egypt, Lebanon and Trinidad and Tobago).

F. Terminology:

51. Following the last 2014 LGBT review, the Home Office use of terminology is more nuanced and appropriate for SOGIE protection claims.

[32] Email from IAGCI to the reviewer, 23 January 2020: 'CPIT have said: …. [see above in main text]' The reviewer has been able to locate both archived reports for Liberia and Mali: (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/848422/Liberia_-_SOGI_-_CPIN_-_v2_0.pdf, (Liberia, February 2017 SOGI CPIN) and: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/848424/CIG-Mali-SOGI-v1-April-2016.pdf, (Mali, April 2016 SOGI CPIN, both accessed 25 January 2020, last accessed 9 February 2020.

52. Adopting the approach of the UNHCR in the 2012 International Protection Guidelines,[33] the Home Office, most recently in the currently in force August 2016 Asylum Policy Instruction on 'Sexual Orientation in Asylum Claims' have adopted the 2007 Yogyakarta principles definition of sexual orientation:[34]

> 'Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'

53. For sexual orientation/sexual identity claims, there is clear use of Lesbian and Gay.

54. However, there needs to be clear inclusion of other sexual identity terms, including Bisexual, in order to ensure there is recognition that claims of those who are bisexual come within the same protection needs of SO applicants, noting their sexual identity highlights their 'difference' to the straight (heterosexual) majority.

55. The 2014 Vine report made the following recommendation with respect to preferred use of 'sexual identity' rather than 'sexual orientation' [section 3.6]:[35]

'We consider that the version of the draft revised guidance provided to us improves on the original in that it:

- refers to sexual identity rather than sexual orientation, helpfully bringing this guidance into line with guidance on gender identity claims; …'

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[33] United Nations High Commission for Refugees, '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' (HCR/GIP/12/09) (23 October 2012), [8], page 3: http://www.unhcr.org/50ae466f9.pdf last accessed 9 February 2020.

[34] Home Office, 'Asylum Policy Instruction: Sexual orientation in the Asylum Claim' (3 August 2016), page 7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf, last accessed 9 February 2020. Yogyakarta definitions, see: https://yogyakartaprinciples.org/introduction/, last accessed 9 February 2020.

[35] *Vine report* (n 20), page 12 (url).

56. Whilst the February 2015 Home Office Asylum Policy Instruction did adopt this recommendation, a document subject to external consultation, the August 2016 (current) policy returned to use Sexual orientation.

57. The reviewer fully supports the above recommendation by the Vine report, as it brings both categories of claims on the same approach to understanding and assists as a positive move to focus on identity, rather than purely sexual conduct.

58. The Yogyarkarta definition on gender identity is cited in the Home Office, 'Asylum Policy Instruction on Gender Identity Issues in the Asylum Claim' (June 2011), but without the brackets inserted in the original text (emphasis added): [36]

> 'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'

59. The following selected terminology is used by the LGBT+ Rights UK Charity STONEWALL, and is adopted by the reviewer to highlight terminology currently not used by the Home Office, or rarely explored, with respect to SOGIE protection claims:[37]

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[36] Home Office, 'Asylum Policy Instruction on Gender Identity Issues in the Asylum Claim' (June 2011), page 4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257387/genderissueintheasylum.pdf, last accessed 9 February 2020. An updated API on Gender Identity and Expression had been subject to external consultation in 2017 to 2018, is currently subject to internal Home Office review.

[37] STONEWALL: Acceptance Without Exclusion: 'Glossary Terms': https://www.stonewall.org.uk/help-advice/glossary-terms, accessed 9 February 2020.

'CISGENDER OR CIS
Someone whose gender identity is the same as the sex they were assigned at birth. Non-trans is also used by some people.

GENDER IDENTITY
A person's innate sense of their own gender, whether male, female or something else (see non-binary below), which may or may not correspond to the sex assigned at birth.

GENDER EXPRESSION
How a person chooses to outwardly express their gender, within the context of societal expectations of gender. A person who does not conform to societal expectations of gender may not, however, identify as trans.

INTERSEX
A term used to describe a person who may have the biological attributes of both sexes or whose biological attributes do not fit with societal assumptions about what constitutes male or female.
Intersex people may identify as male, female or non-binary. Stonewall works with intersex groups to provide its partners and stakeholders information and evidence about areas of disadvantage experienced by intersex people but does not, after discussions with members of the intersex community, include intersex issues as part of its current remit at this stage.

QUEER
Queer is a term used by those wanting to reject specific labels of romantic orientation, sexual orientation and/or gender identity. It can also be a way of rejecting the perceived norms of the LGBT community (racism, sizeism, ableism etc). Although some LGBT people view the word as a slur, it was reclaimed in the late 80s by the queer community who have embraced it.

TRANS
An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois.

TRANSGENDER MAN
A term used to describe someone who is assigned female at birth but identifies and lives as a man. This may be shortened to trans man, or FTM, an abbreviation for female-to-male.

> TRANSGENDER WOMAN
> A term used to describe someone who is assigned male at birth but identifies and lives as a woman. This may be shortened to trans woman, or MTF, an abbreviation for male-to-female.
>
> TRANSITIONING
> The steps a trans person may take to live in the gender with which they identify. Each person's transition will involve different things. For some this involves medical intervention, such as hormone therapy and surgeries, but not all trans people want or are able to have this. Transitioning also might involve things such as telling friends and family, dressing differently and changing official documents.'

60. Based on the above, the reviewer recommends the use by CPIT in COI reports should include 'Gender Expression'[38] and use of 'Trans', rather than 'Transgender',[39] in all future reports.

61. Dr. Peter Dunne, a Senior Lecturer at the University of Bristol Law School and an expert on trans rights, provided the reviewer with an extensive list of websites recommended for research on gender identity or expression:[40]

'https://tgeu.org , https://www.weareaptn.org, https://transactivists.org
https://outrightinternational.org, https://www.hrw.org/topic/lgbt-rights
https://www.genderdynamix.org.za, REC LAC Trans,
https://transgenderlawcenter.org
https://www.kaosgl.org/en/, https://arc-international.net, https://ilga.org
https://www.opensocietyfoundations.org/voices/topics/lgbti'

[38] Whilst in 2018 there was a gradual uniform adoption of reference to 'Gender Identity or Expression' (see Iraq: October 2018 CPIN: SOGIE (url)), during 2019 some updated CPIN reports no longer include 'or Expression' (see Albania: December 2019 CPIN SOGI (url)), whilst other CPINs do include the identity (see Iran: June 2019 CPIN SOGIE (url)).
[39] *API Gender Identity* (n 36), page 4.
[40] Emailed to reviewer from Dr Peter Dunne on 24 January 2020.

62. 'Intersex' is currently not referred to in the current published 2011 API on Gender identity. This may arguably reflect the continued absence of recognition in the majority of CPINs with respect to protection claims of those who are Intersex.

63. Anick Soni, a UK based Intersex Rights activist, forwarded by email to the reviewer the names of the following organisations that may provide a useful resource on Intersex and international COI:[41]

'Oii Europe (https://oiieurope.org/)
InterACT Youth (https://interactadvocates.org/)
Intersex Human Rights Australia (https://ihra.org.au/).'

3. 2020 SOGIE REVIEW TEMPLATE:

64. As no template was provided to the reviewer by CPIT, the following template was adopted, using five sub-headings:

(I) General Country Background Facts:
(A) Previous Reviews and Statistics;
(B) Case Law;
(C) Home Office COI; and
(D) Summary of Review.

[41] Email sent from Anick Soni to the reviewer, 23 January 2020. Anick Soni and the reviewer both volunteer for UK Black Pride.

(1) General Country Background Facts:

65. In the header section, the following issues are determined under the Country Header:

    (i) Capital city;
    (ii) Population;
    (iii) Predominant religion; and
    (iv) FCO Travel Advice.

Population:

66. The population number (calculated as an estimate) as of 25 January 2020, is recorded for all countries.[42]

67. Whilst the reviewer is not relying on a 1 in 10 Kingsey projection of same-sex conduct,[43] the LGBT rights charity STONEWALL does provide a 5% estimation of those who identify as LGBT in the United Kingdom, compared to 2% from the Office of National Statistics (October 2018).

68. Whilst, as correctly held by the Upper Tribunal in the 2019 CG case of BF (Albania), neither statistic provides an insight into LGBT population size in a different country,[44]

[42] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.

[43] Alfred Kinsey's research in post-Second World War America postulated the incidence of same-sex conduct in the Human Male (Sexual Behavior in the Human Male (1948)) and Female (Sexual Behaviour in the Human Female (1953)).

[44] BF (Tirana – Gay men) Albania CG [2019] UKUT 93 (heard 16, 18 and 23 October 2018, promulgated 26 March 2019, published 29 March 2019)[155]:

> 'When we asked Mr Chelvan about this figure, he said that the Office of National Statistics for the UK put the figure of LGBTI individuals within the UK at 2% whereas Stonewall considers it to be closer to 5%. We were not shown any documents supporting his submission nor given any explanation why he preferred the Stonewall figures. In any event, we were not provided with any evidence to show that the recorded percentage of LGBTI individuals in the UK, whichever figure is accepted, is a reliable measure for the community of LGBTI individuals in

identifying the total population does in this reviewer's opinion provide context, through scale, with respect to visibility and SOGIE.

69. If there are country conditions where SOGIE individuals can live 'freely and openly without the fear of persecution', then there should, especially where the population is in the millions, a visible and vibrant SOGIE community. The fact the population size is in the millions, and there is no volume of COI material on 'freely open SOGGIE' is indicative, and probative of, country conditions supporting a SOGIE 'well-founded fear of persecution' protection claim.

FCO Travel Advice:

70. The Foreign and Commonwealth's Travel Advice, Law and Customs update was accessed for all 31 countries reviewed on 25 January 2020.[45]

71. The specific sections highlighted in the review, all cross-reference to the FCO webpage for general 'Advice for LGB&T tourists travelling abroad' page.[46]

72. The Upper Tribunal's recent approach to using the FCO Travel Advice illustrates an example of how it can aid corroboration of COI risk assessment to SOGIE applicants (see Ghana review report and case of EA (Ghana) v. Secretary of State for the Home Department (PA/10658/2018)(unreported) (promulgated 22 August 2019) [33]).[47]

73. There are also examples where the FCO advice is inaccurate, for example Sri Lanka, where the FCO is 'not aware of any prosecutions' (according to the October 2018 SOGI CPIN on Sri Lanka).[48] Nevertheless, it provides a contemporary viewpoint for the purposes of this review.

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other countries nor what proportion of the LGBTI numbers relates to gay men. The figures put forward are at best speculative and do not assist us.'

[45] Foreign and Commonwealth Office, 'Foreign travel advice': accessed for review 25 January 2020: https://www.gov.uk/foreign-travel-advice, last accessed 9 February 2020.

[46] https://www.gov.uk/guidance/lesbian-gay-bisexual-and-transgender-foreign-travel-advice, last accessed 9 February 2020.

[47] Part B, Ghana, pages 74 to 75.

[48] Part B, Sri Lanka, pages 208 to 224, page 208 for FCO Travel advice 'Local laws and customs'.

Predominant Religion:

74. The reviewer cites these matters, including Predominant religion to provide the cultural, religious and social context to the country concerned. Approaching 'cultural, social and religious attitudes towards [SOGIE]' has been recently endorsed by the Upper Tribunal in KB v Secretary of State for the Home Department (PA/09650/2018) (unreported) (heard 12 April 2019, promulgated 23 April 2019, published 24 June 2019) where Upper Tribunal Judge Rintoul held:

> 'There is shown in reference to cultural, social and religious attitude towards homosexuality in Ghana and that this was something which he was taking into account.'

75. There is a clear causation nexus between social, religious and cultural norms and SOGIE persecution in countries where this is well-founded. Any deference to these views when assessing protection claims, a 'cultural relativist' approach, was struck down by the Supreme Court in HJ (Iran) (see Sir John Dyson, SJC [128] to [130]).

A. Previous Reviews and Statistics:

76. This section of the review is divided into two sub-sections:

(i) Earlier IAGCI SOGIE reviews; and
(ii) Decision-making statistics (2015-2018).

(i) Earlier IAGCI SOGIE reviews of 2008 and 2018:

77. The first sub-section addresses firstly whether the earlier reviews reviewed this specific country. If not, and there is no separate relevant SOGIE specific review by the IAGCI, then the review goes to the next sub-section.

78. If either the 2008 reviewer, or the 2014 reviewer did address this specific country, then this section of the review draws the main relevant points for the purpose of this review.

(ii) August 2019 Experimental Statistics on Outcomes on Asylum applications with a SO basis:

79. Following the handing-down of the UK Supreme Court's judgment on 7 July 2010, internal guidance was provided to the then UK Border Agency in order to deal with applying the HJ (Iran) guidelines, including a reference to start collecting data on LGB claims.[49] Up to this July 2010 announcement, only Belgium and Norway published statistics on SO protection claims.[50]

80. The first experimental statistics were published on 30 November 2017, seven years later. [51]

81. These 2017 statistics are defined 'experimental':[52]

> 'These data are experimental statistics and should be interpreted with caution. Experimental statistics are statistics that are in a testing phase and are not yet fully developed. These statistics have not been subject to the full level of quality

[49] Authored by Ian Cheesman, NAM + (UKBA) (memos dated the 7th and 8th of July 2010). The first memo accepts that the UKBA will start to compile data on how many claims are affected by the HJ (Iran) point. This undertaking is recorded in a further date of 1 July 2011 by Bill Brandon, Deputy Director of Asylum, UK Border Agency on 9 June 2011.
See Sabine Jansen and Thomas Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe', 15 (footnote 20) (Amsterdam, 2011): https://www.coc.nl/wp-content/uploads/2013/11/Fleeing-Homophobia-report-EN_tcm22-232205.pdf, last accessed 9 February 2020.

[50] ibid *Fleeing Homophobia*, page 11.

[51] Home Office Official Statistics, 'Asylum claims based on sexual-orientation' (UK Home Office, 30 November 2017) <https://www.gov.uk/government/statistics/asylum-claims-on-the-basis-of-sexual-orientation> last accessed 9 February 2020. Cf S Chelvan, 'Comment: sexual-orientation asylum statistics are good news' (Free movement blog, 4 January 2018): <https://www.freemovement.org.uk/guest-post-sexual-orientation-asylum-statistics-are-good-news/> last accessed 9 February 2020.

[52] *SO Statistics (November 2017)* (n 51), page 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663468/asylum-claims-basis-sexual-orientation.pdf, last accessed 9 February 2020.

> assurance of National Statistics. Further details can be found in the Office for National Statistics Guide to Experimental Statistics.'

82. This review analyses and applies to the review the updated August 2019 experimental statistics for SO protection claims made from 2015 to the end of 2018 - 'UK Home Office, 'Immigration statistics, year ending June 2019 second edition'. These statistics are still regarded as 'experimental':[53]

> 'These data are experimental statistics and should be interpreted with caution. Experimental statistics are statistics that are not yet fully developed nor been subject to the full level of quality assurance of National Statistics. Further details can be found in the Office for National Statistics Guide to Experimental Statistics.'

83. The specific Data Tables are found in Spreadsheets within the link to 'Table 5: Asylum claims based on sexual orientation Dec 2018', accessed by the reviewer on 25 October 2019.[54]

84. Highlighting CPIT's approval in the 23 January 2020 email to the reviewer with respect to the experimental SOGIE statistics supporting the decision to delete Liberia and Mali from the country list, the force in the continued use of the statistics on the approach of CPIT to publication of SOGIE and non-SOGIE reports. [55]

85. These statistics now provide a basis to show patterns and trends for outcomes of SO protection applications lodged, initial decisions made, and appeals determined by the First-tier Tribunal[56] between 2015 and 2018.

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[53] UK Home Office, 'Immigration statistics, year ending June 2019 second edition, last updated 22 August 2019': <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2019/experimental-statistics-asylum-claims-on-the-basis-of-sexual-orientation#initial-decisions>, last accessed 9 February 2020.

[54] ibid. *SO Statistics*: '5: Data tables: Asylum claims based on sexual orientation Dec 2018', last accessed 26 January 2020.

[55] 23 January 2020 email from IAGCI to the reviewer (n 32).

[56] *SO Statistics* (n 53) 'Footnote 4: … Figures for appeals determined are cases dealt with by Immigration Judges at the FTTIAC.'

86. The individual country reviews, based on the legal background and expertise of the reviewer, draw inferences between the statistical outcomes, in-line with the case law, to address the use of Home Office COI reports in determining these SO protection claims

Top Five Nationalities for SO protection claims (2018):

87. The Home Office website accessed by the reviewer, does show for 2018, the top 5 countries for asylum claims and the percentages of SO claims as a percentage. The five countries are:[57]

(i) Uganda (95 out of 117 total asylum claims – 56%);
(ii) Malaysia (139 out of 259 – 54%);
(iii) Cameroon (51 out of a total 211 – 24%);
(iv) Pakistan (324 out of 2,033 – 16%); and
(v) Bangladesh (148 out of 1,297 – 11%).

Data Tables for SO protection claims lodged, decided and appeals:

88. The Data Tables at section 5 of the website opens a Microsoft Excel Spreadsheet. The 3 data sets relate to:

(i) Applications Lodged (2015-2018): Records for the number of applications for protection where sexual orientation ('SO') formed a basis for the lodged application (ranked order with highest country at the top – total number of countries ranked and identified is 52 (plus 'Other' category to capture countries where less than 5 applications were made in a given year);

[57] *SO Statistics* (n 53), Table 1: Top 5 nationalities with the highest proportion of asylum applications where sexual orientation formed part of the basis of claim in 2018', last updated 22 August 2019, last accessed 9 February 2020.

– Pakistan ranked as the highest ranked country with 824 lodged applications where sexual orientation formed part of the protection claim lodged by the main applicant and Tunisia ranked as the lowest ranked country, at 52nd (less than 5 applications lodged);[58]

(ii) Initial Decisions Made (2015-2018): Records for the number of Home Office initial decisions made between 2015 and 2018, with outcomes recorded with respect to granted and refused,[59] as well as withdrawn – 51 countries identified and ranked (plus Other category);

- Pakistan ranked highest with 444 initial decisions in 2018 (90 granted,[60] 346 refused and 14 withdrawn) – Vietnam was the lowest named ranked country with less than 5 decisions recorded in 2018;[61]

[58] *SO Statistics* (n 30). Table 5: 'Asylum applications lodged where sexual orientation formed part of the basis for the claim, by nationality'. The top ranked country for 2018 was Pakistan with 824 applications and the lowest named naked country was Tunisia with a suppressed record of less than 5 (on the list as there were 6 recorded SO protection claims lodged in 2016). The total number of applications lodged in 2015 was 1,768, in 2016, 2,212 in 2017 1,936 and in 2018 there was a dip to 1, 502 applications. These year dates are based on dates of application and record where the SO protection claim was made by the main applicant.

[59] The statistics stipulate these initial decisions do not include the records for decisions withdrawn (recorded in a separate column).

[60] *SO Statistics* (n 53): 'Figures for "Grants" include:

- Grants of asylum, Humanitarian Protection and Discretionary Leave
- Grants under family and private life rules, which relate to the introduction of a new approach to Article 8 of the European Convention on Human Rights
- Leave Outside the Rules, which was introduced for those refused asylum but where there were other exceptional and compassionate circumstances
- UASC leave, which was introduced for unaccompanied asylum-seeking children refused asylum but were eligible for temporary leave until the age of 17.5'

Whilst these caveats are expressed in the statistics, noting the countries involved and SO protection claims recorded, from experience of practice, the number of grants would ordinarily be assigned to positive protection (asylum) grants of leave, rather than the other categories, noting the initial applications were made on the basis of SO protection needs.

[61] *SO Statistics* (n 30). 'Initial decisions on asylum applications where sexual orientation formed part of the basis for the claim, by nationality' (note date of decision may not accord to date of application, i.e. 2017 decision could relate to an application made in 2016). A total of 1.584 decisions were made in 2015, 1,845 in 2016, 1,887 in 2017 and 1,745 in 2018.

(iii) Number of appeals determined by the First-tier Tribunal (2015-2018):[62] Three various outcomes: allowed, dismissed, or withdrawn, all relating only to the First-tier Tribunal,[63] where withdrawn appeals include those withdrawn by the appellant or the Home Office.[64] There are 35 countries listed (plus 'Other' category).

- Pakistan is ranked at the top of the Table, with 364 appeals determined in 2018 (155 appeals allowed, 2015 dismissed and suppressed (less than 5) withdrawn).[65] Accepting some cases will be allowed on non-asylum grounds, and some cases are 'upgrade appeals' where there has been a grant of UASS (Unaccompanied Asylum Seeking Child) or discretionary leave), there is clear force in the drawing an inference of COI being applied to positive grant refugee protection.

  As was the case with Home Office initial decisions, Vietnam was the lowest named ranked country with less than 5 decisions recorded in 2018.[66]

89. Each of the reviews for the **31 COI reports/responses** records the statistics for applications lodged, initial decisions and appeals determined.

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[62] *SO Statistics* (n 53). In 2018, a total of 1,229 appeals were recorded as determined by the First-tier Tribunal where SO formed part of the basis of claim by a main applicant (473 allowed, 718 dismissed, 38 withdrawn (by the Home Office or the appellant). In 2017, 1447 SO protection appeals determined (487 allowed, 951 dismissed, 39 withdrawn). In 2016, 916 SO protection appeals determined (341 allowed, 553 dismissed and 22 withdrawn). In 2015, 515 SO protection appeals determined (167 allowed, 324 dismissed and 24 withdrawn).

[63] *SO Statistics* (n 53), footnote 5 of Table.

[64] *SO Statistics* (n 53), footnote 7 of Table.

[65] *SO Statistics* (n 53). This relates to records in 2018. In 2015, 145 appeals were determined (59 allowed, 81 dismissed). In 2016, 283 appeals determined (155 allowed, 162 dismissed) and in 2017, 505 appeals determined (188 allowed, 312 dismissed).

[66] *SO Statistics* (n 53): 'Initial decisions on asylum applications where sexual orientation formed part of the basis for the claim, by nationality' (note date of decision may not accord to date of application, i.e. 2017 decision could relate to an application made in 2016). A total of 1,584 decisions were made in 2015, 1,845 in 2016, 1,887 in 2017 and 1,745 in 2018.

90. There is a clear link between firstly, the use of Country Guidance and/or reported cases determining outcomes. Where the reported cases are promulgated at some time prior to the decision, then the reviews address how the Home Office COI report/response is being used. There are some reviews, such as the one for Cameroon or Malaysia where there is no published specific SOGIE CPIN, providing an insight into how Home Office (internal) COI is being used in the decision-making process, a matter completely unknown, but for the benefit arising from these statistics being collated and published publicly.

B. Case Law

UK ASYLUM LAW POSITION POST-31 JANUARY 2020:

91. Following the United Kingdom's departure from the European Union on 31 January 2020, protection claims based on Sexual Orientation and Gender Identity or Expression ('SOGIE') now continue to be determined by the framework of the EU 2004 Minimum Standards Qualification Directive,[67] transposed through the domestic 2006 'The Refugee or Person in Need of International Protection Regulations' ('the 2006 Regulations'),[68] in force since October 2006 (section 2 of the EU (Withdrawal) Act 2018):[69]

> 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.'

[67] 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 (Official Journal 2004 L 304, 30/09/2004 p. 12).
[68] http://www.legislation.gov.uk/uksi/2006/2525/regulation/6/made ,last accessed 2 February 2020.
[69] http://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted, accessed 2 February 2020.

92. The Luxembourg-based Court of Justice's judgments binding until 31 December 2020, where they are having to be have regard for in decision-making (section 6 of the 2018 Act).[70]

93. The definition of refugee in Regulation 2 is specifically incorporated at paragraph 334 of the Immigration Rules.[71]

94. The definition of a refugee in-line with the 1951 Refugee Convention is incorporated in both primary legislation (section 1 of the Asylum and Immigration Appeals Act 1993)[72] and secondary legislation (paragraph 334 of the Immigration Rules, cross-referencing the definition in Regulation 2 of the 2006 Regulations).

95. Regulation 2 of the 2006 Regulations stipulates:

> ' "refugee" means a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 [exclusion] does not apply;'

[70] http://www.legislation.gov.uk/ukpga/2018/16/section/6/enacted, last accessed 8 February 2020.

[71] The definition of a refugee is proscribed in Regulation 2 of the 2006 Regulations and cross-references in paragraph 334 (ii) (definition of refugee) of the Immigration Rules: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum, accessed 2 February 2020 (emphasis added):

'334. An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006; …'

[72] Section 1 of the 1993 Act: ' … "claim for asylum" means a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to that Convention.'

96. Article 1A (2) of the 1951 Refugee Convention and 1967 Protocol defines a refugee as: (emphasis added):[73]

> '[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

97. With respect to the definition of sexual orientation, included as a Particular Social Group in Regulation 6 (1) (d) of the 2006 Regulations, read in-conjunction with Regulation 6(1) (e) providing an exception to membership relating to conduct contrary to UK law. Regulation 6 (2) of the 2006 Regulations importantly raises the use of 'perception' (emphasis added):

> '(1) In deciding whether a person is a refugee:
> … [Convention reasons]
> (d) a group shall be considered to form a particular social group where, for example:
> (i) 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
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> (e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;
> (f) …
>
> (2) In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution.'

[73] *1951 Refugee Convention and 1967 Protocol* (n 3), text at: https://www.unhcr.org/3b66c2aa10.html, page 16, accessed 9 February 2020.

98. The 2004 Directive did not include gender identity as a Particular Social Group.

99. The 2011 Common Standards Directive, added gender identity as a defined Refugee Convention Particular Social Group:

100. This definition is accordingly not found in the 2006 Regulations. Nevertheless, the UK does recognise gender identity or expression protection claims (see section B below).

LEGAL PRICNIPLES APPLIED TO 2020 REVIEW:

101. All refugee claims are to be determined at the date of decision and/or hearing (the 'Ravichandran principle' see **TN and AN (Afghanistan) v. Secretary of State for the Home Department [2015] UKSC 40** [70] to [72]).

I HJ (Iran) (2010):

102. Lord Rodger held in the 2010 UK Supreme Court's judgment in **HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department [2010] UKSC 31** [53] (emphasis added):

> 'At the risk of repetition, the importance of this analysis for present purposes is that it proceeds on the basis that, so far from permitting or encouraging its agents to persecute the applicant for one of the protected grounds, the home state should have protected him from any persecution on that ground. The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them.'

103. Lord Rodger's binding guidance on how fact-finding Tribunals[74] should address all protection claims is at paragraph 82 of the judgment (approved by Lords Walker, Collins and Sir John Dyson, SJC (Master of the Rolls)) (emphasis added) (**added emphasis**):

> 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

[74] Lord Rodger at paragraph 83 held (emphasis added): 'The Secretary of State should, of course, apply the same approach when considering applications of this type. Although I have, for the most part, concentrated on the position of gay men, the Secretary of State and tribunals should approach applications concerning lesbian women in the same way.'

> 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.'

104. The first limb of Lord Rodger's guidance addresses a need to establish (to the lower than civil standard 'reasonable degree of likelihood') whether the SOGIE applicant is, or will be perceived to be on return, SOGIE. This importantly recognises the risk to those who do not live a 'heterosexual narrative', ie living, or being perceived to live, a straight/cisgendered life, by engaging in a socially expected heterosexual cisgender sex/gender role. [75]

105. Secondly, an assessment will be required of what would occur to a gay, lesbian, or bisexual person, if they lived '**openly'** in the country of origin. This is directly relevant to this COI report review, noting the focus is an objective (country background evidence to risk to those who are 'open' SOGIE), rather than subjective (individual risk factors on return).

106. If, as a result of living openly, there would be persecution, then the fear is well-founded. Thirdly, if it is found that they will live 'openly' and consequently be subjected to a real risk of serious harm, then they are entitled to refugee status. Nevertheless, if, on the other hand, they are discrete, due to this fear of persecution, then they are also a refugee. The court realised that the number of gay martyrs will be small, and the human condition results in the majority being discrete due to such fear. If the only reason for being discrete is family or social disapproval, then the individual is not entitled to refugee status. This does not ignore the many cases of honour killing as a result of family disapproval, for that in itself will also result in a fear of persecution.[76]

[75] S Chelvan, 'Put Your Hands Up If You Feel Love' (2011) 25 IANL 55 to 66, 60.
[76] S Chelvan, 'Put Your Hands Up If You Feel Love' (2011) 25 IANL 55 to 66, 60.

107. In addressing the use of country -information to address this second limb objective risk, Lord Hope made clear at paragraph 35 of his similar guidance, providing a clearly defined primary source of the assessment exercise being the Home Office COI reports (emphasis added):

> '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.'

II **LC (Albania)**

108. The Court of Appeal in 2017 distilled the guidelines to the following in LC (Albania) v. Secretary of State for the Home Department [2017] EWCA Civ. 351 [2] (emphasis added) (**additional emphasis added**):

(i) Is the applicant gay, or someone who would be treated as gay by potential persecutors in his country of origin?

If no, the claim should be refused. If yes:

(ii) Do **openly gay people** have a well-founded fear of persecution in the country of origin?

If no, the claim should be refused. If yes:

(iii) In respect of his sexual orientation, on his return, will the applicant be open?

If yes, he is a refugee and his claim should be allowed. If no:

(iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.'

109. The Court of Appeal in LC (Albania) importantly addressed the need for country background evidence to show how conformative conduct would need to happen in order to evade persecution – the '**Silence Fallacy'** adding [52 (vii)] (emphasis added) (**additional emphasis added**):

> 'To an extent, Mr Chelvan went further than the Intervener. He submitted that, in drawing a distinction between forced and voluntary modification, the fourth limb of the guidance is misconceived, because being discreet about his sexual orientation can never in practice protect a gay man from persecution because of what he described as "the silence fallacy" in sexual orientation cases, i.e. an assumption that, in a homophobic homeland, an individual will be safe as long as he is silent about his actual sexual orientation. For that proposition, he relied upon a number of authorities, including SW (Jamaica) (see paragraph 23 above) and other Jamaican cases to the same effect; and Hysi v Secretary of State for the Home Department [2005] EWCA Civ 711; [2005] INLR 60, in which this court found that it would be unrealistic for the appellant to lie about the relevant characteristic in that case, namely his ethnicity. **However, in my view, a submission that Albania is a country where it is impossible for a gay man to avoid being perceived as gay without engaging in some form of positive behaviour, as Mr Chelvan suggests, would require some evidential basis. There is no such basis here.** It is also noteworthy that neither Hysi (decided pre-HJ (Iran)) nor the Jamaican cases (post-HJ Iran) suggest that the fourth limb of the HJ Iran guidance is wrong: indeed, at [106] of SW (Jamaica), the Upper Tribunal expressly applied that guidance, emphasising that "those who are naturally discreet for reasons other than fear [of persecution] do not require international protection".

110. Both HJ (Iran) and LC (Albania) address the crucial role of country information, specifically Home Office country information, to address refugee status determination from an objective (background), rather than subjective (individual risk) basis.

III Gender Identity or Expression:

111. In 2020, there are only two reported cases, and under twenty unreported cases, on asylum claims based on gender identity or expression. Both reported cases are in the Court of Appeal: the 2006 judgment in Rahimi and the 2008 judgment in AK (Iran),[77] both trans-women, subjected to either incorrect pronouns and finding no risk to homosexuals equates no risk to trans women (Sedley LJ in Rahimi), or were subject to incorrect application of country evidence on availability of surgical procedures for transition indicated lack of risk on return, thereby being remitted back to the Tribunal for a further fact-finding exercise (AK (Iran)).

112. The lack of reported cases is a reflection of either the success of cases at initial administrative decision-making, or first instance Tribunal stage, or a reflection of the relatively few numbers of claims. There is also the fear trans clients have of not only transphobia from the cis/natal (biological) community, but additionally racism within the trans community, leading to a fear of identification (even with anonymity). This has resulted in requests not to have their cases reported, thereby preventing Judges from providing precedent, or reported guidance.

[77] AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ. 941(unreported) and Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ. 267 (unreported) (application on permission, not publicly available).

113. Where there are unreported cases on gender identity (see **SN** (India);[78] **LSL** (Malaysia);[79] and **MKMR** (Sri Lanka)[80]) this report does address the cases in detail and how the COI applied in determining their appeals.

IV Intersex:

114. There is not a single reported case where the appellant in protection claim proceedings is intersex.

V **Internal relocation: -** MB (ALBANIA):

115. The headnote in the 2019 Upper Tribunal reported determination in **MB (Internal relocation Albania) [2019] UKUT 392 (IAC)** (heard 20 June 2019, promulgated 30 July 2019, published 17 December 2019) (Upper Tribunal Judges Dawson and Keith) (***emphasis added***):

> *The burden of proof remains on the appellant,* ***where the respondent has identified the location to which it is asserted they could relocate****, to* ***prove why that location would be unduly harsh,*** *… MM v Minister for Justice, Equality and Law Reform, Ireland (Common European Asylum System - Directive 2004/83/EC) Case C-277/11 does not impose a burden on the respondent or result in a formal sharing of the burden of proof, but merely confirms a duty of cooperation* ***at the stage of assessment, for example the production of the country information reports****.*

116. There are two stages to the evaluation relevant to this review:

(i) in refusing a protection claim, where internal relocation is relied upon, then the Home Office decision-maker must identify the location for internal relocation in the decision;

(ii) the COI reports provide a basis to identify and determine this place of internal relocation is not unduly harsh.

[78] Part B, paragraphs 14 to 21, pages 82 to 84.
[79] Part B, paragraphs 17 to 18, pages 140 to 142.
[80] Part B, paragraphs 26 to 28, page 218.

117. None of the current COI reports for the Home Office have a section specifically addressing named locations for possible internal relocation alternatives in SOGIE protection claims.

118. Following MB (Albania), it would clearly be standard practice for **all** CPINs to include a section on identified places of suggested internal relocation, if relevant to the status determination of SOGIE applicants from that country (i.e. with respect to Iran, as the fear emanates from the state, there is no internal relocation alternative).

VI Discrimination amounting to persecution - **OO (SUDAN)**:

119. The Home Office August 2016 API on Sexual orientation in the Asylum Claim, makes clear that singularly, or cumulatively, the following discriminatory measures, may amount to persecution (page 16):[81]

- socio-economic discrimination in school
- work or in accessing social services
- unemployment
- lack of access to health services
- lack of career opportunities
- exclusion from family support such as rights to inherit

…

- serious legal, cultural or social restrictions on rights to, or ability to earn, a livelihood
- serious legal, cultural or social restrictions on rights to, or ability to enjoy, private and family life
- serious legal, cultural or social restrictions on rights to, or ability to enjoy, freedom of opinion, expression, association or assembly
- restrictions on political enfranchisement
- restrictions on the choice to practise or not practise a religion
- restrictions on access to public places

[81] *SO API* (n 34), page 16 (url).

- restrictions on access to normally available educational, legal (including law enforcement), welfare and health provision.'

120. The Court of Appeal in 2009 in **OO (Sudan) and JM (Uganda) v. Secretary of State for the Home Department [2009] EWCA Civ. 1432** recorded the following Home Office concession with respect to ECHR rights amounting to persecution [21] (**emphasis added**):

> 'There is no dispute between the parties that Article 9(1)(b), dealing with cases where there is an accumulation of various measures, allows for persecution to be established where there is a violation of human rights, where those rights are not confined to the non-derogable rights referred to in Article 9(1)(a). Ms Collier, on behalf of the **Secretary of State, accepts that. So a sufficiently serious violation of Article 8 rights in an applicant's home country might amount to persecution**.'

121. Noting the approach of the Upper Tribunal in the Occupied Palestinian Territories case of **Mr Alishaaban Ali Mohamed v Secretary of State for the Home Department (PA/08770/2016)** (heard 5 December 2017, promulgated 17 January 2018, published 5 February 2018) (Deputy Upper Tribunal Judge Kelly),[82] finding 'very significant obstacles' (article 8 ECHR breach under paragraph 276 ADE (vi) of the Immigration Rules), there is a significant role for COI to establish either the lower article 8 ECHR threshold is reached, or cumulatively the human rights breaches amount to persecution.

COUNTRY GUIDANCE & REPORTED CASES:

122. There is a list of current Country Guidance ('CG') cases listed on the Upper Tribunal website,[83] updated when new cases are added, or older cases are deleted from the list due to subsequent cases (last updated 20 December 2019 (url)).

[82] Part B, paragraphs 6 to 10, pages 190 to 191.

[83] https://www.judiciary.uk/wp-content/uploads/2020/01/cg_list_last_updated_20_12_19.pdf, last updated 20 December 2019, last accessed 10 February 2020.

123. These cases are invaluable as they provide, for the purposes of the second limb of HJ (Iran), a binding ruling by the Upper Tribunal on country background risk assessment of those who live 'openly'.

124. Practice Direction 12.4 of the 2018 Consolidated Practice Directions[84] stipulate the following procedure requiring a CG case to be applied, unless:

> 'Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.'

125. A Country Guidance ('CG') case is a determination of the Upper Tribunal giving binding guidance on the country conditions specific to a 'risk group' from a specified country.

126. For a CG case to be departed from, the Court of Appeal in **SG (Iraq) v. Secretary of State for the Home Department [2012] EWCA Civ. 940**, requires [46] to [47] (emphasis added):

> '[46] The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.
>
> [47] It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.'

[84] 'Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal', 18 December 2018: https://www.judiciary.uk/wp-content/uploads/2018/12/practice-directions-iac-dated-18-dec-2018.pdf, last accessed 10 February 2010.

127. The CG cases therefore provide a **binding starting point** for the review of the SOGIE COI. If there is a relevant CG case, then this review starts from the premise the COI report must be compatible with the CG case (unless the CG case is made at a time, where subsequent case law renders the CG case unlawful (for example see Turkey review and **SD (military service – sexual identity) Turkey CG [2013] UKUT 612 (IAC)**).[85]

128. Once the review has addressed any CG cases(s), then a search of the Tribunal decisions database is completed, to check whether there are any **reported cases.**[86] Any relevant cases are then addressed in the review.

Unreported Tribunal determinations:

129. If there are no relevant CG cases, or reported cases, a search of the Tribunal decisions database was then completed to identify any relevant COI SOGIE **unreported determinations**, noting the database has records on unreported cases from 1 June 2013.[87]

130. Under the 2018 Consolidated Practice Directions, PD 11 provides the procedure an unreported case can be relied upon, noting the legal proposition cannot be found in any reported determination of the Upper Tribunal or judgment of any Higher Court.

131. Table Five [Part A, page 79] provides the full list of the 31 countries, relevant COI material and Case-law in one consolidated table (with hyperlinks).

[85] Part B: Turkey, paragraphs 9 to 14, pages 227 to 229.
[86] Tribunal decisions database: https://tribunalsdecisions.service.gov.uk/utiac/, last accessed 10 February 2020.
[87] ibid. 'Unreported cases on decisions database only after 1 June 2013 – can e-mail the Upper Tribunal if require earlier cases: utiacdecisions@hmcts.gsi.gov.uk '

C. Home Office COI:

132. There have been various approaches to LGBT+ COI analysis. [88]

133. This CPIN's (have two distinct sections; the first section addresses the Secretary of State for the Home Department's ('SSHD's) summary of her policy positions in light of the country information.

134. In MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC) [265] the Policy Sections in all the reports stand (at the time of MD, Operation Guidance Notes) are policy documents and are not authoritative sources for the country background position.

135. Having addressed the non-COI material, then the review would compare the published SOGIE COI Home Office report, within the framework of the earlier reviews and statistics, and the case law.

136. This provides a completely different approach from the earlier 2008 and 2014 LGBT thematic approaches but is analogous to a triangulation of review, using firstly analysing the current statistics, then use the Law (via case law) as the base starting point for analysis and review of COI.

137. In the January 2019 'Inspection of Country of Origin Information' report by the Independent Chief Inspector of Borders and Immigration, the following recommendation and actions points are highlighted, framing the additional layer of approach to these reviews [3.1] – [3.3]:[89]

'Contradictory' versus 'inaccurate' information

[88] 'EASO: Researching the situation of lesbian, gay & bisexual persons (LGB) in countries of origin', April 2015 https://coi.easo.europa.eu/administration/easo/PLib/EASO_LGB_COI_Guide_Apr_2015_EN.pdf, accessed 10 February 2020.

[89] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809931/Inspection_of_Country_of_Origin_Information_2019._Burma__Iraq_and_Zimbabwe.pdf, page 13, last accessed 10 February 2020.

3.1 The Preface to each CPIN explains the criteria used for the inclusion of information ("relevance, reliability, accuracy, balance, currency, transparency and traceability") and the factors involved in assessing the reliability of sources (including "motivation, purpose, knowledge and experience" and how the information was obtained, including specific methodologies used"). It also refers to the use of multiple sources and provision of "a range of views and opinions", caveating this with "The inclusion of a source, however, is not an endorsement of it or any view(s) expressed."

3.2 This approach, which follows EU guidelines, is both professional and reasonable, particularly given the often complex and changing country conditions that the COI is seeking to describe. It also respects the role of the asylum decision maker.

3.3 However, there is a distinction between "views and opinions", where it is possible for a range of sources to coexist, and "facts" that are either right or wrong, and it is unhelpful to decision makers for CPIN's to include factually incorrect information alongside the facts, even caveated, and arguably more so if it comes from a source generally regarded as reliable.

Recommendation

The Home Office should:

1. Review its use of multiple sources and ensure that where COI is referring to matters of fact rather than views or opinions it either indicates which is correct or provides sufficient details of the sources (motivation, purpose, knowledge, experience, how and when the information was obtained) to enable the reader to make an informed judgement.'

D. Summary of Review:

138. This provides the framework, leading to the individual reviews.

4. Review Bandings

139. Table One below records the respective bandings for the individual SOGIE COI report/responses reviews:

TABLE ONE: BANDED COI REVIEWS

BANDING	COI REPOIRT/RESPONSE [in Alphabetical Order]
EXCELLENT	★ **GAMBIA** [August 2019 SOGIE CPIN]; ★ **NAMIBIA** [November 2018 SOGIE CPIN]; ★ **NIGERIA** [April 2019 SOGIE CPIN]; ★ **TURKEY** [June 2017 SOGI CPIN & September 2018 Military Service CPIN]; ★ **UGANDA** [April 2019 SOGIE CPIN]; and ★ **UKRAINE** [June 2019 CPIN Minority Groups]
VERY GOOD	☑ **IRAN** [September 2019 SOGIE CPIN]; ☑ **IRAQ** [October 2018 SOGIE CPIN]; ☑ **NEPAL** [Country Background Note, August 2018]; ☑ **THE OCCUPIED PALESTINIAN TERRITORIES** [Background Information Note, December 2018]; ☑ **PAKISTAN** [July 2019 SOGIE CPIN]; ☑ **CAMEROON** [May 2018, response to an information request]; ☑ **EGYPT** [April 2019, response to an information request]; & ☑ **TRINIDAD & TOBAGO** [June 2018, response to an information request].

GOOD	✓ **SOUTH AFRICA** [SOGI CPIN of July 2017]; ✓ **VIETNAM** [Fact-finding mission September 2019 report]; & ✓ **LEBANON** [March 2018, response to an information request]
NEUTRAL	- **ALBANIA**[December 2019 SOGI CPIN]; - **JAMAICA**[February 2017 SOGI CPIN] & - **ZIMBABWE** [January 2019 SOGIE CPIN] .
INTERNAL REVIEW/ FURTHER INFORMATION	↔ **INDIA** [SOGIE CPIN October 2018]; & ↔ **MOROCCO** [July 2017 SOGI CPIN]
POOR	**BANGLADESH** [CPIN on SOGI November 2017]
URGENT ACTION	☒ **AFGHANISTAN** [SOGI CPIN January 2017]; ☒ **ALGERIA** [September 2017 SOGI CPIN]; ☒ **GHANA** [February 2016 SOGI CPIN]; ☒ **MALAWI** [February 2017 SOGI CPIN]; ☒ **MALAYSIA** [Country Background Note, January 2019]; & ☒ **MYANMAR** [January 2019 CPIN on Critics of the Government]
PRIORITY ACTION	☏ **SRI LANKA** [October 2018 SOGIE CPIN]; & ☏ **KENYA** [March 2017 SOGI CPIN].

A. Excellent

140. The following three review reports identify the COI report as EXCELLENT:

(a) Gambia [August 2019 SOGIE CPIN];[90]

(b) Namibia [November 2018 SOGIE CPIN];[91]

[90] Part B, pages 73 to 77.
[91] Part B, pages 166 to 172.

(c) Nigeria [April 2019 SOGIE CPIN];[92]

(d) Turkey [June 2017 SOGI CPIN and September 2018 Military Service CPIN];[93]

(e) Uganda [April 2019 SOGIE CPIN];[94]and

(f) Ukraine [June 2019 CPIN Minority Groups].[95]

141. The Gambia CPIN report review is banded 'EXCELLENT' as in-line with the use of other COI by the Upper Tribunal granting appeals, there is a positive use by the Home Office to grant initial SO protection claim applications.

142. The CPIN is specifically banded 'Excellent' due to the section of COI with respect to 'Societal Norms and Public Opinion' [section 6.1, pages 16 to 17], provide a valuable source of material to address the stigma attached to identification by the majority of the 'difference' of SOGIE Gambians, noting this would go directly to providing objective COI to corroborate the narrative of the SOGIE applicant for the purposes of the first limb of HJ (Iran) guidance ('proving LGBT').[96]

143. Noting the EXCELLENT Banding of the Nigeria CPIN, the review highlights the December 2019 arrests of 47 gay men under the 2013 Marriage Prohibition Act.

144. Part B Country Reports were filed just before 9am on 4 February 2020. On the same day Reuters reported a development in the case, where after months of preparation the court case got adjourned, due to lack of attendance of a lead witness.[97] When the hearing was reconvened the following day, 5 February 2020, the hearing was adjourned again, now to 3 |March 2020 as the lead prosecution witness failed to

[92] Part B, pages 180 to 187.
[93] Part B, paged 225 to 237.
[94] Part B, pages 238 to 246.
[95] Part B, pages 247 to 252.
[96] See Part B of this report, page 72.
[97] 'Nigerian court adjourns case of 47 men charged under homosexuality law', Reuters, 4 February 2020: https://www.openlynews.com/i/?id=3ce527a9-662d-4583-a57f-26d1e3fdef02, last accessed 9 February 2020.

attend. The judge warning the prosecutor that this was their last adjournment to be granted to them.[98]

145. The reviews for the other listed reports all address how the CPIN report accords with the ability for the reader to access COI easily and effectively.

B. Very Good:

146. The following eight review reports were banded 'Very Good':

(a) Iran [September 2019 SOGIE CPIN];[99]

(b) Iraq [October 2018 SOGIE CPIN];[100]

(c) Nepal [Country Background Note, August 2018];[101]

(d) The Occupied Palestinian Territories [Background Information Note, December 2018];[102]

(e) Pakistan [July 2019 SOGIE CPIN];[103]

(f) Cameroon [May 2018, response to an information request];[104]

(g) Egypt [April 2019, response to an information request];[105] and

(h) Trinidad and Tobago [June 2018, response to an information request].[106]

147. The above reports, noting the individual reviews were consistent with:

(a) Country Guidance determinations or reported case law; and/or

(b) Provided accurate and reliable source information;

(c) Included COI on Gender identity or expression; and

[98] Libby George, 'Court case of 47 Nigerian men charged under homosexuality law, delayed again', Openly, 5 February 2020: https://www.openlynews.com/i/?id=3ce527a9-662d-4583-a57f-26d1e3fdef02, accessed 9 February 2020.
[99] Part B, pages 87 to 97].
[100] Part B, pages 98 to 104.
[101] Part B, pages 173 to 179.
[102] Part B, pages 188 to 194.
[103] Part B, pages 195 to 201.
[104] Part B, pages 270 to 275.
[105] Part B, pages 276 to 281.
[106] Part B, pages 289 to 296.

(d) Used a wide variety of sources, including domestic LGBT+ NGOs in the country of origin;

(e) Provided clear and persuasive COI on social norms, if not specifically highlighted; and

(f) Most importantly enabled the decision-maker to address the second-limb of Lord Rodger's guidance in HJ (Iran) with some sign-posting.

C. Good:

148. Providing a good and useful source of COI were:

(a) South Africa [SOGI CPIN of July 2017];[107]

(b) Vietnam [Fact-finding mission September 2019 report];[108]and

(c) Lebanon [March 2018, response to an information request].[109]

149. The above three reports are to be commended for their use of COI, noting in light of a lack of reported case law, and low numbers of SOGIE applicants, the weight to be attached to the COI material is yet to be tested.

D. Neutral:

150. The following countries are ranked with a 'Neutral' Banding:

(a) Albania [December 2019 SOGI CPIN];[110]

(b) Jamaica [February 2017 SOGI CPIN];[111]

(c) Zimbabwe [January 2019 SOGIE CPIN].[112]

[107] Part B, pages 202 to 207.
[108] Part B, pages 253 to 258.
[109] Part B, pages 282 to 288.
[110] Part B, pages 26 to 37.
[111] Part B, pages 105 to 113.
[112] Part B, pages 259 to 269.

Albania:

151. The Albanian CPIN SOGIE of December 2019 was published as a further update to the March 2019 CPIN, providing an opportunity for the CPIN to be updated with the updated case-law of BF (Albania) firstly as the March 2019 CG case (**BF (Tirana – Gay men) Albania CG [2019] UKUT 00093 (IAC))**, and secondly as the Court of Appeal judgment reusing permisison to appeal in October 2019 (**[2019] EWCA Civ. 1781**).

152. On this basis there was no country material for the reviewer to assess the 'weight' to be afforded to the CPIN, as the CG case took precedent.[113]

Jamaica:

153. The *Country Policy and Information Note: Jamaica: Sexual orientation and gender identity* (February 2017) needs some updating with respect to further violence towards the LGBT community. [114]

154. However, due to very strong findings in both the 2005 CG case of **DW (Homosexuals Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168** (gay and bisexual men) and the 2011 CG case of **SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)** (lesbians and bisexual women and 'not straight enough straight women'), there is very little use of the CPIN before the Tribunals.

Zimbabwe:

155. The Zimbabwe CPIN was only provided a neutral banding,[115] as the January 2019 CPINJ was amended to address the points raised in the 2018 review, and due to

[113] Part B, pages 26 to 37, at 37.
[114] Part B, pages 105 to 113.
[115] Part B, pages 259 to 269.

time and resources allocated to this review, the reviewer did not conduct an analysis of the level of adherence to the 2018 reviewer's recommendations.

E. Internal Review/Further Information:

156. The report where the review recommended internal review with respect to placing COI before the decision-maker pre-dating a clear change in the country conditions is India [SOGIE CPIN October 2018].[116]

157. The review highlighted with respect to Morocco [July 2017 SOGI CPIN] [117] there needs to be further information noting the disparity between the COI and the positive grants of protection claims highlighted by the SO protection claim statistics recording a near 50% grant rate at initial decision and allowed appeals.

F. Poor:

158. Bangladesh [CPIN on SOGI November 2017] is banded poor as it did not address the real causative link between the 2016 murder of the activists and lack of prosecution as the core trigger for well-founded fear of persecution of 'open' SOGIE applicants. There was also use of the CPIN in the Upper Tribunal as a lack of real risk to 'open' lesbians, showing there needs to be a clear section on risk to those who are not cis-gendered gay and bisexual men.[118]

159. Various sources of updated COI have been highlighted by the reviewer.

[116] Part B, pages 78 to 86.
[117] Part B, pages 149 to 153.
[118] Part B, pages 55 to 67.

G. Urgent Action:

160. The following countries have been banded as 'URGENT ACTION':

(a) Afghanistan [SOGI CPIN January 2017];[119]
(b) Algeria [September 2017 SOGI CPIN];[120]
(c) Ghana [February 2016 SOGI CPIN];[121]
(d) Malawi [February 2017 SOGI CPIN];[122]
(e) Malaysia [Country Background Note, January 2019];[123] and
(f) Myanmar [January 2019 CPIN on Critics of the Government] .[124]

Afghanistan:

161. Whilst the reviewer had initially banded the Afghanistan January 2017 SOGI CPIN as a Priority Action,[125] the banding is left in Urgent Action as there is clearly an internal fixation within CPIT to keep COI on the Bacha bazi (child abuse) within COI reports, even though both the 2008 and 2014 reviews recommended strongly for deletion. The 2017 December EASO report is an excellent resource to remedy the clear failings within this CPIN.[126]

162. There is additionally a lack of understanding and separating CG case law, decided pre-HJ (Iran) and how COI it is to be reinterpreted following the 2010 UK Supreme Court judgment. The reliance on Kabul as a source of COI was not only inaccurately used within the report (one gay man specifically cited for recollections in

[119] Part B, pages 2 to 27.
[120] Part B, pages 38 to 54.
[121] Part B, pages 73 to 77.
[122] Part B, pages 127 to 135.
[123] Part B, pages 136 to 148.
[124] Part B, pages 154 to 165.
[125] Part B, pages 2 to 25.
[126] https://www.easo.europa.eu/sites/default/files/publications/coi-Afghanistan-targeting-society.pdf , accessed 1 February 2020., see Part B, pages 19 to 21.

2013), but the same 2016 BBC on-line source was cited within the sections on gay men and lesbians, but not used as a source of COI for the trans section, even where this same source provided country background material. The fact the CPIN has within the Annex the January 2017 FCO letter making clear Kabul should not be considered a location for internal relocation, the continued use of the COI report, leading to its reliance to inaccurately address appeals before the Upper Tribunal, highlight a position needing urgent internal review (leading to the reviewer's Recommendation Six (Knowledge of the Law)).

Algeria:

163. The Algerian September 2017 CPIN does not engage with the clear pattern and escalation of state-sanctioned persecution of the SOGIE community in Algeria, providing a very strong departure from the earlier 2016 CG case of OO (Algeria).[127]

164. The various US State Department reports show enforcement of the criminal laws, including use by police to subject SOGIE to violence. The February 2019 murder of the bisexual medical student in Algiers provides a basis to highlight the existence of non-straight identifies and additional real risk of persecution outside the family, and in the capital Algiers. By this post-CPIN COI provides an urgent basis for why the CPIN needs updating. A Country Bulletin Update ('CBU') should have addressed the urgency for an update, if a CPIN update could not have been completed in-time.

Ghana:

165. The Ghana 2016 CIG needs urgent updating and is not used at all by the Tribunals, noting even the FCO advice is cited by the April 2019 Tribunal in **EA (Ghana)** referring to 'zero tolerance of lesbian, gay, bisexual and transgender people in Ghana'.[128]

[127] Part B, pages 38 to 54.
[128] Part B, pages 73 to 77, at 74 to 75.

Malawi:

166. Malawi is a country where there is strong and cogent evidence of persecution towards the SOGIE community, including those who are **intersex**, facing discrimination amounting to persecution.[129]

167. The February 2017 CPIN is out-dated, on the basis the COI identified by the reviewer shows clear evidence of how the criminal law is being used to arrest and harass SOGIE.[130]

Malaysia:

168. It is understood CPIT are planning to draft and publish a SOGIE CPIN on Malaysia,[131] but currently this is in the early planning stages.[132]

169. What is clear from the high grant rate, at both initial decision and appeal, is that there is a clear common ground of acceptance of well-founded fear of persecution to those who are openly LGBT. The current inclusion as a section within the January 2019 Country Background note in Malaysia does not address the need for COI to be publicly and visibly accessible.

Myanmar

170. This report on COI position for SOGIE in Myanmar (Burma) relies solely on a section relying on COI from unsourced sources via the Australian DFAT.[133]

171. The concern is the January 2019 IAGCI review conducted on the Myanmar 'Response for Information Request' stands as a separate internal document within the Home Office, and the publicly available January 2019 CPIN does not address what has been discussed at IAGCI level with respect to SOGIE risk on return.

[129] Part B, page 134.
[130] Part B, pages 127 to 135.
[131] Part B, pages 136 to 148.
[132] Part B, page 137, footnote 8.
[133] Part B, pages 154 to 165.

H. Priority Action:

172. The CPIN on Sri Lanka [October 2018 SOGIE CPIN] [134] inaccurately records the position with respect to State persecution of SOGIE applicants. In the face of successive cases where the Home Office have lost cases on this point of fact and law, the sections highlighted in the review with respect to the November 2016 Sri Lankan Supreme Court judgment are not only inaccurate, but misleading. This is a PRIORITY ACTION as there are negative decisions of protection claims based on outdated CG case law (inaccurate on no prosecutions since independence) and inaccurate COI in the CPIN report).

173. The CPIN additionally does not reflect the country background position as to risk of Intersex applicants, available from source information cited elsewhere in the CPIN.

174. On 1 July 2019, the reviewer and other members of civil society were informed by the Head of CPIT that there would be an update to the **Kenya** March 2017 SOGI CPIN. It is clear CPIT provided an update to the India SOGIE CPIN in October 2018, within a month of the 6 September 2018 Indian Supreme Court judgment in **Johar and ors**, an important landmark in the liberation of LGB Indians. However, contrasted with the lack of (continued) update of the Kenyan SOGI CPIN, noting the May 2019 judgment enshrines judicial and legal persecution of SOGIE applicants in Kenya, the lack of publication of an update is extremely troublesome.

[134] Part B, pages 208 to 224.

175. Both these SOGIE CPINs require PRIORITY ACTION, in order not to be perceived to be relied on in an unsatisfactory manner, conflicting with the public law duty of transparency and accuracy of COI.

5. Detailed Recommendations:

176. The following recommendations are made by the reviewer:

Recommendation One:

ALL Country of Origin Information ('COI') reports to include Section on 'Risk to Open SOGIE applicants':

177. All Country of Origin Information reports address directly the second limb of Lord Rodger's binding guidance in **HJ (Iran)** (2010) by investigating country information relating to what happens to those who are 'open and SOGIE' and addressing this in a specific section of the report. It is approaching a decade since the Supreme Court's binding guidance on the approach to country evidence was given.

Recommendation Two:

Identify - *The Martyr*: to accurately assess real risk - there are very few 'martyrs' in countries where there is well-founded risk (HJ (Iran)). COI reports need to identify sources specifically with respect to those who choose to be, or are identified as, 'open':

178. Country Policy and Information Team ('CPIT') understands and adopts an approach to investigation where the starting point for focus includes an acceptance in countries where there is a well-founded fear of persecution, the amount of evidence on risk will be limited as the 'martyrs' will be few in number, due to the human response to act in a manner to avoid harm (see HJ (Iran) [59]).

179. *The martyr* would be limited to including the 'activist' (those who choose to reveal), or those how are identified, as they do not successfully conform to the gender-sex role norm expected by the potential persecutor. Due to the double bind of gender and sexual/gender identity, where there is evidence of risk to gay and bisexual men, the lack of COI with respect to lesbian and bisexual women, trans women, trans men and those are intersex, does not detract from the same exposure to risk if 'open', as they find due to their added marginalised identities are forced into greater invisibility.

Recommendation Three:

Separate sections on COI on Lesbians and Bisexual Women, Trans and Intersex:

180. There should separate sections in the reports with respect to lesbian and bisexual women, trans and gender expression applicants and intersex applicants. The earlier 2008 and 2014 LGBT thematic reviews recommended this approach to be adopted, but this repeated recommendation continues not to be universally followed by CPIT. Currently the CPINs may include a separate section on Trans COI, but the lack of a separate section specifically to all these groups render the reports to lack a user-friendly approach and accurately determine risk to these groups.

3

Recommendation Four:

The Silence Fallacy: All COI reports to include section on 'Social Norms and Public Opinion':

181. All COI reports should have a section addressing 'Social Norms and Public Opinion' as this directly addresses corroborative country background information to support credibility assessment of the subjective first limb of HJ (Iran) and 'proving SOGIE and additionally addresses the steps required by a returnee required to be 'discreet' (conceal), even where this is connected only with social pressure and personal choice (penultimate limb of paragraph 82, HJ (Iran)).

Recommendation Five:

Internal Relocation Alternative: All COI reports should include a section on specifically identified places of suggested internal relocation alternative, if this issue is to be relied on by Home Office decision-makers:

182. All COI reports must, following MB (Albania) (UT) (2019) provide COI on identified places of internal relocation alternative, so if relied upon in a negative decision on a SOGIE protection claim, the Home Office have complied with her legal duty within the decision-making process.

Recommendation Six:

Knowledge of Law: All CPIT undertaken research and drafting of the reports should be done in the knowledge of the approach of the Tribunals and Courts, specifically with respect to binding Country Guidance and reported cases.

183. Lack of understanding of binding case law has led to inaccurate and misleading sections in country reports (see for example Afghanistan and Sri Lanka reviews). Such errors give rise to lack of reliability of the entire report.

Recommendation Seven:

<u>Statistics on SOGIE Claims:</u> Need for on-going data collection for SO claims, to also include protection claims based on Gender Identity or Expression and Intersex claims:

184. There needs to be the continued gathering of statistics on number of claims, initial decisions and appeals outcomes as this provides a clear source of information necessary in order to address updates of claims. The scope of data collection should also include gender identity or expression and trans protection claims. The publication of the data provides a exceptionally valuable basis for identifying the decision-making process from a policy and judicial decision-making perspective.

Recommendation Eight:

<u>Publication of Country Bulletin Updates ('CBU'):</u>

185. Where there are clear changes in the country background information, there needs to be the publication of Country Bulletins Updates ('CBU') to be read in-conjunction with the Country Policy and Information Note ('CPIN'), if the CPIN cannot be updated within a reasonable time-frame (for example one month, see update of Indian SOGIE CPIN within a month of the 6 September 2018 Indian Supreme Court judgment. Cf. May 2019 High Court judgment of Kenya, no published update to Marc 2017 CPIN).

Recommendation Nine:

Publication of Responses to Requests for Information:

186. Where there is no published CPIN or Country Information and Guidance Note ('CIG') any Response for a Request for Information should be published by the Home Office to ensure transparency of decision-making and comply with the legal requirements for referral to country material documents when reviewing decisions, outlined in binding case law guidance on duty of the Home Office to disclose material to assist in refugee protection claim decision-making: UB (Sri Lanka) (CoA) (2017).

Recommendation Ten:

Publication of basic country facts:

187. Population and predominant religion provides useful background context to religious, social and cultural norms and approximate size of SOGIE population expected to be visible if living 'freely and openly without fear of persecution'.

TABLE TWO: 31 COI REPORTS/RESPONSES BANDING

[hyperlinks to reports/responses inserted]

	Country:	Part B (pages):	Title of COI report/response (date)	REVIEW BANDING
1	Afghanistan	2 to 25	**CPIN: Afghanistan:** Sexual orientation and gender identity (01/17)	URGENT ACTION
2	Albania	26 to 37	**CPIN Albania:** Sexual orientation and gender identity (12/19)	NEUTRAL
3	Algeria	38 to 54	**CPIN Algeria**: Sexual orientation and gender identity (09/17)	URGENT ACTION
4	Bangladesh	55 to 67	**CPIN Bangladesh**: Sexual orientation and gender identity (11/17)	POOR
5	Gambia	68 to 72	**CPIN Gambia**: Sexual orientation and gender identity or expression (08/19)	EXCELLENT
6	Ghana	73 to 77	**CIG Ghana**: Sexual orientation and gender identity (02/16)	URGENT ACTION
7	India	78 to 86	**CPIN: India**: Sexual orientation and gender identity and expression (10/18)	NEED FOR INTERNAL REVIEW
8	Iran	87 to 97	**CPIN Iran:** Sexual orientation and gender identity and expression (06/19)	VERY GOOD
9	Iraq	98 to 104	**CPIN Iraq:** Sexual orientation, and gender identity and expression (10/18)	VERY GOOD
10	Jamaica	105 to 113	**CPIN Jamaica:** Sexual orientation and gender identity (02/17)	NEUTRAL
11	Kenya	114 to 126	**CPIN Kenya:** Sexual orientation and gender identity (03/17)	PRIORITY UPDATE
12	Malawi	127 to 135	**CPIN Malawi:** Sexual orientation and gender identity (02/17)	URGENT ACTION

13	**Malaysia**	**136 to 148**	*Country Background Note Malaysia* (01/19)	**URGENT ACTION**
14	**Morocco**	**149 to 153**	**CPIN Morocco:** Sexual orientation and gender identity (07/17)	**REQUEST FOR FURTHER INFORMATION**
15	**Myanmar** (Burma)	**154 to 165**	***CPIN Burma (Myanmar)***: Critics of the government (01/19)	**ACTION REQUIRED**
16	**Namibia**	**166 to 172**	**CPIN Namibia**: Sexual orientation and gender identity and expression (11/18)	**EXCELLENT**
17	**Nepal**	**173 to 179**	*Country Background Note Nepal* (08/18)	**VERY GOOD**
18	**Nigeria**	**180 to 187**	**CPIN Nigeria**: Sexual orientation and gender identity or expression(04/19)	**EXCELLENT**
19	**Occupied Palestinian Territories**	**188 to 194**	***CPIN Occupied Palestinian Territories***: Background information, including actors of protection, and internal relocation (12/18)	**VERY GOOD**
20	**Pakistan**	**195 to 201**	**CPIN Pakistan:** Sexual orientation and gender identity and expression (07/19)	**VERY GOOD**
21	**South Africa**	**202 to 207**	**CPIN South Africa:** Sexual orientation and gender identity (07/17)	**GOOD**
22	**Sri Lanka**	**208 to 224**	**CPIN Sri Lanka:** Sexual orientation and gender identity and expression (10/18)	**PRIORITY URGENT ACTION**
23	**Turkey**	**225 to 237**	**CPIN Turkey:** Sexual orientation and gender identity (06/17) & **CPIN Turkey:** Military Service (09/18)	**EXCELLENT**

24	**Uganda**	**238 to 246**	**CPIN Uganda:** Sexual orientation and gender identity and expression (04/19)	**EXCELLENT**
25	**Ukraine**	**247 to 252**	*CPIN Ukraine: Minority groups* (06/2019)	**EXCELLENT**
26	**Vietnam**	**253 to 258**	***Report of a Home Office fact-finding mission to Vietnam*** (09/19)	**GOOD**
27	**Zimbabwe**	**259 to 269**	**CPIN Zimbabwe**: Sexual orientation and gender identity and expression (01/19)	**NEUTRAL**
A	**Cameroon**	**270 to 275**	Response to an information request: 'Treatment of gay men' (25/5/18)	**VERY GOOD**
B	**Egypt**	**276 to 281**	Response to an information request: 'LGBTI persons' (3/4/19)	**VERY GOOD**
C	**Lebanon**	**282 to 288**	Response to an information request: 'Activists, HIV treatment' (5/3/18)	**GOOD**
D	**Trinidad & Tobago**	**289 to 296**	Response to an information request: 'LGBTI persons/Medical issues' (26/6/18)	**EXCELLENT**

TABLE THREE: DATA TABLE OF COUNTRY REPORTS (42 COUNTRIES (25/1/20))[135]

CPIN on SOGI/SOGIE **20 Countries**	**CIG on SOGI/SOGIE** **1 country**	**Other COI citing SOGI** **6 countries**	**No SOGI/SOGIE reference** **15 countries** **(* - known SOGIE protection claim nation/case law**
Afghanistan (January 2017) Albania (December 2019) Algeria (September 2017) Bangladesh (November 2017) Gambia (August 2019) India (October 2018) Iran (June 2019) Iraq (October 2018) Jamaica (February 2017) Kenya (March 2017) Malawi (February 2017) Morocco (July 2017) Namibia (November 2018) Nigeria (April 2018) Pakistan (July 2019) South Africa (July 2017) Sri Lanka (October 2018) Turkey (July 2017) Uganda (April 2019) Zimbabwe (January 2019)	Ghana (February 2016)	Malaysia (January 2019) Country Background Note [13.1.3, 13.1.6-13.1.7 and Bibliography] Myanmar (January 2019) CPIN Critics of the Government [9.4.2] Nepal (August 2018) Country Background Note [13.1] Occupied Palestinian Territories (December 2018) Background Information: including actors of protection and internal relocation [2.3.3] Ukraine (June 2019) Minority Groups [3.3] Vietnam (September 2019) Report of Home Office Fact-finding Mission [8.1.2, Political Opposition (page 48) and Annex D	Angola Cameroon (*) China Democratic Republic of Congo Egypt (*) Eritrea Ethiopia (*) Kuwait Lebanon (*) Libya North Korea Somalia Sudan (*) Syria (*) Yemen

[135] The Home Office in the published list of countries list Nepal before Namibia.

TABLE FOUR: - FULL COUNTRY LIST

	Country	CPIN	CIG	Other	Title of report [hyperlinks inserted]	V	Date
1	**Afghanistan**	Yes	-	-	**CPIN Afghanistan**: Sexual orientation and gender identity	2	Jan'17
2	**Albania**	Yes	-	-	**CPIN Albania**: Sexual orientation and gender identity	5	Dec'19
3	**Algeria**	Yes	-	-	**CPIN Algeria**: Sexual orientation and gender identity	2	Sep'17
4	Angola	No	No	No			
5	**Bangladesh**	Yes	-	-	**CPIN Bangladesh**: Sexual orientation and gender identity	3	Nov'17
6	Cameroon	No	No	No			
7	China	No	No	No			
8	Democratic Republic of Congo	No	No	No			
9	Egypt	No	No	No			
10	Eritrea	No	No	No			
11	Ethiopia	No	No	No			
12	**Gambia**	Yes	-	-	**CPIN Gambia**: Sexual orientation and gender identity or expression	2	Aug'19
13	**Ghana**	No	Yes	-	**CIG Ghana**: Sexual orientation and gender identity	1	Feb'16
14	**India**	Yes	-	-	**CPIN: India**: Sexual orientation and gender identity and expression	3	Oct'18
15	**Iran**	Yes	-	-	**CPIN Iran:** Sexual orientation and gender identity and expression	5	Jun'19
16	**Iraq**	Yes	-	-	**CPIN Iraq:** Sexual orientation, and gender identity and expression	1	Oct'18

17	**Jamaica**	Yes	-	-	**CPIN Jamaica:** Sexual orientation and gender identity	2	Feb'17
18	**Kenya**				**CPIN Kenya:** Sexual orientation and gender identity	2.0e	Mar'17
19	Kuwait	No	No	No			
20	Lebanon	No	No	No			
21	**Liberia**	No	No	No	**CPIN** Liberia: Archived since 26.11.19	--	--------
22	Libya	No	No	No			
23	**Malawi**	Yes	-	-	**CPIN Malawi:** Sexual orientation and gender identity	3	Feb'17
24	**Malaysia**	No	No	Yes	*Country Background Note Malaysia* [13.1.3, 13.1.6, 13.1.7 and bibliography]	1	Jan'19
25	**Mali**	No	No	-	**CIG** Mali Archived from 26.11.19	-	--------
26	**Morocco**	Yes	-	-	**CPIN Morocco:** Sexual orientation and gender identity	1	Jul'17
27	**Myanmar** (Burma)	No	No	Yes	***CPIN Burma (Myanmar)***: Critics of the government [9.4.2]	3	Jan'19
28	**Nepal**	No	No	Yes	*Country Background Note Nepal* [13.1]	1	Aug'18
29	**Namibia**	Yes	-	-	**CPIN Namibia**: Sexual orientation and gender identity and expression	1	Nov'18
30	**Nigeria**	Yes	-	-	**CPIN Nigeria**: Sexual orientation and gender identity or expression	2	Apr'19
31	North Korea	No	No	No			
32	**Occupied Palestinian Authorities**	No	No	Yes	***CPIN Occupied Palestinian Territories***: Background information, including actors of protection, and internal relocation	1	Dec'18
33	**Pakistan**	Yes	-	-	**CPIN Pakistan:** Sexual orientation and gender identity and expression	3	Jul'19
34	Somalia	No	No	No			

35	**South Africa**	Yes	-	-	**CPIN South Africa:** Sexual orientation and gender identity	1	Jul'17
36	**Sri Lanka**	Yes	-	-	**CPIN Sri Lanka:** Sexual orientation and gender identity and expression	3	Oct'18
37	Sudan	No	No	No			
38	Syria	No	No	No			
39	**Turkey**	Yes	-	-	**CPIN Turkey:** Sexual orientation and gender identity	2	Jul'17
40	**Uganda**	Yes	-	-	**CPIN Uganda:** Sexual orientation and gender identity and expression	4	Apr'19
41	**Ukraine**	No	No	Yes	*CPIN Ukraine: Minority groups* [3.3]	2	Jun'19
42	**Vietnam**	No	No	Yes	***Report of a Home Office fact-finding mission to Vietnam*** (conducted 23 February-1 March 2019, published 9 September 2019) **[8.1.2, Annex D and Political Opposition, page 48]**	-	Sep'19
43	Yemen	No	No	No			
44	**Zimbabwe**	No	No	Yes	**CPIN Zimbabwe**: Sexual orientation and gender identity and expression	4	Jan'19

[original review conducted on 25 October 2019 – 44 countries]

[updated: 25 January 2020]

TABLE FIVE: LIST OF COUNTRIES WITH LISTED COI & SOGIE CASES

[hyperlinks to cases and reports inserted]

	Country:	**Country Guidance ('CG') case(s) / Leading case:**	**Title of report (date)/ Response**
1	**Afghanistan**	**AJ (risk to homosexuals) Afghanistan CG [2009] UKAIT 0001** **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)**	**CPIN: Afghanistan:** Sexual orientation and gender identity (01/2017)
2	**Albania**	**BF (Tirana – Gay men) Albania CG [2019] UKUT 00093 (IAC)** **MB (Internal relocation Albania) [2019] UKUT 392 (IAC)**	**CPIN Albania:** Sexual orientation and gender identity (12/2019)
3	**Algeria**	**OO (Gay men) Algeria CG [2016] UKUT 65 (IAC)**	**CPIN Algeria**: Sexual orientation and gender identity (09/2017)
4	**Bangladesh**	**NO CG** **MSA v Secretary of State for the Home Department (PA/07096/2017) (unreported).**	**CPIN Bangladesh**: Sexual orientation and gender identity (11/2017)
5	**Gambia**	**NO CG** **HC v. Secretary of State for the Home Department (unreported) (PA/00693/2017) (unreported)**	**CPIN Gambia**: Sexual orientation and gender identity or expression (08/2019)
6	**Ghana**	**NO CG**	**CIG Ghana**: Sexual orientation and gender identity (02/2016)

		EA (Ghana) v Secretary of State for the Home Department **(unreported); and** **SL v Secretary of State for the Home Department (PA/13493/2018) (unreported)**	
7	**India**	**MD (same-sex orientated males: risk) India CG [2014] UKUT 00065 (IAC)** **AR and NH (lesbians) India CG [2016] UKUT 66 (IAC)** **Secretary of State for the Home Department v SN (AA/02811/2013) (unreported – Gender Identity)**	**CPIN: India**: Sexual orientation and gender identity and expression (10/2018)
8	**Iran**	**RM and BB (Homosexuals) Iran CG [2005] UKIAT 117** **HS (Homosexuals, Minors, Risk on return) Iran CG [2005] UKAIT 120**	**CPIN Iran:** Sexual orientation and gender identity and expression (06/2019)
9	**Iraq**	**SMO, KSP and IM (Article 15(c) identity documents) Iraq CG [2019] UKUT 400 (IAC)**	**CPIN Iraq:** Sexual orientation, and gender identity and expression (10/2018)
10	**Jamaica**	**DW (Homosexuals Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168** **SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)**	**CPIN Jamaica:** Sexual orientation and gender identity (02/2017)

11	**Kenya**	**JMS (Homosexual behaviour, Prosecution) Kenya CG [2001] UKIAT 17**	**CPIN Kenya:** Sexual orientation and gender identity (03/2017)
12	**Malawi**	**No relevant cases**.	**CPIN Malawi:** Sexual orientation and gender identity (02/2017)
13	**Malaysia**	**NO CG** **HL (Malaysia) v Secretary of State for the Home Department [2012] EWCA Civ. 834** **LSL v Secretary of State for the Home Department [2017] UKAITUR PA117922016 (unreported – Gender Identity and expression and Sexual identity)**	*Country Background Note Malaysia* (01/2019) [13.1.3, 13.1.6, 13.1.7 and bibliography]
14	**Morocco**	**NO CG** **AEH v Secretary of State for the Home Department (PA/08097/2017) (unreported post-CPIN)**	**CPIN Morocco:** Sexual orientation and gender identity (07/2017)
15	**Myanmar** (Burma)	**No relevant cases.**	***CPIN Burma (Myanmar)***: Critics of the government (01/2019) [9.4.2]
16	**Namibia**	**NO CG** **Mr M K v Secretary of State for the Home Department (PA/07763/2018) (unreported)**	**CPIN Namibia**: Sexual orientation and gender identity and expression (11/2018)
17	**Nepal**	**NO CG** **AT v Secretary of State for the Home Department (PA/09402/2016) (unreported)**	*Country Background Note Nepal* (08/2018) [13.1]

18	**Nigeria**	**NO CG** **RA v Secretary of State for the Home Department (PA/07980/2017) (unreported)**	**CPIN Nigeria**: Sexual orientation and gender identity or expression(04/2019)
19	**Occupied Palestinian Territories**	**NO CG** **Mr Alishaaban Ali Mohamed v Secretary of State for the Home Department (PA/08770/2016) (unreported)**	***CPIN Occupied Palestinian Territories***: Background information, including actors of protection, and internal relocation (12/2018)
20	**Pakistan**	**NO CG** **MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC)**	**CPIN Pakistan:** Sexual orientation and gender identity and expression (07/2019)
21	**South Africa**	**NO CG** **AS v Secretary of State for the Home Department (PA/07738/2017) (unreported)** **[conflicting authorities]** **YA v Secretary of State for the Home Department (AA/09448/2015) (unreported)**	**CPIN South Africa:** Sexual orientation and gender identity (07/2017)
22	**Sri Lanka**	**LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC)** **SASS v Secretary of State for the Home Department (AA/07983/2015) (unreported)** **Galabada Payagalaga Sanath Wimalasari and others vs**	**CPIN Sri Lanka:** Sexual orientation and gender identity and expression (10/2018)

		Officer-in-Charge (SC Appeal No. 32/11) **(Sri Lankan Supreme Court)** **Secretary of State for the Home Department v. MKMR (PA/01821/2018)** **(unreported)**	
23	**Turkey**	**SD (military service – sexual identity) Turkey CG [2013] UKUT 612 (IAC)**	**CPIN Turkey:** Sexual orientation and gender identity (06/2017) and **CPIN Turkey:** Military Service (09/2018)
24	**Uganda**	**JM (homosexuality; risk) Uganda CG [2008] UKAIT 65** **R (SB (Uganda) v Secretary of State for the Home Department [2010] EWCH 338 (Admin)** **SN v. Secretary of State for the Home Department (PA/14010/2016)** **(unreported)**	**CPIN Uganda:** Sexual orientation and gender identity and expression (04/2019)
25	**Ukraine**	**MV (Risk, Homosexual) Ukraine CG [2003] UKIAT 5**	*CPIN Ukraine: Minority groups* (06/2019) [3.3]
26	**Vietnam**	**NO CG** **Mr Trung Nguyen Nguyen v. Secretary of State for the Home Department (HU/22151/2016)** **(unreported)** **Miss Hoang Duong Nguyen (IA/53130/2013)** **(unreported)**	***Report of a Home Office fact-finding mission to Vietnam*** (conducted 23 February-1 March 2019, published 9 September 2019) **[8.1.2, Annex D and Political Opposition, page 48]**

27	**Zimbabwe**	**LZ (homosexuals) Zimbabwe CG [2011] UKUT 487 (IAC)** **and** **CM (EM country guidance, disclosure) Zimbabwe CG [2013] UKUT 59 (IAC)** **Secretary of State for the Home Department v LK (PA/01193/2018)** **(unreported)**	**CPIN Zimbabwe**: Sexual orientation and gender identity and expression (01/2019)
A	**Cameroon**	**NO CG** **AETZ v Secretary of State for the Home Department (PA/10158/2017)** (unreported)	Response to an information request: 'Treatment of gay men' (25/5/2018)
B	**Egypt**	**NO CG** **TA v Secretary of State for the Home Department (AA/01405/2014)** (unreported)	Response to an information request: 'LGBTI persons' (3/4/2019)
C	**Lebanon**	**NO CG** **MK v. Secretary of State for the Home Department (AA/0304/2013)** (unreported)	Response to an information request: 'Activists, HIV treatment' (5/3/2018)
D	**Trinidad & Tobago**	**NO CG** **Secretary of State for the Home Department v AAH (AA/04139/2014)** (unreported) **Secretary of State for the Home Department v. NCC (AA/04056/2014)** **(unreported)**	Response to an information request: 'LGBTI persons/Medical issues' (26/6/18)

25 January 2020

PART A: Reviewer's Report
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I. About the Reviewer:

S. Chelvan is a UK-based barrister with expertise in protection claims and LGBT+ rights. He has been instructed as sole Counsel, or leading Counsel on various cases dealing with LGBT+ protection claims since 2001 including the Country Guidance cases of **DW (Jamaica)** in 2005, **JM (Uganda)** in 2008, **SW (Jamaica)** in 2011 and **BF (Albania)** in 2019. In 2014, he was awarded the Barrister award at the Legal Aid Lawyer of the Year awards in recognition of his work in legally aided LGBT+ asylum cases. In 2018, S. Chelvan was awarded a Pride Award by Attitude magazine for his work in representing LGBT+ refugees, including creating the Difference, Stigma, Shame and Harm ('DSSH') model; a positive tool to assess the credibility of a person seeking asylum on SOGIE grounds, endorsed by the UK Home Office and the UNHCR.

S. Chelvan gained a first in Politics and Law, from the University of Southampton in 1998. He was called to the Bar by the Honourable Society of the Inner Temple (Major scholar), in October 1999. He obtained a Master's degree in Law (on international human rights and the Lesbian and Gay Liberation Movement) at Harvard Law School in 2001 (Kennedy Memorial Trust scholar), following a visiting research fellowship at the Centre for International Human Rights Law at Northwestern University, Chicago, in 2000. He returned to the UK and full-time practice at the Bar in August 2001.

In June 2019, S. Chelvan was awarded his PhD in Law, with a thesis on 'Queer Refugees: moving from sexual conduct to identity in sexual orientation/identity asylum cases in England and Wales', from King's College London. Since January 2011, he has practiced from No5 Barristers' Chambers, in London. In March 2019, S. Chelvan was appointed to the LGBT Advisory Panel of the Government Equalities Office and since 2015, he has been a member of the Home Office's National Asylum Stake-Holders' Forum Equality Sub-group.

PART B: COUNTRY REPORTS:

6. AFGHANISTAN

Capital city: Kabul
Population:[1] 38,928,346
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Afghanistan is an Islamic country. You should respect local traditions, customs, laws and religions at all times. Be particularly careful during the holy month of Ramadan or if you intend to visit religious areas …*
>
> *Homosexuality is illegal.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews do address COI with respect to Afghanistan.

2. In 2008, De Jong uses the COI in Afghanistan as an example of **Bad Practice**:

> 'Afghanistan: the report is not covering wider human rights issues or attitudes in society; the absence of any LGBT organisations; the reasons for lack of information; the attitudes in the medical sector or placing the issues in the wider context of regulation of gender and sexuality. Instead the report

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Afghanistan: Laws and Customs, last updated 6 January 2020 https://www.gov.uk/foreign-travel-advice/afghanistan/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), page 20 and 30 to 33.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 20 to 22: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

> concentrates on whether men are able to have sex with men, albeit discreetly. Para. 21.01: the source used here reports on 'homosexuals' not having any problems provided they keep their sexual orientation secret and do not overstep other social norms within their family, such as getting married. This kind of information assumes that there is not 'problem' in complying with these other social norms and limiting same sex relationships to occasional, secret encounters. The report does not contain any information that counters such a view.'

3. At page 31 the reviewer addresses the reliance of Home Office COIS COI with respect to sexual abuse of young men and boys by older men:

> 'Men having sex with (young) men or boys in situations where there is a lack of access to women (due to strict gender segregation or in war zones), or in situations where they can assert power, and/or where this is traditionally a common practice, in particular for young men between puberty and marriage, is not the same as being 'homosexual' or having a gay identity in the sense of being mainly attracted to, and seeking to engage in a sexual or partner relationship with, a person of the same sex.
>
> Overall the information in the LGBT section demonstrates a clear lack of understanding of gender and sexuality issues in Afghanistan. Not only does the report focus on same-sex conduct, rather than on sexual identity, the use of sources actually portray 'homosexuals' (or gay men in particular) as possibly being repressed child abusing individuals on the one hand, and on the other hand as being fairly free to have same-sex sexual relations in a gender segregated society, as long as they also confirm to other social norms, such as marry (a woman).'

4. Leigh in the 2014 IAGCI review report highlights this continued bad practice use of COI (pages 20 to 21):[5]

> 'Reference to men having sex with young boys, for example, in para. 23.10 "the report also detailed a disturbing practice in which older men of status" keep young boys on hand for sexual relationships…" or para. 23.11 "the source knew of commanders who were known of having relationships with young boys."
>
> Men having sex with young men or boys in situations where there is limited access to women (for example due to strict gender segregation), in situations where they can assert power, or where this is a traditional practice, is not the

[5] ibid, pages 20 to 21.

same as gay identities in the sense of being attracted to, and seeking to engage in a a relationship with a person of the same sex. This type of information should be omitted from quotes.

5. Directly relevant to the analysis and 'Summary of review' below is the COIS 2014 response (pages 22 to 23) (emphasis added) (**additional emphasis added**):[6]

> 'We do not agree with the reviewer's main criticism that information about sexual relationships between men is without relevance or is inappropriate to this section. A number of sources refer to the relative frequency of **same-sex behaviour between men** but that there also exists societal intolerance of individuals who have **a gay 'identity'**. This may be confusing to caseworkers because it is so different from a 'western' perception of physical contact and relationship. We have decided to include this material in order to provide some cultural context to **assist decision makers in understanding the distinction between same-sex behaviour and identity, and how these are perceived differently in Afghan society**.'

6. Firstly, the response addresses issues of 'same-sex behaviour between men' includes the presumption the material would address sexual relations are between two parties who in fact and law consent to sexual relations. The response misses the point with respect to the criticism of the use of source material where the COI refers to conduct between older men and young men 'and boys'.

7. The human rights norms to be applied are not culturally relativist norms in Afghanistan, but those internationally recognised norms, including the 1989 UN Convention on the Rights of the Child, noting children do not have capacity to consent to sexual relations with adults and States must protect them from sexual exploitation and abuse [Articles 19 and 34][7]. Noting part of the role of the bacha bazi is to perform as 'dancing boys' for the sexual gratification of the adult men,[8] such practices are a

[6] The Home Office COIS response where responses have been inserted into the original report is not available on-line. Email from IAGCI forwarding copy to the reviewer on 25 October 2019.

[7] Article 34 of the 1989 UNCRC: 'States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a)The inducement or coercion of a child to engage in any unlawful sexual activity; (b)The exploitative use of children in prostitution or other unlawful sexual practices;
(c)The exploitative use of children in pornographic performances and materials.'

[8] See EASO Report on Afghanistan (December 2017), page 67: 5: Child abuse and exploitation: 5.1: Bach bazi:

> 'Bacha bazi ('dancing boys' or 'boy play'), is a form of sexual exploitation by adult men in positions of power, such as militias and armed forces, who use boys and young men (bacha bereesh, or beardless boy) for entertainment, dancing in female garb, and sexual favours.'

clear violation of Article 34 (c) of the 1989 UNCRC due to 'exploitative use of children in pornographic performances ….'.

8. On this basis the source material relied on by the Home Office at the time of the 2014 and 2008 reviews were addressing sexual relations between men and children.

9. The Home Office in other CPIN reports does highlight MSMs, clearly distinguishable from gay and bisexual men (see for example within the Societal Norms section 5 at section 5.2 (Men who have sex with men (MSM)) of the July 2019 SOGIE CPIN on Pakistan).[9] This is an example of **good practice** in not conflating COI on purely sexual conduct, with assessment of risk on return for SOGIE applicants, noting there is no reference within this section in the Pakistan CPIN of sexual relations between adults and children.

10. The Tribunal in the 2005 of CG case on Iran (RM and BB (Homosexuals) Iran CG [2005] UKIAT 117) refers to the Home Office's October 2004 Iran Country report [6.180], where the prevalence of same-sex conduct was accepted to be socially acceptable, where [19]:

> '[S]ources indicate that there are held to be very differing levels of homosexual activity within Iranian society and that in rural areas even "lavat" sexual activity can be considered socially to be compensatory sexual behaviour for heterosexual sexual intercourse and the practitioners held not to be homosexuals.'

(source includes the Afghanistan Independent Commission on Human Rights (AICHR) report, 'The Causes and Consequences of Bachabazi in Afghanistan' (October 2014): https://www.refworld.org/docid/5694c3db4.html , accessed 2 February 2020, which states (page 3) (emphasis added):

> 'What is Bachabazi?
> … They often fall victims to sexual abuses. In some parts of the country, these children while wearing female clothes are used as dancers in parties and wedding ceremonies. At the end of ceremonies, they are usually taken to private houses or hotels and raped; sometimes they are even gang raped. As sex slaves, these children continually suffer from sexual exploitation or other forms of sexual harassments.'

[9] UK Home Office, 'Country Policy and Information Note: Pakistan: Sexual orientation and Gender identity or expression. July 2019', section 5.2 [five sub-sections]: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814050/Pakistan-SOGIE-CPIN-v3.0_July_2019_.pdf , last accessed 2 February 2020.
The source cited at [5.2.4]: BBC News on-line, Mobeen Azhar, 'Gay Pakistan: where sex is available and relationships are difficult', 27 August 2013: https://www.bbc.co.uk/news/23811826 , accessed 1 February 2020.

11. Where due to religious, social and cultural norms pre-marital sexual relations with women are impermissible, identifying the difference between 'lavat' when connected purely with conduct, and where it is connected with desire with a non-straight/cis-gendered (SOGIE) identity arising from 'difference' (actual or imputed).

12. Sexual relations between men who do not identify as gay or bisexual is well known (Men who have Sex with Men ('MSM'). This social group exists in all countries as it is connected with an aspect of human behaviour – sexual conduct without necessarily overlapping with a SOGIE 'identity'.

13. The *Yogyakarta Principles* (2007) distinguish sexual identity from purely sexual conduct:[10]

> 'Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'

14. Sexual relations between adult men and young boys is considered in the UK as paedophilia and is criminal. Convention reason protection and sexual identity are linked to various factors linked to identity, including ability to freely choose and consent.

15. Article 10 (1) (e) of the 2004 Minimum Standards Directive Qualification Directive[11] specifically excludes from the definition of protected Particular Social Group Convention reason 'acts' considered criminal acts in the United Kingdom (in force since October 2006):

> '[D]epending 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.'

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[10] *Yogyakarta Principles* (2007) https://yogyakartaprinciples.org/introduction/, last accessed 27 January 2020. This definition is cited with approval by the Home Office in the August 2016 *API on Sexual orientation issues in the asylum claim*, page 7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf , last accessed 27 January 2020.

[11] 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 (Official Journal 2004 L 304, 30/09/2004 p. 12).

16. The Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006) transposes the Directive (in force from October 2006), into UK domestic law and reflects the above Article 10 (1) (e) Qualification Directive protections in Regulation 6 (1) (e):[12]

> '[A] particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom.'

17. Section 2 (1) of the European Union (Withdrawal) Act 2018 makes clear this regulation is now part of UK law following exit day on 31 January 2020:[13]

> 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.'

18. On this basis, the sexual acts with children would be considered to be criminal in the UK, noting the age of consent in the United Kingdom is 16 and in the alternative, even if the young men were over 16 they are from the very description not freely chosen relationships and on this basis do not constitute evidence of consent. This renders the use of this COI as having no weight to any assessment of SOGIE (asylum) protection claims.[14]

b. Decision-making statistics (2015-2018)

19. The 2015 to 2018 figures for SO protection claims include Afghanistan, ranked 33rd in the country list.[15]

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[12] http://www.legislation.gov.uk/uksi/2006/2525/regulation/6/made ,last accessed 2 February 2020. The definition of a refugee is proscribed in Regulation 2 of the 2006 Regulations and cross-references in paragraph 334 (ii) (definition of refugee) of the Immigration Rules: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum, accessed 2 February 2020 (emphasis added):

'334. An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006; …'

[13] http://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted, accessed 2 February 2020.

[14] This does not ignore the weight to be attached to COI for trafficking claims, or non-asylum (due to lack of PSG Convention reason) humanitarian or subsidiary protection claims.

[15]. UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019:

20. In 2018, a total of five asylum claims were lodged where sexual orientation formed part of the basis of the claim, marking a marked decrease from 16 in 2015, 17 in 2016 and 16 in 2017.[16]

21. Out of the 12 initial decisions made by the Home Office in 2018, there is no registered statistical data with respect to the outcome and whether some form of leave to remain was granted.[17] In 2015 nine initial decisions were made, 12 in 2016 and 13 in 2017, there are supressed outcomes (less than five) recorded in the table. This draws a possible inference in the outcomes could arguably have included decisions refusing protection on the basis of lack of credibility.

22. This is reflected in the data on appeals noting the number of appeals determined were 13 in 2018 (6 in 2015, (less than five) in 2016 and 12 in 2017). Where there are no recorded figures for outcomes in 2015, 2016 and 2018 the statistics for 2017 record out of the 12 appeals determined, five were allowed and seven were dismissed.

23. This reflects a position arguably showing the SOGIE COI for Afghanistan was interpreted in '*at least*'[18] 42 percent of appeals (five out of 12) to show a real risk of persecution and/or lack of return on human rights grounds, based on sexual identity/orientation.

B. CASE LAW:

Country Guidance:

24. The current Country Guidance case is **AJ (risk to homosexuals) Afghanistan CG [2009] UKAIT 0001** (hearing 5 January 2009, promulgated 7 January 2009, updated 26 November 2013) (Mr Baptiste, Professor R Taylor, Mr P Southern).

25. The **headnote** in **AJ** provides the following summary (promulgated prior to the July 2010 Supreme Court guidance in HJ (Iran)) (emphasis added) (**additional emphasis added**):

<https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2019/experimental-statistics-asylum-claims-on-the-basis-of-sexual-orientation#initial-decisions>, last accessed 26 January 2020

[16] ibid. The figures for claims were 63 (2015), 76 (2016), 77 (2017) and 51 applications lodged in 2018.

[17] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave' where an Asterix (figure supressed) is inserted this includes where the figure is less than five.

[18] Noting the seven dismissed appeals could have been dismissed due to adverse credibility findings (first limb of HJ (Iran) [82] 'actual or perceived SOGIE').

> *'1. Though homosexuality remains illegal in Afghanistan, the evidence of its prevalence especially in the Pashtun culture, contrasted with the absence of criminal convictions after the fall of the Taliban, demonstrates a lack of appetite by the Government to prosecute.*
>
> *2. Some conduct that would be seen in the West as a manifestation of homosexuality is not necessarily interpreted in such a way in Afghan society.*
>
> *3. A homosexual returning to Afghanistan would normally seek to keep his homosexuality private and to avoid coming to public attention. He would normally be able to do so, and hence avoid any real risk of persecution by the state, without the need to suppress his sexuality or sexual ident ity to an extent that he could not reasonably be expected to tolerate.*
>
> *4. So far as non-state actors are concerned, a practising homosexual on return to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution.*
>
> *5. If some individual, or some gay lobby, tried to make a political point in public or otherwise behaved in a way such as to attract public outrage, then there might be a sharp response from the Government.*
>
> *6. A homosexual may be relatively safe in a big city (especially Kabul) and it would take cogent evidence in a particular case to demonstrate otherwise. The position in smaller towns and in rural areas could be different and will depend on the evidence in a specific case.*
>
> *7. Relocation to Kabul is generally a viable option for homosexuals who have experienced problems elsewhere, **though individual factors will have to be taken into account**.*
>
> *8. The evidence shows that a considerable proportion of Afghan men may have had some homosexual experience without having a homosexual preference. A careful assessment of the credibility of a claim to be a practising homosexual and the extent of it is particularly important. The evaluation of an appellant's behaviour in the UK may well be significant.'*

26. In this pre-2010 HJ (Iran) case, the Tribunal had made clear findings with respect to the particular past-narrative of the appellant [3] (emphasis added) (**additional emphasis added**):

> 'The Adjudicator then considered the substance of the Appellant's asylum claim which was based upon his professed homosexuality. His material findings of fact are as follows:
>
> > "18. The Appellant's claim is based upon his homosexual activities in Afghanistan. This occurred in the period between 1998 when the family

> moved into Jalalabad and April 2001 when the Appellant left Afghanistan. His story is that a few months after returning to Afghanistan he met Mr K, who was about nine years older than him, and started a homosexual relationship. This was disapproved by his parents but he continued it and then in 2001 it brought trouble. The Taliban were in power in Afghanistan at that time and enforced Sharia law very strictly. Homosexual activities were taboo. Gay people could expect very severe punishment from the Taliban if they were caught.
>
> 19. In the early part of 2001 **someone told the Taliban about a homosexual relationship between the Appellant and Mr K**. The local Taliban leaders sent a messenger and called in the Appellant's father who was given lectures on his son's homosexual activities and was warned that he could possibly face a death sentence. Despite this the affair continued and eventually the Appellant's parents were asked to hand him over to the Taliban. They refused and they were killed and his younger brother disappeared and was probably killed. It was as a result of that that the Appellant left Afghanistan on 15 April 2001 and started his journeys to Mozambique and South Africa. I find that the Appellant's claim is plausible. He claims to have realised that he had homosexual tendencies whilst he was in Pakistan. He also claims to have been involved in gay relationships in the UK. There is therefore a thread of consistency running through his story and there is no reason to disbelieve it."'

27. On the basis the Taliban were no longer in power at the time of the October 2008 hearing, accepting the appellant could not return to his home area of Jalalabad due to the past events [4], the only issue to be determined was with respect to relocation to Kabul.

28. Having examined the country background material and the country expert's evidence (Dr Lau 'openness would be unacceptable' [27] and Dr Giustozzi, cited in the COIR 'It is not difficult to track people down in Afghanistan, although it may take some time.' [29]), the Tribunal allowed the appeal based on the particular facts of the case with respect to risk on return to Kabul, from the Taliban [67] (emphasis added):

> 'The question then arises of internal relocation to Kabul. As simply a practising homosexual who would wish to keep his life private, we would not consider, in light of our general findings, that he could not safely relocate. However we have to take into account the prospect that his history will catch up with him and that his demonstrated willingness to take risks could expose him to public outrage even in a big city like Kabul. We have had regard to the quoted passage in the COIR from a previous paper by Dr Giustozzi concerning the practice of

> neighbours and landlords checking out a newcomer's background. In this case, on its very particular and exceptional facts as established by the Adjudicator, we consider that that there is a real risk that his past notoriety would catch up with him in Kabul, with similar consequences to those he would face were he to return to Jalalabad. In those circumstances we find, albeit marginally, that he does not have a viable internal relocation option and is entitled to asylum.'

29. Post HJ(Iran), noting on the facts of the CG case the Tribunal accepted on the facts those who were known to be gay men would face persecution on return, based on the harm experienced to them due to identification, even on relocation to Kabul. The risk is from the neighbours in Kabul who would have heard about what occurred in Jalalabad, due to the disclosure of his sexual identity, not those in Jalalabad would travel to Kabul to harm him.

30. Noting the Tribunal accepted the past-narrative of 'similar consequence' i.e. real risk of being killed by non-state actors without effective state protection, then this is the 'openly gay men' group highlighted by Lord Rodger in the second limb of HJ (Iran).[19]

31. Force in this interpretation is found within the CG determination, as the general risk category for those returning to Kabul would be those who would 'make a public political point about [sexual identity] … to the extent of attracting public outrage', noting Dr Shah's expert evidence 'once it is made public, it could lead to persecution and prosecution by state and non-state agents' [54].

32. The Tribunal held at paragraph 55:

> 'We conclude that a homosexual [sic] returning to Afghanistan would normally seek to keep his homosexuality, be it with an adult male or otherwise, private and to avoid coming to public attention.'

33. Re-reading the findings above, through the prism of the Supreme Court's binding guidance in HJ (Iran) in 2010, those who are 'open' on return to Afghanistan – the 'martyrs', including Kabul, have a well-founded fear of persecution.

[19] In examining the pre-2010 HJ (Iran) case law, the Tribunal held the earlier 'discretion test' formulated by the Court of Appeal in J v. Secretary of State for the Home Department [2006] EWCA Civ. 1238 for 'reasonably be expected to tolerate discretion' was an objective, and not subjective test [39] (test over-turned by the Supreme Court in HJ (Iran) [29], [38] and [80]). The Particular Social Group Convention reason was defined by the Tribunal as 'practicing homosexuals in Afghanistan', rejecting the Senior Presenting Officer's submitted definition 'homosexuals who conduct relationships to the exclusion of women and who do not conform to social norms' [40].

Post-CG reported case law:

34. The most recent post-CG case is, **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)**, (heard on 15 March 2012, promulgated 18 May 2012, published 18 May 2012, updated 26 November 2013) (Mr D Allen, Dr H Storey, Mr B Dawson). Whilst not addressing specific risk to LGBTI individuals cited the 2010 UNHCR paper[20] at paragraphs 86 and 87 (emphasis added to highlight SOGIE intersecting):

> 'UNHCR 2010 Position:
>
> 86. Reference has already been made to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, 17 December 2010. They include references to a considerable body of empirical data about conditions in Afghanistan, as well as UNHCR's evaluation of it in the form of guidelines. The Guidelines identify two types of risk category. The first concerns persons with a specific risk profile:
>
> "UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include [NB. For convenience we start each subcategory on a separate line:]
>
> (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF);
>
> (ii) humanitarian workers and human rights activists;
>
> (iii) journalists and other media professionals;
>
> (iv) civilians suspected of supporting armed anti-Government groups;
>
> (v) members of minority religious groups and persons perceived as contravening Shari'a law;
>
> (vi) women with specific profiles;

[20] https://www.refworld.org/docid/4d0b55c92.html , last accessed 1 February 2020.

(vii) children with specific profiles;

(viii) victims of trafficking;

(ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals;

(x) members of (minority) ethnic groups; and

(xi) persons at risk of becoming victims of blood feud.'[21]

35. The above country background position of the UNHCR does not identify viable internal relocation to Kabul for gay men, noting this route was identified by them to be open to [87]:

> '[W]here protection is available from the individual's own extended family, community or tribe in the area of prospective relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. Given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas, a case-by-case analysis will, nevertheless, be necessary.'

36. The Upper Tribunal attached significant weight to these guidelines (endorsed by subsequent 2011 UNHCR Guidance) (emphasis added):

> 'We attach considerable weight to the UNHCR Guidelines, not least because in Afghanistan UNHCR has staff on the ground at least in some parts of the country and because the Guidelines are based on a very considerable body of evidence subjected to a rigorous methodology.'

37. Whilst the Tribunal did not specifically address SOGIE claims, the endorsement of the UNHCR Guidelines provides a cogent basis to link the 2009 CG case acceptance of risk to those who are 'open', even in Kabul (due to choosing to make a political point by being open ('the gay martyr' referred to in **HJ (Iran)** [59] and [97]), or as in the case of

[21] Issues relating to 'honour' would intersect with this final sub-group. The reviewer has deliberately not intersected sub-groups with children and trafficking based on discussion within this country report and bacha bazi.

AJ being identified as gay as [3]: 'someone told the Taliban about a homosexual [*sic*] relationship')[22], the COI demonstrates risk on return.

38. These two different aspects of open (chosen and through imputation), go to address the highlighted seventh recital in the **headnote** to **AJ** '***though individual factors will have to be taken into account'*** are in reality, those who are 'open'.

39. There are no further reported cases where SOGIE country background evidence is cited with respect to Afghanistan,[23] or address the 2009 CG case of AJ.[24]

Unreported Upper Tribunal determinations:

40. There was a total of four[25] results following a search on 'Afghanistan and LGBT' on the Tribunals decisions online database. Only one was relevant with respect to assessment of the CPIN and/or country background evidence.

41. In the unreported 21 March 2019 determination of **ASR v. Secretary of State for the Home Department (PS/13601/2017)** (unreported) (Deputy Upper Tribunal Judge Juss) (heard 7 March 2019, promulgated 21 March 2019, published 7 May 2019), the following January 2017 SOGI CPIN (see below) was used by the First-tier Tribunal Judge to find the appellant was credible with respect to his narrative of child abduction and sexual exploitation [4]:

> 'The judge held that the Appellant's claim, that he had been abducted and raped 40 times and then made to dance, was consistent with objective evidence in that the practice of abusing young boys is called "bacha bazi" or dancing boys. The judge referred to the Country Policy and Information Note on Afghanistan, "Sexual orientation and gender

[22] This importantly highlights the veracity of the rumour does not need to be established, as disclosure led to risk. This goes directly to Lord Rodger's first limb in HJ (Iran) and perception of sexual identity (imputed identity) [82]:

> '[T]he 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.'

[23] The European Council for Refugees in Europe (ECRE) in their 2019 report analysing case law from 2017 to 2018 on Afghanistan reported in Austria, Belgium, Finland, France, Germany, The Netherlands, Norway, Switzerland, Sweden and the United Kingdom identifies not a single reported case of SOGIE protection claims from Afghanistan: 'Case Law on Returns of Asylum Seekers to Afghanistan, 2017-2018' (ECRE and ELENA) (2019) https://www.ecre.org/wp-content/uploads/2019/02/Case-Law-on-Return-of-Asylum-Seekers-to-Afghanistan-2017–2018.pdf, last accessed 1 February 2020.

[24] (url), last accessed 2 February 2020.

[25] (url), last accessed 27 January 2020.

> identity" (Version 2.0, January 2017), which confirms the sexual exploitation of young boys and teenagers by older men. The judge held that "the Appellant's evidence of sexual abuse and sexual exploitation by the Taliban is entirely consistent with the objective evidence" (paragraph 104).'

42. This is a finding of fact, relying on the January 2017 CPIN. However, the FCO in their 10 January 2017 letter from the Head of the Afghanistan Unit, Annexed to the CPIN (Annex A, page 22), make clear concern with respect to lack of highlighting this COI is related to child sexual abuse and paedophilia and not sexual identity [4]:

> 'We are deeply concerned at the suggestion that the prevalence, especially in Pashtun community, of the practice of bacha bazi (pederasty) implies an acceptance of certain homosexual conduct. The report should be clear that this practice is sexual exploitation and abuse of boys and young men. Its occurrence reflects Afghanistan's inability to deal with child sexual abuse and paedophilia. It should not be associated with consensual homosexuality and attitudes towards this.'

43. At paragraphs 12 to 14 Judge Juss makes the following findings leading to remittal back to the First-tier Tribunal relying on the 2009 CG as finding internal relocation could be to Kabul:

> '12. In AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001, it was stated (see paragraphs 58 to 62) that, "so far as non-state actors are concerned, a practising homosexual on return to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution" (see subparagraph 4). It was also stated that
>
> > "A homosexual may be relatively safe in a big city (especially Kabul) and it would take cogent evidence in a particular case to demonstrate otherwise. The position in smaller towns and in rural areas could be different and will depend on the evidence in a specific case" (see subparagraph 6).
>
> 13. It ends with the firm statement that "relocation to Kabul is generally a viable option for homosexuals who have experienced problems elsewhere, though individual factors will

> have to be taken into account" (see subparagraph 7). This is a case where the Appellant has maintained that when he was in prison, he "has not been openly gay" because he was afraid of being bullied (paragraph 27).
>
> 14. Whether the Appellant has been openly gay, however, is a matter that needs to be looked in the context of HJ (Iran), although the evidence suggests that he has not been openly gay, particularly in Afghanistan. But even so, whatever the position, the country guidance case of AJ [2009] does need to be applied, and the failure to do so amounts to an error of law.'

44. Whilst not following a CG case can give rise to an error of law (2018 Practice Direction 12.4) the real issue is the lack of reference to the January 2017 SOGIE CPIN by the Upper Tribunal to show there is a clear finding of fact to be made to decide whether to accept the Home Office's country position on accepting relocation to Kabul, when compared to the FCO's contrary position rejecting any safety in Kabul, annexed in the redacted 10 January 2017 letter from the Head of the Afghanistan unit included in the CPIN at Annex A? [5]:

> 'Additionally the guidance states that relocation to Kabul could be an option for homosexual Afghans. There is very little space in Afghan society, in any location, to be an individual that openly identifies as LGB&T. Social attitudes and the legal position of homosexuality means that the only option for a homosexual individual, in all but the very rarest of cases, would be to conceal their sexual orientation to avoid punishment.'

C. HOME OFFICE COI:

Country Policy Information Note (January 2017):

Gay men/Bisexual men/MSM:

45. The current COI is the *Country Policy and Information Note: Afghanistan: Sexual orientation and gender identity* (version 2.0) (January 2017).[26]

[26] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584025/Afghanistan_-_SOGI_-_CPIN_-__January_2017_.pdf, last accessed 1 February 2020.

46. The current policy position of the Home Office is cited at paragraph 3.1.5 (page 8):[27]

> 'In respect of non-state actors, a lesbian, or gay man with what may be seen as feminine traits, is likely to be at risk of persecution or serious harm. Whilst space for being openly gay is limited, subject to individual factors, a practising gay man who, on return to Kabul, would not attract or seek to cause public outrage, would not face a real risk of persecution.'

47. There is no qualification in line with the 2009 CG case, noting 'public outrage' is by being 'open'. The causal link between 'openness' and 'persecution' means even those who are not open, would succeed under the second limb of HJ (Iran).

48. The only other reference to Kabul, as a matter of country policy is highlighted at paragraph 3.1.6 (page 9):[28]

> 'In the absence of other risk factors, it may be a safe and viable option for a gay man to relocate to Kabul, though individual factors will have to be taken into account.'

49. Firstly, noting the starting point for COI assessment is the 2009 CG case and applying the 2019 reasoning of the Upper Tribunal in **MB (Albania)** for country reports to provide COI on internal relocation, CPIN should provide examples to show how SOGIE applicants are treated by state and non-state agents in Kabul.

50. Secondly, if it is safe in Kabul, noting the 2019 Court of Appeal's guidance in **AS (Afghanistan) v. Secretary of State for the Home Department [2019] EWCA Civ. 873** (judgment 24 May 2019), any assessment by decision-makers on viability of internal relocation alternative must be based on comparing the position of the individual (as possessing a SOGIE identity) in the proposed place of relocation when compared with the conditions of the general population, to assess if they can lead 'a relatively normal life without facing undue hardship' [61] to [62]?

51. The current CPIN only cites 'Kabul' twice. The first reference is at paragraph 5.2.4 where it refers from a US-based gay man who originated from Kabul (not addressing country conditions specific to Kabul) speaking to Out magazine in an interview conducted on 21 February 2014.[29]

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[27] ibid.

[28] *SOGI CPIN Afghanistan* (n 22).

[29] Cited at footnote 23 in CPIN. 'As Russia Runs For the Closet, Afghanistan Comes Out' (Advocate magazine) (21 February 2014): https://www.out.com/news-opinion/2014/02/21/russia-runs-closet-afghanistan-comes-out , accessed 1 February 2020. See also BBC on-line article: https://www.bbc.co.uk/news/world-asia-21426632 accessed 1 February 2020.

52. The other reference is at paragraph 5.2.5 where an October 2016 BBC on-line article cited the same individual who comments:

> In October 2016, Nemat Sadat told the BBC that, whilst in Kabul [fleeing Afghanistan and living in New York by August 2013][30], he spoke to LGBT Afghans about their lives. He said '"Like anywhere else there are places where gay people meet like gyms and parks and malls... [but] overall [...] it is very hard to establish long term friendships and relationships. LGBT people are trapped by Sharia law and can't even demand their right to exist, let alone marry who they truly love".

53. When accessing the source article,[31] the October 2016 BBC on-line article interviewed four LGBT+ individuals. It is important to note, the title of the piece makes clear there is a clear schism with the reality in Afghanistan and the view taken by the CG case ad CPIN ('Afghanistan LGBT community living under threat of death') evidencing s causal link between (forced) modification (concealment) and well-founded fear of persecution.

54. The article does not identify the current location in Afghanistan of three of those interviewed, but summarised all those interviewed as:

> 'Everyone speaking to the BBC cited such feelings of soul searching, exclusion, and of being stuck between hope and hopelessness.'

55. Nemat Sadat, the source relied on by CPIN, is being interviewed by the BBC in October 2016 from Washington, having left Afghanistan having lost his job in the American university in Kabul after coming out three years before (2013). The 'Out Magazine' article in February 2014 forecasting 'Afghanistan Comes Out' was extremely premature.

56. As the later 2016 source evidences, the BBC, and CPIT are not able to identify a single LGBT+ person <u>in</u> Kabul who is living a 'relatively normal life' when compared to the general population in Kabul. All the three individuals interviewed by the BBC in Afghanistan (lesbian (Zanaib), gay man (Dawood) and trans woman (Shamela)) are all reported living lives of invisibility arising out of fear of serious harm.

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[30] ibid. '<u>A year later, in July 2013, the Afghan government alleged that my public outreach was subverting Islam in Afghanistan, so they pressured AUAF to fire me. A month later, from my new bedroom in New York City</u>, I took a huge leap of faith to announce my sexuality in a plea to reconcile my identity conflict and finally be accepted by my family and nation.'

[31] BBC News, '

57. On this basis, the current CPIT fails to engage with the issue of relocation to Kabul raised by the 2009 CG case, referred to in the CPIT policy section. There is currently no source information within the CPIN to deal with the issue of country conditions in Kabul.

Child abuse not SOGIE:

58. In the CPIN, there continues to be large sections (sections 5.3, 5.5.3 and 6.1.5 to 6.1.6) where the sources address the continued use of the Home Office with respect to 'bacha bazi' and MSM (Men who have sex with Men).

59. The Home Office following both the 2008 and 2014 reviews have not ceased to include this COI in the reports, even where there is a clear message from both the January 2017 FCO letter (annexed to the report, paragraph 4 and cited at paragraph 5.3.2)[32] the earlier reviewers and IAGCI meetings, for these sources not to be cited.

60. EASO's December 2017 COI report on Afghanistan, 'Afghanistan: individuals targeted under social and legal norms'[33] has a separate section of LGBT claims (section 4) [pages 62 to 67] from the distinct section on Child abuse (section 5) [pages 67 to 71].

61. This report makes clear this is a bacha bazi is a form of child abuse (citations omitted) (emphasis added) (**additional emphasis added**):[34]

> '5. Child abuse and sexual exploitation:
>
> …
>
> 5.1 Bacha bazi:
>
> Bacha bazi ('dancing boys' or 'boy play'), is a form of sexual exploitation by adult men in positions of power, such as militias and armed forces, who use boys and young men (bacha bereesh, or beardless boy) for entertainment, dancing in female garb, and sexual favours. Perpetrators do not perceive it as homosexuality. Usually the boys are under 18, with 14 as the average age. It is a practice serving as a means for perpetrators (bacha baz) to express their male dominance, status, and power, within a particular cultural context. Powerful and

[32] The CPIN does cite at paragraphs from other paragraphs of the FCO letter, but specifically does not draw reference within the body of the COI to this letter for either the issue with respect to this practice, or the lack of internal relocation alternative and/or safety in Kabul.

[33] https://www.easo.europa.eu/sites/default/files/publications/coi-Afghanistan-targeting-society.pdf , accessed 1 February 2020.

[34] ibid, pages 67 to 68: https://www.easo.europa.eu/sites/default/files/publications/coi-Afghanistan-targeting-society.pdf , last accessed 1 February 2020.

> wealthy local figures, as well as the police and security forces have reportedly been involved in perpetrating bacha bazi. **Sources report that young boys are abducted and disappeared into the practice. Boys involved in the practice may be subjected to violence and threats and are raped and kept in sexual slavery. The boys taken into bacha bazi are reportedly perceived as prostitutes and are also 'pimped' to other men or traded between abusers. Boys who are brought into bacha bazi are often from poor families who sometimes trade their children into the practice in exchange for money**. Boys are also lured into it with the promise of a job and become trapped. Once in the practice, boys are also given opium to make them submissive, according to an article by AFP.'

62. At the end of quite extensive referencing, the report concludes by reinforcing the abusive nature of this form of child abuse (page 73):

> According to Abubakar Siddique, bacha bazi boys who become too old or 'age-out' of the practice are expected to simply marry a woman and carry on with their lives as any Afghan man is expected to by society, and many do so. According to the Guardian, bacha boys are usually released from the practice around age 19 at which point they can be married and 'reclaim their status as "male"', noting, however that the stigma of having been involved can be difficult to move past. AIHRC indicated that in some cases, victims of bacha bazi themselves go into the bacha bazi business and become predators themselves, due to having few other life options, or, end up becoming sex workers.'

63. Importantly, with respect to Kabul, the EASO report records referring within the section 4 on Sexual orientation or gender identity, and not within section 5 and child abuse (addressing bacha bazi) [section 4.1, page 63]:

> 'In a 2017 report on the cases of 112 boys imprisoned in Kabul juvenile detention centre, the research organisation Samuel Hall Consulting documented the imprisonment of 16 boys for moral crimes, mostly for levat (sodomy).'

64. The footnote in the report is incorrect, but when searched for on the website, the August 2017 report 'Hope Behind Bars: the Boys of the Kabul JRC',[35] post-dating the

[35] Samuel Hall (2017) 'Hope Behind Bars: The Boys of the Kabul JRC' (commissioned by Children in Crisis) (August 2017). https://static1.squarespace.com/static/5cfe2c8927234e0001688343/t/5d42e0bfe7786a00011a036d/1564664185668/Samuel-Hall-Hope-behind-bars-2017-for-Children-in-Crisis-.pdf , accessed 1 February 2020.

CPIN ,makes clear of the high numbers of boys in the Kabul prison who have been charged with sodomy, a charge included 'under the umbrella term of 'moral crimes, particularly sodomy (*levat*) for boys in the JRC'.[36] This cohort comprised the second largest cohort in the detention centre at 14%. This included one 15 year-old boy from Kabul who had been sentenced for three years.[37]

65. Whilst CPIN correctly addresses this country information within the Pederasty section (4.4, pages 11 to12), these two single paragraphs cross-reference same-sex relations between consenting adults (SO) with bacha bazi at sections 5.3 (four paragraphs) and 6.1.5 to 6.1.6, noting the reference at 6.1.4 to MSM is wholly inappropriate as the sexual conduct was between a child and two adults, leading to the one year's imprisonment of the child.

66. The reviewer is of the firm view it would be a clear and important step for CPIT to no longer include the references to 'bacha bazi' within SOGIE CPINs, as they are not relevant to the issue of this category of protection claims.

Lesbians/Bisexual women:

67. There are only two paragraphs referring to the COI on lesbians. The first source at paragraph 5.4.1 (page 16) addressing the position of Zainab interviewed for the October 2016 BBC on-line report, noting as referred to above, the casual connection between invisibility and fear of persecution. The source accurately records the link to 'fear of death', but as the source does not identify the location of Zainab, this still leaves the question of internal relocation to Kabul.

68. The second source at section 5.4.2 is from 2003, is the only other source cited by CPIT in the CPIN on lesbians. The source accurately reflects the country position of discrimination and social/religious and cultural pressure amounting to persecution,[38] noting the references to 'forced marriage; domestic violence'.

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[36] ibid, 'Diversity in crims and sentencing lengths', footnote 23, page 23.

[37] Ibid, 'Annex 2 – FGD participants', page 80.

[38] **LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC) [119]** whilst not finding there was forced marriages of gay men in Sri Lanka, the Upper Tribunal in this case accepted if there was such evidence, this would be capable of amounting to persecution [119] (emphasis added):

> '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.'

Cf. See Australian Federal Magistrates Court of Australia in **SZANS v. Minister for Immigration [2004] FMCA 445** (Driver FM) (14 July 2004): Bangladeshi gay man faced with societal pressure to marry - such pressure would result in serious harm as it interfered with his right not to be forced into a heterosexual marriage [19-20] (emphasis added):

69. The December 2017 EASO report refers to a 2016 Swiss International report (page 66) revealing the cloak on forced invisibility for lesbians in Afghanistan:

> 'According to the Swedish International Development agency, Afghan lesbian women are especially impacted by the discriminatory societal position of women in Afghanistan.'

70. This Swedish body's November 2014 factsheet 'The Rights of LGBTI persons in Afghanistan'[39] was in the public domain at the time of the January 2017 publication of the CPIN. Noting the use at paragraph 5.4.2 of a January 2003 source from the UK-based Safra project, clear weight should be applied to show a source of 'double bind' harm based on gender and sexual identities.

71. This COI, limited as it is, illustrates a clear cloak of invisibility for lesbians and bisexual women in Afghanistan, forced into marriage and victims of domestic violence, the double bind of gender and sexual identity. There 2009 CG case does not address risk of return for SOGIE claims from women and on this basis, noting no internal relocation to Kabul in the CPIN then these protection claims will be able to be determined with respect to objective risk on return.

Gender Identity or Expression:

72. Importantly, and correctly, CPIN does highlight the following at paragraph 5.5.5:

> 'CPIT could not locate any additional information relating to transgender and transsexual persons in Afghanistan. However this should not be interpreted as a lack of presence of these groups in this country.'

> '[19] It was implicit in my reasoning in *SZAOD* that the consequences of successfully resisting pressure to marry would not constitute persecution. I maintain that view. However, the same could not be said of the consequences of succumbing to that pressure….
> [20] … I accept Mr Karp's submissions that it was part of the applicant's claims, not only that he faced a well-founded fear of persecution by reason of the pressure upon him to marry, but also that he faced persecution by being potentially forced into a heterosexual marriage.'

[39] SIDA, 'The Rights of LGBTI persons in Afghanistan' (November 2014), page 2: 'The situation of gender division and the oppression of women are obstacles for all genders, but especially lesbian women, to find spaces to live freely.': https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-afghanistan.pdf , last accessed 1 February 2020.

73. This records an acceptance of the comment made at the IAGCI meeting in January 2014[40] where the last LGBT thematic review was discussed.[41]

74. However, this reference to CPIT not being able to locate any other source material than those sources cited in the four paragraphs is inaccurate. None of the four paragraphs refer to the interview with Shamena cited in the October 2016 BBC on-line article already cited in the paragraphs above.

> 'Shamela, a 24 year old transgender who was born a boy, says she always liked "girly activities", playing with dolls and mixing with girls even when she was small.
>
> But as an adult she now has to hide her preferences.
>
> "I lock myself up in this small room like a prisoner," she says. "I do my make up in front of the mirror, play music, watch TV and dance.
>
> Her partner also insists on secrecy.
>
> "He is very strict and wants me to dress like a man in public," Shamela says. "My biggest regret is that I was not born a woman. I would love to have children, a good husband and a good life."
>
> Everyone speaking to the BBC cited such feelings of soul searching, exclusion, and of being stuck between hope and hopelessness.
>
> But all are determined to stand by who they are.'

75. The reference at paragraph 5.5.5 to lack of country information 'should not be interpreted as a lack of presence' does not go as far as the 2014 request, as the issue as identified by Lord Rodger in HJ (Iran) is the fact that in countries where there is a well-founded fear of persecution, there will be few 'martyrs'.

76. The above lack of reference to the material in the 2016 BBC on-line article with respect to trans cases is troubling when it is cited within the paragraphs for gay men and

[40] Minutes of the 21 January 2014 meeting (incorrectly dated 1 October 2013) where the LGBTI thematic review was discussed: https://webarchive.nationalarchives.gov.uk/20170803100508/http://icinspector.independent.gov.uk/wp-content/uploads/2014/05/IAGCI-14-21012014-Minutes-FINAL.pdf last accessed 1 February 2020.

[41] ibid, page 5: 'HS noted that a dearth of sources on LGBTI issues does not necessarily mean a claim is unfounded. Can this be made explicit in COI reports? RT said that this would be considered.'

lesbians. This renders the reference at 5.5.5 to be inaccurate. The source document evidences the manner in which gender identity or expression is made invisible.

Sex characteristics:

77. The CPIN continues to have no reference to claims based on intersex and/or sex characteristics.

D. SUMMARY OF REVIEW:

78. At the January 2014 IAGCI meeting where the Leigh's review was discussed, the following overview was provided (minutes: page 5):[42]

> 'VL gave an overview of her findings.
>
> She noted that sometimes there was little information on transgender and nothing on intersex issues. She suggested that „Spartacus" should not be used as a source of information as it is meant to provide travel information rather than comment on the human rights situation in a given country.
>
> HS provided detailed feedback on the review. She saw that most recommendations had been accepted and that generally it was a positive exchange and a constructive process.'

79. The following is minute at the 2014 meeting with respect to bacha bazi (pages 5 to 6) (emphasis added):

> 'There was some discussion about a point made on page 22 regarding the situation (e.g. in Afghanistan) where men have sex with young boys. The reviewer argued that this was not about same sex relationships but more about cultural acceptances and taboos, as well as about adults having sex with children who may be underage (and thus be an issue of child protection) and argued that this should not be included when providing COI material on homosexuality. It was suggested that the issue of men with younger boys could be looked at in the context of prosecution or persecution. Also the age of consent issue is relevant and how permissive a country is about the allowance of the expression of sexual identity below the age of consent.'

80. No action on this specific point is recorded within the minutes.

[42] *Op cit*. fn. 16.

81. The lack of any cogent and accurate country sources showing SOGIE can live in Kabul safely and without unduly harsh, the CPIN fails to engage with this single issue raised by the 2009 Country Guidance case.

82. When the 2009 CG case is re-read through the post-2010 prism of HJ (Iran), then protection claims would have positive COI applied as risk to those who are 'open' is accepted by the Tribunal.

URGENT ACTION:

83. The reviewer provides an **URGENT ACTION** assessment with respect to the January 2017 CPIN on Afghanistan.

84. The country material with respect to bacha bazi should be deleted. It is not known why this material continues to be cited, noting the concerns with respect to this point have been voiced by the reviewers in 2008 and 2014 and the sexual conduct comprises of child abuse. The inclusion has no weight in the assessment of a SOGIE protection claim as the sexual conduct is contrary to both UK law and thereby not able to come within the definition of the Particular Social Group Convention reason for SOGIE status determination.

85. The CPIN additionally records inaccurately interpreted source material on Kabul, the place for internal relocation identified by the 2009 CG case and CPIN. Following the 2019 guidance of the Upper Tribunal in **MB**, the CPIN fails to highlight any reliable country background evidence specifically with respect to Kabul for SOGIE applicants The accuracy of the CPIN is of concern, where it records a lack of evidence of risk to trans applicants, where within the same 2016 BBC on-line article used in the sections on risk to gay men and lesbians, there is also reference to the position of a trans woman in Afghanistan.

86. Noting the 2009 CG case, when reassessed in light of HJ (Iran) can only lead to an acceptance of risk even in Kabul, the CPIN would greatly benefit form urgent revision, noting the concerning approach of the Upper Tribunal in the 2019 unreported case of **ASR** cited at paragraph 41 to 44 above. The December 2017 EASO report on Afghanistan,[43] as well as the other sources cited in this country report, should be used to address the above points.

87. There is no section on Intersex/Sex Characteristics protection claims. This needs to be addressed.

[43] *2017 EASO report* (n 32).

7. ALBANIA

Capital city: Tirana
Population:[1] 2,877,797
Predominant religion: Islam
FCO travel advice:[2]

> *'Homosexuality is decriminalised. Anti-discrimination and anti-hate-crime legislation is in place. Tirana has several gay-friendly bars and a number of LGBT support groups.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews do address COI with respect to Albania.

2. The reviewer is not citing the comments and/or recommendations of these previous reviews as the March 2019 CG case of **BF (Albania)** acts as a starting point for the assessment in this report, rendering any comparison with the earlier reviews of little use (see below).[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Albania: Laws and Customs, last updated 17 January 2020 https://www.gov.uk/foreign-travel-advice/albania/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008), pages 34 to 36.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 23 to 25: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] The most recent authoritative judicial guidance is from the Court of Appeal is **AM (Iran) v. Secretary of State for the Home Department [2018] EWCA Civ. 2706** (6 December 2018) (Sharp, Simon, Thirlwall LJJ) [57 (3)] (emphasis added):'The starting point for the assessment of risk were the CG cases of *FS and others* (2004) and *SZ and JM* (2008). It is not said that these cases have been superseded and *FS and others*

3. The current Home Office COI report is the December 2019 SOGI CPIN on Albania [44 pages].[6]

b. Decision-making statistics (2015-2018):

4. The 2015 to 2018 figures for SO protection claims include Albania, ranking 9th in the list for 50 protection claims lodged in 2018 where sexual orientation formed part of the claim (61 in 2015, 53 in 2016 and 55 in 2017).[7]

5. Out of the 46 initial decisions made by the Home Office in 2018, 5 were granted some form of leave to remain.[8] In 2015 there were 16 positive decisions, 2016 11 positive decisions and in 2017 there is no figure recorded. The number of negative decisions was far greater at 41 in 2018 with 52 in 2015, 38 in 2016 and no figures for 2017. However, there was still an initial grant rate, steadily declining.

6. The refusal decisions would have included those claims refused between the setting aside of the CG determination **MK (lesbians) Albania CG [2009] UKAIT 36** (Mr Goldstein, Mrs Padfield, Mr Spencer) (heard 24 September 2009, promulgated 9 September 2009, published 14 September 2009) by the Court of Appeal 10 October 2011 to the 14 December 2016 removal from the CG list by the Upper Tribunal on 14 December 2016.[9]

(2004) was specifically referred to in the December 2015 CIG. In *R (SG (Iraq) v. Secretary of State for the Home Department* [2013] (see above), Stanley Burnton LJ expressed the position thus:

> "46. The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.
>
> 47. It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."'

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849856/Albania - SOGIE - CPIN - v6.0 December 2019 .pdf, last accessed 2 February 2020.

[7] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[8] ibid. The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'.

[9] There was parallel litigation in the Court of Appeal and the Upper Tribunal in two different appeals use as a mechanism for '**proving'** the 10 October 2011 Court of Appeal Order declaring the determination to 'set aside' meant in both fact, and law, it was unlawful to apply the determination (see

7. The **2009 CG case** held the country background evidence evidenced discrimination, not persecution, even though in the pre-HJ (Iran) determination the Tribunal accepted there is a real risk to:

> '*[H]omosexual men known to be members of gay associations and those who visit cruising areas in the centre of Tirana are likely to be harassed and on occasions ill-treated by the police and in individual cases homosexual men may be at risk of harm from members of their families*' (headnote, paragraph 2).

8. However, lesbians '*who carry on their relationships discreetly*' do not risk serious harm (headnote, paragraph 4).

9. There has never been any published reason given for the error/omission by either the Upper Tribunal, or the Home Office.[10]

10. The Court of Appeal had set-aside the CG determination with a Consent Order for remittal sealed on 10 October 2011.

11. Nevertheless, Home Office COI reports continued to cite the CG case as authority up to 21 December 2016. Version 2 of the Country Information and Guidance on Albania, published in August 2016, noting the 2009 CG case would need to be re-read through the prism of HJ (Iran) (2010) in order to address whether openly LGBT applicants had a well-founded fear of persecution [sections 2.3.4 to 2.3.7, pages 5 to 6]:[11]

> '2.3.4 In the subsequent country guidance case of **MK (Lesbians) Albania CG [2009] UKAIT 00036 (September 2009)**, the Tribunal concluded that 'In general terms in Albania women of lesbian orientation are able to carry on lesbian relationships discreetly without attracting the risk of serious harm. A lesbian woman, whose sexual orientation becomes known, may be at

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DD (Albania) v. Secretary of State for the Home Department (AA/12842/2015) (unreported) (Upper Tribunal Judge Perkins) (heard 12 September 2016) [39] and **LC (Albania) v Secretary of State for the Home Department [2017] EWCA Civ. 351, [2017] 1 WLR 4173** (9 May 2017 judgment): Beatson, David Richards and Hickinbottom LJJ [25])).

[10] See Diane Taylor, 'Asylum seekers may have been wrongly deported to Albania', *The Guardian* (10 May 2017) <https://www.theguardian.com/uk-news/2017/may/10/asylum-seekers-may-have-been-wrongly-deported-to-albania> and Butterworth, Benjamin, 'Teresa May might have wrongly deported hundreds of gay asylum seekers as Home Secretary', *Pink News* (12 May 2017) <http://www.pinknews.co.uk/2017/05/12/theresa-may-may-have-wrongly-deported-hundreds-of-gay-asylum-seekers-as-home-secretary/> accessed 12 May 2017.

[11] UK Home Office: Country Information and Guidance Albania: Sexual orientation and gender identity, August 2016, https://www.ecoi.net/en/file/local/1142462/1226_1471845772_cig-albania-sogi-v2-0.pdf (accessed on 2 February 2020)

risk of harm from members of her family, particularly if she is from a traditional family from the north of Albania, but each case must be determined on its merits. In such a case, however, it is likely that there would be an adequacy of state protection.'(para 384).

7.3.5 The Tribunal in **MK** also went on to conclude 'In our view the evidence supports the proposition that homosexuals known to be members of gay associations and those who visit cruising areas in the centre of Tirana are likely to be harassed and on occasions ill-treated by the police but we are not satisfied that merely being effeminate or butch, being unmarried or living with a person of the same sex who was not a member of the family, would in itself attract the risk of serious harm from the police for reasons of sexual orientation.' (para 339).

7.3.6 In the years since both IM and MK were determined, the Albanian government has passed some of the most progressive LGBT laws in the region and its public officials have demonstrated a willingness and ability to partner with LGBT activists to pass reforms. Anti-discrimination laws in Albania expressly protect LGBT persons and make hate crimes a criminal offence (see Legal framework).

7.3.7 There are no longer reports that the Albanian police ill-treat known members of LGBT associations as was found by the Tribunal in MK. Decision makers should therefore depart from the caselaw in that regard. There are now legal protections and the government has shown formal support for LGBT rights. The collaborative spirit generated by the extensive discussions between the government and LGBT activists has drawn praise from LGBT organisations. On several occasions there have been minor incidents at public LGBT events, however protection and cooperation with the police has been reported as very positive. Awareness events have been attended by highranking government officials and supporters (see Public events and Treatment by, and attitudes of, state authorities).'

12. Following the 2016 unreported case of **DD (Albania) v Secretary of State for the Home Department (AA/12482/2015)**[12] (heard 12 September 2016, error of law determination promulgated 12 December 2016) (Upper Tribunal Judge Perkins), **MK** was removed from the Country Guidance website [39]:[13]

> 'Criticism was made in the grounds of relying on the case of **MK** because, it is said, it can no longer be country guidance because it was remitted to the Upper Tribunal by the Court of Appeal but in fact not redetermined because the appellant was allowed to remain. That assertion is right in part. The decision in MK was overturned by the Court of Appeal and, following Dr Chelvan's submissions being brought to the attention of the responsible judges, I expect it to be removed from the list of Country Guidance cases.'

13. The Home Office only amended their COI document from 22 December 2016, on the basis of the Upper Tribunal removing the case from the on-line CG case list on 14 December 2016 (CPIN Albania: SOGI (version 3)) (page 23):[14]

> 'Policy section updated to reflect the Upper Tribunal decision on 14 December 2016 to remove the case of MK (Lesbians) Albania CG [2009] UKAIT 00036 (September 2009) from the list of country guidance.'

14. Nevertheless, 32 statutory appeals were determined in 2018, with 10 appeals allowed (22 were dismissed).[15] In 2015 there are no figures recorded for allowed appeals for the 17 determined, but in 2016 out of the 37 appeals determined 16 were allowed and 21 dismissed. In 2017 out of the 42 appeals determined, 7 were allowed and 31 dismissed.

15. This makes clear up to the end of 2018 SOGIE protection claims from Albania were allowed, distinguishing the earlier negative CG determinations of **IM** and **MK**. Those

[12] There was parallel litigation in the Court of Appeal and the Upper Tribunal in two different appeals use as a mechanism for '**proving'** the 10 October 2011 Court of Appeal Order declaring the determination to 'set aside' meant in both fact, and law, it was unlawful to apply the determination (see **DD (Albania) v. Secretary of State for the Home Department (AA/12842/2015) (unreported)** (Upper Tribunal Judge Perkins) (heard 12 September 2016) [39] and **LC (Albania) v Secretary of State for the Home Department [2017] EWCA Civ. 351, [2017] 1 WLR 4173** (9 May 2017 judgment): Beatson, David Richards and Hickinbottom LJJ [25])).

[13] See also Independent Chief Inspector report 2017 on Country Information insert link section *****.

[14] UK Home Office: Country Policy and Information Note Albania: Sexual orientation and gender identity, December 2016 https://www.ecoi.net/en/file/local/1277746/1226_1483007145_cpin-albania-sogi-v3-0.pdf (accessed on 2 February 2020),

[15] *SO Statistics* (n 5). The statistics show a marked rise in allowed appeals from 7 (2015), 8 (2016), 18 (2017) and 33 (2018).

appeals dismissed and/or initial decisions refused in 2015 and 2016 based on the 2009 CG case of **MK**, solely on the basis they did not overcome the second limb of HJ (Iran) were unlawful decisions as the CG case had been set aside in 2011.

16. These figures show a position prior to the promulgation in March 2019 of the Country Guidance case of **BF (Albania)** where the Upper Tribunal held in general, internal relocation of gay men to Tirana was neither unduly harsh, or unreasonable (see Section B below).

B. CASE LAW:

Country Guidance:

Gay/Bisexual men and Internal relocation to Tirana:

17. The current and very recent 2019 Country Guidance case is **BF (Tirana – Gay men) Albania CG [2019] UKUT 00093 (IAC)** promulgated on 26 March 2019, reported on 29 March 2019. This 2019 CG reported case replaces the earlier 2003 CG case of **IM (Risk, Objective Evidence, Homosexuals) Albania [2003] UKIAT 67**[16] dealing with (male) 'homosexuals' only with respect to relocation to Tirana. It is not understood why this determination

18. The headnote is of particular relevance in **BF (Albania)** noting the risk assessment for the gay man, on relocation to the capital city of Tirana:

> **'COUNTRY GUIDANCE**
>
> a. *Particular care must be exercised when assessing the risk of violence and the lack of sufficiency of protection for openly gay men whose home area is outside Tirana, given the evidence of openly gay men from outside Tirana encountering violence as a result of their sexuality. Such cases will turn on the particular evidence presented.*
> b. *Turning to the position in Tirana, in general, an openly gay man, by virtue of that fact alone, would not have an objectively well-founded fear of serious harm or persecution on return to Tirana.*
> c. *There is only very limited evidence that an individual would be traced to Tirana by operation of either the registration system or criminal checks at the airport. However, it is plausible that a person might be traced via family or other connections being made*

[16] The Upper Tribunal's website currently lists this as current country guidance.

on enquiry in Tirana. Whether an openly gay man might be traced to Tirana by family members or others who would wish him harm is a question for determination on the evidence in each case depending on the motivation of the family and the extent of its hostility.

d. There exists in Tirana a generally effective system of protection should an openly gay man face a risk of harm in that city or from elsewhere in Albania.

e. An openly gay man may face discrimination in Tirana, particularly in the areas of employment and healthcare. However, whether considered individually or cumulatively, in general the level of such discrimination is not sufficiently serious to amount to persecution. Discrimination on grounds of sexual orientation is unlawful in Albania and there are avenues to seek redress. Same-sex relationships are not legally recognised in Albania. However, there is no evidence that this causes serious legal difficulties for relationships between openly gay men.

f. In general, it will not be unduly harsh for an openly gay man to relocate to Tirana, but each case must be assessed on its own facts, taking into account an individual's particular circumstances, including education, health and the reason why relocation is being addressed.'

19. The Court of Appeal's observations upholding the lawfulness of the CG case is reported at **BF (Albania) v. Secretary of State for the Home Department** [2019] EWCA Civ. 1781 (25 October 2019).

20. The Court of Appeal made the following positive findings with respect to the Upper Tribunal's assessment of the country evidence (paras 43…50).

Reported cases:

21. There are no reported cases on risk on return to Albania for gay or bisexual men.

Unreported cases:

22. Out of the three post-March 2019 CG unreported cases found on the Tribunal decision database,[17] only two address the findings on the background material in BF (Albania).

23. In July 2019 Upper Tribunal Judge Conway applied the reasoning of the CG case and dismissed the appeal in **ED v. Secretary of State for the Home Department (PA/03384/2019)** (heard 31 July 2019, promulgated 28 August 2019, published 22 October 2019), noting the acceptance of the appellant's Counsel [14]:

> '[Counsel] accepted that the recent Country Guidance indicated that an openly gay man would not, in general, have an objectively well-founded fear in Tirana, however, each case had to be assessed on its own facts. In that regard the judge's findings that the father would no longer have an adverse interest in

[17] Tribunal decisions database (url), last accessed 1 February 2020.

him and that the father did not have influential friends in the police were inadequately reasoned. As such the situation for the appellant might be more dangerous.'

24. The protection claim was based on applying sub-paragraph (v) of the headnote in BF (Albania) [25]:

> 'Thus, for the reasons given, the appellant, even with a well-founded fear, falls within the general group of people referred to at (v) of the headnote of BF. The judge's decision on the asylum claim showed no material error of law.'

25. In October 2019, the Upper Tribunal in **ST v. Secretary of State for the Home Department (PA/11036/2017)** (heard 30 September 2019, promulgated 2 October 2019, published 12 December 2019) (Upper Tribunal Judge Pitt) dismissed the appeal of an Albanian female victim of domestic violence who feared her ex-husband, noting with respect to relocation to Tirana, noting the First-tier Tribunal Judge found the ex-husband only had personal friendships and connections in the home area in Kukes [11]:

> 'The judge also set out in paragraph 79 that he had referred to guidance from the case of BF (Tirana gay men) Albania CG [2019] UKUT 00093 to the effect that there was "only very limited evidence" that someone could be traced in Tirana "by operation of either the registration system or criminal checks at the airport".

26. This approach is to be contrasted with the positive finding by the Tribunal with respect to reach of the family to Tirana in MB (Albania).

27. Neither unreported cases cite country background material from the Home Office's SOGIE CPINs, reinforcing the approach in this review to commence with the approach of the Tribunals to the COI in the case law, prior to addressing the Home Office CPIN.

Lesbians/Bisexual women – Internal relocation outside Tirana

28. There is currently **no Country Guidance on risk to lesbians/bisexual women from Albania.**[18]

[18] It had been hoped the Upper Tribunal would have granted permission for **MB (Albania)** to be heard with **BF (Albania)** in October 2018. The application was refused on the following basis at the Error of Law hearing on 2 October 2018 [7] (The Hon. Lady Rae and Upper Tribunal Judge Dawson) (promulgated 21 November 2018):

29. Nevertheless on 17 December 2019 the Upper Tribunal did report the case of **MB (Internal relocation Albania) [2019] UKUT 392 (IAC)** (heard 20 June 2019, promulgated 30 July 2019, published 17 December 2019) (Upper Tribunal Judges Dawson and Keith) on the basis the fact-finding Tribunal accepted the appellant, a bisexual woman, would face a real risk in her home area and would not be able to relocate to the capital Tirana or Tepele, Durres and Volore. The fact-finding Tribunal below had accepted her evidence she had relatives residing in these places leading to a real risk the primary source of her persecution, her father, would be able to locate her [6].

30. The Home Office identified Shkope as a place of relocation in the refused protection decision without any reference to the country conditions prevailing in the identified place for relocation.

31. The Upper Tribunal, on appeal, provided the following guidance with respect to importance of country information reports and internal relocation (**emphasis added**):

> *'The burden of proof remains on the appellant, where the respondent has identified the location to which it is asserted they could relocate, to prove why that location would be unduly harsh, in line with AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC), but within that burden, the evaluation exercise should be holistic. An holistic approach to such an assessment is consistent with the balance-sheet approach endorsed later in SSHD v SC (Jamaica) [2017] EWCA Civ 2112, at paragraphs [40] and [41]. MM v Minister for Justice, Equality and Law Reform, Ireland (Common European Asylum System - Directive 2004/83/EC) Case C-277/11* ***does not impose a burden on the respondent or result in a formal sharing of the burden of proof, but merely confirms a duty of cooperation at the stage of assessment, for example the production of the country information reports.'***

32. At paragraph 45 of the determination, the Upper Tribunal finds with respect to the assessment of internal relocation to Skroder (emphasis added):

> 'Adopting the balance-sheet approach as part of an holistic assessment, we have referred already, on the one-hand, to societal attitudes towards same sex relationships, albeit not beyond the level of a risk, to the lower standard, of non-physical harassment; initial suspicion and curiosity; the fact that the

'In our view this decision can be properly remade in the Upper Tribunal in the light of the findings that have been preserved. We are also aware as indeed are [the Senior Presenting Officer] and Mr Chelvan that there is a pending Country Guidance case on the situation for LGBT individuals in Albania which is listed for hearing on 24 October. The case will be listed for hearing decision once that guidance is published.'

> appellant would be relocating to ShkodÃ«r, a location with which she was not familiar; and her history of depression and fear of past ill-treatment. On the other hand, we take account of the appellant's undisputed ability to access housing and get a job; and establish friendship groups and social networks; as well her recovery from depression and lack of evidence of recurrence of that condition; and access to police assistance, if necessary.'

33. At paragraph 243 of the 2019 CG case of **BF (Albania)** the Upper Tribunal recorded the evidence the position of single women on internal relocation to Tirana would be more challenging than that of a single man (emphasis added):

> 'We do not accept the assertion that a single gay man could not live alone and we find that it is an option that is reasonably open to him. The evidence of the Albanian Ombudsman to the Home Office Fact-Finding Mission is that Tirana in particular is experiencing a cultural change and "rapidly advancing" to a Western way of life where single people (in that context single women) do live alone. Ms Young accepted that the position of a single woman living alone would be more challenging than that of a single male'

Risk on basis of gender-identity/expression:

34. The Upper Tribunal in **BF (Albania)** did raise the issue of specific risk based on gender identity or expression [183]:

> 'There is some limited evidence (in the 2015 CPD report) of denial of access to transgender individuals to public services and private bars and shops.'

35. There is no reference to intersex or sex characteristics country background material in the CG case.

C. HOME OFFICE:

Country Policy Information Note (December 2019):

36. The current published policy position is the *Country Policy and Information Note: Albania: Sexual orientation and gender identity* (version 6.0) (December 2019).[19]

[19] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849856/Albania_-_SOGIE_-_CPIN_-_v6.0__December_2019_.pdf , last accessed 2 February 2020.

37. The current version amended the earlier version by inserting policy paragraphs only following the October 2019 judgment of the Court of Appeal in **BF (Albania)** (page 44):

> 'Assessment updated to take account of the decision of the Court of Appeal of October 2019 to uphold the decision made in the country guidance case of BF and to refuse permission to appeal on all grounds.'

38. The April 2019 version (5) only added references in the policy section to findings by the Upper Tribunal in **BF (Albania) [2019] UKUT 93 (IAC).**[20]

39. On this basis the October 2018 Upper Tribunal when hearing the CG case of **BF (Albania)** were basing their findings with the May 2017 CPIN on Albania and SOGI.[21]

40. On this basis, any comments by the reviewer would be restricted to post-October 2018 Upper Tribunal hearing COI (hearing dates 16, 18 and 23 October 2018), as the March 2019 promulgated CG determination has provided a judicial and binding analysis of the country background for SOGIE protection claims, up to and including the October 2018 hearing date as the date of analysis of country information.

41. Importantly, this version 4 of the CPIN makes clear it includes COI in response to the points raised by the IAGCI March 2017[22] report (page 39):

> 'Update of country of origin information following a review of the previous version by the Independent Advisory Group on Country Information (IAGCI) in March 2017.'

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[20] UK Home Office: Country Policy and Information Note Albania: Sexual orientation and gender identity, April 2019: https://www.ecoi.net/en/file/local/2008619/albania-sogi-cpin-v2.0+%281%29.docx (accessed on 2 February 2020), page 44: 'Update of assessment to take account of country guidance case of BF.'

[21] UK Home Office: Country Policy and Information Note Albania: Sexual orientation and gender identity, May 2017 https://www.ecoi.net/en/file/local/1402151/Albania+-+SOGI+-+CPIN+-+v4.0+%28May+2017%29.docx (accessed on 2 February 2020).

[22] Independent Chief Inspector of Borders and Immigration, 'Inspection of Country of Origin Information: March 2017 report: Annex A: Review of the Home Office Country of Origin Information on 'Minority groups, Albania, October 2016' and 'Sexual orientation and gender identity, Albania, December 2016 By Dr. ENKELEIDA TAHIRAJ', pages 12 to 58, published 13 July 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631316/An-Inspection-of-Country-of-Origin-Information.pdf , accessed 2 February 2020.

42. However, as the veracity of the inclusion of points raised by the review have been subject to judicial country guidance, the reviewer limits analysis to any post-October 2018 material, relevant to points.

D. SUMMARY OF REVIEW:

NEUTRAL ASSESSEMENT

43. CPIT in updating the reports in March 2019 and December 2019 have limited the scope of inclusion to COI addressed and approved by the Upper Tribunal when hearing **BF (Albania**) in October 2019.

44. On this basis the December 2019 COI does not address evidence not before the Upper Tribunal in October 2018.

45. The reviewer cannot, in this report, commence a review of the what is contained in the December 2019 CPIN without risking commencing a disagreement with the approach of the Upper Tribunal in **BF (Albania)**.

46. On this basis, the reviewer provides a **NEUTRAL ASSESSMENT** to the review of the current CPIN on Albania and SOGIE.

8. ALGERIA

Capital city: Algiers
Population:[1] 43,851,004
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Homosexuality is illegal in Algeria. Sexual acts between people of the same sex are punishable by imprisonment.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. The 2008[3] review addressed COI with respect to Algeria. The 2014[4] did not.

2. There are four main categories of recommendations highlighted in the 2008 review:[5]

   (i) Legal information: 'No information on prosecution, or other enforcement of legislation, is included';

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Algeria: Laws and Customs, last updated 5 December 2019 https://www.gov.uk/foreign-travel-advice/algeria/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008), pages 37 to 39.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] De Jong (2008), pages 38 to 39.

(ii) Treatment by, and attitudes of, state authorities: 'include (or expand on) …:

- conscription, military service and treatment of LGBT persons in the military (cross-reference if applicable)
- actions against LGBT persons, organisations or social spaces by state authorities
- explore the need to include or cross-references to information about (male) sex workers and HIV/AIDS
- information that gives a clear and relevant picture of the state's position on sexual morality in general, and the level of state endorsement / enforcement of this morality. For example, availability of protection against societal violence against women (and men) that are seen to be transgressing the prevalent sexual or gender norms (in other ways than engaging in same-sex relations). For example, in relation to marriage and divorce, sexual and domestic violence, and honour crimes.

(iii) Societal treatment and attitudes: Information should be included about (mental) healthcare, the approach of the medical establishment to sexual orientation and gender dysphoria and treatments given. Cross-references could be made if appropriate to medical and HIV/AIDS sections.; and

(iv) Other relevant information and practicalities of 'discretion': Not much information is included (or cross-referenced) relating to the ability of LGBT persons to live a 'discreet' life or that give a context in which state and societal regulation of sexuality and gender can be understood.'

3. The 2014 review did not address these recommendations as there was no examination of COI on Algeria in the review. Both reviews pre-date the 2016 CG case in OO (Algeria).

b. Decision-making statistics (2015-2018):

4. The 2015 to 2018 figures for SO protection claims include Algeria, ranking the country 15th.[6]

[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

5. In 2018, a total of 18 asylum claims were lodged where sexual orientation formed part of the basis of the claim.[7] Out of the 12 initial decisions made by the Home Office, there are no figures for grants or refusals bar 2015, where out of the 18 initial decisions nine SO applicants were granted and nine were refused leave to remain.[8] This record can be interpreted as positive grants prior to the 2016 CG case, finding lack of general risk on return.

6. Whilst nine statutory appeals were determined in 2018, there are no figures for the outcome recorded by the Home Office.[9] Outcomes are also not recorded for appeals determined between 2015 to 2017 where for determined appeals for 2015 and 2016 were seven, and fourteen in 2017.

B. CASE LAW:

Country Guidance:

7. The current Country Guidance case is **OO (Gay men) Algeria CG [2016] UKUT 65 (IAC)** [10] (Upper Tribunal Judge Southern and Deputy Upper Tribunal Judge Kamara) (heard on 24 September 2015, promulgated on 26 January 2016, published 4 February 2016).

8. The **headnote** summarises the 2016 Country Guidance (emphasis added) (**additional emphasis added**):

> 1. *The Algerian Criminal Code makes homosexual behaviour unlawful, the authorities do not seek to prosecute gay men and there is no real risk of prosecution, even when the authorities become aware of such behaviour. In the very few cases where there has been a prosecution for homosexual behaviour, there has been some other feature that has given rise to the prosecution. The state does not actively seek out gay men in order to*

[7] ibid. The figures for SO protection applications lodged were 14 (2015), 19 (2016), 10 (2017) and 18 (2018).

[8] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals, noting an asterisk included in the table records less than 5 individual case outcomes.

[9] ibid.

[10] The Tribunal decisions database continues to list the 2013 CG case of **OO (Gay men) Algeria CG [2013] UKUT 63** as current Country Guidance, even though this was successfully appealed to the Court of Appeal (permission to appeal granted by Lord Justice Maurice Kay on 24th January 2014 (C5/2013/2573)) and then remitted and reheard by the Upper Tribunal, leading to the 2016 CG case addressed in this country report: https://tribunalsdecisions.service.gov.uk/utiac/2013-ukut-63 , last accessed 2 February 2020.

take any form of action against them, either by means of prosecution or by subjecting gay men to other forms of persecutory ill-treatment.

2. *Sharia law is not applied against gay men in Algeria. The criminal law is entirely secular and discloses no manifestation, at all, of Sharia law in its application.*

3. *The only risk of ill-treatment at a level to become persecution likely to be encountered by a gay man in Algeria* ***is at the hands of his own family,*** *after they have discovered that he is gay. There is no reliable evidence such as to establish that a gay man, identified as such, faces a real risk of persecutory ill-treatment from persons outside his own family.*

4. *Where a gay man remains living with his family to whom he has disclosed his sexual orientation in circumstances where they are prepared to tolerate that, his decision to live discreetly and to conceal his homosexuality outside the family home is not taken to avoid persecution but to avoid shame or disrespect being brought upon his family. That means that he has chosen to live discreetly, not to avoid persecution but for reasons that do not give rise to a right to international protection.*

5. *Where a gay man has to flee his family home to avoid persecution from family members, in his place of relocation he will attract no real risk of persecution because,* ***generally, he will not live openly as a gay man****. As the evidence does not establish that he will face a real risk of persecution if subsequently suspected to be a gay man, his decision to live discreetly and to conceal his sexual orientation is driven by respect for social mores and a desire to avoid attracting disapproval of a type that falls well below the threshold of persecution. Quite apart from that, an Algerian man who has a settled preference for same sex relationships may well continue to entertain doubts as to his sexuality and not to regard himself as a gay man, in any event.*

6. *For these reasons, a gay man from Algeria will be entitled to be recognised as a refugee only if he shows that, due to his personal circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria to avoid persecution from family members, or because he has a particular characteristics that might, unusually and contrary to what is generally to be expected, give rise to a risk of attracting disapproval at the highest level of the possible range of adverse responses from those seeking to express their disapproval of the fact of his sexual orientation.'*

Post-CG reported or unreported cases:

9. There are no reported cases following OO (Algeria).

Unreported Tribunal cases:

10. There are two unreported post-CG cases substantively dealing with the approach to be taken following OO (Algeria).

11. In **AG v. Secretary of State for the Home Department (HU/01150/2016) (unreported)** (heard 27 April 2017, promulgated 1 June 2017, published 19 July 2017) (Deputy Upper Tribunal Judge Ramshaw), the Tribunal addressed a case where the First-tier Tribunal had been presented with country evidence post-dating the 2016 CG case, rendering the determination to contain an error of law, but this was held not to be reviewing Tribunal to be material.

12. In addressing internal relocation, Deputy Upper Tribunal Judge Ramshaw held, on the facts already found, the appellant had been found to be able to relocate, due to lack of evidencing reach of the feared persecutor - his father [19]:

> 'The judge took into account the appellant's claim to fear his father's 'reach' throughout Algeria. The judge found' "there is no persuasive evidence before me, first, that his father has the influence throughout Algeria as claimed by the appellant?" There was no evidence before the judge of any specific difficulties that the appellant would face in re-locating to another area of Algeria.'

13. In a more recent unreported Tribunal case of **Mr. A.N. v Secretary of State for the Home Department (PA/10068/2018) (unreported)** (hearing 26 April 2019, promulgated 30 May 2019, heard 25 July 2019) (Deputy Upper Tribunal Judge Farrelly) dismissed an appeal noting there was no error in applying the CG case to the facts of the case, where even where it was accepted a Court document had been issued, due to the country guidance, prosecution would not be enforced [19] and [22]. The Tribunal held there was no error of law in finding there would be an internal relocation alternative [3] and [27].

14. Importantly, both Tribunals do not refer to any CPIN document to address risk on return. This highlights the significance of CG cases as the starting point, specifically where they are very clear about the manner in which risk has been assessed, either way.[11]

[11] The reviewer distinguishes between the approach of the Tribunal in OO (Algeria) (no risk) when compared to appeals from Jamaica applying DW (Jamaica) (gay/bisexual men) and SW (Jamaica) (lesbian/bisexual women/not 'straight enough' straight women) where there is a strong real risk of persecution. Both CG cases give rise to judicial application without needing to address CPIN material.

15. Additionally, there is no record a location for internal relocation, noting following the July 2019 reported determination in **MB (Albania)** lack of identification by the respondent, would render a finding on internal relocation unlawful.

Unreported Tribunal case addressing CPIN and US DOS reports:

16. A case not found in the Tribunal decisions database, is one the reviewer was instructed on, regarding a gay man from Algeria and exercise of internal relocation alternative to Constantine.

17. **IL v Secretary of State for the Home Department (PA/03276/2018) (heard 12 February 2019, promulgated on 28 February 2019) (unreported)** (Deputy Upper Tribunal Judge Froom),[12] the Upper Tribunal Judge dismissed an appeal, where the appellant's Counsel submitted there was post-CG case 2017 US State Department report material highlighting state persecution ('arbitrary detention or physical and sexual abuse by police officers), compared the 2017 CPIN report reference to the 2016 USDOS containing no reference to ill-treatment [38]:

> 'The respondent's CPIN Algeria: Sexual orientation and gender identity, of 22 September 2017, was included in the bundle of documents provided to the judge in the First Tier Tribunal. This stated at paragraph 2.3.7 that there have been a few reports of LGBT people being detained for 'immoral behaviour' and experiencing police harassment. However, prosecutions are extremely rare. At paragraph 5.2 the CPIN refers to the 2016 US State Department report under the heading of ill-treatment by the authorities but there is no reference there to arbitrary detention or physical and sexual abuse by police officers. Mr Chelvan provided me with a complete copy of the US State Department report for 2017, although this had not been before the judge in the First-tier Tribunal.'

18. The Tribunal recorded the following submissions:

> '39. Mr Chelvan argued that there was clear and cogent evidence before the judge of state persecution and her failure to consider it was a 'Robinson-obvious' point which should be considered notwithstanding the fact it had not previously been pleaded. It was clear, in his submission, that OO (Algeria) should not have been

[12] https://www.bailii.org/uk/cases/UKAITUR/2019/PA032762018.html ,last accessed 2 February 2020. The Tribunal did have before it the internal relocation case of **MB**, but this is prior to the Tribunal reporting the determination in December 2019, proving the headnote and need for respondent to identify location, arising from its approach at paragraph 24. **IL** had Constantine raised within the protection decision.

> followed. The evidence of the [2017] US State Department report was sufficient to satisfy the objective test elaborated in paragraph 82 of HJ (Iran), namely, whether gay people who live openly would be liable to persecution in the country of nationality.
>
> 40. [The Senior Presenting Officer] accepted the evidence came from a reliable source and that it post-dated OO (Algeria). However, he argued that it did not justify a departure from country guidance. He reminded me that the test was whether there were very strong grounds supported by cogent evidence justifying departure from country guidance (see SG (Iraq) v SSHD [2012] EWCA Civ 940, paragraph 47).'

19. The Tribunal dismissed the appeal with respect to this ground noting firstly, the point had not been raised by Counsel who appeared before the First-tier Tribunal [44], secondly, the point had not been pleaded and only extracts were cited in the country expert report [45], thirdly the CG Tribunal had evidence of harassment [46] and lastly, there should have been primary sources cited to support what was stated in the US DOS reports [47]:

> 'If the reports contained in the US State Department are correct and there is evidence from primary sources to support them, then there might well be a need to revisit the findings in OO (Algeria). However, that evidence was not before the judge in this case and is not apparent now. In my judgement, the judge did not materially err by failing to consider it.'

20. The Upper Tribunal in OO (Algeria) had the US DOS 2015 (published 2016) which led them to conclude at paragraph 165 of the determination:

> 'Although no information followed of the nature of such harassment. It is significant, therefore, that this evidences is an asserted fear of consequence rather than any evidence that such consequences in fact materialised'

21. The 2016 US DOS (published in 2017), not before the 2016 CG Tribunal in OO (Algeria), but cited in the CPIN at paragraph 5.2, made clear there was a continued pattern of no evidence of prosecutions:[13]

> 'LGBTI activists reported that the vague wording of laws identifying "homosexual acts" and "acts against nature" permitted sweeping accusations that resulted

[13] US State Department Report Country Reports on Human Rights Practices 2016: Algeria (published 2017) https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/algeria/ , last accessed 2 February 2020.

during the year in multiple arrests for same-sex sexual relations but no known prosecutions.'

22. The 2017 USDOS on Algeria (published 2018), cited in **IL** the following, highlighting a clear shift in state action towards the SOGIE community (emphasis added) (**additional emphasis added**):

> 'LGBTI activists reported that the vague wording of laws identifying "homosexual acts" and "acts against nature" permitted sweeping accusations that resulted during the year in multiple arrests for same-sex sexual relations but no known prosecutions. **LGBTI persons were reportedly arbitrarily detained and physically and sexually abused by police officers during the year**.
> **Government officials did not take measures specifically to prevent discrimination against LGBTI persons**.'

23. On this basis, the Tribunal in **IL** dismissed the appeal on the basis the US State Department report (extracts) did not have primary sources to support the reports of contained within them (specifically the 2017 US DOS report relied upon by the appellant).

C. HOME OFFICE COI:

Country Policy Information Note (September 2017):

24. The *Country Policy and Information Note: Algeria: Sexual orientation and gender identity* (version 2.0) (September 2017) [23 pages].

25. The CPIN policy position is stated at sections 3.1.5 to 3.1.8 (page 10):[14]

> '3.1.5 Lesbians, bisexual women and trans people are likely to experience societal intolerance and discrimination, including from members of their family, where their sexual orientation or gender identity becomes known. In the case of women this may compound the discrimination they face in law and through traditional social practices because of their gender.

[14]UK Home Office, 'Country Policy and Information Unit: Algeria: Sexual orientation and gender identity (version 2)' (September 2017): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/646716/algeria_sexual_orientation_gender_identity_v2_0_september_2017.pdf , last accessed 2 February 2020.

3.1.6 LGBT people may face societal discrimination and ill-treatment from nonstate actors but not generally at a level that gives rise to a risk of persecution or serious harm. However, there may be circumstances where ill-treatment may be sufficiently serious by its nature and repetition to constitute persecution or serious harm. Each case needs to be decided on its merits.

3.1.7 Where LGBT people have a well founded fear of persecution, protection is not available.

3.1.8 Internal relocation is generally reasonable in most cases, but it will depend on the facts of the case, and the individual circumstances of the person.'

26. The Tribunal in **IL** (paragraph 17 above), cited paragraph 2.3.7 of CPIN which states (page five):

2.3.5 While there have been a few reports of LGBT people being detained for 'immoral behaviour' and experiencing police harassment, prosecutions of same-sex sexual acts are extremely rare (see Law in practice and Arrests).

27. The Tribunal were additionally directed to paragraph 5.2 of CPIN where there is reference to the 2016 US State Department report (published in 2017) (page 15 of CPIN):

'5.2.1 The USSD report stated: 'Another report released by Trans Homo DZ in November [2016] included allegations by an anonymous former prisoner alleging that prisoners at El Harrach Prison suffered physical and sexual abuse based on their sexual orientation. The former prisoner's report said prisoners who were perceived as gay or transgender were placed in a specific cellblock near other prisoners who had committed serious crimes. The report said gay and transgender prisoners were frequently victims of sexual assaults, including one incident in which prison guards mocked and initially refused medical treatment to a prisoner who was the victim of a gang rape.'

<u>Standing of US State Department reports in Asylum Proceedings:</u>

28. It is trite asylum law the US State Department report has standing, where 'nothing has been addressed to this court which leads me to doubt the good faith with which the

State Department have prepared the report' (*R (X) v Secretary of State for the Home Department* (Court of Appeal: IATRF 98/0474/4, judgment 24 July 1998, Pill LJ).[15]

29. The Court of Appeal's approach to the USDOS is reflected in earlier and later Tribunal determinations, finding the source is 'generally to be a source which is particularly reliable' with a 'particularly high level of reliability' (*Ram Lahori*, determination 7 October 1998, Chair: Mr Care),[16] with a focus on 'the general' rather than the particular (*Hassen*, determination 3 October 1997, Chair: Professor Jackson),[17] directly relevant to the objective country background assessment for the second limb of Lord Rodger's guidance in HJ (Iran).

30. The Tribunals in successive Country Guidance cases have relied on the US DOS to disprove the position advanced by the appellant with respect to risk on return (see for example MD (same-sex oriented males: risk) India CG [2014] UKUT 00065 (IAC) [135) and JM (homosexuality: risk) Uganda CG [2008] UKIAT 00065 [102]).

Post-2017 September CPIN and 2016 CG case country material:

I State Persecution:

USDOS reports:

31. The Upper Tribunal then made the following material finding at paragraph 166 of OO (Algeria) with respect to persecutory ill-treatment outside the family (**emphasis added**):

> 'This discussion of the reasons that might explain why, **given the absence of any reliable evidence of gay men facing persecutory ill-treatment outside the**

[15] 'Nothing has been addressed to this court which leads me to doubt the good faith with which the State Department have prepared that report. It found its way on to the database of the High Commissioner, and that in itself would suggest that no bad faith was involved in the production of the report or in its merit as an analysis of the situation in the Ivory Coast.' [page 5] [emphasis added] (Pill LJ)

[16] 'For example, the US State Department Reports would seem generally to be a source which is particularly reliable. A very careful review of how the reports are prepared, on what basis, who is consulted and the use to which the reports are put, can all be found in the Forward and Appendix to each volume. In earlier years a separate volume was prepared verifying the reports prepared by an association of practising lawyers' [page 2] … We would ourselves, for the reasons which we have given, place the US State Department reports at a particularly high level of reliability. No document is absolutely unbiased, except that we would prefer, to re-phrase it, to say every report proceeds from some viewer stand point' [page 5] (emphasis added): Ram Lahori v Secretary of State for the Home Department G0062 HX-66140-96 IAT Chair: Mr R G Care.

[17] *Secretary of State for the Home Department v Afewerk Merkonnen Hassen* 15558 IAT

family context, very few gay men choose to live openly as such, is informed, therefore, by a number of considerations.'

32. Noting the references to the 2016 USDOS and the 2017 USDOS above, the 2018 USDOS (published March 2019) makes clear the further evidence on state persecution in Algeria – evidencing criminal prosecutions with the addition of the second paragraph highlighted below, and the country evidence of 'forced marriage … particularly for lesbian women' cited in the penultimate paragraph:[18]

> '**Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> The law criminalizes public indecency and consensual same-sex sexual relations between adult men or women, with penalties that include imprisonment of six months to three years and a fine of DZD 1,000 to DZD 10,000 ($8.50 to $85). The law also stipulates penalties that include imprisonment of two months to two years and fines of DZD 500 to DZD 2,000 ($4.25 to $17) for anyone convicted of having committed a "homosexual act." If a minor is involved, the adult may face up to three years' imprisonment and a fine of DZD 10,000 ($85). LGBTI activists reported that the vague wording of laws criminalizing "homosexual acts" and "acts against nature" permitted sweeping accusations that resulted in multiple arrests for consensual same-sex sexual relations, but no known prosecutions during the year.
>
> LGBTI status is not, in itself, criminalized; however, LGBTI persons may face criminal prosecution under legal provisions concerning prostitution, public indecency, and associating with bad characters. NGOs reported that judges gave harsher sentences to LGBTI persons. An NGO reported that LGBTI men were targeted more often than are women.'
>
> The law does not extend antidiscrimination protections to LGBTI persons based on of sexual orientation, gender identity or expression, or sex characteristics. Official assert that the law covers LGBTI individuals through general civil and human rights legislation. Government officials did not take measures specifically to prevent discrimination against LGBTI persons. LGBTI persons faced discrimination in accessing health services. Some organizations maintained a list of "LGBTI-friendly" hospitals, and several NGOs operated mobile clinics

[18] US State Department Report Country Reports on Human Rights Practices 2018: Algeria (published 13 March 2019) https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/algeria/ ,accessed 2 February 2020.

> specifically for vulnerable communities. NGOs reported that employers refused jobs to LGBTI persons, particularly men perceived as effeminate. Community members said that obtaining legal assistance was also a challenge due to similar discrimination.
>
> Members of the LGBTI community reported that forced marriage was a problem, particularly for lesbian women.'
>
> During the year authorities blocked LGBTI NGOs from organizing meetings. The NGOs reported harassment and threats of imprisonment by government authorities.

33. This therefore makes clear a significant development since both the Country Guidance and the 2017 CPIN.

II – Non-state agent persecution:

Risk to Lesbians:

34. This includes the US DOS report on Algeria cited at paragraph 33 above makes clear 'forced marriage was a problem, particularly for lesbian women'.

35. This gives rise to a well-founded fear of persecution.[19]

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[19] **LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC) [119]** whilst not finding there was forced marriages of gay men in Sri Lanka, the Upper Tribunal in this case accepted if there was such evidence, this would be capable of amounting to persecution [119] (emphasis added):

> '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.'

Cf. See Australian Federal Magistrates Court of Australia in **SZANS v. Minister for Immigration [2004] FMCA 445** (Driver FM) (14 July 2004): Bangladeshi gay man faced with societal pressure to marry - such pressure would result in serious harm as it interfered with his right not to be forced into a heterosexual marriage [19-20] (emphasis added):

> '[19] It was implicit in my reasoning in *SZAOD* that the consequences of successfully resisting pressure to marry would not constitute persecution. I maintain that view. However, the same could not be said of the consequences of succumbing to that pressure….
>
> [20] … I accept Mr Karp's submissions that it was part of the applicant's claims, not only that he faced a well-founded fear of persecution by reason of the pressure upon him to

36. The same reference to forced marriage is found in the US DOS 2016 (published 2017) cited at paragraphs and 6.7 of the September 2017 CPIN (page 20),[20] under the sub-section for 'employment'.

37. There is reference at section 6.5.1 to a December 2014 'Muftah' article also addressing pressure to get married, and subsequent COI at paragraphs 6.5.2 and 6.5.3 within the 'Family treatment' section of the CPIN (pages 18 to 19).

38. Noting the 2016 CG case was only with respect to men, rather than women, then highlighting the fact this COI, in line with the case-law cited above, raises cogent evidence of persecution arising from forced marriages, the CPIN should be amended to include the more recent evidence from the 2018 US DOS.

HIV and SOGIE:

39. Highlighting the health intersection between sexual identity and disability, the following is cited in the 2018 US DOS report on Algeria:[21]

> **HIV and AIDS Social Stigma**
> Strong social stigma towards the vulnerable groups in which HIV/AIDS was most concentrated–commercial sex workers, men who have sexual relations with men, and drug users–deterred testing of these groups. The government said it did not take measures to specifically prevent and treat HIV/AIDS in the LGBTI community.
>
> The government's National AIDS Committee met twice during the year. The committee brought together various government and civil society actors to discuss implementation of the national strategy to combat HIV/AIDS.

40. This 2018 US DOS report, updates the position in the 2017 USDOS, continuing to reflect the marginalisation of those living with HIV in Algeria cited at paragraph 8.1.2 of the current CPIN (page 21).

41. Section 8 of the CPIN with respect to 'Access to Healthcare' shows GOOD PRACTICE with respect to highlighting lack of state support for those who are HIV-positive in Algeria, establishing a nexus between those who are SOGIE and HIV-positive,

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> marry, but also that he faced persecution by being potentially forced into a heterosexual marriage.'

[20] *CPIN SOGI Algeria* (n 20).
[21] *US DOS 2018* (n 18).

arguably establishing a basis of discrimination amounting to persecution,[22] with one indicator of group membership highlighting membership of other, rendering discretion meaningless.

Murder of 'open' bisexual man – February 2019:

42. In February 2019, a bisexual man was murdered in Algeria (perceived by his persecutors as a gay man), in the capital Algiers, at the hands of non-state agents who did not constitute family members, in circumstances where his non-straight identity was published on his Facebook page (interested in men and women).

43. This challenges completely the approach of the 2016 CG case on risk only from family member (recital 3) and no living openly as a gay man, no gay identity (recital 5) and internal relocation to Algiers (recital six of the headnote) in **OO (Algeria).**

44. Source material includes *Pink News 'Homophobic murder: Algerian man throat slit, 'gay' smeared in on wall in blood'* (11 February 2019):[23]

> **'An Algerian medical student was murdered in his room when two unknown assailants slit his throat and smeared "gay" on the wall in his blood.**
>
> Assil Belata, 21, was killed on Sunday (February 10) in his student accommodation at the Taleb Abderrahmane campus in Ben Aknoun, a suburb of the city of Algiers, which is part of the Cité Universitaire, according to local media reports and a Facebook post from the LGBT+ Algerian rights group Alouen.
> Belata was murdered when two attackers followed him into his room, before cutting his throat and leaving the student to die.
> His assailants also wrote "he is gay" on the wall in Belata's blood.
> Belata's Facebook profile states that he is interested in men and women.

[22] UK Home Office, 'Asylum Policy Instruction on Sexual orientation issues in the asylum claim' (August 2016) (version 6) 'Discrimination', page 16: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf , last accessed 2 February 2020: 'A discriminatory measure, in itself or cumulatively with others, may however amount to persecution if it led to consequences, which were of a substantially prejudicial nature for the person concerned … restrictions on access to normally available educational, legal (including law enforcement), welfare and health provision.'

[23] Ella Braidwood, '*Homophobic murder: Algerian man throat slit, 'gay' smeared in on wall in blood'*, Pink News, 11 February 2019: https://www.pinknews.co.uk/2019/02/11/homophobic-murder-algerian-man-throat-slit-gay-smeared-wall-blood/ , last accessed 2 February 2020.

> **Algerian student murdered after throat is cut and attackers write "gay" on wall.**
> The third year medical student was found dead in his room lying in a pool of his own blood.
> "This institutional and state homophobia is becoming commonplace", reads a statement from Alouen on Facebook on Monday (February 11).
>
> **"Politicians and some homophobic media are the ones really guilty of this homophobia crime that shook the university city yesterday."**
> "And incitement to hatred against sexual minorities in Algeria becomes a common currency to make buzz and pour into populism.
> "Politicians and some homophobic media are the ones really guilty of this homophobia crime that shook the university city yesterday."
>
> **Hundreds pay tribute to murdered Algerian student.**
> Hundreds of students gathered outside the medicine faculty at the university on Monday and led a minute's silence for Belata, according to local media reports.'

45. DZ'd on-line article on 12 February 2019 reported on the story.[24]

> 'Assil was murdered, on Sunday night at the university campus. According to friends who discovered his body, his throat had been slit and the words "He is gay" were daubed in blood on the wall of his room.'

46. The Algerian LGBT group Alouen (Rainbow) provided a response to the 'forced erasure' of the story by the Algerian state in a piece published in March 2019 (emphasis added):[25]

> 'What happened is that the local authorities tried to conceal certain elements of the crime, including the homophobic message left on the wall of Assil's bedroom – the words "he is gay" were in fact written in Arabic on the wall [in his own blood]. Here at Alouen, we've been trying to raise awareness of this and get the message out there – especially by condemning the homophobic

[24] Hannah Sadda, 'Algeria: slaughtered student Assil Belalta laid to rest in his home town', DZ'd, 12 February 2019: https://www.dzbreaking.com/2019/02/12/algeria-slaughtered-student-assil-belalta-laid-rest-hometown/, last accessed 2 February 2020.
[25] Elizabeth Arif Fear, 'The battle against secularists and homosexuals is more important than the battle against Daesh": Alouen shares the reality of social and institutional homophobia across Algeria', 12 March 2019: https://voiceofsalam.com/2019/03/12/alouen-shares-the-reality-of-homophobia-across-algeria/, last accessed 2 February 2020.

> remarks made by the Algerian Prime Minister and the President of the Magistrate's Union in Algeria, which were made several weeks before the crime took place.
>
> Now the authorities are trying to discredit the claim that Assil's death was the result of a homophobic hate crime by claiming that the murderer was gay himself, saying that he wanted to rape his victim. This was a particularly pertinent statement, given that male rape (as a form of homophobic attack) is not condemned in Algeria because in Middle Eastern and North-African culture, the man penetrating the other man is not considered gay – unlike the other man during the sexual act.
>
> Regardless of Assil's sexual orientation (we can't speak on his behalf), the crime remains an act of homophobic violence because the perpetrator himself declared he hated homosexuals – this is regardless of whether the victim was gay or not.'

47. On this basis, there is strong evidence of a gay identity in Algeria, rather than activists residing in France, with clear and cogent evidence of risk to those who are open about their SOGIE identity, including in Algiers.

48. This marks a fundamental shift of the risk analysis emanating from the country evidence now shows a clear 'gay identity' a point the Upper Tribunal when examining the country evidence in 2015 did not exist.

Gender identity or expression:

49. The only COI cited in the CPIN with respect to Gender identity or expression is at paragraph 7.1.1 (page 20), citing from the 2016 US DOS:

> The organization reported in April that two men who used homophobic slurs physically attacked an activist who supported LGBTI rights in Algiers. In another incident a video posted on YouTube in November 2015 showed what appeared to be a group of men surrounding a transgender woman on the street. Several of the men were shown kicking and punching her while others looked on without intervening. The government did not announce investigations into the perpetrators of either alleged attack... '...

50. There is a reference to trans targeting at paragraph 4.4.4 of the CPIN (page 14):

> 'In May 2017, the Human Rights Council, working on the Universal Periodic Review – 27th session, Summary of other stakeholders' submissions on Algeria – stated:
>
> > 'JS4 regretted that article 336 of the Criminal Code, under which rape was considered to be a crime, did not address the different circumstances of rape in the case of lesbian, bisexual, transgender and queer women, who were often victims of corrective rape perpetrated by persons in their social or family circles.'

Intersex: Sex characteristics:

51. There are no references at all to intersex/sexual characteristic treatment in Algeria.

D. <u>SUMMARY OF REVIEW:</u>

<u>URGENT ACTION:</u>

52. Whilst there is a strong and commendable approach in the CPIN to Healthcare and HIV, the approach to risk on the basis of non-state agent persecution is either not linked appropriately by the CPIN (forced marriage of lesbians/bisexual women) and/ or is outdated (due to the murder of an openly bisexual man in Algiers in February 2019).

53. The approach to state persecution can be shown through the US DOS reports from 2016 onwards to show a growing pattern of state persecution, including evidence of sexual violence. Noting the statistical figures show a clear reliance on the 2016 CG case finding a complete lack of state persecution, hence reliance on internal relocation alternative away form family-centred harm, the CPIN needs to be urgently reviewed to address the above COI.

54. There needs to be a specific section on treatment based on Gender identity or expression, and some evidence of investigation of COI relating to intersex/sex characteristic claims.

9. BANGLADESH

Capital city: Dhaka
Population:[1] 164,689,383
Predominant religion: Islam
FCO Travel advice:[2]

> *'Local laws reflect the fact that Bangladesh is a mainly Islamic country. You should respect local traditions, customs, laws and religions at all times and be aware of your actions to ensure that they do not offend other cultures or religious beliefs, especially during the holy month of Ramadan or if you intend to visit religious areas. See Travelling during Ramadan*
>
> *You should dress modestly to avoid causing offence. Women should cover their shoulders and wear long skirts or trousers.*
>
> *'Local laws reflect the fact that Bangladesh is a mainly Islamic country. You should*
>
> *You should dress modestly to avoid causing offence. Women should cover their shoulders and wear long skirts or trousers.*
>
> *Same-sex relations are illegal.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address COI with respect to Bangladesh.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Bangladesh: Laws and Customs, last updated 8 January 2020 https://www.gov.uk/foreign-travel-advice/bangladesh/local-laws-and-customs accessed 25 January 2020.
[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008), pages 40 to 42.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 26 to 29:

2. The 2008 De Jong report provides a positive review on LGBT COI inclusion: [5]

> 'Legal information
> This is very comprehensive and balanced. Information about the lack of prosecutions is linked to information about how the existence of the legislation may have other side effects, e.g. in being used by the police for extortion and blackmail. (Although a clearer connection to the section on police treatment could be made.)
>
> Information about (the lack of) anti-discrimination measures; about conscription (including a cross-reference), and religious laws, is included, which is good practice.
> …
> Societal treatment and attitudes
> This section is very comprehensive and well balanced. Most of the information points in the template for analysis have been covered. Particularly good practice is the inclusion of information about accessibility of LGTB information and sources, e.g. by stating the limits to access to the Internet in para. 23.09
>
> The section on hijras (para. 23.12) is very good, however perhaps information about the availability of sex change treatments could also be included.
>
> The separate section on access to health and welfare services is provided making a connection to relevant issues of HIV/AIDS and sex work.
> …
> Other relevant information; practicalities of 'discretion'
> Further information could be included on the regulation of sexual and gender norms in general, for example a cross-reference to the section on women, domestic violence and 'honour' crimes.
>
> Some more concrete information about the ability to live a 'discreet' life as an LGBT person could be given, although the comprehensive section on societal attitudes is a very good start, especially the paragraph on lesbians (para. 23.11).'

https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

[5] ibid, pages 41 to 42.

3. The 2014 review of the Bangladesh was one of the most detailed of all country reviews in the report. The following overall assessment was made:[6]

> 'The report is presented as a list of extracts and could be better structured for better readability and flow.
>
> The report refers to violence against hijras, but could include more information about their rights (including property; voting), as well as (availability and legality of sex change operations).'

b. *Decision-making statistics (2015-2018):*

4. In 2018, a total of 148 out of a total of 1,297 asylum claims (11 %) were lodged where sexual orientation formed part of the basis of the claim, making Bangladesh the 5th highest ranked country for highest proportion of SO protection claims lodged in 2018.[7]

5. Bangladesh is ranked second highest in the list of the number of SO protection claims lodged in 2018.[8]

6. In 2015, 149 SO applications were lodged. In 2016, 299 applications and in 2017, 305 applications.[9]

7. Out of the 255 initial decisions made by the Home Office, 32 were granted some form of leave to remain.[10] 223 applications were refused. This figure reflects a clear ability to grant based on COI as individual risk factors would result in a much lower grant rate. It is clear a large number were refused primarily on an adverse credibility basis.

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[6] ibid, page 26.

[7] UK Home Office, 'Immigration statistics, year ending June 2019 second edition - Table 1: Top 5 nationalities with the highest proportion of asylum applications where sexual orientation formed part of the basis for the claim in 2018:, last updated 22 August 2019 (url), last accessed 28 January 2020.

[8] Ibid. '5: Data tables: Asylum claims based on sexual orientation Dec 2018', last accessed 26 January 2020.

[9] ibid.

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. In 2015, 90 initial decision were made (30 granted, 60 dismissed). In 2016, 209 initial decisions with 38 granted, 171 refused and in 2017 269 initial decisions with 23 grants of leave to remain and 246 refusals. In 2016, 8 decisions were withdrawn and 9 in 2017 and 8 in 2018 (reviewer has assumed the decision was withdrawn due to the Home Office deciding the decision is unsustainable and needs to be reviewed, or other procedural error).

8. The high level of positive COI SOGIE risk assessment is reflected by the figures for 2018 where 220 appeals were determined, with 76 appeals allowed (138 dismissed).[11]

B. CASE LAW:

Country Guidance and reported case law:

9. There is no Country Guidance cases on Bangladesh with respect to SOGIE.

Recent unreported case-law:

10. The most unreported Upper Tribunal determination is **MSA v Secretary of State for the Home Department (PA/07096/2017)** (heard 22 November 2018, promulgated, 8 February 2019, publication 11 March 2019) (Lord Matthews and Judge Jackson). At paragraph 28 the following submission was made by Counsel for the appellant, drawing from the September 2017 CPIN [28 to 29]:

> '[28] Mr Reza went on to submit that LGBT people were more likely to be charged with other offences, and not necessarily under 377 of the Penal Code. In this regard he quoted from paragraphs 4.6.1, 4.6.3, 5.1.2 and 5.1.3 of the September 2017 report.
>
> [29] This referred again to the use of Article 86 of the Dhaka Metropolitan Police Ordinance regarding the penalty for being found under suspicious circumstances between sunset and sunrise. It referred again to the Global Human Rights Development report in 2015 of the use of Sections 54 and 55 of the Code of Criminal Procedure, along with Section 377 of the Penal Code. At 5.1.2 (which is in similar terms to paragraph 6.2.2 of the latest Country Policy and Information Note from November 2017) it was noted that according to views adopted by the UN Human Rights Committee in 2013:
>
> "Although the law that criminalises homosexual relationships is not systematically applied it reinforces a general climate of homophobia and impunity for those who persecute LGBT individuals. Moreover, the law is applied in an unofficial manner without recorded prosecutions by state and non-state agents. According to a U.S. State Department 2016 Report, lesbian, gay, bisexual, transgender and

[11] The statistics show a rise in allowed appeals from 6 allowed out of 29 (2015), 39 out of 103 (2016), 66 out of 216 (2017) and 76 out of 220 (2018).

> intersex (LGBTI) groups reported that police used the law as a pretext to bully LGBTI individuals, including those considered effeminate regardless of their sexual orientation, as well as to limit registration of LGBTI organisations. Some groups also reported harassment under a suspicious behaviour provision of the police code. During a Home Office Fact-Finding Mission ("FFM") to Bangladesh in May 2017, two sources noted that people were unlikely to be charged under Section 377 but that other laws, such as drug laws, were used against LGBT people."'

11. This goes to the point raised in the 2014 IAGCI with respect to 'other charges'[60] **MSA** (emphasis added):

> 'The report of the FFM refers to Section 377 of the Penal Code. It also refers to the recent arrest of 27 or 28 men after a raid on a private gathering of gay men in Dhaka. The men were charged with narcotics offences. The Boys of Bangladesh referred to the arrests of four people prior to a Gay Pride rally but they were later released. Two sources noted that men who had sex with men were tolerated if they married and bore children. They were seen as more acceptable than men and women who committed adultery. Sources noted that the LGBT community was closed and private. There was no Gay Pride but there was online activism, particularly in the last five to six years, and there were LGBT groups, mostly based in Dhaka, such as Bandhu. Several sources agreed that gay rights activists and bloggers were "more at risk" than "ordinary" LGBT people. Members of the press judged that Sylhet was riskier than Dhaka. **BLAST noted that there were instances of known LGBT activists being murdered in their own homes by extremists, such as Xulhaz Mannan. His murder was thought to be atypical because he was a prominent activist. However, Boys of Bangladesh claimed that within the last year more LGBT people had left Bangladesh because of the attack against gay activists in 2016. It was difficult to know if LGBT people were being treated worse than anyone else because everyone has a rough time with the police.** The rise in social media and an unfriendly media had led to an increase in hatred against LGBT people, according to the Boys of Bangladesh. There was also discrimination against LGBT people, such as in healthcare, which was worse in urban areas. It was claimed that it was a common experience for families to suggest psychiatric treatment to those who came out. Several sources suggested that LGBT people would not feel they could approach the police for protection. There might be some exceptions to this according to BOB such as someone from an influential family.'

12. Having concluded the position in Dhaka does not provide a viable place of internal relocation (risk [105]) the Upper Tribunal draw the following from the 2017 CPIN [110] (**emphasis added**):

> 'In addition to the above, we find the greatest support for **our conclusions from the evidence submitted by the respondent himself contained in the latest Country Policy Information Note, which on a plain reading, concludes to the lower standard applicable in asylum claims, that there is a real risk of persecution. In paragraph 3.1.5, as already quoted above, it states "In general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm.**" Although it goes on to say that the nature and degree of treatment may vary according to geography and socio-economic status, with gay-rights activists and bloggers potentially at greater risk due to their profile and that each case must be considered on the facts and merits, there is nothing in the evidence before us to detract from the general position of risk. There is for example no indication, save as recorded above the limited evidence that the position in Syhlet is worse than in Dhaka, of any particular difference based on geography, nor that there would not for example be any real risk in Dhaka. There was limited evidence before us that the position may be better for those who come from a wealthy and/or into influential family, but otherwise nothing to detract from the general position.'

13. In a determination promulgated on 18 March 2019 in the (unreported) determination of **MSR v Secretary of State for the Home Department (PA/1419/2016)** Deputy Upper Tribunal Judge Juss had the following submission made to him by Counsel for the appellant, leading to remittal solely on the basis of credibility assessment of sexual identity, establishing a real risk of persecution[12][18]:

> '[i]f one looks at the CIPU report of November 2017, under the heading of "assessment of risk" this makes it clear at paragraph 3.1.1 (at pages 9 to 10) that if a person is gay, then there is a risk on return because this would lead to Section 377 prosecutions in Bangladesh.'

[12] This was the position conceded by the SSHD's Counsel at the remitted hearing in August 2019 (determination allowed protection claim heard 1 August 2019, promulgated 30 October 2019 [39]: 'I have taken note of the fact that the respondent acknowledges that if it is accepted the appellant's sexual identity as a gay Bangladeshi man is established, that he will face a real risk of persecutory ill-treatment in Bangladesh on account of that fact.'

Lesbians – lack of risk:

14. However, Upper Tribunal Judge Black in 2019 in **AN v. Secretary of State for the Home Department (AA/11081/2018)** (heard 18 June 2019, promulgated 27 June 2019, published 23 August 2019) upheld the negative determination of the First-tier Tribunal with respect to an appellant who was accepted by the Home Office to be a lesbian [28] (emphasis added):

> 'In summary, the FTTJ's finding at [17] that the expert report "did not assist in persuading [her] that the objective evidence was incorrect and that a lesbian living in Bangladesh would be at risk of persecution" is sustainable on the evidence before her: she preferred the submission for the respondent that the "lack of criminalisation of the act of female-female sexual relations means that there is no risk to the appellant of persecution from any state actor upon her return as a result of her sexual orientation". Furthermore, the background material makes it clear that there is sufficiency of protection as regards the activities of non-state actors.'

15. The Senior Presenting Officer submitted in line with an interpretation of the November 2017 SOGI CPIN, lesbians would face discrimination and not persecution on return to Bangladesh:

> '[The Senior Presenting Officer] took the appellant's point about paragraph 4.2.1 of the CPIN regarding unnatural offences but also referred to paragraphs 4.6.3 and 5.1.1. He noted the lack of enforcement of Section 377 by the authorities. In summary he submitted that the findings of the FTTJ were open to her. The respondent had accepted the appellant would be subjected to discrimination (paragraph 61 of the reasons for refusal letter referred) but this was not sufficient to amount to persecution. In effect, the FTTJ did not reach the second stage of the HJ (Iran) test. There had been no need for the FTTJ to consider the matter further having found that lesbians were not at risk.'

16. The Upper Tribunal's approach noted sex between men were criminalised, but [26]:

> '[D]oes not relate specifically to lesbians albeit they are included in the general term "LGBT". Given that sexual acts between gay men are criminalised, this general opinion is insufficient to demonstrate, even on the lower standard of proof applicable here, that lesbians are subjected to persecution.'

17. The Upper Tribunal additionally relied on the 2017 Fact-finding mission report to show state protection would be available to the appellant, but failed to consider the objective well-founded basis for the appellant being 'unwilling to avail herself of protection' and succeed in a protection claim [17] (emphasis added):

> 'This Fact-Finding Mission report refers to LGB people being unable to be open about their sexuality and there being differences in treatment between men and women. It refers to particular pressure on women to marry by about 30 and lesbians being forced into marriage. However, this appellant has no contact with her family and has not had contact since 2016. Thus the potential threat of being forced into marriage does not arise here. The report refers at paragraph 7.3.2 to the arrest of men which, again, is of no relevance here. Paragraph 7.9.1 refers to societal treatment and, particularly discrimination, an issue which is not in dispute but which does not assist the appellant. At paragraph 7.10.1 it is stated that "several sources suggested that LGBT people would not feel that they could approach the police for protection ? However, members of the press noted that the police are obliged to take on a case, irrespective of the sexuality of the reporter of the crime; and BLAST noted that there is 'very little research on these issues'". Again this does not assist the appellant. While it is her evidence that she had not sought police protection in the past and that she believed such protection would not be available to her, this report demonstrates that police protection is available to lesbians who seek it.'

18. This is clear and cogent evidence of persecution, as forced marriage amounts to persecution. It also highlights the steps required in order not to be identified as 'different' rendering discretion due to social norms would require 'proving straight' through opposite-sex marriage.

19. The error is looking at specific individual risk factors, rather than the objective evidence to group membership required by HJ (Iran) and the second limb of Lord Rodger's guidance [82] [emphasis added]:

> '[T]he 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.'

20. At paragraph 19, the Upper Tribunal dismissed any reliance on the January 2018 CPIN 'Bangladesh: Women fearing gender-based violence', (version 2.0), as [19]:

> '[L]esbians are not identified at paragraph 4.3 as being a disadvantaged group of women in Bangladesh. This CPIN has no bearing on the assessment of risk on return.'

21. The Upper Tribunal do not engage with the 'double bind' connecting gender and sexual identity and this is a troubling approach noting the clear nexus between the two identities.

22. The Court of Appeal in **UB (Sri Lanka) v. Secretary of State for the Home Department [2017] EWCA Civ. 85** (Irwin LJ) (22 February 2017) has made clear there is a public law duty of a Presenting Officer to disclose to a Tribunal any published country material relevant to the fact-finding assessment [21] to [22]:

> '21. I deprecate any suggestion that this obligation of service is displaced or diminished by the availability of the material online. [Counsel] for the Secretary of State did not in fact mount this argument, although it seems likely from exchanges before the hearing that he was pressed to do so. He was right to decline such an argument. Apart from the clear obligation in law derived from authority, many appellants in immigration and asylum cases are unrepresented. In a number of cases where there is legal representation, the quality of representation is less than optimal.
>
> 22. The obligation is clear but must not be taken beyond the proper bounds. There is no obligation on the Secretary of State to serve policy or guidance which is not in truth relevant to the issues in hand, and complaints as to alleged failures of disclosure of material which is truly peripheral or irrelevant should readily be rejected.'

23. The Senior Presenting Officer did not fail in this duty in **AN.** It is the approach to the interpretation of the SOGI CPIN on Bangladesh as evidencing lack of persecution to 'open lesbians' on return the analysis in this report will seek to address.

Gender Identity or Expression/Intersex:

24. There are no unreported protection cases on Gender Identity or Expression, or Intersex for Bangladesh recorded in the Tribunal decisions database.

C. HOME OFFICE COI:

Country Policy and Information Note (November 2017):

25. The current published policy is the *Country Policy and Information Note: Bangladesh: Sexual orientation and gender identity* (version 3.0) (November 2017) [36 pages].[13]

26. Paragraph 3.1.1 (at pages 9 to 10) (cited to the Upper Tribunal in **MSR** in March 2019) states:

> '3. Policy summary
>
> 3.1.1 Male same-sex sexual acts are criminalised in Bangladesh under Section 377 of the Penal Code and punishable by life imprisonment. However there have only ever been two arrests under the provision and no convictions. Sex between women is not criminalised and transgender persons (hijras) are legally recognised. There are, however, reports that Section 377, together with other legal instruments, have sometimes been used by the police to arbitrarily arrest, harass and intimidate LGBT persons. There have also been reports police use physical and sexual violence against LGBT persons.'

2016 Murder of Two Activists:

27. The November 2017 CPIN at paragraph 6.4.3 (page 19) (footnotes within text omitted) (emphasis added):[14]

> 'Reuters reported on 18 May 2016 that 'Home Minister Asaduzzaman Khan said no one involved in the killings [of Xulhaz and Mahbub] would be spared...' But the Minister also urged people to respect religious sensitivities, telling reporters '"I request everyone to express views moderately. We have learned that Xulhaz was an editor of an LGBT magazine and used to work to protect the rights of gay people. It is not in line with our society"'. According to Western officials consulted during the Home Office FFM to Bangladesh in May 2017, the murder of Xulhaz and Mahbub had not yet been solved and no arrests had been made49. The New York Times reported in June 2017 that one

[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf, last accessed 3 February 2020.

[14] There is a cross-reference to the 'targeting my extremist' groups at section 2.2.7 and to the murder at section 7.1.5 of the July2017 CPIN on Bangladesh: Journalists, publishers and internet bloggers: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628644/CPIN_Bangladesh_Journalists_publishers_bloggers_v1_0.pdf , accessed 3 February 2020.

arrest had been made but there was no further progress in the case a year after the murders (see Violence perpetrated by extremist groups).

28. In October 2017, Amnesty International in a press-release highlighted the lack of prosecution of any suspects 18 months after the killings.[15]

29. Speaking to Attitude magazine in July 2018, the UK-based Bangladeshi gay activist Mazhural Islam highlighted the continued lack of prosecutions following his friends' brutal murder:[16]

> 'That's why the fact no one has been charged with Xulhaz and Mahbub's murders leaves such a bitter taste in Mazharul's mouth.
>
> There are so many holes, he claims, in the police investigation – a handful of arrests were made, but "nothing has happened" since. "They failed to submit a report 23 times. That's why I'm raising my voice.
>
> "They're human beings and they deserve justice."'

Gay Martyrs:

30. At paragraph 6.4.4, the CPIN records the following background country material (page 19) (emphasis added):

> 'DFAT noted in July 2016 'Many gay men – including LGBTI activists and non-activists - have reportedly received threats of violence and have been unwilling or unable to approach police for support.' During the Home Office FFM to Bangladesh in May 2017, several sources suggested that LGBT people would not feel that they could approach the police for protection. Boys of Bangladesh said there may be some exceptions to this, for instance someone from an influential family. However, members of the press noted that the police were obliged to take on a case, irrespective of the sexuality of the reporter of the

[15] Amnesty International, 'Bangladesh: Xulhaz Mannan LGBTI activists killed', October 2017: https://www.amnesty.org.uk/files/201710/Online%20casesheets%20TIER1%20Xulhaz%20Mannan%20WEB.pdf?xnIrexzoYTRAEpTeDItl3Q5HX5zZOMXK , last accessed 3 February 2020.

[16] Attitude magazine, 'Attitude Pride Awards: the LGBT activist fighting for justice after the brutal murder of his friends', 26 July 2018: https://www.attitude.co.uk/article/attitude-pride-awards-the-lgbt-activist-fighting-for-justice-after-the-brutal-murder-of-his-friends/18412/ , last accessed 3 February 2020.

> crime; and the Bangladesh Legal Aid and Services Trust (BLAST) noted that there was "very little research on these issues".'

31. The reliability of DFATs source material is covered in the Myanmar (Burma) section of this report.

Lesbians and Bisexual women:

32. The November 2017 CPIN records the following single paragraph on COI on Lesbians under 'Legal Context' [4.3.1] (page 11):

> 'In 2017 ILGA indicated that female-female sexual activity was not a criminal offence under existing penal law4. The Human Dignity Trust, in a May 2016 report, did not include Bangladesh on a list of countries where 'lesbians and bisexual women are criminalised'

33. A lack of criminalisation does not equate to lack of risk for women.

34. In January 2017, prior to the publication of the CPIN, the UK-based DIVA magazine published an article, 'Lesbians in Bangladesh'.[17] The report highlighted the prevalence of forced marriages and lesbian suicides:

> 'Many [Bangladeshi parents] think that their daughter has "turned" lesbian after having read about it on the internet, [or] is trying to be Westernised or modern in a detrimental way. Parents may send them to a doctor for a check-up. They can force them into marriage, falsely hoping that it'll solve things. Lesbian suicides arising out of homophobia are common in Bangladesh, but they are under-reported, or some other pretext is cited as the trigger".'

35. Forced marriage amounting to persecution is addressed in the Afghanistan and Pakistan CPIN review.

36. The research cited in the CPIN at section 8.3 and 'Societal Violence and Discrimination Against Lesbian and Bisexual Women', uses sources from 2012 (section 8.3.1 and 8.3.2) and cites a 2016 book referring to a 2013 source (section 8.3). Connection the section on 'Societal Norms' at section 7.2 for 'marriage' and 'Family treatment' at section 8.8 with the January 2017 Diva article make clear, the use of the CPIN to establish a lack of risk for lesbians and bisexual women is not an accurate position.

[17] Diva magazine, Abia Khan, 'Lesbians in Bangladesh', 17 January 2017: https://www.pressreader.com/uk/diva-uk/20170117/282381219371688, last accessed 3 February 2020.

Gender identity or expression:

37. In the November 2017 CPIN there is only one paragraph of non-hijra (trans women) [5.4.1]:

> 'Information and legislation on transgender persons outside of the hijra community could not be found among sources consulted by CPIT within the time constraints of producing this note.'

38. The same January 2017 Diva article cited above refers to Arshi, a GenderQueer (born female, identifies as genderqueer and dates women) highlights the use of aversion (conversion) therapy for those non-conforming to gender stereotypes:

> 'When Arshi clearly came out to her mother, she said that Arshi was going through psychosis and needed behaviour therapy to convert her to a feminine heterosexual girl. In this so-called therapy, Arshi was coerced to chant that she was not homosexual. She says: "Mother told me to observe men every day and try to find something to like about them, we could build on that and start to find more and more things to like about them."'

39. The lack of analysis of non-criminalisation harm to lesbians and those who express their gender identity or expression outside a cis-gendered stereotype is of clear concern, especially where the material cited in this review was available on-line prior to the publication of the CPIN.

40. There is no COI on intersex.

D. SUMMARY OF REVIEW:

POOR

41. Whilst the CPIN and case -law accepts there is a well-founded protection claim based on the COI for SO protection claims for men, supported by the high rate of initial grants and allowed appeals, the COI is being interpreted as providing no basis for the same finding with respect to the SO protection claims of women (case of **AN**).

42. The case of **AN** shows why there needs to be a presumed lack of COI, within the cultural/religious and social context of a country should made the assumption risk to man on the basis of SO would automatically apply to women and Gender Identity and Expression cases. There are no country examples known to the author where persecution based on 'difference' targeted to men, would not be targeted to women on the basis of any acceptance of 'sameness/lack of difference' to them.

43. CPIN needs to be revised to address the above lack of COI on lesbian/bisexual women and Gender Identity or Expression and Intersex.

10. THE GAMBIA

Capital city: Banjul
Population:[1] 2,416,668
Predominant religion: Islam
FCO Travel Advice:[2]

> ***'LGBT***
>
> *There is a zero tolerance towards lesbian, gay, bisexual and transgender people in The Gambia. The Gambian criminal code states that any person who has or attempts to have 'carnal knowledge' of any person 'against the order of nature' is guilty of a crime and could face 14 years' imprisonment. The criminal code was amended in October 2014 to include Section (144A) entitled Aggravated Homosexuality which sets out 7 specific categories, including being "a serial offender", where a person is "liable on conviction to imprisonment for life". …*
> *Gambian law criminalises the act of men dressing as women with a 5-year jail.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. The 2008 did not address COI with respect to the Gambia.[3] The 2014 review did examine the Gambia. [4]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: The Gambia: Laws and Customs, last updated 16 January 2020 https://www.gov.uk/foreign-travel-advice/the-gambia/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 35 to 38: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. Leigh makes the overall assessment of the November 2013 Gambia COI Report as 'quite average, an considering the proportion of asylum seekers currently claiming asylum based on sexual orientation in the UK from the Gambia, researchers should pay particular important [sic] that information from this section be complete and accurate.'[5]

3. One of the main areas of concern was the inaccurate reference of application of the Criminal Code to women.[6]

b. *Decision-making statistics (2015-2018):*

4. The 2015 to 2018 figures for SO protection claims include the Gambia.[7]

5. In 2018, 8 applications were lodged, with 37 in 2015, 29 in 2016 and 10 in 2017.

6. There were 40 initial decisions made in 2015 with 7 granted some form of leave to remain and 33 refused and leave. No figures for 2016 to 2018 have been published.[8]

7. 12 appeals were determined in in 2018 with five appeals allowed and seven dismissed. For 2015 14 appeals were determined with no precise outcome figures published. In 2016, 28 appeals were determined with 8 allowed and 19 dismissed and in 2017, 28 appeals were determined with 12 allowed 16 dismissed.[9]

8. The fact SO appeals were allowed implies the COI was interpreted to provide a positive answer to Lord Rodger's second limb of paragraph 82 in HJ (Iran) and well-founded fear of persecution for those living openly.

[5] ibid, page 35.
[6] Leigh (2014), page 36.
[7] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020. The Gambia ranked 24th for the number of SO applications lodged in 2018.
[8] ibid. The figures for claims were 63 (2015), 76 (2016), 77 (2017) and 51 (2018).
[9] The statistics show a marked rise in allowed appeals from 7 (2015), 8 (2016), 18 (2017) and 33 (2018).

B. CASE LAW:

Country Guidance and reported cases:

9. There is no Country Guidance with respect to SOGIE protection claims.

10. There are no reported determinations of the Upper Tribunal with respect to Gambian SOGIE protection claims.

Unreported Tribunal cases:

11. The most recent unreported Upper Tribunal case is **HC v. Secretary of State for the Home Department (unreported) (PA/06693/2017)** (hearing date 23 November 2018, promulgated on 3 December 2018, published 9 January 2019) (Upper Tribunal Judge Smith)[19] and [22] (emphasis added):

> '[19] '[The Senior Presenting Officer] recognised that Mr Ceesay's report touches on the religious background to societal attitudes in Gambia and noted that both the Christian church and the Islamic religion in the country is opposed to homosexuality. He also accepted that the Home Office guidance did indicate that, as at January 2016, an openly gay man returning to Gambia would be likely to be at risk on return and although that guidance pre-dated the change in government, in spite of the positive indications, there had, according to the evidence, been little change particularly in societal attitudes. Given the laws criminalising homosexuality, he also recognised that an openly gay man could not seek the protection of the authorities in the event of being subjected to violence by non-State agents.
>
> …
>
> [22] Taken as a whole, when the expert report of Dr Ceesay is read with the other background evidence to which I was referred, the evidence does not suggest that there has been such a change in the position on the ground in Gambia or attitudes in that country that the previous guidance published by the Home Office (and not withdrawn since the change in government) should be departed from.'

12. This reflects the continued number of allowed appeals recorded in the June 2019 published statistics (five out of twelve appeals allowed in 2018), evidencing continued successful appeals, notwithstanding the change in government in late 2016.

C. HOME OFFICE COI:

Country Policy Information Note (August 2019):

13. The current published policy is the *Country Policy and Information Note: The Gambia: Sexual orientation and gender identity or expression* (version 2.0) (August 2019) [22 pages].[10]

14. At paragraph 2.4.12, the respondent states her policy position (emphasis added):

> 'In general, LGBTI persons are likely to face discrimination from state and societal actors which, by its nature and repetition, is likely to amount to persecution. Each case, however, needs to be considered on its facts, with the onus on the person to demonstrate that they face such a risk.'

15. Importantly, section 3.1 with respect to the Gambian Criminal Code includes the equal application of the criminal law to women under Article 147 (2) as highlighted by Leigh in her 2014 review.

16. The August 2019 CPIN has eight sections that are sourced from recognised authoritative sources (including the 2018 US DOS (published March 2019), the UN Human Rights Committee and Freedom House). Sources are mostly cited from 2017 to 2019 , making the source material up-to-date.

17. The review cannot recommend enough the section on Societal Norms and Public Opinion at section 6. The COI source at section 6.1 highlights the best example in all the CPINs reviewed of what the decision maker should be looking for when identifying the reality of SOGIE life in a country where there is a well-founded fear of persecution and 'locating the martyr' [6.1.4] (pages 16 to 17) (**emphasis added**):

> The [15 March 2019 Mail&Guardian Africa] article goes onto observe that:
>
> > 'Unlike other countries such as Uganda and Nigeria, where LGBT communities exist and advocate for themselves despite widespread persecution, there is no such civil society in Gambia. It is too dangerous.
> >
> > 'This means someone very brave will have to come forward if the commission is to hear evidence of Jammeh's LGBT abuses and record them into public memory.

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825234/Gambia_-_SOGIE_-_CPIN_-_v2.0__August_2019_.pdf , last accessed 3 February 2020.

> '**If word got out that an activist or LGBT Gambian planned to raise such issues before the commission, Jobarteh said he would be concerned for their safety.**
>
> **'Musu Bakoto Sawo, the commission's deputy executive secretary, acknowledges "there is a high probability of victims not coming out."**
>
> **'The result is that LGBT Gambians may be the one group whose experience with persecution goes unrecorded**. Put another way, they may be the one group whose rights do not improve in the post-Jammeh era. '"For a long time the situation will remain as it is. Gambians generally are not going to take LGBT issues easily," Jobarteh said.'

D. SUMMARY OF REVIEW:

EXCELLENT

18. The CPIN, published in August 2019 is being applied to initial decisions and asylum appeals in a manner consistent with addressing SOGIE protection needs by providing up-to-date and accurate COI. The inclusion of the '**Societal Norms and Public Opinion'** section is an example of Best Practice: - drawing on the recognition within the COI of few 'martyrs' in countries where there is a well-founded fear of persecution.

11. GHANA

Capital city: Accra
Population:[1] 31,072,940
Predominant religion: Christianity (Pentecostal)
FCO Travel Advice:[2]

> *Ghana is a conservative and deeply religious country. Although modern and progressive attitudes also prevail, you should show respect for traditional values and morals.*
>
> *Dress modestly in public.…*
>
> *Anti LGBT rhetoric/hate speech by religious leaders and government officials and a local media that tends to sensationalise homosexuality, can incite homophobia against the LGBT community. Although there's a small gay community, there is no 'scene' and most Ghanaians don't accept such relationships exist.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

19. Both the 2008 and 2014 reviews did not address COI with respect to Ghana.

20. The Home Office COI for Ghana is the February 2016 Country Information and Guidance: Ghana: Sexual orientation and gender identity [33 pages].[3]

[1]Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Ghana: Laws and Customs, last updated 20 December 2019 https://www.gov.uk/foreign-travel-advice/ghana/local-laws-and-customs , accessed 25 January 2020.
[3]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565769/CIG-Ghana-SOGI-v1-February-2016.pdf, last accessed 3 February 2020.

b. Decision-making statistics (2015-2018):

21. The 2015 to 2018 figures for SO protection claims include Ghana.[4] Ghana is ranked 12th in the list for applications lodged in 2018.

22. In 2018, eight SO-related applications were lodged, compared to 37 in 2015, 29 in 2016 and 10 in 2017.

23. The only outcomes at initial decision are published for 2015 with 40 initial decisions leading to 7 applicants being granted some form of leave to remain and 33 refused.[5]

24. Out of the 12 appeals determined in 2018, five were allowed and seven dismissed. For 2015 14 appeals determined (no figures), in 2016 28 appeals determined (8 allowed 19 dismissed) in 2017 28 appeals determined with 12 allowed, 16 dismissed).

B. CASE LAW:

Country Guidance and reported cases:

25. There are no Country Guidance cases listed on the Upper Tribunal website.

Unreported cases:

26. There is a total of 6 unreported cases when the search item 'Ghana lesbian' or 'Ghana gay' is entered. The most recent unreported determination of the Upper Tribunal is **EA (Ghana) v Secretary of State for the Home Department** (heard on 5 April and 12 August 2019, promulgated 22 August 2019, published on 18 October 2019) (Deputy Upper Tribunal Judge Monson) where the Judge rejected the litigation position of the Home Office reply filed prior to the 5 April 2019 error of law hearing [17]:

[4]UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[5] ibid.

> 'I do not consider that it is obvious from the background material that the second question should be answered in favour of the Department (as contended in the Rule 24 Response) nor is it obvious that it should be answered in favour of the appellant (as contended by [Counsel for the appellant]).'

27. Within the determination, there is a complete absence of reference to the 2016 CIG (see below).

28. The April 2019 Upper Tribunal allowed the appeal [33] and [34], noting the most recent evidence relied on by it was the FCO travel advice (hence the use of this advice at the start of each country report in this report). The determination also provides a case example where the decision-maker used country background material pre-dating the 2016 policy document thereby showing a lack of knowledge about the existence of published policy guidance (emphasis added):

> '32. Neither in Dr Fumanti's report or elsewhere is there a quantitative analysis of the number of reported incidents of violence against gay people since February 2016 (the date of publication of the CPIN) as against earlier years, such as to demonstrate clearly that violence against gay people is getting steadily worse to the point such that it can be said that being openly gay anywhere in Ghana gives rise to a real risk of persecutory harm. But as was pointed out by [the appellant's Counsel] in her closing submissions, [the Senior Presenting Officer] did not challenge Dr Fumanti's credentials or seek to persuade me that her opinion was based on flawed evidence, but he simply relied on the RFRL. Despite the RFRL being issued on 21 August 2018, the background evidence relied upon in the RFRL all pre-dates the CPIN of February 2016.
>
> 33. Recent FCO advice fortifies the appellant's case. In the FCO advice of December 2017, travellers to Ghana are warned that there is "a zero tolerance towards lesbian, gay, bisexual and transgender people in Ghana" and that "Anti LGBT rhetoric/hate speech by religious leaders and government officials and a local media that tends to sensationalise homosexuality can incite homophobia against the LGBT community". The FCO also reiterates its earlier advice of 2015 that there is no LGBT scene in Ghana.
>
> 34. Accordingly, having considered the evidence in the round and the arguments presented by both parties, I find that the appellant has made out his case to the lower standard of proof. There are substantial grounds for believing that if he lived openly as a gay or bisexual man

in his former home area of Accra, or anywhere else in Ghana, he would face a real risk of persecution.

35. The appellant would not live openly as a gay or bisexual man in Ghana, and a material reason for him doing so would be a well-founded fear of persecution. Accordingly, the appellant qualifies for recognition as a refugee.'

29. In **SL v Secretary of State for the Home Department (PA/13493/2018)** (case) (hearing date 9 May 2019, promulgated 22 May 2019 and published 23 July 2019) Deputy Upper Tribunal Judge Safer recorded the following finding of the earlier appeal where on appeal to the Upper Tribunal it did not find any error of law in rejecting the appellant's claimed sexual identity as a gay man [3]:

'[47] I am satisfied on the available objective evidence that gay people who lived openly would be liable to persecution in the appellants country of nationality….'

30. There are no relevant cases when 'Ghana trans', where credibility had been accepted and the only issue was with respect to country evidence and risk on return.

C. HOME OFFICE COI:

Country Information Guidance (February 2016):

31. The current published policy is the *Country Information and Guidance: Ghana: Sexual orientation and gender identity* (version 1.0) (February 2016).

32. The policy position is stated at paragraphs 3.1.1 to 3.1.3 (page 8) (emphasis added):

'3.1.1 The law about same-sex activity is unclear. Although LGBT persons face intolerance and discrimination, in general the level of intolerance and discrimination is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment.

3.1.2 However an asylum claim from a LGBT person may succeed if it can be demonstrated that they face an accumulation of measures which are

sufficiently serious by their nature and repetition that they constitute persecution. Each case needs to be decided on its merits.

3.1.3 Protection will not be available if a person is threatened by state actors. However, if a person is at risk from non-state actors, or rogue state actors, the onus is on the person to demonstrate that they will not be able to obtain protection.'

D. SUMMARY OF REVIEW:

URGENT ACTION

33. A lot of the source material is outdated, even when the CIG is published in 2016. This includes the reference to the 2011 Freedom House report on no registered LGBT organisations [sections 5.5.1 and 7.1.1] and the 2012 UN Human Rights Council report in 2012 [section 5.5.7]

34. As is clear from the approach of the April 2019 Upper Tribunal in **EA (Ghana)**, the document is not used by Home Office even when drafting the negative protection decision [sources pre-date the CPIN of February 2016 [33]], or is relied on by the Senior Presenting Officer at the hearing [simply relied on the RFL].

35. The May 2019 Upper Tribunal in **SL** makes clear, the objective evidence is accepted to show, 'gay people who lived openly would be liable to persecution' [47].

36. The 2016 CIG is out-dated and does not reflect the real risk on return for SOGIE applicants from Ghana.

37. In order for the protection claims to have been allowed (as evidenced in the published statistics), the COI would have been determined to provide a source of cogent evidence of real risk of persecution to SOGIE appellants who lived openly in Ghana.

38. As this source material is not in the public domain, the reviewer urgently recommends the updating of the 2016 CIG to include the COI used in order to assist decision makers (both administrative and judicial) and those representing refugees the basis for the Home Office's decision-making.

12. INDIA

Capital city: New Delhi
Population:[1] 1,380,004,385
Predominant religion:
FCO Travel Advice:[2]

> *'LGBT*
>
> *In September 2018, the Indian Supreme Court decriminalised homosexuality. Although homosexuality is no longer prohibited by law, same-sex marriage is still illegal. Indian society remains conservative and public attitudes towards LGBT people can be less tolerant than in the UK, this is especially the case outside of big cities. LGBT travellers should be mindful of local attitudes and be aware that public displays of affection may attract unwanted attention.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address COI with respect to India.

2. The current Home Office COI report is the October 2018 CPIN India SOGIE report.[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2]Foreign travel advice: India: Laws and Customs, last updated 19 December 2019 https://www.gov.uk/foreign-travel-advice/india/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 54 to 56.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 40 to 43: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] UK Home Office, 'Country Policy and Information Note: India: Sexual orientation and gender identity and expression (version 3.0)', 2 October 2018:

3. De Jong (2008) observed with respect to the LGBT section in the July 20008 COI Report in India:[6]

> 'The report complete and balanced overall and generally based on recent sources. It is divided in subheadings. Some aspects could do with further elaboration and/or cross-referencing, such as situation for women and medical information.'

4. Leigh (2014) made clear having reviewed the LGBTI section of the March 2012 COI Report in India:[7]

> 'Overall this is a fair report. Whilst the report provides useful information on the legal framework and information on the legal framework and information on implications on having a gender identity in India, more information could be included (for example on personal status laws, anti-discrimination laws, police violence, access to health – see analysis below) to provide a complete and balanced view of LGBTI situation in India.
>
> The structure for the COI is not followed. It is recommended that under each major heading (*Legal Rights, Treatment by and attitudes of state authorities, Social treatment and attitudes*), subheadings for each group be included. This would make for a more comprehensive structure, allowing for identifying more quickly the situation from different perspectives for each group. Where the information overlaps, cross-references to different sections can be made.'

b. Decision-making statistics (2015-2018):

5. The 2015 to 2018 figures for SO protection claims include India, ranked 13th in the list for applications lodged in 2018 with a total of 21 claims.[8]

6. The previous figures for 2015 to 2017 record 33 applications lodged in 2015, 59 in 2016 and 54 in 2017.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745075/India_-_SOGIE_-_CPIN_-_v3.0__October_2018_.pdf, last accessed 4 February 2020.

[6] *De Jong (2008)* (n 3), page 54.

[7] *Leigh (2014)* (n 4), page 40.

[8] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

7. The only figures published were for initial decision with a clear drop to 19 applications lodged in 2018, previously showing an increasing trend with 30 applications lodged in 2015, 49 in 2016 and 47 in 2017.[9] This would clearly correspondent to the legal framework changes following the negative Supreme Court judgment in **Kousar** in December 2013, reversed by the Indian Supreme Court on 6 September 2018 in **Johar**,[10] historically striking down section 377 of the Indian penal code (anti-sodomy provisions).

8. The recorded statics indicate a number of unsuccessful applicants did not appeal the negative decisions. The Tribunal determined 6 appeals in 2015, 8 in 2016 and 11 in 2017. There are no figures recorded for the number of appeals determined in 2018 and no figures for any of the years 2015 to 2018 with respect to outcomes. UK refugee law has been clear with respect to availability of internal relocation alternatives since the landmark Court of Appeal 1999 judgment in **Jain v. Secretary of State for the Home Department [2000] INLR 71** (Schiemann, Evans and Walker LJJ).

B. CASE LAW:

Country Guidance:

Gay men and Bisexual men:

9. For Gay and Bisexual men is **MD (same-sex orientated males: risk) India CG [2014] UKUT 65 (IAC)** (heard on 24 February 2012 and 10 October 2013, promulgated 12 February 2014, published on 14 February 2014) (Upper Tribunal Judges Eshun and O'Connor).

10. The **headnote** states:

    a. *Section 377 of the Indian Penal Code 1860 criminalises same-sex sexual activity. On 2 July 2009 the Delhi High Court declared section 377 IPC to be in violation of the Indian Constitution insofar as it criminalises consensual sexual acts between adults in private. However, in a judgment of 11 December 2013, the Supreme Court held that section 377 IPC does not suffer from the vice of unconstitutionality and found the declaration of the Delhi High Court to be legally unsustainable.*

[9] ibid.

[10] **Johar and ors v Union of India and ors (Writ Petition (Criminal) NO. 76 of 2016 (6 September 2018)**, https://www.scribd.com/document/387971783/Supreme-Court-Judgment-on-Section-377 , accessed 4 February 2020.

b. *Prosecutions for consensual sexual acts between males under section 377 IPC are, and have always been, extremely rare.*

c. *Some persons who are, or are perceived to be, same-sex oriented males suffer ill treatment, extortion, harassment and discrimination from the police and the general populace; however, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said in general to be a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.*

d. *Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.*

e. *It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.*

f. *India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities.*

Lesbians and Bisexual women:

11. For lesbians and bisexual women the CG case is **AR and NH (lesbians) India CG [2016] UKUT 66 (IAC)** (heard on 23 June 2015, promulgated 1 February 2016, published 23 February 2016) (Upper Tribunal Judges Gleeson and Southern).

12. The headnote provides the following approach:

(1) The guidance in MD (same-sex oriented males) India CG [2014] UKUT 65 (IAC) stands. The guidance at (a) – (f) in MD (India) applies equally to lesbians.

(2) A risk of persecution or serious harm for a lesbian woman in India, where it exists, arises from her family members, and the extent of such risk, and whether it extends beyond the home area, is a question of fact in each case.

(3) The risk of persecution or serious harm is higher for uneducated lower class lesbian women in rural areas, who remain under the control of their family members and may not be permitted to leave the home to continue meeting their lesbian partners.

(4) Where family members are hostile to a lesbian woman's sexuality, they may reject her completely and sometimes formally renounce her as a member of that family. In such a case,

whether relocation to a city is unduly harsh will be a question of fact, depending on the ability of such a lesbian woman to survive economically away from her family and social networks.

(5) If a lesbian woman's family wishes to pursue and harm her in the place of internal relocation, their ability to do so will depend on the reach of the family network, how persistent they are, and how influential. The evidence indicates that there is normally sufficient state protection for women whose families seek to harm them in their place of internal relocation.

(6) In general, where there is a risk of persecution or serious harm in a lesbian woman's home area, for educated, and therefore 'middle class' women, an internal relocation option is available. They are likely to be able to relocate to one of the major cities in India and are likely to be able to find employment and support themselves, albeit with difficulty, and to live together openly, should they choose to do so. In general, such relocation will not be unduly harsh.

13. The September 2018 Indian Supreme Court judgment in **Johar and ors** states the following with respect to the treatment of India's LGBT+ community:

Gender Identity or Expression:

14. Trans cases and clear opposition to the gender identity legislative changes from the trans community.

15. In **Secretary of State for the Home Department v. SN (AA/02811/2013)**[11] (Upper Tribunal Judge Taylor) (heard 12 December 2013, promulgated and published 21 January 2014) allowed the appeal of the Secretary of State against a positive determination of the First-tier Tribunal on refugee grounds for a trans man from India. The Upper Tribunal held return to India would not violate the Refugee Convention as there was a viable internal relocation alternative [41]:

> 'For him it would not be unduly harsh to relocate to a city in India where there are other transgender individuals. Revealing that he was born female would not cause him unreasonable difficulty because he continued to refer to himself as female for two to three years after his arrival in the UK in his dealings with the authorities here. While for Professor Whittal it would be unbearable to reveal his birth gender for the purposes of employment, for the Appellant it would not. He could return to a region of India such as Delhi or Uttar Pradesh, if he did not want to go back to his home area. He clearly does not fear acts of

[11] The reviewer has anonymised the name of the appellant.

violence by the population generally, and must have some kind of support network in order for him to have returned for numerous visits, either family or friends. I do not accept that there are no institutions which would be able to assist. Whilst it may well be that the numbers of people transitioning from female to male is small, nevertheless it is clear that there is a large measure of support for gays, lesbians, bisexuals and transsexuals more generally in India, particularly in the bigger cities. Some elements of the church would no doubt disapprove of the Appellant, but there will be others who are more supportive.'

16. When the appeal is reheard in the Upper Tribunal three years later in 2016 in **Secretary of State for the Home Department v SN (AA/02811/2013)** (heard on 20 July 2016, promulgated 29 July 2016, published 29 June 2017) Judge Hemmingway allows the appeal finding SN (the respondent) will be at risk on return in Hyderabad and it would be unduly harsh to internally relocate [18] to [22] (**emphasis added**):

'18. In looking at the safety issue, I remind myself of the background country material to which I have already made reference indicating that even the police, who might be expected to afford protection to transgender persons, have sometimes acted against them by threatening to arrest them in order to coerce them not to report incidents. A Human Rights Watch report refers to a transgender non-Governmental organisation which has indicated that in the State where it is based there have been, on average, 10 physical attacks every month against transgender persons. The report has also referred to indications from LGBTI groups that their members face widespread societal discrimination and violence though that is said to be so, especially, in rural areas. I do not take that to mean, however, that there is no such problem in urban areas. Professor Whittle, for the most part, gave evidence about the difficulties faced by transgender persons which were of a general nature, rather than the sorts of problems which specifically arise for transgender persons in India and, indeed, in his oral evidence he acknowledged during cross-examination that he had never been to India. That said, he provided written and oral evidence which I was not urged to disbelieve in submissions, to the effect that the various organisations named by the Secretary of State in the reasons for refusal letter as being able to assist transgender persons either failed to respond to his approaches or indicated that they did not have experience of assisting or supporting persons who are transitioning from female to male. I conclude in light of that, that any support which the claimant would be able to access away from his home area in India would be limited.

19. Turning to matters relating to identity documentation, the report of M Suresh makes reference to identification cards issued in India. It is noted that

individuals may register themselves as male, female or transgender but that a person who is born female and who is a trans-man would only be able to register himself as either being female or transgender but not male. Thus, it is said that this claimant "would not be able to legally identify himself as a man". It is suggested that his choice would be registering himself as a female in order to gain access to such as education, employment, insurance and banking services, or registering himself as a transgender person which, as I understand it, would also mean he would have access to such services but would be denying his male identity and would mean exposing himself to discrimination on the basis that persons such as, for example, employers and landlords would became aware of his transgender status.

20. There would, then, be a range of difficulties which might be faced by the claimant upon his taking advantage of an internal flight alternative. **He would, I conclude, feel obliged to cease living openly as a male because, even if what he would face would not amount to persecution, he would feel unsafe or would not wish to be discriminated against.** This would, I accept, be particularly difficult for him bearing in mind the progress he has made in recent months towards greater transition to male status. He has documents which identify him as a female and which he would be required to produce when engaging with officialdom and the production of those would enable him to access such as an employment and various services but it would involve him in denying what he now very strongly feels is his male identity and emotional difficulties would result from that. Alternatively, if he registered as a transgender person, he would risk inviting unwelcome attention. He would, I find, lack significant support from any agencies in India my having accepted Professor Whittle's evidence regarding the research he has conducted concerning those organisations. His evidence was to the effect that he did not know any friends in India who would now be able to help and support him and I accept what he says as to that.

21. **Putting all of that together I would conclude that even if it is not the case that the claimant would be persecuted solely as a result of his being a trans-man, requiring him to relocate in India would be unduly harsh**.'

C. HOME OFFICE COI:

Country Policy Information Note (October 2018):

17. The *Country Policy and Information Note: India: Sexual orientation and gender identity and expression* (version 3.0) (October 2018) [35 pages].

18. The only change form the previous CPIN is for the 2 October 2018 update to include sections with respect to the section 377 6 September 2018 Supreme Court judgment in **Johar**: (page 35):

> '**Changes from last version of this note**
>
> Country information and assessment updated to reflect the September 2018 Supreme Court of India judgment on Section 377 of the IPC.'

D. SUMMARY OF REVIEW:

NEED FOR INTERNAL REVIEW

19. CPIT is to be highly commended to amend the CPIN within less than a month from the 6 September 2016 judgment of the Indian Supreme Court. This should be a practice adopted to other COI reports, for example Kenya (see country review, May 2019 High Court judgment) and Sri Lanka (November 2016 judgment, cited with omission in October 2018 CPIN, see country review).

20. The main issue with this CPIN, is whilst the amendment within a month is highly commendable, the main thrust of the COI evidences state officials targeting SOGIE individuals prior to the judgment [see sections 4.4.3 (US DOS report 2015) and 4.4.4 to 4.4.8].

21. The 2014 Country Guidance case on men heard evidence up to 2012, and the 2016 CG case on lesbians, evidence considered up to 2014, the pre-September 2016 Supreme Court COI needs to be placed in context within decision-making in order for this post-CG evidence to provide "strong grounds supported by cogent evidence" to enable departing from the CG guidance (**SG (Iraq)** applied [47]-[48]).

22. Noting (bar the unusual facts in **SN** cited above), the CG cases are relied on by the CPIN to address internal relocation alternative - the core issue leading to refusing SOGIE protection claims from India where risk in the home area is established.

23. t is difficult for this reviewer to comprehend how the CPIN operates to address this issue post-CG case law?

24. The reviewer recommends a need consultation between CPIT, Policy and Legal Departments within the Home Office to address this observation, noting the COI cited in the CPIN in some instances post-dates the CG cases, but pre-dates the September 2018 Supreme Court judgment.

13. IRAN

Capital city: Tehran
Population:[1] 83,992,949
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Women should take extra care, particularly when travelling alone or with friends of the opposite sex. If you're a woman travelling in Iran you should respect local dress codes and customs and avoid isolated areas. See further advice for women travelling abroad.*
>
> *Unmarried partners and friends of the opposite sex travelling together should be discreet at all times in public. Iranian hotel managers could insist on seeing a marriage certificate before allowing any couple to share a double hotel room.*
>
> *Homosexual behaviour, adultery and sex outside of marriage are illegal under Iranian law and can carry the death penalty.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address the Home Office COI reports with respect to Iran.

2. The current Home Office COI report is the June 2019 CPIN: Iran: SOGIE.[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Iran: Laws and Customs, last updated 11 January 2020 https://www.gov.uk/foreign-travel-advice/iran/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 57 to 66.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 44 to 49: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] UK Home Office, 'Country Policy and Information Note: Iran: Sexual orientation and gender identity or expression (version 3.0), 21 June 2019:

3. In 2008, De Jong in a detailed overall assessment with respect to the April 2008 COI Bulletin on LGBT issues in Iran, provided the following observations [extract]:[6]

> 'The quality of this Bulletin is very poor, particularly considering that it is a specialised document and considering Iran has been indicated by the APCI u the project brief as [a] country from which a large number of LGBT person[s] apply for asylum/human rights protection. It is incomplete, unbalances and often inaccurate in its representation of the information available.
> …
> The report overall reads as an unstructured collection of extracts from (often outdated) sources: many of the sources are old (up to 10 years) and the information within and across the headings is poorly organised. Several extracts repeat information already provided in other sources.
>
> The Bulletin overall does not reflect an appropriate understanding of LGBT issues, or includes sufficient LGBT sources, and information relating to women is sparse.
>
> The Bulletin would require significant improvements, to meet the COI Service's stated purpose and standard of quality. Due to the Bulletin's overall weakness and the limited timeframe for the review, I cannot address all the issues: I have detailed only a sample.'

4. Leigh's 2014 review of the LGBTI section of the September 2013 COI report in India, highlighted 'improvement since the 2008 review':[7]

> 'The report is on the whole ok, with extensive information on State treatment and persecution.
>
> However, considering that Iran has been indicated by the IAGCI in the Project brief as a country from which a large number of LGBTI persons apply for asylum/human rights protection, a particular effort should be made at ensuring a thorough and complete overview. More information on transgender persons and lesbians should be included (see below for specific issues). The section on societal treatment could also be expanded, including more

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810845/CPIN_-_Iran_-_SOGI_-_v3.0__June_2019__EXT.PDF , last accessed 4 February 2020.

[6] *De Jong 2008* (n 3), page 57.

[7] *Leigh 2014* (n 4), page 44.

information on societal harassment, on the medical sector, implications of being out, as well as media coverage.

Some of the information could be restructured, with information on transgender persons and lesbians included under the main headings as set out in the template for analysis

b. Decision-making statistics (2015-2018):

5. Iran is ranked sixth highest in the list of SO protection claims lodged in 2018.[8]

6. In 2018, a total of 75 asylum claims were lodged where sexual orientation formed part of the basis of the claim.

7. In 2015 100 applications were lodged, in 2016, 136 applications and in 2017, 59 applications.[9]

8. Out of the 64 initial decisions made by the Home Office, 33 were granted some form of leave to remain and 31 applications were refused. [10]

9. This shows a clear positive reliance by Home Office case decision-makers on the Home Office CPIN report to show a real risk of persecution on return for SO applicants, in order for the second objective limb of Lord Rodger's guidance at [82] of **HJ (Iran)** to be overcome, in order to avail protection status.

10. 37 statutory appeals were determined in 2018, with 16 appeals allowed (17 were dismissed).[11] This additionally implies positive use of COI to enable SO appeals to be allowed.

[8]UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[9] ibid.

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. In 2015 107 initial decision were made (73 granted, 34 refused), 2016 124 initial decisions with 65 granted, 59 refused and in 2017 78 initial decisions with 44 grants of leave to remain and 34 refusals.

[11] The statistics show a marked rise in allowed appeals from 20 appeals determined in 2015: 12 allowed, 6 dismissed. 39 appeals determined in 2016, 20 allowed and 18 dismissed and in 2017, 53 appeals determined: 22 allowed and 29 dismissed.

B. CASE LAW:

Country Guidance and Reported Cases:

11. The current Country Guidance case is for gay men is **RM and BB (Homosexuals) Iran CG [2005] UKIAT 117** (heard 8 July 2005, promulgated 8 July 2005, published 11 July 2005 and designated CG on 26 November 2013) (Mr Allen, Mr Mackey, Mr Mather).[12]

12. Noting the application of risk to the case law in 2005 is prior to the 2010 Supreme Court guidance in **HJ (Iran),** the relevant Country Guidance is found at paragraphs 123 and 124 of **RM and BB** (emphasis added):

> '123. We consider that we can properly conclude from the evidence that it is most unlikely, given the statistics and the problems of proof, that the death penalty for sodomy is anything other than an extremely rare occurrence. It is clear however that, and here we are in agreement with paragraph 24 of [Counsel for the appellant's] summary of the evidence, those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what [Counsel for the respondent] accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with [Counsel] that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as [Counsel] suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing.

[12] The Strasbourg Court in F v. the United Kingdom (Application no 17341/02) (22 June 2004) held the evidence did not show a real risk of arrest and punishment for gay men (article 3 ECHR violation), noting the evidence before the Glasgow Tribunal. The Strasbourg Court deals with evidence one year prior to the 2005 CG case, highlighting the importance of accurate COI.

124. Given that we consider therefore that there is a real risk that a person who comes to the authorities' attention for having committed an act falling within the relevant provisions of the code, it must follow that since this can be presumed to be known by those engaging in such acts, such actions would be likely to be carried out carefully. We have not been addressed on the issue of discretion and whether people engaging in such acts can be expected to act discreetly, which was considered by the Australian High Court recently, in Appellant S395/2002 v Minister for Immigration [2003] HCA 71. That is another argument for another day and we would not wish this determination to be interpreted as imposing a requirement of discretion, but rather a recognition that in the legal context in which homosexuals operate in Iran it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow. We also consider, bearing in mind the consequences for persons prosecuted successfully for such actions, that Adjudicators should view with healthy scepticism claims that family members or friends or neighbours reported such actions to the authorities. Given the severity of the consequences we consider that proper caution should be exercised in assessing claims that people came to the attention of the authorities in such ways. This must be particularly so in the case of family members and friends. In our view, it is the case that homosexual acts carried on in private between consenting adults are most unlikely to come to the attention of the authorities and it is the case, and we think it is common ground, that the authorities do not seek out homosexuals but rather may respond to complaints of consensual homosexual activity being carried on. That then is the context in which these appeals must be decided.'

13. Following **RM and BB** the Asylum and Immigration Tribunal heard **HS (Homosexuals, Minors, Risk on return) Iran CG [2005] UKAIT 120** (Ms. C Jarvis, Ms. C Griffiths) (heard 19 May 2005, promulgated 4 August 2005, published 14 September 2005 and designated 26 November 2013), noting the post-**RM and BB** hanging of two young men in Iran in July 2005 on what was perceived to be linked to them being gay [94 to 95]:

'94. Evidence was placed before us, in the form of an article from the Times of London dated 22 July 2005 and an article from the internet, from Roozonline, 21 July 2005, to show that two young teenage men, one said to be eighteen and one still a minor, were subjected to public execution by hanging, apparently after having more than 200 lashes inflicted upon them; on Tuesday of this week, in Justice Square, in the city of Mashhad. Both articles state that whilst the sentence was ostensibly handed down following a conviction for rape of another teenage boy, both British and other Gay Rights groups accuse the Iranian authorities of using the conviction on the charge of rape as a

> smokescreen to justify killing homosexuals, and of torturing the two young men into wrongful confession. The lawyer for one of the two, stated that a plea to commute the death sentence for the young man who was still a minor was rejected. He stated that the two had not understood that gay relations were forbidden.
>
> 95. We note that Ms Enayat, in her evidence, (paragraph 39 of RM and BB), states that there was a tendency of the Iranian authorities only to report cases which satisfied their model of a corrupt homosexual. At paragraph 43, she was of the expert opinion that for the most part, since the Revolution, there would not be a discreet gay community in Iran, although she thought that there was a certain degree of co-ordination and contact.'

14. The Tribunal made the following significant finding with respect to discrimination and persecution [147]:

> 'In the light of all the evidence, we find that the discrimination experienced by homosexuals in Iran does include discrimination in law, not least through a lack of protective legislation, and discrimination in terms of criminalization of their daily lives; lack of access to an impartial, fair and independent police and judicial service, and punishment through that criminalization of their daily lives, that of itself is persecutory and contrary to Article 3 ECHR. There is further risk of ill-treatment in detention for those who are homosexual, by reason of their homosexuality, even if they are not in detention by reason of their homosexuality. We further find that the discrimination also includes societal discrimination by members of the population, from which the authorities either cannot or will not provide protection. As it was put by the President in the case of ZH (Women as a Particular Social Group) Iran CG [2003] UKIAT 00207, the lack of state protection is inherent in the discrimination relied on.'

15. Departing from the artificial private versus public conduct approach in 2005, through the prism of the 2010 **HJ (Iran)** guidance all parties accepted before the Supreme Court [25] (Lord Hope):

> 'There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.'

16. At [35 (b)] (Lord Hope) (emphasis added):

> '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.'

17. At [43]:

> 'In the case of HJ, the Asylum and Immigration Tribunal observed, at para 9 of its determination, that "It is accepted that for a person to be openly gay in Iran would attract a real risk of persecution (see in particular *RM and BB (Homosexuals) Iran* [2005] UKAIT 00117). The issue therefore is whether the need for the appellant to be discreet about his sexuality on return to Iran would itself constitute persecution within the meaning of the Refugee Convention." The Tribunal went on to hold, at para 25, that "It remains clear, as it was at the time of *RM and BB*, that those who confess to homosexual acts or are convicted by whatever means are at real risk as they face condign punishment." But, in its view, the evidence fell well short of showing that surveillance had reached such levels that Iranian citizens who engaged in homosexual activities in private ran a real risk of discovery. It remained the case, as the Tribunal had concluded in *RM and BB*, at para 124, that, given "the legal context in which homosexuals operate in Iran, it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow."

Lesbians and Bisexual women:

18. There is currently no CG case for protection claims of lesbians and bisexual women.

Gender Identity or Expression:

19. There are two reported cases specifically addressing the protection claims based on gender identity or expression or sex characteristics.

20. The Court of Appeal in Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267 the Court correctly referred to a pre-operative trans woman, who was born natal male but identified as female, in the female gender [1] (Moore-Bick LJ):[13]

> 'The applicant is an Iranian transsexual. She was born male but considers herself to be female and acts and dresses accordingly and I shall therefore refer to her in that way."
>
> …
>
> Homosexual acts clearly are criminal, but there is little to suggest that a person who is homosexual in orientation is subject to serious ill-treatment or persecution as a result.
>
> The position of transsexuals seems to be very similar. The condition is one that is recognised by the state and the state makes provision for appropriate treatment for those who wish to undergo it. There is little to support the suggestion that merely being transsexual [*sic*] in Iran will expose one to serious ill-treatment or persecution.'

21. The Court held there would be no specific risk on return even though she would come to the attention to the authorities on return [9] (emphasis added):

> 'This applicant, as the judge has found, has no record of having committed homosexual acts in Iran, has no record of arrest or detention or of anything which might suggest that there are existing grounds for treating her as homosexual or one who has committed homosexual acts. Although I accept that the applicant is quite likely to come to the attention of the authorities when she seeks to re-enter the country, it seems to me that there is really no evidence to support the proposition that as a result, and for no other reason than being a transsexual [*sic*], she will be subject to treatment which can properly be described as persecution or serious ill-treatment of a kind that would fall within Article 3 of the ECHR. In the circumstances I can see no real prospect of an appeal against the judge's decision succeeding and therefore the application is dismissed.'

[13] As this was an application for permisison to apply for judicial review the case report is not accessible publicly.

22. In 2008, the Court of Appeal in AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ. 941 (appeal remitted) distinguished cases involving homosexuality and those involving 'transexuality' [*sic*] with respect to a claim of a self-identified trans woman, but used male pro-noun as pre-operative [4] (Sedley LJ):

> 'Before I go any further, I want to make three points about these two determinations. First of all Immigration Judge Atkinson had not made the *jejune* error of confusing transexuality [*sic*] with homosexuality.'

23. The error was to focus on medical intervention to change pronouns in enable to freely express chosen gender identity.[14] The Court had taken a good deal of care to distinguish between sexual and gender identity, but had accepted the appellant's case that there was a 'real risk that others in Iran would not do so'. The Court of Appeal remitted the appeal back to the Tribunal to be redetermined.[15]

Post-Country Guidance Unreported Upper Tribunal case:

24. The most recent unreported case is **MAT v. Secretary of State for the Home Department (DC/00013/2018)** (heard on 28 May 2019, promulgated 31 July 2019, published 17 September 2019) (Upper Tribunal Judge Perkins). The determination highlights the need for anonymity due to the real risk to those who are, or perceived to be LGBT+ from countries where it is accepted, they would be at risk if they lived openly [1]:

> 'I make this order because the appellant has shown that he is a gay man from Iran and publishing his name might create a risk to his safety in the event of his return. Publicity could mean that the appellant could not be returned to Iran even if I am wrong to allow this appeal.'

[14] This runs counter to the definition of gender identity in the *Yogyakarta* principles (2007):
'[2] Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'
(emphasis added) https://yogyakartaprinciples.org/introduction/ accessed 25 January 2020.

[15] As the Tribunal decisions database does not contain determinations prior to 1 June 2013, the reviewer was not able to locate the determination of the Tribunal on remittal.

25. At paragraph 40 of the determination the Upper Tribunal highlighted the need to separate adverse credibility assessment arising from a separate issue from accepted risk on return of a refugee accepted to be gay:

> 'It was decided that because the appellant was gay he could not be returned safely to Iran. Neither his name nor date of birth had anything to do with that. There is nothing to show that the subsequent grant of further leave and then nationality depended on anything but his residence in the United Kingdom.'

C. HOME OFFICE COI:

Country Policy Information Note (June 2019):

26. The current published policy is the *Country Policy and Information Note: Iran: Sexual orientation and gender identity or expression* (version 3.0) (June 2019) [40 pages].

27. The respondent's policy position is states at paragraph 2.4.13 (page 8):

> 'In general, LGBTI persons who openly express their sexual orientation and/or gender identity or expression are likely to face discrimination, illtreatment and prosecution from state actors as well as discrimination and illtreatment from societal actors which, by its nature and repetition, is likely to amount to persecution. In addition, if an LGBTI person does not live openly as such, and a material reason for this is the fear of persecution that would follow if they lived openly, then they should also be considered as a refugee.'

28. On this basis, the general 50/50 split in the appeals determined illustrates, in light of the strong CG case-law, appeals are primarily dismissed due to adverse credibility findings in order not to require determination of the second objective country risk limb of **HJ (Iran)**.

29. However, where there is clear and strong evidence as to risk, in what way is the 'narrative of difference'[16] experienced by the appellant examined in light of the country evidence to corroborate the claim?

[16] For example, in applying the Difference, Stigma, Shame and Harm ('DSSH') model as a positive tool to credibility assessment, both the narrative of difference to stigma relate to the social, cultural and

D. SUMMARY OF REVIEW:

VERY GOOD

30. Whilst the CPIN has accepted the 2014 recommendation for a separate trans section in the CPIN [section 4.2, pages 20 to 23], the recommendation for a separate section for lesbians has not been adopted. Instead CPIT have included a merged section for gay men and lesbians [section 4.1, pages 15 to 20]. This does not address the separate COI with respect to the specific intersection between gender and sexual/gender identity for ciswomen in Iran.

31. CPIT has to be commended on the use of very up-to-date source material (see 4.1.8 January 2019 Daily Mail) ensuring the safety net of very well-established and unchanged case law (the CG cases from 2005) do not detract from a pro-active research exercise and investigation.

32. Clearly, this CPIN is 'fit for purpose', providing an excellent source for COI and with more clearly defined sub-sections for individual SOGIE identity strands would make an excellent COI resource.

religious experience of the SOGIE applicant in the country of origin. It also has a direct relevance to the narrative of 'harm' both with respect to possible past-narrative of experience of harm and future fear of harm being objective verified. On this basis, the CG case findings are directly relevant to not only the second limb of Lord Rodger's guidance, but also the first limb on credibility findings to 'prove "not straight enough", see Gábor Gyulai (ed), 'Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual' (2) (Hungarian Helsinki Committee, Budapest, 2015), S Chelvan and Gábor Gyualai, 'Chapter XI. Asylum Claims based on Sexual Orientation or Gender Identity', 59-91, at 68: https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf, last accessed 27 January 2020. See also recommendation for use of the DSSH model by the UK Home Office: John Vine CBE QPM (Independent Chief Inspector of Borders and Immigration), 'An investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation' (23 October 2014) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547330/Investigation-into-the-Handling-of-Asylum-Claims_Oct_2014.pdf accessed last accessed 27 January 2020.

14. IRAQ

Capital city: Baghdad
Population:[1] 40,222,493
Predominant religion: Shia Islam
FCO Travel Advice:[2]

> *'Although homosexuality is not illegal under Iraqi law, the LGBT community generally keeps a low profile, making it difficult to assess its size or relative freedoms. Local attitudes towards LGBT people may be hostile. There have also been reports of individuals being targeted by extremists. You're advised to exercise discretion.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address COI reports with respect to Iraq.

2. The current Home Office COI report is the October 2018 CPIN on Iraq: SOGIE.[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Iraq: Laws and Customs, last updated 8 January 2020 https://www.gov.uk/foreign-travel-advice/iraq/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 68 to 71.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 50 to 54: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] UK Home Office, 'Country Policy and Information Note: Iraq: Sexual orientation, gender identity and expression, 16 October 2018 (version 1): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749713/Iraq_-_SOGIE_-_CPIN_-_v1.0.pdf, last accessed 4 February 2020.

3. In 2008, De Jong reviewed the LGBT section of the August 2008 COI Report, observing:[6]

> 'The report covers the main issues relevant to LGBT persons within the current context of Iraq.
>
> However, the focus is almost solely on gay men. Transgender issues could be included more, as some of the sources used and additional sources suggested do include information. A more general link to gender non-conforming behaviour or appearance should be made. Issues [in] relation to women should also be included and/or cross-reference to the women's section made.
>
> The legal information is unclear and needs updated [sic]. Although comprehensive on the targeting of gay men by the militia, the report could be more structured generally which would make the information more easily accessible.
>
> Good practice in this report is that the information is placed in the general context of the country and some cross-references to other parts of the report are made.'

4. Leigh in 2014 made clear in her review of the LGBTI section of the 30 August 2011 COI report on Iraq:[7]

> 'The report is overall quite good, although the legal section could be a little clearer (see review of section below).
>
> The report includes an overall cross-reference to the section on women which is good practice, and gives context for considering the position of lesbian and bisexual women in Iraq. Cross-references are also provided to sections on political factions, abuses by non-government groups, and security issues, which is a good practice as it allows for putting the issues into a national context.
>
> Another good practice in this report is reporting on regional issues in Kurdistan, and specific information on areas in which violence occurred. This is important when assessing asylum claims and identifying persecution risks

[6] *De Jong (2008)* (n 3), page 68.
[7] *Leigh 2014* (n 4), page 50.

from a regional perspective. It would be good to include this information within the main headings of the reporting template, under discreet subheading "LGBT persons in the Kurdistan Regional Government Area"'

5. The January 2019 Independent Chief Inspector's review on CPIN addressing two Iraq CPIN's has no reference to any country background material, or assessment on SOGIE protection claims from Iraq.[8]

b. *Decision-making statistics (2015-2018):*

6. Iraq is ranked seventh highest in the list of SO protection claims lodged in 2018.[9]

7. In 2018, a total of 60 protection applications were lodged where sexual orientation formed part of the basis of the claim.

8. In 2015, 18 applications were lodged. In 2016, 46 applications and in 2017, 59 applications.

9. Out of the 54 initial decisions made by the Home Office in 2018, 9 were granted some form of leave to remain and 45 applications were refused. [10]

10. 39 statutory appeals were determined in 2018, with 18 appeals allowed (20 were dismissed).[11] This figure, and the earlier allowed appeals in the earlier years imply, the COI is being interpreted by the fact-finding Tribunal to show 'well-founded fear of persecution for openly SO applicants.

[8] Independent Chief Inspector of Borders and Immigration, 'Inspection of Country of Origin Information January 2019 report' (June 2019): Annex F: Review of the January 2018 Home Office Country Policy and Information Note on Iraq: Perceived collaborators and COI responses' (pages 61 to 78) and Annex G: Review of the January 2018 Home Office Country Policy and Information Note on Iraq: Internal relocation, civil documentation and returns' (pages 79 to 95) (reviewer Alan George) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809931/Inspection_of_Country_of_Origin_Information_2019._Burma__Iraq_and_Zimbabwe.pdf, last accessed 1 February 2020.

[9] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. In 2015, 9 initial decision were made (supressed data, less than five outcomes recorded), 2016, 30 initial decisions with 9 granted, 21 refused and in 2017, 41 initial decisions with 8 grants of leave to remain and 33 refusals.

[11] The statistics show a marked rise in allowed appeals. There are no specific figures recorded for 2015 (supressed figure of less than five). In 2016, 6 appeals were determined (supressed figure recorded for outcome). In 2017, there were 37 appeals determined with 18 allowed and 20 refused.

11. As there was no specific CG highlighting specific risk to SOGIE claimants prior to the December 2019 summary, but not country guidance [35] in the CG case of **SMO, KSP and IM (Article 15(c) identity documents) Iraq CG [2019] UKUT 400 (IAC)** (heard 26 June 2019, promulgated 20 December 2019, published 23 December 2019) (Upper Tribunal Judges Perkins and Blundell) (see below) it cannot be determined on what case law the country material on risk to SOGIE applicants was based.

12. This implies there is a real significance in the weight placed on the Home Office's CPIN and other country background material to establish risk on return.

B. CASE LAW:

Country Guidance and Reported Tribunal cases:

13. There are no specific Country Guidance cases, or reported binding cases, specifically with respect to SOGIE protection claims from Iraq.

14. The current relevant, if not binding Country Guidance case is **SMO, KSP and IM (Article 15(c) identity documents) Iraq CG [2019] UKUT 400 (IAC)** (heard 26 June 2019, promulgated 20 December 2019, published 23 December 2019) (Upper Tribunal Judges Perkins and Blundell).

15. The **headnote** states with respect to country guidance with respect to LGBT claims:

> *'5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:*
>
> - *Opposition to or criticism of the GOI, the KRG or local security actors;*
> - *Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;*
> - *LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;*

- *Humanitarian or medical staff and those associated with Western organisations or security forces;*
- *Women and children without genuine family support; and*
- *Individuals with disabilities.'*

16. At paragraph 301 the Upper Tribunal highlight the nexus between non-conformity with Islamic mores and risk categories (emphasis added):

> 'The position in respect of those contravening strict Islamic mores is similar, although we note that there is comparatively little recent evidence (whether cited at footnotes 475-478 of the UNHCR guidelines or elsewhere) that individuals are presently at risk, or at enhanced risk, on this basis. Some, but not all, of the incidents described in those footnotes pre-date the military defeat of ISIL and we consider the general direction of travel in Iraq, in light of recent history, to be away from fundamentalism. Whilst there is some evidence of attacks against venues selling alcohol, we note the evidence in the respondent's document entitled *Iraq: Standards of Living* about the re-opening of such venues in Mosul. As with the other factors presently under consideration, we accept that a lack of adherence to strict Islamic mores is capable of giving rise to an increased risk for subsidiary protection purposes, although it will be necessary to have careful regard to the nature of the area in question before concluding that this factor actually serves to increase risk.'

17. At paragraph 305 the Upper Tribunal provides the following observations, warning they are not giving Country Guidance on LGBTI claims (**emphasis added**):

> 'Individuals of diverse sexual orientations and/or gender identities are considered by UNHCR to be likely to be in need of international refugee protection. UNHCR reports, for example, that LGBTI organisations cannot operate openly and that most individuals keep their orientation or gender identity secret. Such considerations are to be assessed firstly under the Refugee Convention framework provided by HJ (Iran) [2010] UKSC 31; [2010] 3 WLR 386 and **we do not purport to give country guidance on the situation for LGBTI individuals in Iraq.** Where an individual with a diverse sexual or gender identity is found not be in need of protection under the Refugee Convention, their identity might nevertheless be relevant to the sliding scale analysis required by Article 15(c), not least because UNHCR records increased difficulties for such individuals in accessing employment and medical care and in crossing checkpoints. We note also that EASO states in the *Targeting of*

> *Individuals* report that LGBTI individuals have been targeted by the PMUs for "deviating morality".'

Unreported Tribunal case law:

18. The most recent unreported Tribunal case addressing a position on country background material and risk on return based on SOGIE is **Secretary of State for the Home Department v. AN (PA/13696/2016)** (heard 3 May 2018, promulgated 14 May 2018, published 1 June 2018) (Upper Tribunal Judge Lane).

19. Inn dismissing the Secretary of State's appeal against a positive asylum determination made by the First-tier Tribunal, Upper Tribunal Judge Lane noted [7]:

> 'Before the First-tier Tribunal, the parties accepted that, if the Tribunal found that the appellant was homosexual, he would be at risk on return to Iraq… the appellant will be at risk as a homosexual anywhere within Iraq.'

20. This determination records an acceptance of risk on return on SOGIE grounds, anywhere in Iraq, as recently as June 2018.

C. HOME OFFICE COI:

21. The current CPIN was published prior to the December 2019 CG case - *Country Policy and Information Note: Iraq: Sexual orientation and gender identity and expression* (version 1.0) (October 2018) [27 pages].

22. The policy position is states at section 2.4.5 [page 8]:

> 'In general, a person living openly as an LGBTI person may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm from Shia militia groups, family and wider society. However, decision makers must consider each case on its merits, with the onus on the person to demonstrate why their particular circumstances would put them at real risk from non-state actors.'

23. Replicating the template of SOGIE CPINS the section-headings do provide a user-friendly document, noting this CPIN, in particular is succinct.

24. Under Legal Context (section 3), the Table in section 3.1.1, providing a relevant overview of the Iraqi constitution and rights at pages 9 to 10 is commended, setting the picture for the sub-sequent sections.

25. The range of source material throughout the CPIN is not more than two years prior to publication of the CPIN, making the document reliable. The sources range from the US DOS reports, international NGOs and the Special Rapporteur on extrajudicial, summary and arbitrary executions [4.5.7, 5.3.2] to IraQueer (an Iraqi LGBT not-for-profit group) [e.g. 4.4.2, 5.4.5]. The source material read well and provided a transparent and accurate overview for general risk assessment, in-line with the case law authorities cited in Section B above.

26. Delving within the CPIN revealed specific passages with respect to gender identity or expression [see for example 4.3.2, 5.5.10]. The reviewer highlights it would be advisable to have separate sections on the specific risk profile of lesbian and bisexual women, trans and intersex individuals, to ensure the document becomes more accessible to all strands of SOGIE claims.

27. The section 5.4 on Societal and familial attitudes and citation at 5.4.1 with respect to lack of ability to be openness, this section would greatly benefit from what steps a SOGIE returnee, noting the danger to 'gender non-conforming Iraqis' [5.5.1] needs to be viewed in the broader context of not conforming to the gender-sex role the potential persecutor would require the returnee to 'prove' in order not to be identified as SOGIE.

D. <u>SUMMARY OF REVIEW:</u>

<u>VERY GOOD</u>

28. The CPIN is extremely user friendly. There are substantial improvements when compared to the 2008 ad 2014 reviews, especially in the legal section. The breath of COI sources is to be highly commended, specifically with LGBT+ NGOs providing a rich contextual context to the country background material.

29. As with the majority of CPINs, the reviewer nots when it comes to lesbian and bisexuals, trans and intersex claims, these would benefit from separate sections.

30. There is also the opportunity to improve on the engagement with social attitudes to delve more deeply with respect to what needs to be done to 'prove' gender/sexual conformity in order to be identified as 'different' if returned to Iraq.

15. JAMAICA

Capital city: Kingston
Population:[1] 2,961,167
Predominant religion: Christianity
FCO Travel Advice:[2]

> *'Local attitudes towards the LGBT community are mostly conservative throughout the Caribbean. In Jamaica, certain same-sex activity is illegal. In practice these laws are rarely enforced. However, the attitude of many Jamaicans to the LGBT community is hostile. LGBT travellers should be mindful of local attitudes and be aware that public displays of affection may attract unwanted and negative attention. Public displays of affection (such as hand-holding or kissing) between opposite or same-sex couples are uncommon.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. The 2008 review did,[3] but the 2014 review[4] did not address COI with respect to Jamaica.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Jamaica: Laws and Customs, last updated 24 October 2019 https://www.gov.uk/foreign-travel-advice/jamaica/local-laws-and-customs accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 72 to 76.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. De Jong (2008) made the following recommendations in the review of the LGBT section of the August 2008 COI report on Jamaica. This was at a time prior to the Upper Tribunal had determined the risk to lesbian and bisexual (and straight) women in the 2011 CG case of **SW (Jamaica),** but had determined risk to gay and bisexual men in 2005 with **DW (Jamaica)**:[5]

> 'The report is fairly comprehensive and generally of good quality. It starts with an overview, which is very useful. However, the attack in February 2008 (para 21.20) might be better, more recent, example to mention in the overview instead of the 2005 attack.
>
> The report needs further elaboration on certain points, in particular on the attitude, treatment and level of protection provided by the police; the situation for lesbian and bisexual women, and for transgender persons. Some more attention could be given to treatment in the medical sector and the level of activity and presence of LGBT organisations.'

b. Decision-making statistics (2015-2018):

3. There has been a marked drop in the number of SO protection claims from Jamaica since the 2015 first published numbers, with a two-thirds drop in applications from 25 in 2017 to only 8 in 2018, ranking it 25th in the 2019 updated published list for claims in 2018. [6]

4. In just a decade, Jamaica claims based on SO have dramatically dropped from the number of claims lodged previously. In their 'No Going Back' report of 2010, STONEWALL cited a complaint of a caseworker to the number of gay Jamaican applicants, who would complain: '*I've got another Jamaican!*'.[7]

5. In 2015, 28 applications were lodged. In 2016, 39 applications were lodged.[8]

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[5] *De Jong (2008)* (n 3), page 72.

[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[7] Nathanael Miles, 'No Going Back: Lesbian and Gay People and the Asylum System' (STONEWALL May 2010), page 19. https://www.stonewall.org.uk/system/files/No_Going_Back_2010_.pdf, last accessed 27 January 2020:

> '"If you get someone who's claiming they're gay and they come from Jamaica, it's just automatically disbelieved by people. They just say oh I've got another gay Jamaican," Indira [not her real name) UKBA Caseworker.'

[8] ibid.

6. Out of the 20 initial decisions made by the Home Office in 2018, 11 were granted some form of leave to remain and 9 applications were refused. [9]

7. Seven statutory appeals were determined in 2018, with no specific outcome recorded by the Home Office.[10]

8. Noting the strong CG case law addressed below, the inference to be drawn is a number of the negative decisions are based on adverse credibility findings on SOGIE.

9. Certification under section 94 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') as (clearly or manifestly) unfounded claims should no longer occur following the 2015 Supreme Court judgment in **R (Jamar Brown) v. Secretary of State for the Home Department [2015] UKSC 8** successful challenge to inclusion of Jamaica on the 'white list' as a safe countries due to accepted CG position. Nevertheless, the legislation has not been amended to delete Jamaica from the 'safe country' (white list) (section 94 (4) (n) of the 2002 Act).[11]

B. CASE LAW:

Country Guidance:

10. The current Country Guidance case Is for gay and bisexual men is **DW (Homosexuals Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168** (heard 28 October 2005, promulgated 28 November 2005, published 5 December 2005, designated CG 26 November 2013).

[9] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. In 2015 30 initial decision were made with 14 granted leave and 16 refused. In 2016, 30 initial decisions with 12 granted and 18 refused. In 2017, 27 initial decisions with 7 grants of leave to remain and 20 refusals.

[10] The statistics do not record any outcomes on the appeals determined from 2015 (7 appeals determined); 2016 (8 appeals) and 12 appeals determined in 2017.

[11] It would clearly be arguable following the 2015 reasoning of the UK Supreme Court in **R (Jamar Brown) v. Secretary of State for the Home Department [2015] UKSC 8** with respect to Jamaica, applying the same reasoning to the country conditions in South Africa, designation on the white list where there is a real risk of harm based on SOGIE identity is unlawful.

11. The headnote states:

> *'Men who are perceived to be homosexual and have for this reason suffered persecution in Jamaica are likely to be at risk of persecution on return. Men who are perceived to be homosexual and have not suffered past persecution may be at risk depending on their particular circumstances. The Secretary of State conceded that, as a general rule, the authorities do not provide homosexual men with a sufficiency of protection. There are likely to be difficulties in finding safety through internal relocation but in this respect no general guidance is given.'*

12. Paragraphs 71 and 72 of **DW** addresses the notion of 'perception is key' to persecution (**emphasis added**):

> **'General Conclusions**
>
> 71. Mr Chelvan has submitted that we needed to consider both a particular social group and an imputed particular social group. We find that as the reasons for persecution must be found in the mind of the persecutor there is no need to differentiate between such categories. The only question we need to ask is whether an individual is a member of a particular social group. **It may matter a great deal to an individual whether he is or is not homosexual but, certainly in the context of Jamaica, whether an individual is or is not homosexual, bisexual or asexual is of far less importance than the question whether he is perceived to be homosexual. There is some force in the suggestion, that "perception is all".** Mr Blundell has conceded that gay men in Jamaica belong to a particular social group.
>
> 72. Mr Chelvan sought to persuade us that a widely defined group was at risk of persecution in Jamaica. **He put this as "those seen as not conforming to what Jamaica sees as the norm of masculine identity in Jamaica." Whilst we accept that this formulation may assist in defining those who are thought to be homosexual, it is a wider definition than is required for the purposes of this determination both on the facts of the appellant's case and in relation to the expert evidence and country material before us.** We have not heard sufficient argument nor has the material before us been sufficiently targeted for us to address anything other than the core group of men who are or are perceived to be homosexual. This determination is not intended to address the position of Lesbians, Transsexuals, Transvestites or others who have encountered difficulties because of their actual or perceived sexuality.'

13. The current Country Guidance for lesbians and bisexual women is **SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)** (heard 7 December 2009 and 30 November 2010, promulgated 24 June 2011, published 29 June 2011 and designated CG 26 November 2013).

14. The headnote states:

> *(1) Jamaica is a deeply homophobic society. There is a high level of violence, and where a real risk of persecution or serious harm is established, the Jamaicans state offers lesbians no sufficiency of protection.*
>
> *(2) Lesbianism (actual or perceived) brings a risk of violence, up to and including 'corrective' rape and murder.*
>
> *(3) Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear.*
>
> *(4) Single women with no male partner or children risk being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion.*
>
> *(5) Because the risks arise from perceived as well as actual lesbian sexual orientation, internal relocation does not enhance safety. Newcomers in rural communities will be the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians. Perceived lesbians also risk social exclusion (loss of employment or being driven from their homes).*
>
> *(6) A manly appearance is a risk factor, as is rejection of suitors if a woman does not have a husband, boyfriend or child, or an obvious and credible explanation for their absence.*
>
> *(7) In general, younger women who are not yet settled may be at less risk; the risk increases with age. Women are expected to become sexually active early and remain so into their sixties, unless there is an obvious reason why they do not currently have a partner, for example, recent widowhood.*
>
> *(8) Members of the social elite may be better protected because they are able to live in gated communities where their activities are not the subject of public scrutiny. Social elite members are usually from known families, wealthy, lighter skinned and better educated; often they are high-ranking professional people.'*

15. There is no specific Country Guidance based on Gender Identity or Expression but there are paragraphs within the above CGs which adds force with the proposition that 'perception is key'.

Internal relocation:

16. The Tribunal in **DW (Jamaica)** made an observation with respect to internal relocation, noting this was not a point advanced by the Home Office in the proceedings before them [26].

17. Noting the approach of the Supreme Court with respect to Cameroon and Iran when addressing the position in **HJ (Iran)** the case law has not argued there is anywhere in Jamaica a SOGIE applicant will be free from persecution.

18. This is another country example of how non-state agent persecution is pervasive in nations where there are strong cultural, religious and social attitudes against those who are "not straight enough" and confirm to the gender-sex role model held in the perception of the potential persecutor.[12]

Reported case law:

19. There are no reported, or unreported SOGIE protection cases on the Tribunal decision database departing from the 2005 CG case of DW (gay/bisexual men),[13] or 2011 CG case of SW (lesbians/bisexual women/'not straight enough' straight women).[14]

20. There are no reported cases on the two CG cases relevant to SOGIE claims.

Unreported case law:

21. The following two are unreported post-Country Guidance case law addresses continued use of the 2005 and 2011 CG cases.

[12] See for further analysis on this point S Chelvan, 'SB (Uganda) - Case Comment' (2010) 24 (2) I.A.N.L, 191.
[13] Tribunal decisions database: (url), last accessed 1 February 2020.
[14] Tribunal decisions database: (url), last accessed 1 February 2020.

22. Upper Tribunal Judge Storey in **Riggan v Secretary of State for the Home Department (DA/02573/2013)** (heard 8 December 2015, promulgated 13 January 2016, published 5 September 2016) remitted an appeal back to the First-tier Tribunal, addressing the continued applicable force of both CG cases [2]:

> 'The unsatisfactory nature of this treatment of this part of the appellant's claim was compounded by the fact that in the decision by UTJ Chalkley it has been emphasized that there had been a failure by the earlier tribunal decision with which he was concerned to consider the applicability of the country guidance given in DW (Homosexual Men - Persecution - Sufficiency of Protection) Jamaica [2005] UKAIT 00168. (Also relevant of course should have been the decision in SW (lesbians - HJ and HT applied) Jamaica CG (2011) UKUT 00251 (IAC) at least insofar as it addressed attitudes towards homosexuality in Jamaica generally.'

23. In **Kelia B v Secretary of State for the Home Department (IA/14697/2015)** (heard 18 September 2017, promulgated 26 September 2017, published 4 October 2017) (Deputy Upper Tribunal Judge Chapman) cited continued force of **SW (Jamaica)** to allow the appeal based on a non-protection article 8 ECHR (private and family life rights) claim bar to removal.

24. The Secretary of State's appeal in **Secretary of State for the Home Department v. KG (PA/01819/2015)** (heard 27 July 2016, promulgated 17 August 2016, published 23 February 2018) (the Hon. Mrs Justice May DBE, Upper Tribunal Judge Allen) recorded the following agreed position on SOGIE risk in Jamaica [3] (emphasis added):

> 'We note at this point that nowhere has it been suggested that an actively [sic] gay person would not be at risk of persecution in Jamaica. The Secretary of State appears to accept, in accordance with the country guidance of SW, that persons in same sex relationships, particularly lesbians, would be at risk by reason of their sexual orientation in Jamaica. There is no appeal against the First-tier Tribunal's finding that this was and is the case.'

25. These unreported Tribunal determinations evidence the continued use of the CG cases as evidencing risk on return for gay and bisexual men (**DW**), and for lesbians, bisexual women and straight women (perceived as lesbian when they are not receptive to the sexual advances of a potential persecutor and cannot prove they have other straight connectors (children, partner or recently widowed) (**SW**).

C. HOME OFFICE COI:

Country Policy Information Note (February 2017):

26. The current published policy is the *Country Policy and Information Note: Jamaica: Sexual orientation and gender identity* (version 2.0) (23 February 2017) [30 pages].[15]

27. The Home Office COI position is summarised at section 2.3.3 (page five):

> Jamaica is a deeply homophobic society and there are reports of LGBT persons facing a high level of both physical and sexual violence from nonstate agents (and some rogue state agents) and many live in constant fear. LGBT persons are targeted for mob violence, 'corrective rape', extortion, harassment, forced displacement and discrimination, and are taunted, threatened, fired from their jobs, thrown out of their homes, and suffer illtreatment including being beaten, stoned, raped, or killed (see Treatment by, and attitudes of, state authorities and Societal treatment and attitudes.'

28. There is a clear continued presence of violence targeted to the SOGIE community in Jamaica. Post-CPIN in September 2017, the former head of Jamaica Pride, Dexter Pottinger, was found murdered in his home.[16]

29. The January 2020 UK FCO Travel advice (cited at the beginning of this country review), make clear the homophobic climate is still very much prevalent. Noting there are no unreported Tribunal cases evidencing a shift in the continued force of the CG cases, then the CPIN continues to have force, in reflecting the starting position of the binding Country Guidance.

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[15] UK Home Office, 'Country Police and Information Note: Jamaica: Sexual orientation and gender identity (version 2), February 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594901/Jamaica_-_SOGI_-_CPIN_-_v2_0.pdf, last accessed 4 February 2020.

[16] Jon Sharman, 'Dexter Pottinger dead: Gay activist and face of Jamaica Pride found murdered in his home' (The Independent), 2 September 2017: https://www.independent.co.uk/news/world/americas/dexter-pottinger-dead-jamaica-gay-pride-murder-stabbed-kingston-a7925556.html , accessed 4 February 2020.

D. SUMMARY OF REVIEW:

NEUTRAL:

30. CPIT has not adopted the 2008 recommendations of De Jong, to provide separate sections for treatment of lesbian and bisexual women and trans applicants.

31. The decreasing number of SO protection claim applications may mean the CPIN will not get updated in the near future.

32. Whilst the CPIN does have clear sections, the source material is generally two years or older (prior to 2017), thereby decreasing the force in the relied country background evidence as not evidencing COI, at the date of hearing.[17] This may be due to the acceptance of decision-makers, the country conditions have not changed since the CG cases.

[17] Ravichandran v. Secretary of State for the Home Department [1996] Imm AR 97, CA.

16. KENYA

Capital city: Nairobi
Population:[1] 53,771,296
Predominant religion:
FCO Travel Advice:[2]

> ***'The coastal areas are predominantly Muslim. Although there are no strict dress codes, you should dress conservatively away from the tourist resorts and hotels, especially in Mombasa town, during the holy month of Ramadan or if you intend to visit religious areas.***
>
> ***…***
>
> ***Homosexual activity is illegal. Public displays of homosexuality like holding hands or kissing in public areas could lead to arrest or imprisonment.'***

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008 and 2014 reviews did not address COI with respect to Kenya.

2. The reviewer has been informed a SOGIE CPIN on Kenya was expected to be published in 2019.[3] The current version is dated March 2017.[4]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Kenya: Laws and Customs, last updated 11 January 2020 https://www.gov.uk/foreign-travel-advice/kenya/local-laws-and-customs, accessed 25 January 2020.
[3] This was disclosed by the Head of CPIT at a meeting of Civil Society Groups, of which the reviewer is a member, on 1 July 2019: [MS]: 'Kenya, Gambia, Cameroon are on the list for this quarter to update by September [2019], but may be in the following quarter.'

b. Decision-making statistics (2015-2018):

3. SO protection claims lodged with the Home Office have seen a sharp rise in 2018 from 17 in 2017 to 47 in 2018 placing the country 13th in the rankings.[5] In 2016 there were 19 applications lodged and in 2017, 17 applications lodged.

4. In 2015 13 initial decisions were made, 18 in 2016, 21 in 2017 and 25 in 2018. However, there are no recorded figures for the outcomes of initial decisions for this period.[6]

5. However, there were 22 appeals determined by the Tribunals in 2018, with 9 granted and 22 dismissed. On the basis just over one-third arguably established risk on return for 'openly LGBT' there is a clear divergence of judicial opinion on the country background evidence, away from the information contained in the March 2017 COI.

6. There is no specific data recorded (bar asterix for less than 5) for the outcomes of the appeals determined for 2015 (5 determined), 2016 (10) and 2017 (22).[7]

B. CASE LAW:

Country Guidance:

7. The current Country Guidance case is **JMS (Homosexual behaviour, Prosecution) [2001] UKIAT 17** (hearing date 9 October 2001, promulgation 3 December 2001, published 18 March 2005. designated CG 26 November 2013).

8. Paragraphs 10 to 11 provide the relevant country guidance, as of 2001 (emphasis added):

> '10. The Adjudicator appears to have accepted that there was a reasonable amount of likelihood that the appellant was detained and ill-treated. There is no

[5]UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[6] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

[7] The statistics show a gradual increase in number of appeals determined by the Tribunals, noting this is prior to the Kenyan High Court judgment in May 2019 upholding the constitutionality of the anti-sodomy laws (see discussion and analysis in main text).

justification at all for the appellant being treated in the way he has described in his interview and in his oral evidence before the Adjudicator. The Adjudicator describes these as the actions of rogue officers who should be prosecuted or disciplined. The Secretary of State in his decision letter refers to the fact that there has been a vociferous human rights debate in Kenya and there are human rights organisations that are extremely active. The appellant may well have been a victim of homophobic behaviour by the Kenyan police, but the fact remains that he was released without charge. There is no reason to believe that were he now to return to Kenya, that he would be of any interest to the authorities.

11. We agree with the Adjudicator that the evidence shows that discreet homosexuals are unlikely to face prosecution still less persecution in Kenya. The Tribunal accepts as set out in paragraph 5.25 of the CIPU Report that although there is strong social pressure against individual instances of homosexuality such as from family members, it is not an issue in the public domain. There is no strong antagonistic feeling towards homosexuals, but equally neither is there an active gay community to provoke it. Discreet homosexuals are unlikely to face prosecution or persecution. It is unlikely that criminal proceedings will be taken against a homosexual male unless some other offence is involved.'

9. There is no other reported cases of the Upper Tribunal directly making findings with respect to the country background evidence and risk on return.[8]

Recent post-CG unreported Upper Tribunal case law:

10. In **KM v Secretary of State for the Home Department (PA/12452/2016)** (heard 25 June 2017, promulgated 1 August 2017, published 12 September 2017) (Upper Tribunal Judge Grubb) [40] (reviewing the earlier March 2016 CIG on SOGI noting acceptance the appellant is a gay man):

> 'In my judgement, although the background evidence undoubtedly established a level of intolerance, discrimination and even actual hostility towards gay men in Kenya, it was not irrational for the judge to find that exposure to that society would not create a real risk of "persecution" to the

[8] **MN (Findings on sexuality) Kenya [2005] UKAIT 00021** (heard 3 November 2004, promulgated 28 January 2005, published 2 March 2005) (Mr Perkins, Mr Widdup, Mr Armitage) addresses approach to sexual identity and makes clear the Tribunal remitted for the country background evidence to be assessed by the Adjudicator [28].

appellant on the basis that it had not attained the necessary level of severity (cumulatively or individually) to engage the Refugee Convention's protection.'

11. The appellant served a fresh claim and following refusal in 2019 served a pre-action letter highlighting lack of engagement with the May 2019 Kenyan High Court judgment. The Secretary of State has granted a fresh claim, currently subject to statutory appeal proceedings before the First-tier Tribunal.[9]

12. In **CNK v. Secretary of State for the Home Department (PA/00248/2019)** (hearing 18 July 2019, promulgated 26 July 2019, published 16 September 2019) (Deputy Upper Tribunal Judge Froom) the Upper Tribunal heard the appeal of a lesbian from Kenya who challenged a negative determination finding on return she would behave discreetly for reasons unconnected with persecution. At paragraphs 14 to 15 the Upper Tribunal record the country background evidence:

> '14. The judge considered the background evidence in detail and noted some materials suggesting Kenya was a more tolerant place than, for example, neighbouring Uganda. However, he also noted that the US State Department report noted that violence and discrimination against LGBT individuals was widespread and that victims were extremely reluctant to report abuse due to fear of violence. Many LGBT victims believe the police were just as likely to persecute them as to protect them. A 2015 report stated there had been "few prosecutions ? in recent years".
>
> 15. The judge also noted the contents of the expert report of Professor Mario Aguilar. He was critical of parts of it finding it "general in nature", but he noted the overall opinion that the appellant would be at a real risk of persecution if she returned to Kenya.

13. At paragraphs 33 to 36 the Upper Tribunal were informed about the Kenyan High Court judgment dismissing the constitutional challenge. The determination does not record the Tribunal being taken through the reasoning of the Kenyan Court:

> '33. At [50] of his decision, the judge mentioned that he was aware that the Kenyan High Court was shortly to deliver its judgment in a case challenging the constitutionality of sections of the Kenyan Penal Code which are construed as criminalising same-sex acts. He noted the outcome of the Indian Supreme

[9] Express consent has been given by KM through his solicitor who the reviewer is instructed by. Email communication between Lauren Franchina, Solicitor at Fountain Solicitors and the reviewer, dated 24 January 2020.

> Court case, which challenged very similar legislation applicable in India. [Counsel for the appellant] informed me that, unlike the Indian Supreme Court, the Kenyan High Court had upheld the provisions as legal.
>
> 34. There was clearly no error in the judge's reference to the case, which had not then been decided. He referred to it because he was provided with a press release about it. [Counsel for the appellant] suggested the judge's mention of the Indian case was an indicator that he thought the Kenyan case would go the same way, thereby reaffirming parts of the background evidence which suggested there was a movement towards greater acceptance of LGBT people in Kenya, which the appellant disputes. He told me that, should the case go further, he would advise his instructing solicitors to obtain evidence showing an escalation in violence towards the LGBT community.
>
> 35. I do not consider that it is a fair reading of [50] to say the judge took an unduly optimistic view of the Kenyan case. A press release is unlikely to have provided sufficient detail to show how, if at all, the case might affect the appellant's safety, particulalry given the lack of clarity about whether the sections of the Penal Code in question apply to women at all (see [24] and [49]).
>
> 36. It follows from the fact that I cannot see any error of law in the judge's approach to the issue of the appellant's reasons for behaving discreetly on return to Kenya, there is no need to consider the second question concerning the judge's consideration of the risk of persecution arising from living openly.'

14. In **EMM v. Secretary of State for the Home Department (PA/06065/2019)** (hearing on 17 October 2019, promulgated on 23 October 2019, published 14 January 2020) (Upper Tribunal Judge Mandalia) dismissed the appeal of the lesbian appellant who was found to be at risk on her home area, but was found by the Tribunal below, based on the March 2017 CPIN to have an internal relocation alternative to Nairobi. The Judge of the First-tier Tribunal preferred the evidence in the March 2017 COI, rather than attach significant weight to the May 2019 judgment of the Kenyan High Court [5] (emphasis added):

> 'The judge found that the report of Mr Murugi, was not helpful in deciding the issues in the appeal. The judge also considered the judgement of the High Court in Kenya dated 24th May 2019 in petition 150 of 2016, noting that the court had dismissed petitions which sought to obtain declarations that the provisions of the Kenyan criminal code that criminalised gay sex, were unconstitutional. The judge referred to an unreported decision of Judge Norton-Taylor in another appeal, that the appellant relied upon. Having considered all the background material before him, at paragraph [36], the judge

noted that the information as a whole, paints a mixed picture with different sources pointing different ways. He said:

"... I do not find it a helpful or sensible approach to focus on particular sources either positive or negative, to the exclusion of other sources pointing the other way, but rather to read the material as a whole. Having done that I regard the [March 2017] policy summary which I have set out in paragraphs 22 above, as balanced, fair and correct."'

15. Noting the judgment of the Kenyan high Court post-dated the COI by over two years, the Upper Tribunal did not address the significance of the Kenyan High Court judgment as part of the error of law challenge before it and dismissed the appeal based on the 2017 COI material in light of the appellant's particular circumstances.

16. None of the unreported cases engage with the reasoning of the Kenyan High Court in the 24 May 2019 judgment upholding the constitutionality of the anti-sodomy provisions of the Kenyan Penal Code.

The Kenyan Penal Code:

17. The 2017 SOGI CPIN makes clear the following with respect to the position of the penal code that criminalises same-sex conduct at sections 4 ('Legal context') onwards, noting the applicant relies only on Section 162 (c) – the 14 year sentence to men having sex with another man with consent (ie the 21 year sentence is not relied on, as this relates to rape) ***[emphasis added to relevant sections]***:[10]

'4.1 The penal code

4.1.1 The laws relating to same-sex activity are contained in Chapter XV of the Kenyan Penal Code [revised 2014]:

'162. Unnatural offences Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

[10] *2017 SOGI CPIN*, pages 9 to 10.

> (c) ***permits a male person to have carnal knowledge of him*** *or her against the order of nature, is guilty of a felony and* ***is liable to imprisonment for fourteen years****:*
>
> *Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if— (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.*
>
> 163. ***Attempt to commit unnatural offences*** *Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and* ***is liable to imprisonment for seven years.***
>
> 164. *Deleted by Act No. 3 of 2006, Second Sch.*
>
> 165. *Indecent practices between males Any male person who,* ***whether in public or private****, commits any act of gross indecency with another male person, or procures* ***another male person to commit any act of gross indecency with him****, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private,* ***is guilty of a felony and is liable to imprisonment for five years****.'*

4.1.2 The United States State Department, Country Reports on Human Rights Practices for 2016, (USSD report 2016), published on 3 March 2017, stated:

'The constitution does not explicitly protect LGBT persons from discrimination on the basis of sexual orientation or gender identity. The penal code criminalizes "carnal knowledge against the order of nature," which is interpreted to prohibit consensual same-sex sexual activity and specifies a maximum penalty of 14 years' imprisonment if convicted. A separate statute specifically criminalizes sex between men and specifies a maximum penalty of 21 years' imprisonment if convicted.'

18. On this basis, consensual same-sex conduct is liable to up to 14 years imprisonment, an attempt to have sex liable to five years imprisonment and gross indecency, up to five years (whether in public or in private (i.e. would include the home).

19. The 2017 SOGI CPIN makes clear there are challenges to the law [section 4.4] [**emphasis added to impending litigation in the Kenyan High Court in 2016**]:[11]

[11] *2017 SOGI CPIN*, pages 11 to 12.

'4.4 Challenge to the law

4.4.1 The USSD 2016 report noted:

> 'In April [2015] the National Gay and Lesbian Human Rights Commission (NGLHRC) filed Petition 150 of 2016 challenging the constitutionality of these penal codes. In May a coalition of human rights organizations filed a petition challenging the constitutionality of the same penal code provisions based on violence, the fear of violence, and documented human rights violations against citizens.'

4.4.2 Anna Dubuis, a freelance journalist living in Nairobi, **in an article of 9 May 2016 on Vice news**, reported that the **National Gay and Lesbian Human Rights Commission** (NGLHRC), **is working on a case currently filed in the country's high court** that could remove criminal punishment for adults who engage in homosexual activity altogether:

> **'"Those laws degrade the inherent dignity of affected individuals by outlawing their most private and intimate means of self-expression,"** the petition states.
>
> 'It is the first time that anyone has directly challenged the ban, with lawyer and NGLHRC leader Eric Gitari saying he closed the office after filing the case over fears of a backlash from members of the public, but returned ten days later to find no threats or violence had taken place.
>
> '"We wanted to monitor the public reaction, and not put our staff at risk, but the reaction has not been as expected. We thought there would be backlash but there has been none," he said.
>
> 'The news barely made headlines in local media, and the social media reaction has been negligible. Next month, proceedings in the High Court will begin, though the appeals process means **it could take up to five years for an outcome**…
>
> 'The case brought by NGLHRC revolves around a challenge to Section 162 of Kenya's penal code — a piece of legislation introduced in the 19th century during British colonial rule in East Africa. Under the heading "unnatural offenses," it condemns anyone who has "carnal knowledge of any person against the order of nature."

20. It is quite clear from the CPIN there is a challenge to the penal code provisions, and this had been lodge in 2016 and was awaiting judgment (within the next 5 years).

Effect of the 24 May 2019 judgment of the Kenyan Hight Court:

21. The Kenyan High Court on 24 May 2019 in **EG and 7 others v Attorney General**[12] upheld the constitutionality of the Kenyan Penal Code which criminalises same-sex conduct between men.

22. The Kenyan High Court rejected the international jurisprudence which had applied to a volume of cases that had stuck-down legislative provisions, including the recent September 2018 judgment of the Supreme Court of India in **Johar and others**[13] which struck down similar colonial laws criminalising sex between consenting members of the same sex. Importantly, the **Johar** judgment, also post-dating the 2017 SOGI CIPN made clear the mere existence of the criminal laws created a climate of harm for the LGBT community (see fifth concurrent judgment).

23. The findings on constitutionality are from page 28 of the judgment.

24. The Kenyan High Court, at paragraph 368, summarised the Zimbabwe case of **Banana v. State** in the following terms:

> 'In Zimbabwe, the Supreme Court was called upon to determine whether the common law crime of sodomy was in conformity with Section 23 of the Constitution of Zimbabwe, which guaranteed protection against discrimination on the ground of gender. This arose in Banana v. State [206] where Canaan Banana, a former president of Zimbabwe, had been convicted by the High Court on counts of sodomy, indecent assault, common assault, and committing an unnatural offence. The court, by majority, dismissed the appeal holding that the law criminalizing sodomy was not unconstitutional. The majority stated that consensual sodomy had been decriminalised in three main ways: by legislation, by a constitution or by a supra-national judicial authority, such as the European Court of Human Rights.'

[12] http://kenyalaw.org/caselaw/cases/view/173946/index.html, accessed 4 February 2020.

[13] Submissions on *Johar* from page 27 of the Kenyan High Court judgment.
See summary of the Court at paragraph 359, page 42 of the judgment. See for **Johar and ors v. Union of India and ors (6 September 2018)** judgment:
https://www.scribd.com/document/387971783/Supreme-Court-Judgment-on-Section-377, accessed 4 February 2020.

25. At paragraph 401-404 of the judgment, the Court, relied on public opinion to find the provisions are to be upheld (upholding constitutionality on basis of Article 45 (2) Kenyan Constitution 2010 amendments to codify marriage between one man and one woman) **[emphasis added]**:

> '401. Given the clear wording of Article 45(2), we find it unnecessary to address the question whether the impugned provisions can pass the Article 24 analysis test.
>
> 402. We were invited not to be guided by public opinion or majoritarian views in determining this Petition. In our humble view, the desire of Kenyans, whether majoritarian or otherwise are reflected in the Constitution. We are unable to agree with the Petitioners that the views of Kenyans should be ignored given the clear and unambiguous provisions in Article 45 (2).
>
> 403. As was held in the persuasive Zimbabwean case of Banana v. State, while courts may not be dictated to by public opinion, they would still be loath to fly in the face of such opinion. In our view, where the will of the people is expressed in the Constitution, it represents societal values, which must always be a factor in considering constitutional validity of a particular enactment where such legislation seeks to regulate conduct, private or public. In our case, those views were clearly expressed in Article 45(2).
>
> 404. We are required at all times to uphold the paramountcy of the Constitution. We find it appropriate to cite Tinyefuza v Attorney General where it was held that in so far as interpretation of the Constitution is concerned, the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.
>
> 405. Looking at the impugned provisions vis a vis Article 45(2), we are satisfied that the provisions do not offend the right to privacy and dignity espoused in Articles 28 and 31 of the Constitution. Our view is informed by the fact that we cannot read Articles 28 and 31 in isolation from Article 45(2). Differently stated, **unless Article 45(2) is amended to recognize same sex unions, we find it difficult to agree with the Petitioners' argument, that, we can safely nullify the impugned provisions, whose effect would be to open the door for same sex unions and without further violating Article 159 (2)(e) which enjoins this court to protect and promote the purpose and principles of the Constitution**.
>
> 406. In conclusion, therefore, having considered the arguments on both sides, the precedents cited, the Constitution and the law, we are not satisfied that the

> Petitioners' attack on the constitutional validity of sections 162 and 165 of the Penal Code is sustainable. We find that the impugned sections are not unconstitutional. Accordingly, the consolidated Petitions have no merit. We hereby decline the reliefs sought and dismiss the consolidated Petitions.'

26. On this basis, the Court rejected the constitutional challenge of the penal code provisions, and held that without constitutional amendment, these provisions are enforceable, even in 2019. In other sections of this judgment, the Court rejected any challenge based on right to privacy, or healthcare.

27. Article 9 (2) (b) of the 2004 Minimum Standards Qualification Directive[14] (in force from October 2006) makes clear that persecution includes [**emphasis added**]:

'legal, administrative, police, and/or **judicial measures which are in themselves discriminatory** or which are implemented in a discriminatory manner'.

28. The corresponding Regulation in the Refugee or Person in Need of International Protection Regulations 2006 is Regulation 5 (2) (b).

29. Section 2 (1) of the European Union (Withdrawal) Act 2018 makes clear this regulation is now part of UK law following exit day on 31 January 2020:[15]

> 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.'

30. In *EG and 7 others* the Kenyan High Court held the penal code provisions relating to criminalisation of same-sex conduct did not violate the rights to equality, freedom from discrimination, highest attainable standards of health and other internationally recognised rights including human dignity and privacy.

31. In rejecting the petitioner's arguments the Constitution should provide them such protections, the Kenyan High Court made clear the Constitution does not protect those from the LGBT community, as the Kenyan constitution only protects those who are 'born that way', and that there 'is no conclusive scientific proof that LGBTIQ people are born that way' [paragraph 393 of judgment].

[14] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN (last accessed 4 February 2020.

[15] http://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted, accessed 2 February 2020.

32. The Court recognised that Article 45 (2) of the Constitution only allows for 'marriage union .. for adults of the opposite sex', and to decriminalise 'same sex on the grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2). Continued reasoning at paragraph 396 of the judgment held (emphasis added):

> 'The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or note, would be in violation of the tenor and spirit of the Constitution.'

33. The above makes quite clear, the judicial enforcement not only goes to uphold the constitutionality of the penal code provisions, but also marginalise, stigmatise and render as not protected or safeguarded by the Constitution, with respect to any internationally respected rights.

34. On this basis, the cumulative discrimination and lack of any Constitution, amounts to persecution.

C. HOME OFFICE COI:

35. The *Country Policy and Information Note: Kenya: Sexual orientation and gender identity* (version 2.0) (March 2017)[33 pages].

36. At section 2.3.6, the CPIN records the following position on the COI (page five):

> 'The government has stated that it will not decriminalise same-sex conduct, but it has also committed to review the penal code to align it with the constitution and to adopt an anti-discrimination law providing protection, irrespective of a person's sexual orientation or gender identity (see State treatment)..'

37. The 24 May 2019 Kenyan High Court judgment fundamentally changes the position of governmental review.

38. On 9 November 2019 Africanews.com published an article 'Kenya's president Uhuru Kenyatta rejects gay agenda in global population conference':[16]

> '…Kenyatta reiterated Kenya's stand to protect cultural norms by not allowing any practices that will be seen devaluing traditions of various local communities.
>
> It is understood that the President was referring to the push by reproductive health activists for legal abortion and homosexual rights during the conference.
>
> "We will welcome the visitors Nairobi. We will be there and we will listen. But will be firm in rejecting what we do not agree with," he said.
>
> "We have a stand," he said, adding that "But on things that do not conform with our cultures and religion, we will firmly reject," he told the gathering attended by UNFPA country director Ademola Olajide and western diplomats.
>
> President Kenyatta has been quoted many times rejecting total inclusion of homosexuals in the constitution.'

39. On this basis the country conditions clearly show a government and judiciary committed to ensure margialisation of SOGIE in Kenya, denying them equality and fundamental human rights protections. This ruling amounts to persecution.

D. <u>SUMMARY OF REVIEW:</u>

<u>PRIORITY UPDATE</u>

40. CPIT should publish the expected updated SOGI CPIN on Kenya as a priority. The reviewer cannot see how there can be publication of the India CPIN update on 2 October 2018, within weeks of the September 2018 section 377 Indian Supreme Court judgment,[17] but no CPIN update with respect to this Kenyan High Court judgment in May 2019.

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[16] Michael Oduor (Africanews.com), 9 November 2019 https://www.africanews.com/2019/11/09/kenya-s-president-uhuru-kenyatta-rejects-gay-agenda-in-global-population/ accessed 25 January 2020. See also, *Uhuru rejects gay agenda in population conference*, Gordon Osen (Star), 9 November 2019 https://www.the-star.co.ke/news/2019-11-09-uhuru-rejects-gay-agenda-in-population-conference/ accessed 25 January 2020.

[17] See page 35 of 36 of October 2018 CIPN on India: SOGIE (version 3).

17. MALAWI

Capital city: Lilongwe
Population:[1] 19,129,952
Predominant religions: Protestant Christianity and Sunni Islam.
FCO Travel Advice:[2]

> *'Outside the main tourist areas, women should cover legs and shoulders to avoid offending local sensitivities.*
>
> *Homosexual acts are illegal.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Malawi.

2. The current Home Office COI for Malawi is the February 2017 Country Policy and Information Note: Sexual orientation and gender identity.[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Malawi: Laws and Customs, last updated 22 January 2020 https://www.gov.uk/foreign-travel-advice/malawi/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678301/Malawi_-_SOGI_-_CPIN_-_v3.0__February_2017_.pdf , last accessed 3 February 2020.

b. *Decision-making statistics (2015-2018):*

3. There has been a very slight drop in the number of SO protection claims from Malawi, with a a drop in applications from 10 in 2017 to only 8 in 2018, ranking it 26th in the June 2019 published list for claims in 2018. [6]

4. In 2015 15 applications were lodged. In 2016 18 applications were lodged.[7]

5. Out of the 12 initial decisions made by the Home Office in 2018, no specific outcomes were recorded for 2018, 2017 (11 decisions) and 2016 (17 decisions).[8] In 2015 out of 13 initial decisions, 5 were granted and 8 were refused leave to remain.

6. 11 statutory appeals were determined in 2018, with no specific outcome recorded by the Home Office.[9]

7. On this basis no inference can be drawn with respect to the use of COI by administrative or judicial decisions, bar 2015 where there was a 38% grant outcome for initial decisions.

B. CASE LAW:

Country Guidance and reported cases:

8. The are no Country Guidance cases on Malawi.

9. There are no reported Tribunal cases on SOGIE claims from Malawi.

[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition -5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[7] ibid.
[8] *SO Statistics* (n 4). The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[9] ibid. The statistics do not record any outcomes on the appeals determined from 2015 (5 appeals determined); 2016 (6 appeals) and 2017 (12 appeals determined).

Unreported Tribunal cases:

10. There were 2 results for a search on 'Malawi LGBT'.

11. Only one addressed by country background evidence. The Upper Tribunal in the unreported determination of **Secretary of State for the Home Department v EK (AA/09217/2015)** (heard 4 July 2016, promulgated 7 July 2016, published 12 June 2017) (Upper Tribunal Judge Macleman) held the findings of the Judge who allowed the appeal of a lesbian from Malawi were not supported by the COIR thereby allowing the appeal by way of remittal back to the First-tier Tribunal for reconsideration afresh (de novo)). [12]:

> 'The further conclusion that such behaviour, were it to occur, would give rise to risk of persecution is similarly unsupported. It runs counter to the evidence that prosecutions are rare. No instance has been cited of prosecution (or other persecution) of a person who makes homosexual manifestations as the result of mental disturbance.'

12. None of the 7 case results for 'Malawi gay' made any findings of fact regarding the country evidence, or were related to Malawi SOGIE claims. Only one of the six results for 'Malawi lesbian' was arguably relevant (cited above).

13. There were no relevant matches for 'Malawi bisexual', 'Malawi trans', or 'Malawi intersex'.

C. HOME OFFICE COI:

Country Policy Information Note (February 2017):

14. The current published policy is the *Country Policy and Information Note: Malawi: Sexual orientation and gender identity* (version 3.0) (February 2017).

15. The policy summary states [paragraphs 3.1 to 3.3] (page 8) (emphasis added):

> '3.1.1 Same-sex sexual relations are criminalised in Malawi, however this legislation is currently under review. Although a moratorium on imposing this law has been annulled there have been no reports of arrests and prosecutions under anti-gay legislation since the

annulment. While there have been arrests and prosecutions in the past these have been few in number and since 2010 have been overturned by the government.

3.1.2 There is no evidence that there is widespread harassment of, or violence against, LGBT persons. While societal intolerance and discrimination occurs, such treatment does not generally amount to a real risk of persecution or serious harm. Each case needs to be considered on its individual merits, with the onus on the person to demonstrate that they would be at real risk on return.

3.1.3 Protection may be available and it is up to the person to show that they are unable to seek and obtain it.'

Legal Context:

16. There are credible reports of use of the criminal law in 2018.

17. The May 2019 Human Dignity report records the following, referring to Malawi as one of the country case examples:[10]

'In 2012, Malawian Justice Minister Ralph Kasambara announced a moratorium on laws criminalising same-sex activity while Parliament debated repealing such provisions.210 In July 2014, Solicitor General Janet Chikaya-Banda re-affirmed the moratorium to the UN Human Rights Committee, pending the review of a constitutional challenge of the laws by the Centre for the Development of People and the Malawi Law Society before the High Court. However, news reports from April 2018 suggest that Sections 156 and 153 are still being used to arrest and harass people.'

18. The April 2018 news report referenced as the source by Human Dignity Trust is the on-line publication 'Erasing 76 crimes'[11] article 'Malawi trying to elude moratorium on anti-gay arrests' (emphasis in source material):[12]

[10] Human Dignity Trust, 'Injustice Exposed: The Criminalisation of Transgendered People and its Impact', May 2019, pages 52 to 53, at page 52: https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf , last accessed 3 February 2020.
[11] This is a source of COI used by CPIT (see section 5.1.1, page 15 of CPIN).
[12] Colin Stewart, 'Malawi trying to elude moratorium on anti-gay arrests' 76 crimes, 27 April 2018, https://76crimes.com/2018/04/27/malawi-trying-to-elude-moratorium-on-anti-gay-arrests/, accessed 3 February 2020.

> 'For six years, Malawi has imposed a moratorium on arrests for alleged violations of the nation's laws against gay sex, but police have now arrested a man on suspicion of being gay and charged him with indecency.
>
> The arrest was reportedly made for an alleged violation of Section 156 of the Penal Code (indecent practices between males) rather than under the country's main anti-gay law, Section 153 (carnal knowledge of any person against the order of nature).
>
> Those laws are facing a constitutional challenge in court.'

19. The on-line article posts a link to the news report on the arrest (25 April 2018, Nyasa Times).[13]

20. As recorded in 2017 at section 4.5.3, there continues in 2020 to be no decision on the constitutional challenge.

21. However, as the COI source material shows the law is being applied, as recently as April 2018 and there is no evidence the reviewer can locate of government action to cease the charge and/or prosecution of this case. This arrest also shows the 2017 CPIN's reference to the law being under review [section 3.1.1] has not showed lack of enforcement.

Discrimination amounting to persecution (SOGIE):

22. The US State Department Report 2018 (published 2019) provides evidence of restrictions of movement of LGBTI refugees in Malawi (Section D):[14]

> 'UNHCR received asylum seekers claiming to be lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. Asylum seekers travelled [sic] irregularly from Kakuma Refugee camp in Kenya and from Uganda. The government has placed a ban on registration of perceived LGBTI persons' cases on the basis that it is against the law of the country. UNHCR was still negotiating with the Ministry of Home Affairs to reverse its decision and consider registration and processing of all arrivals, including LGBTI cases.'

[13] Judith Moya, 'Malawi police arrest man suspected of being gay in Mzuzu, charged with 'gross indecency', Nyasa Times, 25 April 2018: https://www.nyasatimes.com/malawi-police-arrest-man-suspected-of-being-gay-in-mzuzu-charged-with-gross-indecency/?utm_source=&utm_medium=&utm_campaign= , accessed 3 February 2020.

[14] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/malawi/ accessed 25 January 2020.

23. The section 6 section on discrimination records 21 incidents (in 2018) of complaints not merely based on discrimination, but also including violence (**emphasis added**):

> **'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> By law and practice LGBTI persons are denied basic civil, political, social, and economic rights. Consensual same-sex sexual activity is illegal and for which conviction is punishable by up to 14 years in prison, including hard labor. The penal code, a legacy from the British colonial era, outlaws "unnatural offenses" and "indecent practices between men." In 2014, however, Solicitor General Janet Banda told the UN Human Rights Commission the government would not enforce these laws. In 2015 Minister of Justice Samuel Tembenu reaffirmed the moratorium on the enforcement of laws criminalizing consensual same-sex sexual activity.
>
> Same-sex sexual activity may also be prosecuted as "conduct likely to cause a breach of the peace." A 2011 amendment to the penal code established penalties for consensual same-sex sexual activity between women, setting a maximum prison term for conviction of five years.
>
> **In 2016, the latest year for which data were available, the Center for the Development of People documented 21 instances of abuse based on sexual orientation and gender identity. The nature of the abuses fell into three broad categories: stigma, harassment, and violence**.
>
> **HIV and AIDS Social Stigma**
>
> Societal discrimination against persons with HIV/AIDS remained a problem, especially in rural areas. Many individuals preferred to keep silent regarding their health conditions rather than seek help and risk being ostracized. Campaigns by the government and NGOs to combat the stigma had some success. The National AIDS Commission maintained that discrimination was a problem in both the public and private sectors.
>
> The *2012 People Living with HIV Stigma Index for Malawi* indicated that of 2,272 persons with HIV interviewed, significant percentages reported having been verbally insulted, harassed, and threatened (35.1 percent) and excluded from social gatherings (33.7 percent).'

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24. The CPIN records the following at [8.1.1] (page 23):

> 'The USSD report for 2014 noted that public discussion of LGBT rights increased during 201439 and the USSD report for 2015 stated: 'From January to September, the Center for Human Rights and Rehabilitation and the Center for Development of People documented 40 instances of abuse based on sexual orientation and gender identity. The nature of the abuses fell into three broad categories: stigma, harassment, and violence. The Weekend Nation newspaper published a weekly column entitled "Sexual Minority Forum" written by the leaders of human rights NGOs to shed light on conditions affecting LGBTI persons and their rights.'

25. Paragraph 7.1.6 of the 2017 CPIN does not record any information about the Centre (page 21):

> 'However in regard to the comments of Dr Idruss, the Nyasa Times reported: 'Malawi's Justice and Constitutional Affairs Minister, Fahad Assani, has trashed calls by the Muslims Association of Malawi (MAM) to toughen the punishment for homosexual acts to include death penalty. 'MAM general secretary Shiek Salmim Omar Idruss said those convicted of homosexual acts should face a death penalty and not 14 years jail as the law states now. 'Idruss argued that capital punishment was the only way to rid society of homosexuality. However, Assani said pushing such a law there will be an international outcry, which could see some countries suspend aid to the country. Speaking in a telephone interview with Nyasa Times, Assani said Malawi is a democratic country and cannot promote homophobia and impose death penalty on gays.'

26. Noting the CPIN is published in February 2017, the above citation in the US DOS 2018 makes clear a continued link between discrimination, stigma and violence.

27. In 2017, the Other Foundation published a report 'Canaries in the coal mines: An analysis of spaces for LGBTI activism in Malawi: Country Report'.[15] In this report at page 6 it states:

> 'Fear of family and community rejection leads many LGBTI people to live secret lives in a patriarchal society with strongly heteronormative value systems. In many instances, this secrecy and the need to hide their sexual orientation means having concurrent male and female sexual partners.'

[15] http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Malawi.pdf accessed 25 January 2020.

28. This report also records a CEDEP 2015 report recording 76 incidents of violence against LGBTI people in Malawi (section 7.1) (page 42):

> '7.1 Violence, Harassment and Isolation
>
> LGBTI people in Malawi lack protection from arbitrary harassment, violence and intimidation, with little recourse to legal redress. The 2015 CEDEP-CHRR report documenting human rights violations against LGBTI people states that "in recent years, human rights violations on the basis of real or perceived sexual orientation, gender identity or gender expressions have become increasingly visible in Malawi".
>
> The report documents 76 cases of rights abuses against LGBTI people.'

29. This 2015 CEDEP Human Rights Violation report cited in the above section is not cited in the 2017 CPIN.

30. This COI source material accords with the Home Office reference to single, or cumulative discriminatory measures, may amount to persecution.[16]

Gender Identity and Expression/Intersex:

31. The CPIN does give a broad overview of COI with respect to Gender Identity or Expression and Intersex at section 4.4 of the CPIN, addressing the 2015 change to the marriage laws and gender is ascribed to "sex of a person's birth' (section 4.4.1).

32. The three paragraphs in this section do form a basis to show the legal measures used to show discriminatory measures amounting to persecution, due to the 2015 legislative measures.

[16]UK Home Office, 'Asylum policy instruction: Sexual orientation issues in the asylum claim', August 2016, page 16: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf , last accessed 3 February 2020.

D. SUMMARY OF REVIEW:

URGENT ACTION:

33. The CPIN need urgent updating. It is clear there COI shows arrests as recently as April 2018, evidencing there is no moratorium; the law is being enforced.

34. There is also clear and credible COI evidencing abuse and violence towards SOGIE in Malawi to be included and made publicly available to decision-makers.

18. MALAYSIA

Capital city: Kula Lumpur
Population:[1] 32,365,999
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Malaysia is a multicultural, majority Muslim country. You should respect local traditions, customs, laws and religions, especially during the holy month of Ramadan, other religious festivals or if you intend to visit religious sites. See Travelling during Ramadan*
>
> *.'*
>
> *You should also dress modestly, particularly in conservative and rural areas and when visiting places of worship.*
>
> *If you're a Muslim you may be subject to local Shari'a law.*
>
> *… Homosexual acts are illegal in Malaysia and punishable under federal law, and in some staes, shari'a law. You should avoid any behaviour which could attract unwanted attention, including public displays of affection. Openly gay and lesbian support groups exist.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Malaysia.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Malaysia: Local Laws and Customs, last updated 25 January 2020: https://www.gov.uk/foreign-travel-advice/malaysia/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014):

2. There is no current SOGIE CPIN for Malaysia.

3. There is a *Country Background Note on Malaysia* (version 1.0) (January 2019).[5]

b. *Decision-making statistics (2015-2018):*

4. There has been a dramatic and substantial rise in the number of asylum applications lodged on the basis of SO from Malaysia with an approximately 250% rise from 53 in 2017 to 139 in 2018.

5. Malaysia is ranked the country the 3rd highest ranking in the list for asylum applications lodged,[6] and is additionally the 2nd highest country of origin for proportion of SO protection claims with 139 out of a total 259 protection claims lodged in 2018 (54%).[7]

6. The ranking and the lack specific SOGIE on Malaysia formed the basis of why CPIT was approached for any internal country policy documentation. The author has been informed there may be plans to publish a specific SOGIE CPIN on Malaysia.[8]

7. Out of the 103 initial decisions made by the Home Office in 2018, a record 54 were granted leave and 49 refused some form of leave to remain.[9] There is a pattern of an approximately fifty percent split between grants and refusals recorded in the previous three years: 2015 (15 decisions: 7 granted, 8 refused; 2016: 22 decisions: 11 grants and 11 refusals; and 2017: 24 decisions: 10 grants and 14 refusals.

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https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774875/Malaysia_-_Background-_CPIN_January_2019_ex.pdf, last accessed 1 February 2020.

[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020. The number of applications lodged in 2015 was only 19 and in 2016; 21.

[7] ibid. 'Table 1: Top 5 nationalities with the highest proportion of asylum applications', last accessed 28 January 2020.

[8] Email communication from IAGCI to the reviewer communicating response to reviewer's request. Email 21 January 2020:

- *'Malaysia – The most recent COI is contained in the Background note of January 2019 which is published on GOV.UK. We are in the process of developing a SOGIE CPIN but this is at an early drafting stage.'*

[9] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

8. 33 statutory appeals were received in 2018, with 14 appeals allowed (17 were dismissed).

9. There are no figures for appeals determined in 2015. From 2016 to 2017 there are no figures for outcomes for the 8 appeals determined in 2016 and 10 appeals determined in 2017.

10. There is a logical inference of country background evidence supporting risk on return based on the figures for positive grants at decision and/or appeal level.

B. CASE LAW:

Country Guidance:

Country Guidance and reported cases:

11. There are no current Country Guidance cases on Malaysia.

12. There is the Court of Appeal case of **HL (Malaysia) v Secretary of State for the Home Department [2012] EWCA Civ. 834** citing at paragraph 5 of the judgment, paragraphs 33 to 35 of the First-tier Tribunal's approach (emphasis added):

> "33. Having carefully considered the background evidence and the Appellant's own evidence that he knew of no one who had been persecuted in Malaysia and [Counsel's] account of finding no cases since 2000, I am not satisfied that gay people would be subject to persecution in Malaysia. Homosexuality is not a criminal offence and the law under Section 377 that criminalised sexual acts has only been used 7 times in 70 years and 4 of these occasions were against the ex-Prime Minister, Anwar Ibrahim. As a Christian the Appellant will not be subject to Sharia Law, I accept that some reports refer to not being private but it is evidence from the information about clubs, venues, spas etc and information for gay visitors and the report that gay life was blossoming in Malaysia that gay people are able to live openly in Malaysia without fear of persecution.

> 34. In the event that the above finding was flawed, I have considered how this Appellant would live on return. This is an Appellant who has returned to Malaysia, having lived in in the United Kingdom for some time. He was there for 6 months in 2008-2009 and recently went back for a wedding. He has described visiting gay clubs in London and having physical contact in a sauna. Such gay venues exist in this country but he has not visited them and did not know of them and said that he did no research on them via the internet ... The Appellant said in interview and confirmed in evidence that he had not told his parents about his sexuality to spare them heartache. He has said that he will only tell people he is gay if they ask. I find that it is in the nature of this Appellant to be discreet. He is someone who is sensitive to his family's feelings.
>
> 35. I find that as an unflamboyant discreet homosexual, the Appellant would be unlikely to bring himself to the attention of ordinary citizens and even less likely to attract the attention of the authorities. As stated in Paragraph 82 of **HJ,** 'If the Tribunal concludes that the applicant would choose to live discreetly because that was how he himself would choose to live or because of social pressure, then his application should be rejected.' Having considered the Appellant's case I conclude that the Appellant would choose to live because that was how he would choose to live. If he were to have a relationship and a partner, I do not find that the background evidence demonstrates that this would cause him to be at risk of persecution.'

13. The above case shows where there is no country evidence of risk to persecution (arising from the social, religious and cultural mores), then the fact-finding Tribunal can link to modification on return (not a step required after not successfully engaging the second objective risk limb), due to 'choose to live'.

14. This highlights the causal link in protection claims following HJ (Iran), where a positive finding that those who live openly have a well-founded fear of persecution, then modification of the individual on return is within an environment where social, religious and cultural mores give rise to persecution.

15. 'Choosing' discretion is done within the context of a persecutory environment where not being identified would require (successful) conformity with the gender-sex role stereotype required by the potential persecutor, in order not be identified and persecuted ("proving straight").

16. There have been clear recorded changes in the COI reflected in the fact there is a 46% grant rate in first decisions (see 2018 statistics).

Unreported Tribunal cases:

Gender Expression and Identity and Perceived Sexual Identity:

17. There is also the unreported August 2017 Upper Tribunal determination in **LSL v Secretary of State for the Home Department [2017] UKAITUR PA117922016** (heard 25 April 2017, promulgated 6 July 2017, published 10 August 2017) (unreported) (Deputy Upper Tribunal Judge Latter) [21]-[24]:

> '21. The background information before the First-tier Tribunal is summarised in [33]-[39] of the decision. From this information, the judge accepted that same-sex sexual activities were against the law in Malaysia, although actual prosecutions appeared to be very rare. "Cross-dressing" was at least to some extent against the law in Malaysia, although actual incidents of prosecution did not seem to be common. Criminalisation provided a background against which politicians would occasionally engage in rhetoric directed against LGBT people in Malaysia and similar sentiments were expressed by clerics and religious leaders. There was general discrimination in society, including occasional harassment, against LGBT people in Malaysia. The difficulties were typically greater for those from Muslim societies in Malaysia but this did not include the appellant. There was no legal recourse for LGBT people who had been discriminated against.
>
> 22. In [50] of his skeleton argument [Counsel] refers to the Human Dignity Trust Report that:
>
> > "According to the United States Human Rights Country Report, the law is rarely enforced. However, transgender individuals were often charged under the Minor Offences Act for 'indecent behaviour' and 'importuning for immoral purposes'."
>
> 23. In [51] he cites from the International Gay and Lesbian Human Rights Commission Report of 1 September 2015 as follows:
>
> > "The Malaysian Government along with Brunei and Singapore, rejected the inclusion of sexual orientation and gender identity in the ASEAN Human Rights Declaration, resulting in the adoption of a regional human rights instrument that intentionally excluded human rights protections for LGBT

> persons. Within Malaysia Razak's [the Malaysian Prime Minister] statement fuels discrimination, disrespect and even physical assaults against LGBT people.
>
> During his tenure as Prime Minister, LGBT students have been rounded up and sent to camps for 'conversion' of gay and effeminate boys, the Human Rights Arts and Education Festival Seksuality Merdeka, was shut down and banned in 2011 and religious officers have been shown to repeatedly abuse Mak Nyah (female to male transsexuals and transgender persons).
>
> Malaysia criminalises 'carnal intercourse against the order of nature' (s. 377, Malaysian Penal Code). Several provisions under Malaysia's Sharia laws criminalise gender non-conformity ('male posing as woman' or 'female posing as a man'), lesbianism and sexual relations between men."

23. In a report "Erasing 76 Crimes, 4 July 2016" it is said that:

> "In Malaysia, the system causes and reinforces the targeting and discrimination of transpeople. Transpeople are not allowed to change their name, gender and the last digit in their identification card number or in any other legal documents. The Government's refusal to allow transpeople to change details in their identification documents to reflect transpeople's authentic identities makes transpersons vulnerable to stigma, discrimination and violence, including denial of employment opportunities, humiliating experiences when forced to use identification card, and arbitrary arrests among others".

24. I have also been referred to the UNHCR Guidelines No 9 which at [33] reads as follows:

> "Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response to an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term."

18. At paragraphs 26 and 30 the following findings of fact are made with respect to persecution:

> 26. The respondent accepted that the appellant would be at risk of discrimination, but found that the evidence did not support a finding that the discrimination would be such as to amount to persecution. This may be the case for some, but

I must consider the position of the appellant in his particular circumstances. The appellant's claim was assessed by the respondent on the basis that he was a lesbian (and understandably so as the issue of gender identity does not appear to have been fully formulated at that stage). The issue on the evidence available now is whether the appellant would be at risk of persecution as a transgender man or whether because of his birth assigned gender, he would be perceived to be a lesbian in Malaysia. Following the approach in HJ (Iran), I am satisfied that the appellant is a transgender man who would be perceived as a lesbian by the Malaysian authorities. I must go on to consider whether if the appellant lived openly as such, he would be liable to persecution?.

…

30. The country information shows that prosecutions are infrequent under the laws criminalising homosexual behaviour but I accept that there is a real risk of prosecution under the Minor Offences Act. The evidence also satisfies me that the appellant would not be able to live freely and openly as a transgender man. The contrary is suggested by the fact that a number of states have introduced a specific law against cross-dressing and there is no indication of any change of attitude generally or by the authorities in Malaysia which could indicate any increasing tolerance on issues of sexual identity. When this is considered with the evidence about the system in Malaysia causing and reinforcing targeting and discrimination of trans-people by the restrictions identified in "Erasing 76 Crimes 4 July 2016" (see [24] above) and taking into account the appellant's background and his account of the way he was treated when in Malaysia, I am satisfied, at least to the lower standard of proof required in international protection cases that the fact that the appellant would be unable to live freely and openly as a transgender man without being at real risk of treatment and discrimination sufficiently severe to amount to persecution.'

C. HOME OFFICE COI:

Country Background Note (January 2019):

19. The *Country Background Note on Malaysia* (version 1.0) (January 2019).[10]

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774875/Malaysia_-_Background-_CPIN_January_2019_ex.pdf, last accessed 3 February 2020.

20. The Home Office's policy position is stated at section 13 of the report (pages 22 to 25):

'13. Sexual orientation and/or gender identity Section 13 updated: 15 January 2019

13.1.1 Same-sex sexual acts are illegal under Section 377A of the 1976 Penal Code Section 377A105 106 and are punishable by up to 20 years in prison107. Although the law states that sodomy and oral sex acts are 'carnal intercourse against the order of nature', the authorities rarely enforced this provision108.

13.1.2 The ILGA world survey of laws noted that: 'Several states in Malaysia have instated Islamic Sharia laws, applying to male and female Muslims, criminalising male/male and female/female sexual acts with up to three years imprisonment and whipping. The Sharia Penal law in the Malaysian state of Pulau Pinang confers penalties for sodomy [Liwat] and lesbian relations [Musahaqat] with fines of RM5,000.00, three years imprisonment and 6 lashes of the whip. All these penalties can be combined.'109

13.1.3 DFAT reported that: 'The National Fatwa Council banned gender reassignment surgery in 1983 and the National Registration Department does not allow transgender people (Muslim or non-Muslim) to change the sex marker on their national identity cards to match their gender. State religious authorities or the RMP have arrested transgender women identifiable as Muslim whose national identity cards identify them as male. 'The Malaysian government has in the past openly criticised lesbian, gay, bisexual, transgender or intersex (LGBTI) people. In August 2015, Prime Minister Najib claimed that 'groups like the Islamic State and lesbians, gay, bisexuals, and transgender both target the younger generation and seem successful in influencing certain groups in society. 'The police and judiciary have banned public demonstrations of support for the LGBTI community. 'The federal government and a few state governments, have openly run programmes aimed at 'rehabilitating' suspected LGBTI youth. 'Some state governments went beyond the educational measures supported by the federal government. The Terengganu government has run a 'reeducation boot camp' or 'behaviour corrective program' in Besut for effeminate teenage males since 2010, to which boys selected for effeminate behaviour were sent for physical training and religious and motivational classes. 'Cross-dressing is not illegal but police are known to arrest transgender men under the Minor Offenses Act (1955) for public indecency and immorality and, where Muslim, under sharia-based law for impersonating women.'

13.1.4 The USSD report noted that 'Authorities often charged transgender individuals with "indecent behavior" and "importuning for immoral purposes" in public. Those convicted of a first offense faced a maximum fine of 25 RM ($5.77) and a maximum sentence of 14 days in jail. The sentences for subsequent convictions may be maximum fines of 100 RM ($23.10) and a maximum of three months in jail. Local advocates contended that imprisoned transgender women served their sentences in prisons for men where police and inmates often abused them verbally and sexually. A survey by a local transgender rights group reported more than two-thirds of transgender women experienced some form of physical or emotional abuse'.

13.1.5 The UN General Assembly noted in September 2018 that: 'The Special Rapporteur on health stated that discriminatory societal attitudes towards lesbian, gay, bisexual and transgender persons prevailed in Malaysia and had been exacerbated over the past few decades by the use of a stigmatizing rhetoric by politicians, public officials and religious leaders. The criminalization of same-sex conduct and of different forms of gender identity and expression had reinforced negative societal attitudes and led to serious human rights violations of the rights of that group of the population.'

13.1.6 HRW's annual report covering 2017 assessed that discrimination against LGBT people is 'pervasive in Malaysia' and that violence against them 'remains a serious concern' and 'highlighted by the murder of a transgender woman Sameera Krishnan in February, and the rape and murder of 18-yearold T. Nhaveen, a young man whose assailants taunted him with anti-LGBT slurs, in June'. However it also noted that the Health Ministry, in response to strident criticism from activists and the general public, reframed the terms of a youth video competition, removing language and criteria that stigmatized LGBT identities in favour of language that appeared to affirm them.

13.1.7 For more information see:

• Amnesty International Report 2017/18 - The State of the World's Human Rights – Malaysia, 22 February 2018

• CNN, ''People are afraid': Gay caning stokes fear in Malaysia's LGBT community', 3 September 2018,

• DFAT's April 2018 Country Information Report Malaysia (p27)

• Freedom House, Freedom in the World 2018 – Malaysia, • International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), A World

Survey of Laws: Criminalisation, Protection and recognition of same-sex love, (p39 & 131), May 2017

• Ipsos, Malaysia: 'Top Issues Faced by Women & Misperceptions of Women Empowerment', 6 April 2018,

- Penal Code, as at 1 February 2018 , (Section 377A)

• The Guardian, 'Malaysia accused of 'state-sponsored homophobia' after LGBT crackdown', 22 August 2018

• US Department of State (USSD), Country Reports on Human Rights Practices for 2017, Malaysia, (Section 6), 20 April 2018 Back to Contents.'

Discrimination amounting to persecution:

20019/20 evidence:

21. US DOS 2018 (published in March 2019) states in the Country Report on Malaysia:[11]

'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity

Adult same-sex acts are illegal regardless of age or consent. The law states that sodomy and oral sex acts are "carnal intercourse against the order of nature." While authorities rarely enforced this provision, it was the basis for the controversial case against then-opposition leader Anwar Ibrahim (see section 1.e.). Religious and cultural taboos against same-sex sexual conduct were widespread (see section 2.a.). In August two women in Terengganu State were sentenced by a sharia court to RM3,300 ($825) in fines and six strokes of the cane each after they were accused of same-sex sexual activity. Authorities caned the women before an audience of approximately 100 persons, marking the first public caning recorded in the state.

Authorities often charged transgender persons with "indecent behavior" and "importuning for immoral purposes" in public. Those convicted of a first offense faced a maximum fine of RM25 ($6.25) and a maximum sentence of 14 days in jail. The sentences for subsequent convictions may be maximum fines of RM100 ($25) and a maximum three months in jail. Local advocates contended that imprisoned transgender women served

[11] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/malaysia/, last accessed 3 February 2020.

their sentences in prisons designated for men and that police and inmates often abused them verbally and sexually.

A survey by a local transgender rights group reported more than two-thirds of transgender women experienced some form of physical or emotional abuse. In August a group of boys repeatedly beat a transgender woman in Negeri Sembilan State. In November police arrested a man for allegedly killing his transgender girlfriend in Perak State.

State religious authorities reportedly forced lesbian, gay, bisexual, and transgender (LGBTI) persons to participate in "treatment" or "rehabilitation" programs to "cure" them of their sexuality. In August police raided a club in Kuala Lumpur associated with the LGBTI community, detaining 20 men and ordering them to attend counseling for "illicit activities." Authorities stated the raid was part of an antidrug operation, but a government minister posted on Facebook that he hoped the operation would "mitigate the LGBT culture from spreading into our society."

LGBTI persons reported discrimination in employment, housing, and access to some government services because of their sexuality.

In August a federal government minister ordered festival organizers in Penang State to remove portraits of two LGBTI activists from a photography exhibition because the government does "not support the promotion of LGBT culture…" One of the activists whose photograph was removed received multiple death threats in the wake of the controversy. Authorities took no action against those making the threats.

Also in August a government minister stated that authorities would monitor social media and other online content in order "to curb LGBT issues, as well as liberal Islam."

22. The May 2019 Human Dignity Report, 'Injustice Exposed: The Criminalisation of Transgender People and its Implications' cites Malaysia as a case country example (pages 25 to 26, at page 26) (footnotes omitted) (emphasis added):[12]

> 'Malaysian police officers have also arrested a number of trans women under an overly vague provision of the secular federal criminal code that prohibits "public indecency" and applies to people of all religious backgrounds.

[12] https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf, last accessed 3 February 2020.

> These criminalising provisions have fuelled stigmatisation of transgender and gender diverse people in Malaysia and created an environment in which prejudice and discrimination against this group, including within education, employment and health care settings, is commonplace. This is exacerbated by the actions of public institutions and government ministries, which perpetuate the belief that gender and sexual diversity are to be prevented and controlled.
>
> The resulting denial of basic rights and access to essential services means that transgender and gender diverse people in Malaysia frequently suffer socio-economic deprivation. Moreover, the significant obstacles faced by the trans community in accessing public healthcare have contributed to greater HIV prevalence, despite the government of Malaysia's recognition of transgender people as an at-risk population in the fight against HIV and AIDS.
>
> Furthermore, there is evidence that trans women, in particular, experience oppressive and discriminatory treatment from police officers and Islamic religious officers. These state actors arbitrarily detain trans women, stop them at unauthorised roadblocks, question them with sexual undertones, and humiliate, intimidate and threaten them. Such treatment has the effect of discouraging trans women from going to the police or seeking legal remedies, even when they fall victim to violence, for fear of being ridiculed and further harassed by the authorities.'

23. In January 2020 Human Rights Watch reflected the stalling of human rights in Malaysia, specifically with respect to LGBT rights 'Malaysia: Human Rights Stall: Backtracking on Free Expression, Accountability, LGBT rights' (14 January 2020):[13]:

> 'Discrimination against LGBT people in Malaysia is pervasive. Federal law punishes "carnal knowledge against the order of nature" with up to 20 years in prison, while numerous state Sharia laws prohibit both same-sex relations and non-normative gender expression, resulting in frequent arrests of transgender people. In November, five men were sentenced to prison terms and six strokes of the cane for "attempted intercourse against the order of nature." Four were caned on November 19.
>
> Prime Minister Mahathir Mohamad and other government officials have made statements expressing a lack of support for the LGBT community. In June,

[13] https://www.hrw.org/news/2020/01/14/malaysia-human-rights-reforms-stall, last accessed 3 February 2020.

Mahathir said that the discussion of LGBT rights was being promoted by "Western countries" and was "unsuitable" for Malaysia.'

D. SUMMARY OF REVIEW:

URGENT ACTION

24. The reviewer notes he has been informed a SOGIE CPIN on Malaysia is planned.[14]

25. In order to carry out functions of transparency and accessibility, noting the high level of grants of protection, then this separate CPIN with the additional material cited above would be recommended.

26. Noting the high number of claims and initial decisions granting protection, it is recommended this is done as a matter of urgency, to save on public resources.[15]

[14] 21 January 2020 email (n 6).

[15] A SOGIE published policy (CPIN) would ensure decision-makers (administrative and judicial) had access to the policy and also assist in reduction of expense in preparing individual applications and/or appeals. The policy should provide consistency and certainty.

19. MOROCCO

Capital city: Rabat
Population:[1] 36,910,560
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Morocco is a Muslim country which follows Islamic laws and customs. Be aware of your actions to ensure they don't offend, especially during the holy month of Ramadan or if you intend to visit religious areas. You should respect local traditions, customs, laws and religions at all times. See Travelling during Ramadan.*
>
> *Avoid public displays of affection, particularly outside the main tourist areas and near religious places.*
>
> *Sexual relations outside marriage are punishable by law. It's not uncommon for hotels to ask couples to show evidence of marriage at the time of check-in, and if such evidence is not available, to insist on separate rooms.*
>
> *Homosexuality is a criminal offence in Morocco. Be sensitive to local laws and customs and avoid public displays of affection. Complaints can lead to prosecution. See our information and advice page for the LGBT community before you travel.*
>
> *Women, especially when travelling alone, may receive unwanted attention from men. To minimise hassle, you may choose to wear loose-fitting clothing which cover the arms, legs and chest. See our information and advice page for women before you travel.'*

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Morocco: Local laws and Customs, last updated 17 October 2019 https://www.gov.uk/foreign-travel-advice/morocco/local-laws-and-customs, accessed 25 January 2020.

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Morocco.

b. Decision-making statistics (2015-2018):

2. Morocco ranks 20th in the ranking with 11 protection applications based on SO as part of the claim lodged in 2018.[5]

3. There was a very slight dip in the number of claims in 2018 with 14 lodged in 2015, 18 in 2016, 17 in 2017, compared to the 11 in 2018.[6]

4. Out of the 17 initial decisions made by the Home Office in 2018, 9 were granted some form of leave and 8 were refused leave to remain.[7] In 2015, out of the 19 decisions 8 were positive and 11 were negative decisions. There is no specific figure for the outcomes for 2016 (10 decisions) and 2017 (15 decisions).

5. 6 statutory appeals were received in 2018, five appeals were allowed (six were dismissed).[8]

6. On the basis of the analysis of the CPIN below, the approximately fifty percent of positive outcomes at initial decision and/or appeal stage indicate interpretation of the

[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[6] ibid.
[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[8] From 2015 to 2017 6 appeals were determined. No precise outcome figures are recorded by the Home Office for these years (all figures supressed as less than five recorded).

country background material in a manner to recognise protection and/or subsidiary protection needs.

B. CASE LAW:

Country Guidance and reported Tribunal case law:

7. There is currently no Country Guidance case on SOGIE and Morocco.

8. There are no reported Tribunal cases on SOGIE and Morocco.

Unreported Tribunal cases:

9. There are 6 unreported cases when a search is undertaken on the Tribunal decisions database on "Morocco and gay": There were 2 cases when 'Morocco and LGBT', 1 case for "Morocco and lesbian' (related to a remitted appeal from DRC") and 2 for 'Morocco and trans' (both cases related to non-Moroccan claims (Vietnam and Thailand)).

10. The **only** relevant with respect to substantive consideration of the country evidence and risk on return is the 2018 unreported Tribunal case of **AEH v Secretary of State for the Home Department (PA/08097/2017)** (heard 2 October 2018, promulgated 6 November 2018, published 27 November 2018) (Upper Tribunal Judge Grubb) addressed the CPIN and held in a case where credibility and involvement in LGBT activism (ALCS) was accepted, there was no real risk on return arising from 'rare prosecutions' [22], there was low level discrimination in the workplace [23] and he was able to evade arrest by the paying of bribes [24]. At [22] (**emphasis added**):

> 'Secondly, the judge did not conclude that the background evidence only showed prosecution of gay men where there was in addition an "aggravating factor". He merely said, at para 19, that "many" of the cases involve men who were "committing a sexual act" and not being prosecuted simply because they were gay; and "other" prosecutions involved "other aggravating offences", such as possession of alcohol, corrupting younger people and promoting prostitution. Judge Clemes accepted that there were instances of gay men being prosecuted, in a variety of circumstances, under the Moroccan law. **However, the evidence before him was that these prosecutions were not numerous and**

> **the CPIN Report identified, on the basis of evidence, that prosecution was "rare". Judge Clemes had to decide whether there was a "real risk" of persecution based upon prosecution which was "more than fanciful". In my judgment, having properly considered the background evidence, it was not irrational for Judge Clemes to conclude that a "real risk" of prosecution (amounting to, as he put it, "persecution") had [not *sic*] been established. In reaching that conclusion, I am wholly unpersuaded that he failed properly to consider the background material before him.'**

11. The 21 March 2017 Danish Immigration Service Report: "Morocco: situation of LGBT persons' was relied on by the appellant's legal representative [22]. This report is cited within the July 2017 CPIN.

C. HOME OFFICE COI:

Country Policy Information Note (July 2017):

12. The current published policy is the *Country Policy and Information Note: Morocco: Sexual orientation and gender identity* (version 1.0) (July 2017) [34 pages].[9]

13. In summary the CPIN policy position is [2.3.16]:

> 'In general, the level of discrimination faced by LGBT persons in Morocco by society in general and/or their family is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm.'

14. This policy position is not reflected the initial grant rate or allowed appeals for 2018 (9 out of 17 initial decisions granted and five out of six appeals allowed), noting the 'in general' lack of persecution in the 2017 CPIN is by 2018 leading to a polar opposite acceptance of persecution in decision-making.

15. The US State Department report for 2018 on Morocco (published March 2019) records the following:[10]

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627380/cpin_morocco_sexual_orientation_and_identity_july_2017.pdf, last accessed 3 February 2020.
[10] US State Department Country Reports 2018: Morocco, 13 March 2019, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/morocco/, last accessed 3 February 2020.

'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity

The law criminalizes consensual same-sex sexual activity, with a maximum sentence of three years in prison. Media and the public addressed questions of sexuality, sexual orientation, and gender identity more openly than in previous years. According to some human rights organizations, LGBTI victims of violence in high profile cases from previous years continue to be harassed when recognized in public.

Antidiscrimination laws do not apply to LGBTI persons, and the penal code does not criminalize hate crimes. There was a stigma against LGBTI persons, but there were no reports of overt discrimination based on sexual orientation or gender identity in employment, housing, access to education, or health care.'

16. This does not reveal country background evidence to show persecution.

D. SUMMARY OF REVIEW:

REQUEST FOR FURTHHER INFORMATON:

17. The reviewer has made the decision in this unusual case to seek further information from CPIT and the Home Office Casework team on the 2017 published policy (CPIN on SOGIE) and the clear proportion of claims leading to positive grants either at decision, or appeal determination.

20. MYANMAR

Capital city: Rangoon
Population:[1] 54,409,800
Predominant religion: Buddhism
FCO Travel Advice:[2]

> ***'Religious customs.***
>
> *Respect religious customs when visiting Buddhist religious sites. Shorts and sleeveless tops will cause offence. You should remove shoes and socks before entering a pagoda or monastery. The Myanmar government and Myanmar Tourist Federation have published tips for visitors on local customs.*
>
> *…*
>
> ***LGBT travellers***
>
> *Homosexuality is technically illegal in Myanmar, although these laws are rarely enforced in practice. These laws can carry punishments of up to life imprisonment and apply equally to men and women. There have been reports of police using threats of prosecution to extort bribes and allegations of arbitrary arrest and detention, although these have primarily been reported by Myanmar nationals.*
>
> *LGBT people are rarely open about their sexuality or gender identity publicly, and LGBT communities are more likely tolerated than accepted within Myanmar society. There have nonetheless been increasingly large pride festivals that have taken place in recent years. Public displays of affection, whether heterosexual or LGBT are frowned upon in Myanmar's conservative culture. International organisations have reported high rates of HIV prevalence within the LGBT community in Myanmar. See our information and advice page for the LGBT community before you travel.'*

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2]Foreign travel advice: Myanmar: Local laws and customs, last updated 23 January 2020 https://www.gov.uk/foreign-travel-advice/myanmar/local-laws-and-customs , accessed 25 January 2020.

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Myanmar.

2. However, the January 2019 Independent Chief Inspector's review of CPIJ on Burma, Iraq and Zimbabwe did address the Home Office response to a request on the position of gay men in Burma. The following reviewer's comments and CPIT response is recorded in the report, noting the document assessed is only accessible internally within the Home Office and is not published publicly (reviewer Laura Draper):[5]

   'COI request – Treatment of gay men 04/15-101

   The request seeks information as to whether gay men can live openly anywhere in Burma:

   The quality of this response is high, providing detailed and accurate information in response to the request, from a range of reliable sources. I have no comments on this response, except to state that the situation as described in the information request is much the same as the present day. Although small moves have been made towards greater openness, particularly in Yangon, section 377 of the Penal Code remains in force and societal discrimination and police harassment persevere. See e.g. Myanmar Times, 'Prejudice and progress: a snapshot of LGBT rights in Myanmar', 1 June 2017, available at: https://www.mmtimes.com/lifestyle/26228-prejudice-and-progress-a-snapshot-of-lgbt-rights-inmyanmar.html

[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).

[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

[5] Independent Chief Inspector of Borders and Immigration, 'Inspection of Country of Origin Information January 2019 report' (June 2019): (pages 56 to 57). '[1.2]: These countries and topics were chosen because they had not been reviewed by IAGCI for some time (Iraq was last reviewed in 2015, Zimbabwe in 2014, and Burma in 2011) and because of the numbers of asylum applications and high refusal rates.' (page 2). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809931/Inspection_of_Country_of_Origin_Information_2019._Burma__Iraq_and_Zimbabwe.pdf, last accessed 1 February 2020.

We thank the reviewer for the positive SUMMARY OF REVIEWs. We will update the response, incorporating the additional source suggested and point the reader to the IAGCI review.'

3. The 2017 on-line report cited as COI by the reviewer makes clear the protection risks include all SOGIE strands: 'Pride and prejudice: a snapshot of LGBT rights in Myanmar':[6]

'"We are rejected."

That's how 21-year-old transgender woman Sue Sha Shinn Thant summed up being LGBT in Myanmar – a sentiment that many people across this country are all too familiar with.

We are verbally teased and even beaten. This scars us emotionally," she told *Weekend*.
…
[U Aung Myo Min said from his time at Equality Myanma] … had seen cases where lesbians were sexually assaulted in an effort to "cure them of their homosexuality"
Sue Sha Shinn Thant also felt that professional opportunities were more limited because of her sexual orientation.
"Most transgender women [only become] make-up artists or designers. They are not accepted in other professional fields apart from these two. Due to discrimination in society and fewer job opportunities, LGBT people often have to work much harder than straight people."
Small steps
But there have been some tentative steps forward.
…
Over the past few years, LGBT beauty pageants have become more popular and LGBT voices are being more widely publicised, especially on World AIDS Day and the International Day Against Homophobia, Transphobia and Biphobia.
…
So despite ongoing difficulties, Sue Sha Shinn Thant is determined to stay positive.
"There are LGBT people who are standing tall. We all need to do the same. If we speak out, the opinions of other people will change."
"Being LGBT is not a problem for our society. If we all come together, we can make an even more beautiful society."'

[6] Myanmar Times, 1 June 2017 https://www.mmtimes.com/lifestyle/26228-prejudice-and-progress-a-snapshot-of-lgbt-rights-in-myanmar.html ,last accessed 1 February 2020.

b. Decision-making statistics (2015-2018):

4. Myanmar (listed as Burma) is ranked 38th in the 2018 rankings for SO protection claims.[7] Only 2017 records 8 applications lodged with 2015 and 2016 not recording a specific number lodged.

5. Out of the initial decisions data set for 2015 to 2018 only 2016 and 2018 provides a record of 5 and 7 initial decisions made with no outcomes for either year recorded.[8]

6. 5 statutory appeals were determined in 2018. There are no outcomes recorded for this year, or for any of the years from 2015.[9]

B. CASE LAW:

Country Guidance/Reported/Unreported Tribunal case law:

7. None of the three Country Guidance cases listed by the Upper Tribunal under Burma address risk on return for SOGIE applicants.

8. A search of the decisions database under 'Myanmar gay' or 'Myanmar lesbian', 'Myanmar bisexual' 'Myanmar trans' or 'Myanmar intersex' revealed no cases relevant to SOGIE protection (reported or unreported (from 1 June 2013)).

[7]UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[8] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

[9] The statistics are supressed (*) for all other entries (record entry less than five).

C. HOME OFFICE COI:

Country Policy Information Note (January 2019):

9. The *Country Policy and Information Note: Burma: Critics of the government* (version 3.0) (January 2019) provides a single paragraph with respect to SOGIE [9.4.2]:

> '9.4 Entering Burma
>
> …
>
> 9.4.2 DFAT reported in its January 2017 Country Information Report that: 'Former political prisoners and exiled activists are now typically able to return safely to Myanmar. In preparation for this report, DFAT spoke with a number of political and human rights activists who had been imprisoned or exiled from Myanmar during the period of military rule; these people had been able to freely return to Myanmar in recent years, and have remained politically active. People who are known to have actively and openly criticised the military may face a higher level of scrutiny than other political activists such as LGBTI or democracy activists.'[10] (See also Political affiliation).'

10. At page 47, the source document is listed in the bibliography as:

> 'Australian Government, Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Myanmar', 10 January 2017, http://dfat.gov.au/aboutus/publications/Documents/country-information-report-myanmar.pdf. Last accessed 4 January 2019.'

11. This report is no-longer on the DFAT website and has been superseded by the 'DFAT Country Information Report Myanmar', 18 April 2019, (report) which has a full section on LGBTI (sections 3.105 to 3.112 at pages 41 to 43) (emphasis added) (**additional emphasis added**):

> 'LGBTI
>
> 3.105 Article 377 of the Penal Code prohibits 'carnal intercourse against the order of nature with any man, woman or animal', with a punishment of a fine and up to ten years' imprisonment. This is interpreted, inter alia, as criminalising sex between men; sex between two women is not

[10] Paragraph 5.3.4 (footnote 145)

considered to be covered under Article 377. There have been two prominent cases where authorities have used this provision against members of the LGBTI community: a transgender person who was sentenced to five years imprisonment in 2011 (released after three years), and an unsuccessful attempt to prosecute a gay couple who held a civil ceremony in 2014. Authorities also use Article 377 to prosecute perpetrators of child sexual offences and same-sex rape (provisions in the Penal Code only discuss rape of a female victim by a male perpetrator), thus conflating homosexuality and paedophilia. There have been no recent prosecutions under Article 377, and local civil society representatives told DFAT that this provision is primarily used by the police to extort money, particularly from gay and transgender men. 3.106 There are credible and recent reports of police harassment, extortion, physical and sexual abuse of LGBTI people. Section 35 (c) of the Police Act (1945) and Section 30 (c) and (d) of the Rangoon Police Act (1902) (known as the 'Shadow and Disguise Acts') are also used to intimidate and arrest LGBTI individuals. These provisions allow the police to detain a person located on the street between sunset and sunrise, with a covered face or being otherwise disguised, and unable to give a satisfactory account of oneself. LGBTI people are increasingly being detained at patrol sites, rather than being taken to police stations, and forced to pay fines of around MMK 50,000 (approximately AUD 45) for release. As police officers are frequently the perpetrators of harassment, a victim's ability to seek legal recourse is limited. When victims do file cases at police stations, officers are frequently uncooperative in gathering evidence and identifying perpetrators. Furthermore, the majority of documented cases cannot proceed to court due to an insufficient number of qualified lawyers being equipped and willing to advise in cases involving LGBTI individuals. A recent report from a LGBTI rights group identified 13 organisations and 15 lawyers around the country who provide legal aid to LGBTI people, mostly in or near the larger cities.

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3.107 The LGBTI community has become increasingly visible in Myanmar in recent years, but societal discrimination persists, particularly in rural areas. Most Myanmar people hold conservative views about gender roles, and the open discussion of sex in Myanmar is considered taboo. Traditional Buddhist beliefs consider homosexuality a result of karma. In remote and rural areas, religious groups (Buddhist, Muslim and Christian) have a high level of influence, and perpetrate societal discrimination against LGBTI, particularly transgender individuals. Some LGBTI individuals relocate from rural areas to avoid social stigma, and to seek employment opportunities. **Forced heterosexual marriage occurs, particularly involving gay and transgender men**. LGBTI people can cohabit in major cities, with large numbers of LGBTI people living in Yangon and Mandalay. Some restaurants, hotels and other venues in these major cities openly identify as LGBTI friendly; however, these venues can face some resistance from more conservative parts of the community, including religious organisations.

3.108 **Public violence by the community against LGBTI individuals is rare, however credible sources told DFAT that parents often use corporal punishment to 'correct' behaviour in young children that does not align with traditional gender roles or heterosexual norms**. Some parents are also reported to support teachers to discriminate against their LGBTI children at school. In school, LGBTI individuals are bullied by both peers and teachers, and there are high rates of school drop-out in the LGBTI community. There are restrictions on dress for transgender men in some universities. However, some recent improvement in the education system has been made, including the development of sexual orientation and gender identity content for the school curriculum by LGBTI rights groups and the Ministry of Education in 2017.

3.109 LGBTI people, particularly transgender, have limited employment prospects, including in large cities. **Gay men are not permitted to take up senior positions in the police force or Tatmadaw**. Employment in the beauty and entertainment industries is generally socially accepted for gay men and transgender women, but is often seasonal and poorly paid. **Outside of these industries, most transgender women are required to dress as men in their workplace**. Transgender men often work in low-paid manual jobs, including as construction workers or rickshaw drivers. Research by LGBTI rights groups indicate that there are gay and lesbian individuals working in government and the private sector, but they choose not to disclose their sexual orientation in the workplace for fear of discrimination. **Workplace discrimination as experienced by lesbians and transgender men is not as well-documented as that experienced by gay men and transgender women.** However, LGBTI rights organisations report it is higher due to the double disadvantage of being biological female in a patriarchal society. For example, transgender men have reported being given heavy workloads in manual jobs, while receiving the lower wages of a woman.

3.110 LGBTI people, particularly transgender, routinely experience discrimination in accessing health services. LGBTI people typically prefer to seek medical treatment in clinics operated by NGOs, especially in rural areas, due to experiences of discrimination on the basis of their sexual orientation and gender identity in government hospitals, including compulsory HIV/AIDS testing of transgender patients. Some of these NGO clinics provide antiretroviral therapy to HIV/AIDS patients. There are no fertility services for LGBTI individuals, and hormone replacement therapy for transgender women is often self-administered using contraceptive pills due to a lack of endocrine specialists. Sexual reassignment surgery is permissible in Myanmar with a doctor's recommendation; without this, a transgender individual could be charged under Section 312 of the Penal Code that relates to sterilisation by surgery. DFAT is aware of only one case, in 2005, of a transgender woman successfully changing her identity documentation following sexual reassignment surgery.

3.111 Media coverage of LGBTI issues is often negative, but visibility of LGBTI issues is increasing, particularly in urban centres. For example, in 2018 the fourth '&PROUD' Yangon LGBTI film festival attracted around 5,000 people, after it was first held in 2014. Social media has

helped to increased awareness of LGBTI issues, but has also been a medium for hate speech targeting the LGBTI community. There is an active LGBTI civil society in Myanmar; the Myanmar LGBTI Rights Network is a group of around 20 civil society organisations advocating for LGBTI rights. These groups have permission to operate from the government, but can be subject to threats and intimidation.

3.112 DFAT assesses that **LGBTI people in Myanmar face a moderate risk of official and societal discrimination on a day-to-day basis. DFAT further assesses that LGBTI people in Myanmar face a low risk of violence due to their sexual orientation or gender identity**.'

12. Firstly, there is no source material for either the 2017 or 2019 reports and on this basis at its highest provide a policy position. This is contrary to the published statement on the DFAT website with respect to these country reports:

> 'The reports provide a general, rather than an exhaustive country overview. They are prepared with regard to the current caseload for decision makers in Australia without reference to individual applications for protection visas. Reports do not contain policy guidance for decision makers.
>
> Ministerial Direction Number 84 of 24 June 2019 under s 499 of the Migration Act 1958 states that:
>
> Where the Department of Foreign Affairs and Trade has prepared [a] country information assessment expressly for protection status determination purposes, and that assessment is available to the decision maker, the decision maker must take into account that assessment, where relevant, in making their decision. The decision maker is not precluded from considering other relevant information about the country.
>
> Reports take into account relevant and credible open source reports, as well as information obtained on the ground.'

13. Unlike the standing of US DOS reports (see citation of source cases in Algeria country review).

14. In a search of the Tribunal decisions database on 23 January 2020 a total of 16 results were reported where DFAT was cited. The only reported case is the 2004 Country Guidance case of **FS and others (Iran, Christian converts) Iran CG [2004] UKIAT 303** where the Immigration and Asylum Tribunal provided a negative assessment to DFAT's approach [59]:

> 'We now turn to the DFAT material from June, August and November 2002 and February 2003. DFAT was the source through its diplomatic channels in Teheran for the information which the Country Information Service provided to refugee decision-makers. The questions provided some background information about the applicant. He had attended an Assembly of God Church in Teheran for about two years, attending Friday service and did not have to go through any formal process in order to be able to attend services. The actual answers were drafted by the DFAT based on information supplied by a single unidentified source described in the Tribunal's decision as a senior member of the clergy of the Assembly of God Church in Teheran.'

15. Whilst the UK's IAT noted the deference provided by the Australian Refugee Review Tribunal [65], at paragraph 174 the IAT did not place weight on the DFAT report:

> 'In fact, there is now some evidence that even that level of activity does not lead to targeting. It is the Armenian Assembly of God Church in the CEDOCA Report, which appears to be the same one as provided the DFAT material, which says that not even proselytising converts are at a real risk of persecution. This is useful evidence but, although in this instance we do not regard the lack of precise identification of the source as detracting from its weight, in view of the reliable evidence as to his position and authority, it is a single source within a single church…However, with the general tenor of all the other evidence, the other evidence is sufficiently weighty to mean that the full extent of the DFAT material cannot be regarded as a sound basis for the return of those converts who would proselytise or evangelise, "bearing witness", or who would occupy leadership positions. In the light of the Appellants' evidence, we are not as confident as the RRT that the DFAT material has not been to some extent contradicted or reduced in the weight which can confidently be put on it. It may be that in another case there will be additional material dealing with those who proselytise actively as converts, covering other Churches. But the general weight of the evidence is too strong to put such crucial reliance upon the DFAT material.'

16. The most recent unreported Upper Tribunal determination addressed an appeal by the SSHD against a positive determination of the Tribunal below allowing an appeal of a Bangladeshi man based on lack of availability medical treatment. The reference

to DFAT was with respect to a CPIN on Medical treatment in Bangladesh where a USDOS reference was also used to provide country background evidence to show lack of available medical treatment [14] **Secretary of State for the Home Department v HA (PA/12698/2018) (24 October 2019)** (Upper Tribunal Judge Finch).

17. Another recent unreported Upper Tribunal determination is **MSA v Secretary of State for the Home Department (PA/07096/2017)** (heard 22 November 2018, promulgated 8 February 2019, published 11 March 2019) (Lord Matthews and Judge Jackson). At paragraph 61 the Upper Tribunal cited passages from the DFAT report on Bangladesh (2 February 2018) but had earlier on determination positively cited passages regarding country material from both the 2017 CPI and Canadian Refugee Board (2010 report referred to at [37]) to establish a protection claim of a gay man from Bangladesh.[11]

18. The 2018 US State Department report on Burma cite the following country background material on LGBTI in Section 6 (emphasis added):[12]

'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity

Political reforms in recent years made it easier for the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community to hold public events and openly participate in society, yet discrimination, stigma and a lack of acceptance among the general population persisted. Consensual same-sex sexual activity remains illegal under the penal code, which contains a provision against "unnatural offenses" with a penalty of a maximum of 10 years' imprisonment and a fine. Laws against "unnatural offenses" apply equally to both men and women; these laws were rarely enforced. LGBTI persons reported police used the threat of prosecution to extort bribes. While the penal code is used more for coercion or bribery, LGBTI persons, particularly transgender women, were most frequently charged under so-called shadow and disguise laws. These laws use the justification that a person dressed or acting in a way that is perceived as not being in line with their biological gender is in "disguise." According to a report by a local NGO, transgender women reported higher levels of police abuse and discrimination than other members of the LGBTI community.

In March, authorities in Rangoon used the "unnatural offenses" law to charge an openly gay restaurant owner for allegedly sexually assaulting a male member of his staff. The case was pending at year's end.

[11] Upper Tribunal determination cited in the review of the Bangladesh CPIN in this report.
[12] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/burma/ accessed 25 January 2020.

There were reports of discrimination based on sexual orientation and gender identity in employment. LGBTI persons reported facing discrimination from medical-care providers.

HIV and AIDS Social Stigma

The constitution provides for the individual's right to health care in accordance with national health policy, prohibits discrimination by the government on the grounds of "status," and requires equal opportunity in employment and equality before the law. Persons with HIV/AIDS could theoretically submit a complaint to the government if a breach of their constitutional rights or denial of access to essential medicines occurred, such as antiretroviral therapy, but there were no reports of individuals submitting complaints on these grounds. There are no HIV-specific protective laws or laws that specifically address the human rights aspects of HIV.

There were continued reports of societal violence and discrimination, including employment discrimination, against persons with HIV/AIDS. Negative incidents such as exclusion from social gatherings and activities; verbal insults, harassment, and threats; and physical assaults continued to occur. Laws that criminalize behaviors linked to an increased risk of acquiring HIV/AIDS remain in place, directly fueling stigma and discrimination against persons engaged in these behaviors and impeding their access to HIV prevention, treatment, and care services.

High levels of social stigma and discrimination against female sex workers and transgender women hindered their access to HIV prevention, treatment, and social protection services. Police harassment of sex workers deterred the workers from carrying condoms.'

19. The respondent's policy position is states at paragraph

D. <u>SUMMARY OF REVIEWs:</u>

<u>ACTION REQUIRED</u>

20. Whilst the amendment to the response is assumed to have been done, noting the January 2019 CPIN on Critics of the government is the only publicly available document accessible for any COI from the Home Office on SOGIE, the reviewer highly recommends updating of the published document, or publishing the response reviewed in January 2019 (paragraphs 2 to 3 above), adding the most recent evidence from the 2018 USDOS cited above.

21. NAMIBIA

Capital city: Windhoek
Population:[1] 2,540,905
Predominant religion:
FCO Travel Advice:[2]

> *'Homosexuality is not illegal in Namibia. Some sexual relations between men are criminalised, but this is generally not enforced. However, many people in Namibia consider LGBT relationships to be taboo.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Namibia.

2. There does exist a SOGIE CPIN for Namibia (November 2018) (version 1).[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Namibia: Local laws and customs, last updated 21 January 2020 https://www.gov.uk/foreign-travel-advice/namibia/local-laws-and-customs accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758230/Namibia_-_SOGIE_-_CPIN_-_v1.0e__November_2018_.pdf, last accessed 3 February 2020.

b. Decision-making statistics (2015-2018):

3. Namibia SO protection claims dramatically rose from no specific figures in 2015 and 2016, to a jump to 31 applications lodged in 2017. The numbers rose again by approximately fifty percent to 48 applications lodged in 2018. This ranks Namibia as 10th highest ranking country in 2018.[6]

4. The dramatic increase in applications does not give rise to a record number of grants. In 2018, 41 initial decisions resulted in 5 grants and 36 refusal of some form of leave to remain.[7]

5. 5 statutory appeals were determined in 2018. There are no outcomes recorded for this year, or for any of the years from 2015.[8]

B. CASE LAW:

Country Guidance and reported Tribunal cases:

6. There are no reported Country Guidance cases on the Upper Tribunal website with respect to Namibia. There are also no reported SOGIE Tribunal cases from Namibia.

Unreported Tribunal cases:

7. There was only one unreported case of the Upper Tribunal addressing risk on return (two cases highlighted following search 'Namibia LGBT' – the other case was the CG case on Zimbabwe). The determination dismissed the appeal of the gay man from Namibia **NK v Secretary of State for the Home Department (AA/007754/2014)** (hearing 15 January 2016, promulgated 15 February 2016, published 2 December 2016) (Deputy Upper Tribunal Judge Juss). No country evidence was considered on appeal

[6]UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

[8] The records are supressed for all other entries (record suppressed as less than five).

as the appellant had failed to establish his sexual identity as a gay man before the Tribunal below.

8. Nevertheless, by 2017 the Upper Tribunal in the unreported case **Secretary of State for the Home Department v. Elias Shipindo (PA/06556/2016)** (hearing 31 July 2017, promulgated 10 August 2017, published 14 September 2017) referred to a concession made by the Home Office in the Tribunal below (hearing 26 January 2017):

> 'I note from the decision [34] that the respondent had accepted that, if he were to prove that he was homosexual, the appellant had established that he would be risk of serious harm or mistreatment in Namibia.'

9. However, the Upper Tribunal did not substantively address this point as the Secretary of State was successful in remitting appeal based on erroneous approach to positive credibility assessment on sexual identity.

10. However, by 2018, the Upper Tribunal in the unreported case of **Mr M K v Secretary of State for the Home Department (PA/07763/2018)** (hearing date 15 April 2019, promulgated on 8 May 2019, published on 15 July 2019) (Upper Tribunal Judge Storey) dismissed the appeal on basis of lack of real risk of persecution where it had been accepted the appellant is a gay man [4]:

> 'However, first of all the judge plainly did have regard to the background country evidence: so much is plain from paragraphs 12 and 13 for example. Second, that background country information did not establish that gay men in general were at risk of persecution or serious harm - Mr Janjua accepted as much during submissions. Third, whilst that background information did identify a number of difficulties and discriminatory circumstances facing gays in Namibia - including the illegality of same sex acts - the judge's findings (which were that the appellant faced discrimination but not persecution) were wholly consistent with that evidence.'

11. The above unreported case law shows whilst in 2017 there was an acceptance of persecution in Namibia, by 2019, the country background information did not establish "(in general)"[9] a real risk of persecution.

[9] The reference to 'in general' is the wrong legal test, as the assessment, in line with the second limb of Lord Rodger's guidance at paragraph 82 of HJ (Iran) is 'openly' SOGIE, which in light of acceptance of lack of 'gay martyrs' in countries where there exists persecution would be small in number, as the 'general' SOGIE community will be discreet due to the well-founded fear of persecution.

C. HOME OFFICE COI:

Country Policy Information Note (November 2018):

12. The current published policy is the *Country Policy and Information Note: Namibia: Sexual orientation and gender identity or expression* (version 1.0) (November 2018) [44 pages].[10]

13. The 'in general' lack of state persecution is cited at paragraph 2.4.10 (page 8):

> 'The available information does not establish that there is a general risk of persecution or serious harm to LGBTI persons from the authorities. Each case must, however, be considered on its facts and the onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk from state actors on the basis of their sexual orientation or gender identity or expression.'

14. Nevertheless, the CPIN does accept non-state agent persecution [2.4.12] (emphasis added) (page 8):

> 'There have been reports of non-state actors subjecting LGBTI persons to harassment and violence including verbal, physical and sexual abuse. One 2016 study indicated 52% of men who have sex with men (MSM) have experienced a human rights abuse (the study defined a human rights abuse as a person, because of their sexuality, having been denied housing or healthcare, been blackmailed, beaten by the police, or raped). There have been reports of 'curative rape' of lesbians, but the available evidence is limited on scale and frequency of such treatment (see Violence and discrimination). '

15. Also accepting a lack of (willing) state protection [2.5.5] (page 9) [emphasis added]:

> 'In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities. Decision makers must, however, consider each case on its facts. The onus is on the person to demonstrate why they would not be able to seek and obtain state protection.'

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758230/Namibia_-_SOGIE_-_CPIN_-_v1.0e__November_2018_.pdf, last accessed 3 February 2020.

16. The November 2018 SOGIE CPIN provides a largely well-balanced and wide range of authoritative sources on country background, generally (bar few references to 2013 material), from sources dated no more than three years prior to publications date.

17. Importantly, whilst addressing a lack of arrests and prosecutions for consensual same-sex conduct [section 4.3 (pages 17 to 18)], CPIN does address in a balanced approach to the overall CPIN, the COI on lack of effective willingness from the police and authorities to provide protection [section 4.4 (pages 19 to 20)], outlining avenues for redress in the next section.

18. There are clear references to stigma and discrimination pervading the general atmosphere in Namibia to those who are SOGIE [section 5: societal treatment (pages 21 to 27), balanced with drawing from the country material to show a wide range of civil society support NGOs [section 6.1 (pages 27 to 28)] and LGBTI events [section 6.2 (pages 28 to 31)].

19. There is also a good selection of COI on Gender Identity and Expression (see sections 4.2.4 to 4.2.9 (treatment of) (pages 15 to 17) and section 7.3 and Gender reassignment (page 34). However, there is no COI on the position of those who are intersex.

20. Noting as the three post-CPIN sources evidence, Namibia is in a state of flux with signs of liberation, and cases of serious harm.

21. The 2018 US State Department Country Report on Namibia (published March 2019) makes the following observations (section 6) (emphasis added):[11]

> 'Gender discrimination law does not address discrimination based on sexual orientation or gender identity. Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons faced harassment when trying to access public services. There were isolated reports of transgender persons being harassed or assaulted. Some politicians opposed any legislation that would specifically protect the rights of LGBTI persons. The minister of health and the ombudsman both favored abolition of the common law offense of sodomy. LGBTI groups conducted annual pride parades recognized by the government as constitutionally protected peaceful assembly; the parades have not met with violence.'

[11] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/namibia/, last accessed 3 February 2020.

22. In an on-line article posted on 5 September 2019, Aedin Mohrmann describes in 'A Closeted Namibia' her experiences of living in Namibia (emphasis added):[12]

> 'It is clear that Namibians are uneducated about LGBTQ+ issues. A recent discussion was also sparked to let community representatives come and provide LGBTQ+ friendly sex education in high schools for a more inclusive approach around HIV and STI prevention, but the idea was unfortunately rejected. In another heartwrenching event, a police constable arrested a Namibian man without any legal grounds to do so, taking him into custody and placing him into a holding cell. There the constable would order the gang rape of this poor man by his fellow cellmates. It was later revealed that the victim and the constable had been in a secret relationship and that it had turned sour… this case is currently still under investigation.
>
> Our National Pride Week is coming up on the 1st of December – 8th of December, Kicking off in the Capital city of Windhoek and ending at the coastal town of Swakopmund. we will see a Pride Parade, various LGBTQ+ evening events, and family-friendly day events. It's the first of its kind on this scale, we hope to bring attention to LGBTQ+ issues and that our fellow Namibians could learn to be more accepting by seeing us celebrating our lives and living to be our true selves.'

23. In a 12 December 2019 on-line article, 'Namibia: LGBTQ+ Urged to Do More' Arlana Shikonogo provides an insight into the position of SOGIE in Namibia:[13]

> '…
> Activist and ORN [OutRight Namibia] board member Conny Samaria explained that while he too questioned the proactiveness of leaders within the community, it is important that the efforts reach all corners of society.
>
> "For far too long we have seen how we have been thinking of the country not being ready for a legal reform and redress agenda, and we have been focusing on the very smaller, low- hanging fruit," he said.
>
> "The challenge, I think, the leadership of the LGBTQ+ community is, are we ready to lead our community in the right direction? If we are not able to make

[12] Posted by Pricilla Philip, 5 September 2019, https://thelgbtafrica.com/a-closeted-namibia/, accessed 3 February 2020.
[13] All Africa.com, 12 December 2019: https://allafrica.com/stories/201912120727.html, accessed 3 February 2020.

bold, robust steps and statements within this country, we are not going anywhere."

Pointing out that even with first lady Monica Geingos who recently made a very progressive statement, that Namibia would soon follow the example of countries like Botswana who have repealed their sodomy law, Samaria said few local LGBTQ+ organisations and leaders had jumped on the bandwagon. The stakeholders and community members who participated in the discussion asserted that the community needs to start taking more tangible action, and that bold leadership will be necessary in achieving that.'

D. <u>SUMMARY OF REVIEW:</u>

<u>EXCELLENT</u>

24. The reviewer comments this is a very well drafted CPIN with various sources which could, in individual cases, provide assistance in determining protection claims of SOGIE applicants.

25. The only area of clear need for COI is with respect to those who are Intersex.

22. NEPAL

Capital city: Kathmandu

Population:[1] 29,136,808

Predominant religion: Hinduism

FCO Travel Advice:[2]

> *'Women should avoid wearing shorts and sleeveless tops where this might be seen as inappropriate, eg temples and other holy places. Remove shoes before entering certain holy places. Non-Hindus are not permitted in some temples.*
>
> *Nepal is generally open and tolerant to LGBT issues, and same-sex relations are not criminalised. A Supreme Court ruling in 2007 ordered the government to end discrimination against sexual minorities and to ensure equal rights. However, all public displays of affection, irrespective of sexuality or gender identity, tend to be viewed as inappropriate in Nepali society and may therefore attract negative attention.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Nepal.

2. There is no specific SOGIE CPIN for Nepal.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.

[2] Foreign travel advice: Nepal: Local laws and customs, last updated 27 September 2019 https://www.gov.uk/foreign-travel-advice/nepal/local-laws-and-customs accessed 25 January 2020.

[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).

[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

3. However, there is one paragraph from the August 2018 Country Background Note on Nepal [13.1] where there is reference to COI on Nepal [see below].[5]

b. Decision-making statistics (2015-2018):

4. Nepal is ranked 46th in the 2018 rankings for SO protection claims.[6] Only 2016 records 5 applications lodged with 2015, 2017 and 2018 not recording a specific number lodged.

5. There is no entry in either the initial decision or appeals determined for Nepal in either table.[7]

B. CASE LAW:

Country Guidance and Reported Tribunal cases:

6. The current Country Guidance case is **KG (Review of current conditions) Nepal CG [2006] UKIAT 76** (heard on 14 August 2006, promulgated 31 October 2006, published 31 October 2006, designated CG 26 November 2013).

7. **KG** is the only extant CG case listed for Nepal. However, when addressing current conditions in 2006, it does not address risk on return for SOGIE applicants.

Unreported Cases:

8. Two unreported cases were located following a search on the decisions database under 'Nepal LGBT'. Only one was with respect to a SOGIE protection claim from Nepal.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800221/nepal-country-background-note-aug-18.pdf, last accessed 3 February 2020.
[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

9. In **AT v Secretary of State for the Home Department (PA/09402/2016)** (unreported) (heard on 10 August 2017, promulgated 21 September 2017, published 3 October 2017) (Deputy Upper Tribunal Judge Juss) allowed the appeal of an 'effeminate' gay men.

10. The evidential basis for the appellant's profile was based on the findings of fact of the earlier First-tier Tribunal:

> '3. The judge held that the Appellant had faced societal attitudes in Nepal and discrimination against gay people. He had no family support. He was ostracised by his family. Although he had spent nearly nineteen years growing up in Nepal, and was familiar with the language and traditions and culture, those years were not lived as an openly gay person.
>
> 4. As a gay man, the judge found that the Appellant was a particularly effeminate man who was likely to be judged on his demeanor, and "the Appellant will face very significant obstacles in finding somewhere to live and finding a job. His capacity to participate in Nepalese society and to be accepted in Nepalese society would be limited by these very significant obstacles" (paragraph 51).'

11. The Judge in allowing the appeal on lack of internal relocation to Kathmandhu held [21] and [23]:

> '21. …The judge had already found (at paragraph 51) that the Appellant "will face very significant obstacles in finding somewhere to live and finding a job". She had found that the Appellant's "capacity to participate in Nepalese society" and also "to be accepted in Nepalese society" was such that it would be "limited by these very significant obstacles".
>
> …
>
> 23. Given those findings, I conclude that the Appellant would find it unduly harsh to relocate to Kathmandu, especially as the evidence pointed that he was a depressed and mentally fragile homosexual man, who had been ostracised by his family, and was unlikely to be able to freely access the employment market and obtain accommodation. That would have sufficed, on the lower standard, for the purposes of a successful asylum and humanitarian protection claim.'

12. The ten positive results searched under 'Nepal gay', or three with 'Nepal lesbian', three for 'Nepal bisexual', two from 'Nepal trans' and two for 'Nepal intersex'.[8] did not reveal any determination substantively dealing with protection claim points other than the above cited case.

C. HOME OFFICE COI:

Country Policy Note (August 2018):

13. There is no SOGIE CPIN.

14. There is a general *Country Policy Note: Nepal* report (version 1.0) (August 2018) [28 pages], where the following section addresses SOGIE protection claims [13.1] (citations omitted):

'13. Sexual orientation and/or gender identity

13.1.1 No laws criminalise same-sex sexual activity and the new constitution of September 2015 contains provisions outlining protections for LGBTI persons – the first in Asia to specifically protect gay rights.

13.1.2 A 2014 report by UNDP and USAID concluded that 'Tolerance of diverse sexual orientations or gender identities (SOGI) […] can be perceived to be high.'110 Conversely, the same report claimed that 'Nepal is a largely patriarchal society and does not easily accept people of diverse sexual orientations'.111

13.1.3 In May 2017, ILGA reported there had been no arrests within the previous three years.

[8] This does not indicate there were for example two unreported cases dealing with protection claims for intersex appellants from Nepal – only that these two words appeared in two cases following the search on the Tribunal decisions database.

13.1.4 LGBTI persons actively advocated for their rights and LGBTI activists continued to press for further legislation to increase protections for gender and sexual minorities.

13.1.5 According to local LGBTI advocacy groups, the government did not provide equal opportunity to LGBTI persons in education, health care, or employment and some LGBTI persons faced difficulties in registering for citizenship, particularly in rural areas

.

13.1.6 DFAT, in their April 2016 country report on Nepal, assessed that 'LGBTI people can face harassment by the authorities and other citizens, particularly in rural areas. General community attitudes towards same sex relationships remain negative. Nonetheless, there are examples of LGBTI people being able to be open with their families, communities and employers and to live without discrimination, although their gender, caste and ethnicity can also play a role determining the extent to which this is possible.'

13.1.7 Human Rights Watch, in a report of 11 August 2017, described Nepal as a 'global LGBT rights beacon' and went on to say that members of Nepal's LGBT community were once openly derided as 'social pollutants', but now enjoy social and political rights—including legal recognition of a third gender. See How Did Nepal Become a Global LGBT Rights Beacon?.

13.1.8 For more information see:

• CEDAW, 6 February 2018: Brief report on genital mutilation, stigma and bullying in connection with intersex persons, submitted by the NGO StopIGM.org

• United States Department of State Country Report on Human Rights Practices for 2016, Nepal, 7 March 2017 (Section 6:Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity).

• The Himalayan Times, 5 August 2017, LGBT couple registers marriage, first in Nepal.

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15. The 2018 US State Department report (published March 2019) states the following with respect to country conditions for4 the LGBTI community in Nepal:[9]

> **'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> **No laws criminalize same-sex sexual activity, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons actively advocated for their rights. The constitution contains provisions outlining protections for LGBTI persons, but LGBTI activists continued to press for further legislation to increase protections for gender and sexual minorities**.
>
> **In August the cabinet registered an amendment to the 2006 Citizenship Act that officially recognizes nonbinary gender identity for citizenship documents**. This step is intended to reduce discrimination experienced by transgender persons. The current civil code, however, defines marriage only between opposite-sex persons, which LGBTI activists have interpreted as a sign of bias against LGBTI persons.
>
> According to local LGBTI advocacy groups, the government did not provide equal opportunities for LGBTI persons in education, health care, or employment (see section 7.d.). Additionally, advocacy groups stated that some LGBTI persons faced difficulties in registering for citizenship, particularly in rural areas.
>
> Although several LGBTI candidates ran for office in local elections in 2017, LGBTI activists noted that election authorities prevented one person who self-identified as third gender from registering as a candidate for vice mayor because electoral quotas required the individual's party to register a "female" candidate for the position. **Separately, LGBTI activists stated that some transgender persons refrained from voting out of fear of harassment or social scorn because transgender persons were forced to stand in lines reflecting the gender on their citizenship documents, regardless of whether they had changed gender in practice.**
>
> **According to LGBTI rights NGOs, harassment and abuse of LGBTI persons by private citizens and government officials declined during the year, especially in urban areas, although such incidents still occurred**. Several NGOs praised the government, specifically the Ministry of Women, Children, and Senior Citizens, for taking the initiative in organizing LGBTI-related trainings and sensitivity programs to reduce violence and discrimination targeting LGBTI persons.

[9] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/nepal/ , accessed 25 January 2020.

LGBTI rights groups reported that gender and sexual minorities faced harassment from police during the year. The Nepal Police HRS confirmed that some low-level harassment occurred because many citizens held negative views of LGBTI persons. The HRS added that the Nepal Police were not immune to such social prejudices. According to LGBTI advocacy group Blue Diamond Society, in February police officers assaulted two transgender women without cause. After registering the case with police and the NHRC, the victims received a formal apology and the police paid medical expenses.

HIV and AIDS Social Stigma

There was no official discrimination against persons who provided HIV-prevention services or against high-risk groups that could spread HIV/AIDS.

Societal discrimination and stigma against persons with HIV remained common, according to NGOs.'

D. SUMMARY OF REVIEW:

VERY GOOD

Sexual Orientation/Identity:

16. The COI on SOGIE relied on by the Home Office provides a clear and accurate picture of the position for SO protection claims form Nepal.

Gender Identity and Expression/Intersex:

17. The only additional COI missing from the document is the reference to fears of the trans community highlighted in the section above from the 2018 US DOS. The reviewer recommends this addition to the Home Office COI report.

18. There should be some record with respect to COI on Intersex, even if it is a sentence to show no COI located, but noting causal nexus between other non-conformist gender-sex identities.

23. NIGERIA

Capital city: Abuja
Other major cities include Lagos
Population:[1] 206,139,589
Predominant religion: Islam and Christianity
FCO Travel Advice:[2]

> *'Homosexuality is generally viewed as unacceptable in Nigeria. The 'Same Sex Marriage Prohibition Bill' allows lengthy prison sentences for those entering into a same sex marriage, those witnessing, aiding or abetting a same sex marriage, the operation and support of gay clubs, societies and organisations and the public display of same sex relationships.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews do address COI with respect to Nigeria.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Nigeria: Local laws and customs, last updated 25 January 2020 https://www.gov.uk/foreign-travel-advice/nigeria/local-laws-and-customs ,accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 81 to 83.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 53 to 56: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. De Jong (2008) observed:[5]

> ' … Much more detailed information is needed to make the report suitable to base asylum/human rights decisions on (refer to the template for analysis). If specific information is not found, this should be mentioned, demonstrating that it has been considered.'

3. Leigh (2014) recorded an improvement in SOGIE COI in the June 2013 COI Report:[6]

> 'Overall, this is a good report which cites a variety of up-to-date sources.
>
> However, the LGBTI sections need to be restructured. A lot of information from the *societal treatment* section on prosecution of cases should be included under *legal rights*. The report includes specific headings on extorsion and religion which provides relevant information interesting. However, these headings should be included as sub-headings to the *societal treatment* section.
>
> Very little information is included on transgender or intersex persons. While the *legal rights* section explicitly states that no data was found, no similar statement is made for the other sections and very little information is provided on the transgender/ intersex perspective.'

4. The current Home Office COI report is the April 2019 CPIN: Nigeria: SOGIE.[7]

b. *Decision-making statistics (2015-2018):*

5. Nigeria is ranked fifth highest in the list of SO protection claims lodged in 2018.[8]

6. In 2018, a total of 90 applications were lodged where sexual orientation formed part of the basis of the claim. In 2015 154 applications were lodged. In 2016 a clear rise to 222 applications and in 2017 a slight decrease to 184 applications.[9] There is a clear decline in the number of SO Nigerian protection claims.

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[5] *De Jong (2008)* (n 3), page 81.
[6] *Leigh (2014)* (n 4), pages 53 to 54.
[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795440/Nigeria_-_CPIN_-_SOGIE_-_final_version.G__April_2019_.pdf, last accessed 3 February 2020.
[8] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[9] ibid.

7. Out of the 109 initial decisions made by the Home Office, 28 were granted some form of leave to remain, with 81 claims refused.[10] There is a clear pattern of refusals compared to grants at initial decision stage, noting in 2015 (146 decisions: 37 granted leave, 109 refused); 2016 (186 decisions: 29 grants and 157 refusals); and 2017 (192 decisions: 41 grants and 151 refusals).

8. 96 statutory appeals were received in 2018, with 27 appeals allowed (65 were dismissed). In 2015 there were 59 appeals determined (7 allowed, 49 dismissed); 2016 103 appeals determined (25 allowed and 73 dismissed); and 2017, 140 appeals determined (37 allowed and 102 dismissed appeals). [11]

9. The increasing trend in allowed appeals is inferred to be due to a greater number of appeals previously being dismissed on the basis of adverse credibility findings (failed to 'prove SOGIE') (first limb of Lord Rodger's guidance at [82] of **HJ (Iran)**).

10. The COI in Nigeria has not shown since 2015, a starting position of 'no risk' to those who are 'openly SOGIE'. Noting the approach specific to this review, compared to the earlier reviews, this reviewer will address the CPIN in light of these statistics in this section and case law cited in the next section.

B. CASE LAW:

Country Guidance and Reported cases:

11. There is no current Country Guidance cases on Nigeria addressing SOGIE protection claims. The reviewer comments the lack of CG case law, when there is a high number of applications basing protection claims on SO grounds, reflects the lack of conflict with respect to the country background conditions and risk on return.

12. On 1 August 2017 the SSHD granted refugee status to **Aderonke Apata**[12] where proceedings were live before the First-tier Tribunal following a fresh claim refusal arising from the earlier 2016 judicial review proceedings before the Court of Appeal

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[11] The statistics record a notable recognition rate over and above attributable to individual risk factors over and above objective risk to 'open SO'.
[12] See Diane Thompson, 'Nigerian gay rights activist wins UK asylum after 13 year battle', *The Guardian*, 14 August 2017 https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle accessed 25 January 2020.

based on negative credibility findings (sexual identity claim as a lesbian from Nigeria) (**R (Apata) v. Secretary of State for the Home Department [2016] EWCA Civ. 802** (unreported elsewhere)).

Unreported Tribunal cases:

13. There were 40 results from a search on the Upper Tribunal decisions database with the search items 'Nigeria gay'.

14. The most recent unreported Upper Tribunal determination dealing with an agreed position with respect to risk is **RA v Secretary of State for the Home Department (PA/07980/2017)** (unreported) (heard on 29 January 2019, promulgated 18 February 2019, published on 29 March 2019) (Deputy Upper Tribunal Judge Hall) (appeal allowed with positive finding the appellant is a lesbian)[20] (**emphasis added**):

> '[The Senior Presenting Officer] confirmed that **if the Appellant was a lesbian, the Respondent accepted that she would be at risk in Nigeria,** but the Respondent's case was that the Appellant had fabricated her claim to be a lesbian.'

15. In May 2017, Upper Tribunal Judge Perkins records a general position this consensus also applied to gay men[13] **AA v Secretary of State for the Home Department (PA/11650/2016)** (Upper Tribunal Judge Perkins) (hearing date 18 May 2017, promulgated on 7 June 2017 and published on 20 July 2017) (appeal of claimed gay man dismissed due to no error of law in negative credibility assessment) [11]:

> 'Mr Nelson did all that could be expected of him and I realise that the appellant has made allegations which if truthful would put him at risk. I see no basis for criticising the First-tier Tribunal Judge's decision and I dismiss the appeal.'

[13] This is also reflected in the position of the Secretary of State, see **Secretary of State for the Home Department v HKO (AA/01413/2015)** (unreported) (Deputy Upper Tribunal Judge Norton-Taylor) (hearing date 28 April 2017, promulgated 8 May 2017, published 5 July 2017) (appeal of SSHD appeal dismissed on basis of no error of law in positive credibility findings of protection claim of gay man) [32]:
'The Respondent had conceded the issue of risk on return.'

16. The most recent unreported Upper Tribunal determination out of the possible 40 is in October 2016 dealing with the assessment of the Home Office's country background material is **Ayodeji (Anonymity not retained) v. Secretary of State for the Home Department (AA/04499/2015)** (unreported) (heard date 9 September 2016, promulgated 14 October 2016, published 10 September 2018) (Deputy Upper Tribunal Judge Lever) [17] and [18] (emphasis added) (**additional emphasis added**):

> '[17] I have carefully considered the country material regarding Nigeria in this respect and that provides an insight into the position in Nigeria. The Home Office's own country guidance notes that the existence of criminal laws such as those which specifically target homosexuals supports the finding that those persons must be regarded as forming a particular social group. It noted that same-sex sexual relations between men are criminalised in federal law in twelve northern states and that the **Same-Sex Marriage Prohibition Act 2013 prohibits same-sex marriage, the public show of same-sex amorous relationships and the registration and operation of support groups**. Further at paragraph 1.3.5 it is noted that 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 sexual orientation in his country of origin or to exercise reserve in the expression of his sexual orientation. That is consistent with the ruling in HJ (Iran). **The Same-Sex Marriage Prohibition Act 2013 was enacted as recently as January 2014. Further the report notices that Nigeria is a religious and culturally conservative country where homophobic attitudes are widely held and a survey conducted in 2013 noted that 98% of Nigerians stated they believed homosexuality should not be accepted by society**. It further notes that such individuals have experienced loss of accommodation, jobs and denial of access to health services. It is said that because of societal attitudes and the threat from the state with the legislation internal relocation is not a viable option.
>
> [18] It is necessary to look at cases individually. I accept the Appellant is gay and I further accept that in his time in the UK he has increasingly become more open about his sexuality and the life that he has led. I find that if returned to Nigeria additional to a potential risk of information deliberately or inadvertently coming from his family the Appellant would be at risk of persecution if he led the life he leads in the UK in the same manner. The Appellant would by necessity suppress and alter the manner in which he conducted his life but that would be largely out of fear of retribution from society generally or specifically from the authorities who have recently enacted legislation that would open the

> Appellant to the prospect of arrest and prosecution. There is not in my view an option for relocation and indeed the area of the country where the Appellant is from presents a slightly less of a risk than other parts of the country.'

Gender Identity and Expression and the diaspora:

17. **RS v Secretary of State for the Home Department (AA/00666/2016)** (unreported) (Deputy Upper Tribunal Judge DE Taylor) (heard 28 November 2017, promulgated 14 December 2017, published 4 January 2018) evidence of a Somali trans partner's relationship with a Nigerian appellant, noting:

> '[D]ouble life which he led both as a male in society and as a transgendered female …T has produced, including, at some risk to himself, of producing his true identity documents.'

18. The case addressed credibility assessment of Nigeria gay man rather than risk on return and held the earlier Tribunal's approach was legally flawed (remittal). The case is relied on to illustrate the stigma linked to non-cis-normative/non-straight identity, within the diaspora in the UK.[14]

C. HOME OFFICE COI:

Country Policy and Information Note (April 2019):

19. The current policy position is published in the *Country Policy and Information Note: Nigeria: Sexual orientation and gender identity or expression* (version 2.0) (April 2019) [37 pages].

20. The Home Office's policy position is stated at paragraph 2.4.11 (page 8):

> 'LGBT persons may face societal discrimination and isolation, violence, blackmail and extortion, threats and hate speech, and, sometimes, mob attacks from non-state actors, including family and community members. In a survey undertaken in 2016 by the Bisi Alimi Foundation, 55% of respondents claimed

[14] See for comparable example of Nigerian Queer women in the USA, Meremu Chikwendu, 'Circular Consciousness in the Lived Experiences of Intersectionality: Queer/LGBT Nigerian Diasporic Women in the USA', (2013) 14 (4) Journal of International Women's Studies 34 .

> that they had experienced physical/verbal abuse. Many added that they did not report the incidents for variety of reasons, including shame and fear of reprisal. Discrimination may be greater in northern states, particularly where Sharia law is implemented (see Societal attitudes and treatment).'

21. Noting the agreed position as to COI SOGIE risk on return, the key piece of post-April 2019 COI relates to the first arrests in December 2019 under the Same-Sex Marriage Prohibition Act 2013 (commenced January 2014). As the Upper Tribunal held in **Ayodeji** there had at that time been no evidence of arrests (see paragraph 16 above).

COI on Same Sex Marriage Prohibition Act 2013 arrests:

22. On 11 December 2019 the Guardian reported the arrest of 47 gay men in Nigeria as the first arrests under the 2014 anti-homosexuality law:[15]

> 'Forty-seven men went on trial in Nigeria on Wednesday for public displays of affection with members of the same sex, an offence that carries a 10-year jail term in the country.
>
> The men were among 57 arrested in a police raid on a hotel in the impoverished Egbeda district of the commercial capital, Lagos, in 2018. They pleaded innocent at a hearing last month.
>
> Campaigners say the case is an important test of a law banning gay marriage and same-sex "amorous relationships", which came into force five years ago.
>
> Xeenarh Mohammed, the executive director of the Lagos-based Initiative for Equal Rights (TIERS), said the law had historically been used to harass and blackmail gay people but there had not been any convictions.
>
> "People have been detained, men and women, at different gatherings but no cases had ever gone before a judge. We have to establish that people have a right to meet that shouldn't be a crime under any law in any country," said Mohammed.
>
> Homosexuality is illegal in most African countries. In several, gay people face life imprisonment or the death penalty. Some religious groups brand it a corrupting western import.

[15] Jason Burke, *First men go on trial under Nigeria's anti-homosexuality laws' The Guardian*, 11 December 2019 https://amp.theguardian.com/world/2019/dec/11/first-men-go-on-trial-under-nigerias-anti-homosexuality-laws?CMP=share_btn_tw&__twitter_impression=true , accessed 25 January 2020.

> Police said the Nigerian men were being initiated into a gay club. The accused say they were attending a birthday party.
>
> The Same Sex Marriage Prohibition Act, which banned gay relationships and entrenched intolerance of sexual minorities in Nigerian society, was signed by Goodluck Jonathan, then president, in January 2014.
>
> The law caused an international outcry, with condemnation from global human rights organisation and western governments. Human Rights Watch called it a "sweeping and dangerous piece of legislation".
>
> "Police officers will stop you and then get you arrested, extort money from you and begin to call you names," Smart Joel, 25, one of the defendants, said before last month's hearing. "I just wish the case will be quickly dismissed as soon as possible."
>
> Defendants have been granted bail of 500,000 naira (£1,048), a significant sum locally.
> Two days of hearings have been scheduled this week to allow the prosecution to make its case. The trial is likely to last for several months.
>
> Surveys have historically shown high levels of homophobia in Nigeria, but some have pointed to what campaigners say is a tentative, growing acceptance of gay men and women.'

23. This country background evidence provides a fundamental shift for SOGIE protection claims evidencing state persecution, not just with respect to arrests for acual or perceived sexual conduct, but now also with respect to identity and assembly
24.

D. SUMMARY OF REVIEW:

EXCELLENT

25. This is a very unusual country review as all parties are on the same page with respect to risk on return based on SOGIE identity.

26. Clearly the COI is not being used by either party (applicant or Home Office) to provide an issue of dispute. Due to the resources given to the reviewer, they have focussed on countries where it is arguable there is a dispute, or there is a need to update and/or amend the COI report.

24. OCCUPIED PALESTINIAN TERRITORIES

Capital city: fine
Population:[1] 5,101,404
Predominant religion: Sunni Muslim
FCO Travel Advice:[2]

> *'You should dress modestly in Jerusalem, the West Bank, and Gaza.*
>
> *Local residents in ultra-Orthodox Jewish neighbourhoods can react strongly to anyone (particularly women) dressed inappropriately. Women should not wear trousers.*
>
> *Avoid driving into ultra-Orthodox Jewish areas of Jerusalem on Shabbat (from sunset on Friday to sunset on Saturday). If you attempt to drive into these areas local residents may stone your car. In 2020, the Muslim holy month of Ramadan is expected to start on 23 April and finish on 23 May. During Ramadan, eating, drinking and smoking between sunrise and sunset are forbidden for Muslims (though not for children under the age of 8). Although alcohol will be available in some hotels and restaurants, drinking alcohol elsewhere may cause offence. As a courtesy, you should avoid drinking, eating, and smoking in public places in the OPTs during Ramadan. See Travelling during Ramadan*
>
> *… Israeli law does not criminalise same-sex sexual relations between consenting adults. Same-sex sexual activity is legal in the West Bank but is illegal in Gaza, where it carries a 10 year prison sentence. Attitudes towards LGBT issues within some parts of society can be hostile. All public displays of affection, regardless of the gender or sexuality of those involved, may attract negative attention in more conservative areas. Homosexuality is largely taboo in Palestinian society. Tel Aviv has a large, active LGBT community and is famous for its annual Pride Parade. An annual Pride Parade is also held in Jerusalem, but there has been a heavy security presence at the event since a fatal stabbing occurred during the 2015 parade. You should exercise extra vigilance if attending.'*

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: The Occupied Palestinian Territories: Local laws and customs, last updated 6 January 2020 https://www.gov.uk/foreign-travel-advice/the-occupied-palestinian-territories/local-laws-and-customs, accessed 20 January 2020.

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to the Occupied Palestinian Territories.

2. There is no specific SOGIE CPIN for the Occupied Palestinian Territories.

b. Decision-making statistics (2015-2018):

3. The Occupied Palestinian Territories is not individually ranked in the 2018 rankings for SO protection claims lodged with the Home Office.[5]

4. The same lack of specific ranking occurs for table for initial decisions[6] and appeals determined.[7]

[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

- Note in data table with respect to lack of record (emphasis added):
'Only those countries with at least one unsuppressed value are included in the data tables. Data for those countries for which all values are suppressed, and which therefore do not appear in the 'Country of nationality' column, are totalled under 'Country of nationality - Other'.

The data table records 52 applications in 'Other' category for 2018, 38 in 2015, 62 in 2016 and 59 in 2017.
[6] 'Other' for initial decisions: 2015 (48: 17 granted, 31 refused); 2016 (39: 15 granted, 24 refusals); 2017 (58: 16 granted, 42 refused); and 2018 (65: 27 granted, 38 refused). 5 decisions were withdrawn in 2017 and 4 in 2018.
[7] 'Other' for appeals determined: 2015 (26 determined: 9 allowed, 15 dismissed); 2016 (29 determined: 11 allowed, 17 dismissed); 2017 (55 determined: 21 allowed, 29 dismissed); and 2018 (68 determined: 29 allowed, 29 dismissed). No recorded figures for 'Other' for withdrawn for 2015 to 2018.

B. CASE LAW:

Country Guidance and reported Tribunal cases:

5. There are no Country Guidance cases posted on the Upper Tribunal website.

Unreported Tribunal case law:

6. There are no unreported cases on the Upper Tribunal decisions database when searching under 'Palestinian LGBT', or 'Palestinian lesbian' or 'Palestinian trans'.

7. However, there is the one unreported case when searching 'Palestinian gay': the appeal of **Mr Alishaaban Ali Mohamed v Secretary of State for the Home Department (PA/08770/2016)** (heard 5 December 2017, promulgated 17 January 2018, published 5 February 2018) (Deputy Upper Tribunal Judge Kelly). The appeal to the Upper Tribunal was against the determination below dismissing a protection claim, but allowing an appeal of a gay man (sexual identity accepted by the respondent) on the basis of positively establishing 'very significant obstacles to integration' on return to Gaza as an openly gay man [4].

8. At paragraph 6 the Upper Tribunal record Counsel for the appellant's thrust of his submissions (emphasis added):

> 'In support of this submission, he drew my attention to the relevant 'Country of Origin Information Report' (COIR) which referred to instances of many homosexuals being left with "no choice" but to close themselves off from society (a fact that was, as previously noted, acknowledged by the judge) before concluding that "the incidence of ill-treatment [on the basis of sexuality] is not insignificant". The judge had failed to deal with the evidence that gay people are sometimes coerced into working for the Palestinian police and are suspected of being collaborators with the Israelis. Insofar as there was an absence of evidence of specific acts of persecution, the judge failed to have regard to the possibility that the climate of fear was such that gay people were too afraid to report them. For the judge to subject the expert report to his own critical analysis, in circumstances where the Presenting Officer had not done so, "verged on unfairness". The judge had been selective in his references to the background country information and the passages that he had quoted were incomplete and misleading. The judge should have treated the absence of a large, robust and accessible LGBTI activist and support network as indicative of a climate of persecution of gay men in Gaza.'

9. The Upper Tribunal held in addressing the country background material [8] (emphasis added):

> 'The judge was in my view entitled to conclude that the background country information did no more than establish that Gaza provides a challenging environment for openly gay men such that the appellant would face very significant obstacles to his integration. Indeed, the judge's reference to a "challenging environment" was one that he adopted from one of the sources of information that was before him. I also reject the suggestion that the judge ought to have considered the possibility that the limited evidence of openly gay men being visited with acts of violence was due to them being too afraid to report it. On the contrary, the judge would doubtless have been accused of speculation by the respondent had he done so. Whilst it is true that the judge did not make specific reference to gay men being coerced into working for the Palestinian police and of being suspected of collaboration with the Israeli authorities, it is also true that the evidence did not suggest that they suffered specific acts of persecution as a result. The judge was not in any event bound to refer to each and every facet of the voluminous background country information that had been presented to him. This observation applies equally to the complaint that the judge made selective and incomplete references to that evidence. Whilst a strong LGBTI activist and support network may be said to militate against openly gay men being at risk of persecution in any given country, it was equally open to the judge to conclude that its absence was not indicative of the existence of such a risk when viewed within the context of the evidence as a whole. Thus, far from the judge's conclusion being irrational, I am satisfied that it was the result of a detailed and cogent analysis of the totality of the evidence. I therefore turn to consider the second ground.'

10. This provides a basis to distinguish refugee protection needs and subsidiary protection through the '**very significant obstacles to integration'**[8] gay men would face in Gaza due to their status within Palestinian society.

[8] Human rights claim under Article 8 ECHR (private life rights) under the Immigration Rules (paragraph 276 ADE (vi)):
https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories#pt7privatelife , last accessed 3 February 2020:

> '[S]ubject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'

C. HOME OFFICE COI:

11. There is no SOGIE country specific CPIN for the OPT.

Country Policy and Information Note (January 2017):

12. The *Country Policy and Information Note: Background information, including actors of protection, and internal relocation: Occupied Palestinian Territories:* (version 2.0) (January 2017) [66 pages].

13. This report provides no country background material/sources with respect to risk to SOGIE applicants.

14. Nevertheless, the Home Office do publish a single paragraph of COI with respect to lack of protection from harassment and discrimination for LGBT individuals at paragraph 2.3.3:

> 'The court system generally failed to ensure due process, and civilians are sometimes tried in military courts. The legal system offers little protection against harassment and discrimination for women or LGBT individuals (see: Security forces).'

15. The section on Security forces (Section 11) cited in the above passage is at pages 36 to 39 of the CPIN, without citing any source documents with respect to risk. However, within the policy position there is a recognition of harassment and discrimination for women or LGBT individuals (in-line with the undisturbed finding under Article 8 of the Upper Tribunal in the unreported determination and 'very significant obstacles).

Post-CPIN COI:

16. The US State Department Country reports 2018 (published 2019) consolidate Israel with the OPT and find in Section 6 (emphasis added):[9]

> 'The law prohibits discrimination based on sexual orientation, and the government generally enforced these laws, although discrimination based on sexual orientation or gender identity persisted in some parts of society. There were

[9] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/israel-golan-heights-west-bank-and-gaza/ accessed 25 January 2020.

reports of discrimination in the workplace against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, despite laws prohibiting such discrimination. At least 14 LGBTI candidates won seats in the October 30 municipal elections, up from eight in the 2013 election.

LGBTI activists were able to hold public events and demonstrations with few, if any, restrictions. On May 31, police canceled security restrictions they had imposed on organizers of the first ever Kfar Saba LGBTI Pride march, including a two-meter (six-foot) fence along the parade route, which would have cost approximately 24,000 shekels ($6,700). This action followed an appeal to the Supreme Court by the NGOs Israel Gay Youth, ACRI, and the Aguda. The march was held on June 1.

Violence and discrimination against transgender persons in confinement remained a matter of concern. Following a lawsuit by a transgender woman and NGOs, on March 5, the IPS issued new regulations that prohibit holding transgender prisoners in solitary confinement, except for the first days after an arrest.

On September 6, the Tel Aviv Magistrate's Court sentenced a police officer to two months of community service after he shared a video of a shirtless transgender woman detained at a police station.

HIV and AIDS Social Stigma

Although discrimination against persons with HIV is illegal, the Israel AIDS Task Force (IATF) reported instances of HIV-related stigma and discrimination, including cases related to employment, insurance, rehabilitation centers, and prisons.

On March 1, the Petah Tikva Magistrate's Court ordered a beauty salon to pay 27,000 shekels ($7,500) compensation to an HIV-positive man to whom the salon had refused service. In August the Kibbutzim movement refused to let a person with HIV volunteer in a kibbutz but later reversed its decision, according to IATF.

On April 1, the Ministry of Health began a two-year pilot program to accept blood donations from gay and bisexual men. Under the pilot program, a donation from a gay or bisexual man is to be stored until the man donates blood again four months later. If both donations pass routine screening tests, both will be used.'

17. The Human Rights Watch report 2020 (12 December 2019) in 'Israel and Palestine: the events of 2019':[10]

> 'In August, the PA police spokesperson announced a ban on activities by the Palestinian lesbian, gay, bisexual, and transgender (LGBT) group Al-Qaws for Sexual & Gender Diversity in Palestinian society and vowed to prosecute its members. Police subsequently told rights groups that they disavowed the statement but have yet to publicly repudiate it.'

D. <u>SUMMARY OF REVIEW:</u>

<u>VERY GOOD</u>

18. The single paragraph CPIN COI accords at a minimum with subsidiary protection claim under human rights, in-line with the unreported Tribunal determination. This COI is, in line with the most recent COI, a position for those with SO protection claims.

19. The reference to detention of trans individuals cited in the 2018 US DOS report should be brought to the attention of decision-makers, noting this elevates the claim for protection on asylum grounds, based on Gender Identity or Expression.

20. COI on intersex needs to be investigated.

[10] https://www.hrw.org/world-report/2020/country-chapters/israel/palestine accessed 25 January 2020.

25. PAKISTAN

Capital city: Islamabad
Population:[1] 220,892,340
Predominant religion: Sunni Muslim
FCO Travel Advice:[2]

> *'You should dress modestly at all times. Men and women should cover their shoulders and legs when in public. Women should cover their heads when entering mosques or other holy places, and when travelling in rural areas.*
>
> *Homosexuality is illegal. See our information and advice page for the LGBT community before you travel.*
>
> *Cohabitation by an unmarried couple is illegal.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address COI with respect to Pakistan.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2]Foreign travel advice: Pakistan: Local laws and customs, last updated 24 January 2020 https://www.gov.uk/foreign-travel-advice/pakistan/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 84 to 86.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 57 to 60: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. Addressing the LGBT section of the COI report on Pakistan (July 2008), the 2008 review observations of De Jong provide a positive response:[5]

> 'The report is fairly comprehensive, divided in headings and generally based on recent sources, including LGBT sources.
>
> Transgender/transsexual issues are dealt with in detail. However, lesbian and bisexual women are barely mentioned.
>
> Further information is also required on other points, in particular on treatment in society and lack of protection (e.g. by providing more concreate examples); the ability to live 'discreetly', and attitudes and treatments in the medical sector.'

3. Leigh's 2014 review, based on the 9 August 2013 COI report's LGBT section observed:[6]

> 'The report is comprehensive, transgender issues, are described in detail in a separate section. Less information is provided on lesbian, bisexual and intersex issues but the COI reports a paucity of data in this area.
>
> More information could be included on abilities to express LGBTI identities, as well as on attitudes and treatments in the medical sector.'

b. <u>*Decision-making statistics (2015-2018):*</u>

4. The Pakistan is *the* highest ranked country in the list of SO protection claims lodged in 2018.[7]

5. In 2018, a total of 324 out of a total of 2,033 asylum claims lodged (16 %) where sexual orientation formed part of the basis of the claim, ranking Pakistan fourth in the rankings for highest proportion of SO protection claims. [8]

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[5] *De Jong* (2008) (n 3), page 84.
[6] *Leigh* (2010) (n 4), page 57.
[7] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (<u>url</u>), last accessed 26 January 2020.
[8] ibid. 'Table 1: Top 5 nationalities with the highest proportion of asylum applications[2] where sexual orientation formed part of the basis for the claim in 2018, last accessed 28 January 2020.

6. In 2015, 509 applications were lodged. In 2016, 621 applications and in 2017, 551 applications were lodged.[9]

7. The high number of applications can be attributed, in part, the ETS TOIEC refusal-based decisions of the Home Office from 2015, for those who had entered and remained in the UK on the basis of student leave. Following the negative decisions, those who did not return, or challenged the decisions, were left with no other option but to lodge applications for leave to remain to prevent removal to Pakistan. These statistics evidence a number of leave to remain applications were based on SO protection grounds.

8. However, the 16% of total protection applications lodged in 2018 evidence SO grounds for protection claims are not being used by the majority of applicants from Pakistan to stay in the UK (prevent removal).

9. Out of the 444 initial decisions made by the Home Office in 2018, 98 were granted some form of leave to remain (22 %),[10] 346 applications were refused. Noting the probative country background material and case law referred to in this section of the review, the vast majority of claims must have been refused based on adverse credibility findings (failing to 'prove LGB').

10. In 2015, 432 initial decisions were made (168 grants, 264 refusals); 2016 (528 decisions (129 grants, 399 refusals)); and 2017, 562 decisions (110 grants, 452 refusals)).[11]

11. This evidences a clear trend with the statistics on initial decisions evidencing an increasing 'disbelief culture' (well-founded or not),[12] akin to what had occurred in Jamaican claims a decade earlier.[13]

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[9] *SO Statistics* (n 7).

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

[11] *SO Statistics* (n 7).

[12] The reviewer is drawing an inference from increasing negative decisions based on credibility and not commenting on the quality of decision-making, or the number of 'false' claims.

[13] See Nathanael Miles, 'No Going Back: Lesbian and Gay People and the Asylum System' (STONEWALL May 2010), page 19.
https://www.stonewall.org.uk/system/files/No_Going_Back__2010_.pdf, last accessed 27 January 2020:
'"If you get someone who's claiming they're gay and they come from Jamaica, it's just automatically disbelieved by people. They just say oh I've got another gay Jamaican," Indira [not her real name) UKBA Caseworker.'
https://www.stonewall.org.uk/sites/default/files/No_Going_Back__2010_.pdf last accessed 27 January 2020.

12. When the negative initial decision are appealed, the fact-finding Tribunals are overturning a noticeable number of adverse (credibility) decisions.

13. In 2018, 364 appeals were determined, with 155 allowed and 205 dismissed. In 2015, 145 appeals determined (59 allowed, 81 dismissed). In 2016, 283 appeals were determined (115 allowed, 162 dismissed) and in 2017, 505 appeals determined (188 allowed, 312 dismissed).[14]

14. This figure reflects a clear ability to grant based on COI as individual risk factors would result in a much lower grant rate. It is clear a large number were refused on appeal, primarily on an adverse credibility basis, rendering the earlier negative initial decisions sustained, on appeal.

B. CASE LAW:

Country Guidance and Reported Tribunal cases:

15. Whilst the 2016 CG case of **SM and MH (lone women – ostracism) Pakistan CG [2016] UKUT 00067 (IAC)** deals with the position of lone women in Pakistan, there is no reference to the risk of the double-bind of gender and sexual identity or gender identity or expression. There is therefore no Country Guidance SOGIE protection claims.[15]

16. There is the recent 2019 determination of the Upper Tribunal in **MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC) (The Hon. Mr Justice Lane, President and Mr C.M.G. Ockelton, Vice President)** (heard on 24 July 2019, promulgated 3 October 2019, published 15 November 2019) addressing the position with respect to conduct on return (the final subject limbs of **HJ (Iran)**), noting the Tribunal below had recorded if the appellant lived openly on return '**he would be at risk, and the appeal would be allowed'** [10].

[14] ibid.
[15] Upper Tribunal (Immigration and Asylum Chamber), 'Country Guidance Determinations'' last updated 20 December 2019: https://www.judiciary.uk/wp-content/uploads/2020/01/cg_list_last_updated_20_12_19.pdf,last accessed 27 January 2020.

17. This position was maintained before the Upper Tribunal, noting the current 2 July 2019 CPIN had been filed for the 24 July 2019 hearing.

18. The Upper Tribunal based on the expert psychiatric reports, accepted discretion would not be an option for the gay appellant diagnosed with paranoid schizophrenia [60]:[16]

> 'It is this feature of the report of 30 August… that is in our judgment crucial. There is, as [the Home Office] accepted before us, no reason to doubt it. The question of any reasons for the appellant's discretion does not arise in this case. Nor, realistically, does any question about whether he would wish (or choose) to be discrete. The position is that he is a homosexual man who because of his quite exceptionally severe mental condition, well-attested by medical opinion not subject to any challenge, will be unable to maintain a life of discretion whatever his wishes would be.'

19. On this basis, as recently as July 2019, the Upper Tribunal has made clear the second limb of Lord Rodger's guidance at [82] in **HJ (Iran)** is engaged in Pakistan SOGIE appeals: - those who live openly have a well-founded fear of persecution in Pakistan.

20. No unreported Tribunal case law has been searched, due to the recent 2019 reported case.

C. HOME OFFICE COI:

Country Policy and Information Note (July 2019):

21. The current published policy document is the *Country Policy and Information Note: Pakistan: Sexual orientation and gender identity or expression* (version 3.0) (2 July 2019) [37 pages].[17]

22. Paragraph 2.4.15 to 2.4.16 states:

> '2.4.15 Various sources maintain that LGBTI persons are, in general, reluctant to be open about their sexuality as they may face

[16] For the reviewer's Case Comment on this case see, *'Avoiding the naughty step in Cart judicial review cases'* (free movement blog, 9 December 2019) https://www.freemovement.org.uk/avoiding-the-naughty-step-in-cart-judicial-review-cases/

[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814050/Pakistan-SOGIE-CPIN-v3.0_July_2019_.pdf, accessed 27 January 2020.

abuse, humiliation, societal discrimination and harassment, including in the workplace, in the family and in renting an apartment. Some persons from a higher socio-economic background may 'come out' to their family or friends and have access to the 'gay scene' albeit 'underground' but if their sexuality is known, they may be exposed to violence or blackmail. Reasons for not being open may be because the person wishes to conform to societal norms but may also be due to fear of discrimination and/or violence (see Societal attitudes and treatment).

2.4.16 Transgender persons are marginalised or ostracised by their families or wider society and there are numerous reports of violence, intimidation and abuse, particularly against transgender women (see Societal attitudes and treatment).

2.4.17 Advocates for LGBTI persons may also be vulnerable to attack (see LGBTI rights activists and LGBTI groups, civil society and human rights NGOs).

2.4.18 Whilst each case must be considered on its facts, with the onus on the person to demonstrate that they face a risk, persons who openly express their sexual orientation or gender identity are likely to be at real risk of treatment, which by its nature and repetition, amounts to persecution and/or serious harm.'

D. <u>SUMMARY OF REVIEW:</u>

<u>VERY GOOD</u>

23. The CPIN has clear structure, published in July 2019 has used up-to-date sources, generally not published before 2017. The inclusion of 2019 COI on the ill-treatment of MSM (Men who have sex with Men) by police at section 4.3.1, provides an important source of COI.

24. Comparing with the observations in the earlier 2014 review, the 2019 CPIN does not have a separate and distinct section for lesbians/bisexual women, trans (gender identity or expression) and intersex. Powerful COI is sourced within the CPIN (see [5.3.3 and 2015 EASO report: 'Lesbians are less visible than gay men]). However, this should be clearly highlighted, rather than require the decision-maker to search the document electronically for key words.

25. The reader is left with some difficulty with signposting for these underrepresented SOGIE strands. There should be separate sections in the COI section (mirroring what appears in the policy section).

26. This COI provides an insight into the steps SOGIE will have to go to 'prove straight' in order not to be identified on return (even where they are found by the decision-maker to only be discrete due to 'personal reasons or 'social pressure' (penultimate conduct limb of [82] of HJ (Iran)).

27. The 'Social attitudes and treatment' section 5, importantly includes reference to intersex [section 5.1.2 (pages 20 to 21)] with cogent evidence of serious harm to those who are intersex. The exceptionally powerful September 2018 COI in section 5.1.3 provides the clearest overview of the stark reality of SOGIE applicants on return, where discretion engages persecution, in order to 'prove straight'[section 5.1.3] (page 20) [**emphasis added**]:

> 'Grande Colibrì, an activism project in favour of LGBTQI, published an interview with Haseeb Rathore, a gay Muslim living in Lahore, dated September 2018. Haseeb spoke of how gay men in Pakistan spent their lives, stating:
>
> > '**Most gay men spend their life in guilt, carrying a burden of sins**. In our society they only have two options: one is to come out of the closet and live a horrible life and being bullied; **the other is to conceal their sexuality for the rest of their lives. People usually choose the second option. They get married and start living a dual life: one for the family and society, the other for their own satisfaction. This makes life very pathetic and a under continuous threat of being caught**. Very few men come out and even when [/] if that happens, they get very little support from family and society

28. Noting forced marriage amounts to persecution (see Bangladesh country review), then this COI stands by itself to answer to one of the core questions posed in Part A of this review:

> ***What are the steps required in order to "prove straight"?***

29. The reviewer would have rated the CPIN excellent, if not for the lack of signposting identified in paragraph 24 above.

26. SOUTH AFRICA

Major cities: Cape Town (legislative), Pretoria, Bloemfountein
Population:[1] 59,308,690
Predominant religion: Protestant Christian
FCO Travel Advice:[2]

> *'Homosexuality is legal, and the South African authorities have introduced legislation which bans any discrimination on the basis of sexual orientation.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to South Africa.

2. There current COI is the July 2017 SOGIE CPIN for South Africa.[5]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2]Foreign travel advice: South Africa: Local laws and customs, last updated 21 January 2020 https://www.gov.uk/foreign-travel-advice/south-africa/local-laws-and-customs
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.
[5]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632481/South_Africa_-_SOGI_-_CPIN_-_v1_0_July_2017.pdf, last accessed 28 January 2020.

b. Decision-making statistics (2015-2018):

3. South Africa is ranked 27th in the 2018 rankings for SO protection claims.[6] There were eight application lodged in 2018 where SO formed part of the basis of the protection claim. In 2015 there were nine. In 2016, five applications lodged and in 2017, 12 applications lodged.

4. There are supressed entries (less than 5) for outcomes in both the initial decision and appeals tables for South Africa for 2015 to 2018.[7] There are only specific figures for initial decisions made record 10 in 2015, five in 2016 and seven in 2017 (supressed figure for 2018). In the appeals table, only in 2016 is the 2016 figures for appeals determined record six appeals. The author assumes the disparity in numbers at initial decision and outcomes could arguably be due to certification under section 94 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') as (clearly or manifestly) unfounded as South Africa is listed on the 'white list' of safe countries (section 94 (4) (w) of the 2002 Act),[8] leading to no in-country right of appeal during 2015 to 2018.

B. CASE LAW:

Country Guidance and Reported case law:

5. There are no Country Guidance cases listed for South Africa.

6. In 2012 the Court of Appeal (Laws LJ) granted permission to appeal **GN (South Africa) v Secretary of State for the Home Department** [2012] EWCA Civ. 1930 against the determination of the Upper Tribunal with respect to a protection claim of a (white) gay man from South Africa [**Annex**].

[6]UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

[8] It would clearly be arguable following the 2015 reasoning of the UK Supreme Court in **R (Jamar Brown) v. Secretary of State for the Home Department [2015] UKSC 8** with respect to Jamaica, applying the same reasoning to the country conditions in South Africa, designation on the white list where there is a real risk of harm based on SOGIE identity is unlawful.

7. The Respondent in the accompanying 2013 statement of reasons accepted second limb well-founded fear of persecution for gay men in South Africa and subsequently granted the gay man from South Africa refugee status [**Annex**].[9] This based on the prism for the second limb being the Particular Social Group, where the innate/immutable characteristic and protected Convention reason is sexual orientation (identity) and not colour of skin.

Unreported Tribunal case law:

8. In a search of the Upper Tribunal decisions database – 'South Africa LGBT' resulted in 7 decisions with only two unreported determinations having relevance.

9. In **AS v Secretary of State for the Home Department (PA/07738/2017)** (hearing on 16 October 2018, promulgated 19 October 2018 and published 12 November 2018) (Deputy Upper Tribunal Judge Pickup) [9]:

> 'However, the difficulty with the appellant's case on appeal, as pointed out in [Counsel's] submissions and frankly acknowledge by [the Senior Presenting Officer], is that there is no appeal against the finding that the appellant is of South African nationality; that there is no risk to LGBT persons in South Africa; and that the relationship with Ms N could continue in South Africa.'

10. In 207 the Upper Tribunal held in the unreported case of **YA v Secretary of State for the Home Department (AA/09448/2015)** (heard on 31 October 2017, promulgated on 2 November 2017 and published on 20 November 2017) (Upper Tribunal Judge Lindsley) addressing the central question the appeal posed:

> 'The question before me is whether the appellant is at real risk of serious harm on return to South Africa from non-state actors, and particularly vigilante homophobic elements and an organisation called PAGAD, and with no sufficiency of protection or possibility of finding safety by internal relocation away from the Asian community in Cape Town which is his home area.'

11. Looking at the disparity between legislative reforms and societal attitudes and risk, relying on the current **July 2017 SOGI CPIN** [17 to 18] (emphasis added) (**additional emphasis added**):

> '17. The reason for this disparity between the legal framework and the reality of action implementing it to protect those in the LGBT community is said by both

[9] **GN (South Africa) v Secretary of State for the Home Department** [2012] EWCA 1930 (Laws LJ) (grant of permission to appeal). Proceedings were withdrawn on the basis of a grant of refugee status to the Appellant (sealed order, dated 19th June 2013).

parties in this case to be a reflection of prevailing societal attitudes which are not universally accepting of gay and other LGBT rights. The surveys to which my attention was drawn paint, however, an inconsistent picture. Some would indicate in the region of three quarters of South Africans have tolerant views: for instance, 77% having no concerns if their neighbour was gay or 76% agreeing that human rights apply to everyone regardless of sexual orientation, see paragraphs 7.1.3 and 7.1.4 of the July 2017 Country Policy Note. Other opinion polls indicate however a less tolerant picture: for instance, **72% of South Africans viewing same sex activity as morally wrong, see 7.1.5 of the July 2017 Country Policy Note**, which in turn is linked to conservative Christian religious views, and said to be **more prevalent in poorer less educated black African communities, see paragraph 7.3.1 of the July 2017 Country Policy Note**. The link to the views of Christian churches is also one made by the expert Professor Aguilar.

18. This leads to the question of how prevalent violence is towards gay men such as the appellant in South Africa. **It is notable that the Policy Summary at 3.1.2 of the July 2017 Country Policy Note states: "LGBT persons are generally accepted or tolerated by South African society, although discrimination and violence is relatively widespread particularly in rural areas...While LGBT people are likely to face some form of discrimination, harassment and/or violence from societal actors, in general LGBT persons are not at risk of persecution or serious harm from non-state actors but each case will need to be considered on its facts."** The respondent's position seems therefore to be that whilst it is likely that a gay man such as the appellant would face violence, harassment and discrimination in South Africa this would not be likely to amount to a real risk of serious harm. As Ms Easty has highlighted the position of the respondent does appear to be that the **likelihood of violence to persons such as the appellant has worsened since the 2013 Operational Guidance Note on South Africa as in that report it was stated: "LGBT persons remain vulnerable to societal violence, discrimination and hostility". This would appear to be a statement that this behaviour was less likely that it is now perceived to have become**.'

12. In addressing the country background evidence , noting the CPIN is viewed as evidence likelihood of 'some form of discrimination, harassment and/or violence from societal actors' [24]:

'This is a very finely balanced decision. **I start from the position of the respondent in the July 2017 Country Policy Note that the appellant as a gay man is likely to suffer some form of discrimination, harassment and/or violence from societal actors**. Although it is not conceded that this will always,

> in the view of the respondent, amount to persecution or a real risk of serious harm a likelihood of facing violence on return is a matter that must weigh in the appellant's favour. The nature of this violence is of course further illustrated by the other country of origin reports I have summarised above, and does include failings by the police service to protect gay men and to rigorously uphold the law, evidence of violence to gay men by the police and a failure to keep proper statistics on this issue which would perhaps facilitate official action to increase protection in this area.'

13. The findings of fact leading to the positive grant of protection to the gay man from South Africa [26]:

> 'I do not find that the material before me shows that all gay men would face an insufficiency of protection against homophobic societal violence in South Africa or that there was a real risk of serious harm as a result of that violence given the excellent legal framework and obvious efforts by the democratic government of South African government to advance in preventing hate crime as the material before me is not comprehensive enough for such a conclusion. However I am satisfied that this has been shown to the lower standard of proof to be the case for this appellant who intends to live as an openly gay man with his particular vulnerabilities in the context of the country of origin materials before me. I find that the appellant has a well founded fear of persecution for reason of his social group as a gay man, and for the same reasons his removal would also be a breach of Article 3 ECHR.'

C. HOME OFFICE COI:

Country Policy and Information Note (November 2017):

14. The *Country Policy and Information Note: South Africa: Sexual orientation and gender identity* (version 1.0) (July 2017) [39 pages].[10]

15. The Home Office COI policy position at sections 2.3.2 to 2.3.3 (page 7):

> '2.3.2 LGBT persons may experience discrimination, verbal harassment and physical attacks - including 'corrective rape'- with black lesbian and bi-sexual women particularly vulnerable to violence. South Africa has high levels of societal violence generally, including gender and sexuality-based, however accurate

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632481/South_Africa_-_SOGI_-_CPIN_-_v1_0_July_2017.pdf, last accessed 4 February 2020.

data on the type and numbers of incidents are not available (see Violence and discrimination).

2.3.3 While LGBT people may face some form of discrimination, harassment and violence from societal actors, the evidence does not establish that they are generally at risk of serious harm or persecution from non state actors. Some LGBT persons, particularly black lesbian and bisexual women, however may face treatment which by its nature and repetition amounts to serious harm or persecution, depending on the facts of the case.'

D. <u>SUMMARY OF REVIEW:</u>

<u>GOOD:</u>

16. The COI makes clear despite the leading light South Africa gave in the region with respect to SOGIE legislative reform (legal situation – section 5), there still exists strong cultural conservatism (public attitudes section 7.1). The section of violence at section 7.4.4 highlights the schism between legal reform and violence targeting SOGIE communities in South Africa (page 29):

> 'The Freedom House's Freedom in the World report covering events in 2016 observed: 'South Africa has one of the world's most liberal legal environments for LGBT (lesbian, gay, bisexual, and transgender) people… However, there are frequent reports of physical attacks against LGBT people, including instances of so-called corrective rape, in which lesbians are raped by men who claim that the action can change the victim's sexual orientation.'

17. The CPIN COI material is powerful when viewed in isolation within the sub-headings, for example the COI at sections 7.5 and 7.6 [Corrective rape]. It would have been helpful to have separate sub-headings for lesbians and bisexual women and trans/intersex.

18. The concern the reviewer has, is with respect to sub-dividing the Particular Social Group, where there is no basis in law to do so

27. SRI LANKA[1]

Capital city: Sri Jayawardenepura Kotte (administrative) Colombo (financial)
Population:[2] 21,413,249
Predominant religion: Buddhism
FCO Travel Advice:[3]

> *'Same-sex relations are illegal but the FCO is not aware of any prosecutions.*
> *…*
>
> *Although Sri Lankan attitudes to informal styles of dress are generally relaxed, women travelling alone may feel uncomfortable if not dressed modestly. Cover your legs and shoulders, and take off shoes and hats if you are entering a Buddhist temple.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[4] and 2014[5] reviews do address COI with respect to Sri Lanka.

[1] The reviewer is a Trustee of Equal Ground (since September 2018) an LGBTQ+ NGO in Sri Lanka. The reviewer certifies that he has not discussed the contents of this country review with anyone connected with the NGO.
[2] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[3] Foreign travel advice: Sri Lanka: Local laws and customs, last updated 20 November 2019 https://www.gov.uk/foreign-travel-advice/sri-lanka/local-laws-and-customs, accessed 25 January 2020.
[4] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages 90 to 93.
[5] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 62-64: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. Both reviews were undertaken prior to the February 2015 promulgation of the CG case of **LH and IP** (see Section B below).

3. De Jong (2008) made provided the following overall assessment:[6]

> 'The report covers most of the main relevant points of information although many could do with some more detail. In particular, the treatment by the police or other state authorities, as well as attitudes in society and medical services. The presence of LGBT organisations is well covered, but some more information about the practicalities of living 'discreetly' would be good to include.
>
> The situation for transgender persons needs to be included.
> A good balance of recent sources has been used.'

4. Leigh in her 2014 review states (addressing the 7 March 2012 COI report):[7]

> 'On the whole this is a good report, and provides perspectives of the different sub groups of LGBT persons (no mention of intersex persons however).
>
> The legal section could be slightly structured for a better flow, and include information on personal laws … Slightly more information on the transgender group would be useful … as well as information on intersex (or at least acknowledgement of lack of data). The report includes cross/references to women and medical sections, as well as to local NGOs, which is good practice.'

5. The current **CPIN on SOGI claims in Sri Lanka** was updated in October 2018 to include the November 2016 judgment of the Sri Lankan Supreme Court in **Galabada**.

6. On this basis the reviewer can see a clear and **urgent** need to **amend the CPIN** as it **does not accurately reflect the position as to fact, and law with respect to state-sanctioned persecution**, following the 2016 Supreme Court judgment, the reviewer has concentrated in this country review with respect to this core issue only, as the subsequent case law at Tribunal level has endorsed the position with respect to linking this judgment to evidence of persecution (see **MKMR**).

[6] *De Jong (2008)* (n 4), page 90.
[7] *Leigh* (2014) (n 5), page 62.

b. *Decision-making statistics (2015-2018):*

7. Sri Lanka is ranked 19th in the list for protection claims where SO formed part of the basis of the asylum claim in 2018. [8] 13 applications were lodged in 2018, evidencing a gradual decline from 50 applications lodged in 2015, 29 in 2016, and 18 in 2017.

8. Whilst 13 initial decisions are made by the Home Office in 2018, there are no specific figures for outcomes in 2018, or for 2017 (19 decisions) or 2016 (38 decisions). However, in 2015 there were 50 decisions made with 6 claims granted leave and 44 refused leave to remain.[9]

9. Out of the 16 statutory appeals determined in 2018, three years after the promulgation of the 2015 Country Guidance case of **LH and IP** (viable internal relocation to Colombo), five appeals were allowed and 11 were dismissed.[10]

10. In 2015, 6 appeals were allowed and 19 dismissed (26 appeals determined). In 2016, 12 allowed and 21 dismissed (33 appeals determined) and in 2017, 12 were allowed and 19 dismissed (31 appeals determined).

11. On this basis, fact-finding Tribunals were departing from the February 2015 CG case of **LH and IP** by identifying country background evidence, or individual risk factors to protection claims in order to avail the SOGIE person seeking asylum, protection, highlighting for the protection claims allowed this would be either on the basis of accepting there was state persecution on return and/or finding there was no internal relocation alternative to Colombo (non-state agent claims) (see Section B below).

[8] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[9] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[10] ibid.

B. CASE LAW:

Country Guidance:

12. The current Country Guidance case is **LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC)** (heard 8 August 2014, promulgated 18 February 2015 and published 23 February 2015) (Upper Tribunal Judges Gleeson and Macleman).[11]

13. The headnote provides the following CG summary:

> 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.*

[11] The date of promulgation arguably raises an issue of jurisdiction. Section 85 (5) of the Nationality, Immigration and Asylum Act 2002 precludes a Tribunal from considering a 'new matter' on appeal unless the Secretary of State has given express consent for it to be considered., A 'new matter' includes a ground of appeal not considered part of the original decision on appeal, in this case, asylum (section 84 (1) (a) of the 2002 Act). Section 85 (5) of the 2002 Act came into force on 20 October 2014. The Upper Tribunal 'considered' the appeal on asylum grounds at a stage post-20 October 2014, where 'asylum' was not a matter considered by the Secretary of State in the administrative decision and there is no evidence in the determination the respondent was asked for and provided express consent to the Upper Tribunal to consider the 'new matter' as part of the reported determination (promulgated after coming into force of statutory provision on 18 February 2015) [3] (*emphasis added*):

> *'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.' (emphasis added)*

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.*

14. The Upper Tribunal CG held the following with respect to state persecution and the criminal law [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.' (emphasis added)**

Post-CG unreported case law:

Lack of internal relocation alternative to Colombo:

15. The Upper Tribunal in the June 2016 unreported determination in **SASS v Secretary of State for the Home Department (AA/07983/2015)** (heard 3 May 2016, promulgated 8 June 2016) (unreported)[12] (Deputy Upper Tribunal Judge Sani) held *LH and IP* is no longer good law as the September 2015 *Country Information and Guidance Note: Sri Lanka: Sexual orientation and Gender Identity* (CIG) contained country background material to show internal relocation to Colombo will lead to serious harm from state agents [40] (**emphasis in bold in determination**):

> 2.5.3 **There is a general perception in the LGBTI community that police officers used blackmail and violence against persons they perceived to be homosexual, bisexual, or transgender. If the person's fear is of serious harm/persecution at the hands of the state, it is unreasonable to consider they would be able to avail themselves of the protection of the authorities**.

[12] The determination is not published on the Tribunal decisions database – but can be accessed on bailii.

16. At paragraph 42 of the determination, the Judge cited the following extracts from the September 2015 CIG [42]:

'The guidance goes further and discusses the Attitudes of the state at section 4. The passages of direct relevance appear to be the following (**emphasis added by Tribunal**):

4.1.1 The US State Department's 2014 Country Report on Human Rights Practices (USSD Report 2014), Sri Lanka, published on 25 June 2015, noted that, 'Authorities very rarely enforced the criminal provisions. In recent years human rights organizations reported that, while not actively arresting and prosecuting members of the LGBT community, police harassed and extorted money or sexual favors from LGBT individuals with impunity and assaulted gay men and lesbians in Colombo and other areas. ... '.

4.1.2 The same source further noted that:

'**A civil society group that worked to advance LGBT rights reported close monitoring by security and intelligence forces. In a March report by the Women's Support Group, "Sri Lanka: Not Gonna Take it Lying Down," 13 of 33 LGBT persons interviewed in the country between 2010 and 2012 admitted to having been the victim of some kind of violence at the hands of state agents. Interviewees noted police often utilized existing laws, such as the 1842 Vagrants Ordinance, to detain any individual deemed to be "loitering," which generally led to detention and at times physical and sexual abuse. Interviewees also noted that police and antigay groups also used penal code sections on "gross indecency" and "cheating by personation" to brand LGBT persons as "perverts and criminals." There was also a general perception in the LGBT community that police officers used blackmail and violence against persons they perceived to be homosexual, bisexual, or transgender.**'

4.1.3 A report by the Kaleidoscope trust, Speaking Out, The rights of LGBTI citizens from across the Commonwealth, 2014, stated that, 'Although the law is rarely enforced it continues to be used to threaten and harass LGBTI people. A recent study by human rights organisation EQUAL GROUND found that 90 [percent] of trans people and **65 [percent] of gay men reported experiencing police violence based on their sexuality and/or gender identity**. The law still retains widespread support amongst lawyers and the police.'

4.1.4 A Shadow Report to the UN Human Rights Committee regarding Sri Lanka's protection of the Rights of LGBTI Persons (Response to List of Issues) Compiled by the Kaleidoscope Human Rights Foundation with

the assistance of DLA Piper International LLP and Sri Lankan LGBTI Advocacy Groups, dated September 2014, stated:

'**There have been reports of arbitrary arrests and detention by law enforcement officials and violent and abusive police behaviour. Although arrested LGBTI individuals have thus far not been charged or prosecuted, there have been reports of subsequent blackmail, extortion, violence or coerced sexual acts of individuals by police officers**.

For example, in one reported cases two gay men were arrested by police in a public restroom in Colombo and taken to a police station. At the station, the police officers used derogatory terminology and accused the two men of having sex in the restroom. The police then drove the men to another location where the men were forced to pay a bribe to the police before being released. The transgender nachchi community is especially vulnerable to such victimisation, abuse and exploitation. The awareness that most LGBTI individuals will be unwilling and fearful to report such incidents and the subsequent lack of action by the State gives police officers the license to continue such practices.'

(My emphases supplied in bold).'

17. The Deputy Upper Tribunal Judge held the September 2015 CIG made clear the respondent accepted a departure from the evidence before the CG Upper Tribunal [47 to 48]:

> '47. I am unable to accept [the Senior Presenting Officer's] submissions in reply. [the Senior Presenting Officer] gave no reason why the fresh evidence should not carry weight other than the suggestion that it was the same as that before the panel in *LH & IP*. That submission is wholly untenable. That much is obvious from a bald comparison of the passage before the panel in *LH & IP* and the evidence before me as carefully excerpted above. A closer analysis reveals that the tone and content of the Country Information from the Respondent has changed given that she has published a CIG which discusses in detail the reliable and verifiable material available to her which, on that evidence, points to acts of violence by the police against gay men, and to a 65% history of violence by a survey of gay men as well as coerced sexual acts, which are synonymous with rape and sexual violence. Whilst there is continued mention of harassment and extortion, that is of insignificance on its own, but combined with the aforementioned difficulties represents a growing trend in hostility towards the gay community. It is further noteworthy that the panel in *LH & IP* did not accept the

evidence before it of harassment of gay men (see [115] of that decision) whereas the Respondent has since accepted and referred to that evidence herself in her own CIG.

48. Returning to the instant appeal, in the context of this appellant who has been outed to his family and the community, the second question in *HJ (Iran)*, namely, if a gay man lived openly would he be liable to persecution in his own country, has been answered in the affirmative owing to the above background evidence.'

18. The appeal was allowed with a subsequent grant of refugee status, with both pre-CG case law and post-SASS case law providing force for why on the Home Office's own COI on lack of safety on relocation to Colombo, the CG case should no longer be followed.[13]

[13] The approach of the 2016 Deputy Upper Tribunal Judge is consistent with the June 2014 pre-CG approach of Upper Tribunal Judge Perkins in **KHKS v. Secretary of State for the Home Department AA/0382/2013** (unreported) (heard 5 March 2014, promulgated 18 June 2014, published 16 July 2014) when examining the country background evidence in the March 2012 COIR report on Sri Lanka. The Judge cited from the COI at [21]: '"The fear of being apprehended and identified as a person of non-normative sexual behaviour or practice leads to a cycle of silence by members of the LBT community, by their families and friends and by society as a whole and makes them vulnerable to a range of abuses including extortion, intimidation, unlawful arrest and detention, harassment and torture'". At [22] the Judge relied on the 2010 US DOS quoted in the COIR: '"[P]olice harassed and extorted money or sexual favours from those persons and assaulted gays and lesbians in Colombo and other areas." The report also suggested that many incidents of crimes against members of the LGBT community were unreported." The Judge distinguished the 2014 CG of **MD (India)** [26] and held in allowing the appeal on refugee protection grounds: MD (same-sex oriented males: risk) India CG [2014] UKUT 615. As is apparent from the title the case is about the persecution of gay people in India. Mr Wilding was not suggest that India is the same as Sri Lanka but he did suggest that the case is a useful guidance on the correct approach to take to the persecution of gay people in a country where gay activity is illegal and prosecutions are rare and where extortion, harassment and discrimination by the police and the general population does take place.' And [28]: 'There was no evidence before me that any comparable [LGBTI activist and] support network exists in Sri Lanka.'
In **Mr MT v. Secretary of State for the Home Department (PA/06406/2016)** (heard 18 January 2018, promulgated 23 January 2018, published 9 February 2018) (Upper Tribunal Judge Chalkley). The Tribunal refused to allow reliance on **SASS,** as no permission had been granted in those proceedings to rely on the determination [5]. Cf. **Mr MM v. Secretary of State for the Home Department (AA/01790/2014)** (heard 19 November 2018, promulgated 29 November 2018, published 18 December 2018) (Deputy Upper Tribunal Judge McGinty) allowed the appeal by way of remittal back to the First-tier Tribunal where the appellant had relied on **SASS** to show he also had the same objective evidence to show why **LH and IP** should be departed from (emphasis added):

> 'Indeed, in that regard, the Appellant had specifically relied upon the evidence considered in the unreported case of AA/07983/2015, which the Judge had indicated although permission had not been given to rely upon the decision itself, that the evidence contained therein could be relied upon, that at paragraph 44 of that decision reference was made to the latest COIS report where at paragraph 4.1.3 it was stated that 65% of gay men surveyed had reported police violence based on their sexuality/gender identity and the US State Department Human Rights Report for Sri Lanka 2014 had made findings of arbitrary arrests, detention, blackmail,

19. Notably, in **PP (female headed household; expert duties) Sri Lanka [2017] UKUT 117 (IAC)** McCloskey J (President) held (see headnote):

> '(I) A Tamil female single head of household residing in the former conflict zone of Northern and North Eastern Sri Lanka may be at risk of sexual abuse and exploitation perpetrated by members of police, military and paramilitary State agents.'

20. This is relevant to SOGIE claims from women, as the ability to reside in the conflict zones for Tamil women requires (as was the case in **SW (Jamaica)**[14]) to prove connections with men in order to evade a well-founded fear of persecution. This gives further force to the issue of 'the silence fallacy' as outlined in **LC (Albania),** where country background evidence shows lack of 'providing straight' in a patriarchal society leads to risk on return.

21. Since **SASS,** there is a clear fundamental shift from the internal relocation alternative analysis in Colombo, to state-sanctioned persecution, through the enforcement of the Criminal Penal Code provisions (sections 365 and 365A) by the authorities, specifically the Supreme Court.

State Persecution:

November 2016 Sri Lankan Supreme Court judgment in *Galabada:*

22. The Supreme Court of Sri Lanka on 30 November 2016 handed-down their judgment in **Galabada Payagalaga Sanath Wimalasari and others vs Officer-in-Charge (SC Appeal No. 32/11** (sections 365A and 365 judicially enforceable) addressing the constitutional challenge to section 365A of the Penal Code (gross indecency convictions) following the 12 months sentence of two gay men imposed by the Magistrate in 2003. The following points arise from this judgment:

> (1) Even where the conduct is consensual – *"Section 365A was part of our criminal jurisprudence almost from the inception of the Penal Code in the 19th century. A minor amendment was effected in 1995,*[15] *however,* ***that did not change its character and the offence remains intact."*** **[page 11 of judgment]**;
>
> (2) Whilst this is "not an offence in England now" [**page 11 of judgment**];

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extortion, violence and coerced sexual acts. I am not satisfied that the analysis of the First-tier Tribunal Judge in this case was sufficiently thorough, in order to deal with the evidence presented fairly in order to examine whether or not that evidence did show persecution as opposed to simple discrimination.'

[14] SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 000251 (IAC).

[15] The change was to amend 'a man' to 'a person' to enable prosecution of women and men and thereby undermine any challenge to the Penal Code based on discriminatory treatment.

(3) "*The contemporary thinking, that consensual sex between adults should not be policed by the state nor should be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England.*" [**page 11 of judgment**];

(4) "***The offence however remains very much a part of our law***" **[page 11 of judgment**];

(5) *"[T]he fact that the act was consensual, and absence of criminal history on the part of the other accused as well.* ***In my view this is a first instance where the offenders should be afforded an opportunity to reform themselves."*** [**page 12 of judgment]; *and***

(6) *[on this basis – lack of prior offending and opportunity to reform] and matter was 13 years ago –* ***"I set aside the sentence of the one year term of imprisonment and substitute the same with a sentence of 2 years rigorous imprisonment and acting under Section 303(1) of the Code of Criminal Procedure Act, suspend the operation of the term of imprisonment for a period of 5 years effective from the date the sentence is pronounced by the learned Magistrate."*** **[page 12 of judgment**].

23. On this basis the following can be gleamed:

(1) The Supreme Court of Sri Lanka has made clear, as recently as November 2016 that the Penal Code paragraphs 365 and 365A – anti-sodomy laws – are enforced and enforceable in Sri Lanka;

(2) For a consensual offence – where it is a **first offence** – committed some time ago – then a sentence of at least 2 years **rigorous imprisonment** should be given, so this gives **an opportunity to reform (ie gay cure therapy)**, with a 5 years suspension – so if at any time there is a further consensual act of sex (or any other offence) committed then the gay man (for a first time offence) will be sent back to prison to serve a 2 year term of imprisonment; and

24. Axiomatically – where it is either (a) this is the first time offence under paragraph 365A, but there is a previous criminal history (completely unconnected with sexual identity) then there will be no suspended sentence – a minimum 2 years sentence will be imposed; or (b) it is not the first offence of consensual same-sex conduct – then a **minimum period of two years rigorous imprisonment** will be imposed

25. Via successive cases before the First-tier Tribunal from 2017 appellants succeeded in relying on **Galabada** as evidence of state-sanctioned persecution, thereby significantly departing from the 2015 finding of LH and IP recorded at [16] with respect to lack of a single prosecution.

26. The Home Office appealed one of these positive First-tier Tribunal determinations. The Upper Tribunal in November 2018 dismissed the Secretary of State's appeal and held in the unreported determination in **Secretary of State for the Home Department v. MKMR (PA/01821/2018)** (heard 1 November 2018, promulgated 26 November 2018) (Upper Tribunal Judges Latter and Allen).[16]

27. The Upper Tribunal held when dismissing the challenge to the positive First-tier Tribunal determination, the Country Guidance had erred when finding a lack of prosecutions since independence in 1948 [28]:

> 'The respondent's grounds argue that Galabada is not a precedent on country conditions and does not seek to provide an objective overview of the country conditions in Sri Lanka. This misses the point: it does not purport to do either. Neither is it a piece of legislation based on its own facts. It is a case dealing with a prosecution under the Sri Lankan Penal Code. It shows at the very least that contrary to the basis on which the Tribunal proceeded in LH and IP at [16] that the criminal law has been used in Sri Lanka, if only once but nonetheless recently and in a judgment of the Sri Lankan Supreme Court.'

28. The Upper Tribunal held there was no error in not following the CG case and additionally highlighted the risk to the trans community noting **MKMR** self-identified as a gay man and a pre-operative trans woman [32]:

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

[16] This determination also is not published on the Tribunal decisions database but is published on bailii (url), last accessed 3 February 2020.

C. HOME OFFICE COI:

Country Policy and Information Note (October 2018):

29. The current published policy is the *Country Policy and Information Note: Sri Lanka: Sexual orientation and gender identity* (version 3.0) (October 2018) [43 pages].

30. Noting the judgment was handed down by the Sri Lankan Supreme Court in November 2016, the Home Office did not include reference to the judgment when revising the **SOGI CPIN in July 2017**.[17]

State persecution:

31. Paragraph 4.1.2 of the October 2018 CPIN accepts there is no difference between whether acts constituted criminal conduct are committed in public or private (page 16) (**emphasis added**):

> 'In November 2016, the Sri Lankan Supreme Court heard a case in which an accused appellant was charged along with another accused before the Magistrates Court for "committing an act of gross indecency between two persons in terms of Section 365A of the Penal Code". The Magistrate had found the Appellant and the other accused guilty and imposed a term of imprisonment of one year and imposed a fine of Rs. 1,500 with a default sentence of six months. The Supreme Court heard all the evidence again and determined that the sentence of the one year term of imprisonment should be set aside and substituted **with a sentence of 2 years rigorous imprisonment, suspended for a period of 5 years**'.

32. The paragraph below, at 4.1.3 refers to evidence from an advocate of no prosecutions under the law:

> 'Attorney-at-law Dushantha Kularathne, however, told Roar (an online media platform covering current affairs, business, lifestyle, technology, arts, and culture in South Asia), that: 'homosexuality in Sri Lanka is definitely an offence, but conceded that it is indeed open to interpretation. […] Homosexuality, among other things, comes under "unnatural offences" or acts of a sexual nature that go against nature, as per section 365 of the Penal Code.

[17] UK Home Office: Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity, July 2017 (archived): https://www.ecoi.net/en/file/local/1445308/1830_1538726993_sri-lanka-sexual-orientation-country-note-3.docx (accessed on 3 February 2020)

> According to Kularathne, however, no cases have been reported of anyone actually being prosecuted for being gay. […]

33. This above statement is plainly wrong, as the November 2016 judgment in **Galabada** makes clear there is enforcement of the law (as accepted by the Upper Tribunal in **MKMR** in November 2018).[18]

34. However, paragraph 4,1,2 of CPIN importantly **omits** the only reason to suspend the sentence that is on the basis that it is a first time offence and provide an **"opportunity for reform"** (ie gay cure therapy) which is persecutory in itself, as it goes against the protected immutable characteristic, making the CIPN reference **selective and inaccurate.**

35. As sections 365 and 365A of the Criminal Code were amended in 1995 to include women (to avoid any issue of discrimination), state persecution applies to both men and women. The acts prohibited address both the public and private sphere, and consent between adults, is not a defence.

36. As **Galabada** makes clear (pages 11-12 of the judgment):[19]

> '**The offence however remains very much a part of our law**. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that **the act was consensual,[20] and absence of a criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves.**
>
> …

[1818] The Tribunal's determination in **MKMR** was used in the Upper Tribunal in an application to apply for permission to apply for judicial review against a fresh claim decision as forming ground for departing from LH and IP – permission granted by Upper Tribunal Judge Craig on 25 September 2019 R (ATTA) v. Secretary of State for the Home Department (JR/3162/2019). A copy of the Grant of Permission and Consent Order is **Annexed** to this report. Permission to adduce these documents have been obtained from the litigant (lesbian from Sri Lanka) and her solicitor (Naga Kandia: MTC Solicitors) [Email attaching Anonymised Orders with Consent emailed to reviewer on 23 January 2020].

[19] http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf (last accessed 9 October 2018), cited at footnote 19 of October 2018 CIPN para 4.2.1.

[20] This thereby wholly undermines the quote at para 4.1.3 of the October 2018 CIPN from the Defence Attorney in January 2017 as being wholly inaccurate – as the conviction was based on consent (noting the offence took place in 2003 (13 years prior to the hearing before the 2016 Supreme Court).

> Considering the above I set aside the sentence of the one year term of imprisonment and substitute the same with a sentence of 2 years rigorous imprisonment and acting under Section 303(1) of the Code of Criminal Procedure Act, suspend the operation of the term of imprisonment for a period of 5 years effective from the date the sentence is pronounced by the learned Magistrate.'
>
> (**emphasis added**)

37. This 'rehabilitation' is persecutory, as the ill-treatment is discriminatory against and directed at the protected immutable characteristic (see **East African Asians v the United Kingdom (1981) 3 EHRR 76** for analogous position on grounds of race and 'acting against will' amounts to 'inhuman and degrading treatment' **The Greek Case (1969)**).

38. The CPIN does not address aversion therapy (also known as conversion therapy), required to enable the 'opportunity to reform' to be proved.

Pressure to conform:

Discrimination amounting to persecution:

39. The CPIN draws from the **August 2016 Human Rights Watch report** '*All Five Fingers Are Not The Same*' as a source document (see bibliography at page 40).[21] It cites at paragraph 6.1.6 the report's reference to the requirement to conform to gender stereotypes (page 25):

> 'As specified in the Human Rights Watch report, "All Five Fingers Are Not the Same" - Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka, 15 August 2016: 'In Sri Lanka, ideas about the way men and women should look and act are deeply entrenched. Those who challenge gender norms—including many lesbian, gay, bisexual, transgender, and intersex (LGBTI) people—may face a range of abuses from … private individuals that compromise the quality and safety of their daily lives, and their ability to access services that are central to their realizing basic human rights.' 'The abuses experienced by transgender people are part of a broader picture of discrimination faced by gender non-conforming people in Sri Lanka. LGBTI people in general may face stigma and discrimination in housing, employment, and health care, in both the public and private sectors.' 'Social standing plays a significant role in the discrimination that LGBTI people face: those who are poor, who engage in sex work, or who obviously do not adhere

[21] Accessed 24 January 2020.

to rigid gender norms are most vulnerable to abuse, including physical assault or arrest.'

40. Nevertheless, the CPIN fails to address the following country background material in the HRW report with respect to aversion therapy (page 45 of report):

> Aversion Therapy In March 2016 the World Psychiatric Association (WPA), which represents over 200,000 psychiatrists worldwide, stated that it "accepts same-sex orientation as a normal variant of human sexuality," and that "same-sex sexual orientation, attraction, and behaviour and gender identity are not seen as pathologies."152 The WPA also issued a statement declaring so-called "treatments of homosexuality" ineffective, potentially harmful, and unethical.153
>
> In Sri Lanka, some families seek "aversion" or "conversion" therapy for their children, including for those above the age of 18—treatments that are aimed at turning them away from homosexuality or gender non-conformity, or toward heterosexuality. Dr. Pinnawala reported seeing a young man whose parents wanted aversion therapy for him. "We can't have our son being gay; fix this," she said the parents told her. Dr. Pinnawala refused, trying to explain to the parents that aversion therapy does not work and that it is unethical.154
>
> Maneesha said that she went to a psychiatrist at 15 because she wanted to speak with someone about her newly discovered feelings for women. When she revealed to the psychiatrist that she had feelings for women, the psychiatrist offered her a "choice" between conversion therapy or "going ahead with it."155 When Maneesha replied that she did not want to have feelings for men, the psychiatrist referred her to Heart2Heart, an organization that works with gay and bisexual men, transgender people, and MSM. "Even when doctors are gay friendly, they think conversion is an option," Maneesha said.'

41. At page 46 of the report, Human Rights Watch address mental health:

> 'Mental Health Although Human Rights Watch could not identify academic studies on the mental health of LGBTI Sri Lankans, studies conducted elsewhere suggest that higher levels of discrimination may adversely impact the mental health of lesbian, gay, bisexual, or transgender people.157
>
> Dr. Chithramalee de Silva, director of Mental Health at the Ministry of Health, said no government programming currently takes into consideration the special mental health needs of LGBTI people and the sensitivities involved in addressing their concerns when they seek mental health services.158

> A significant issue that threatens the mental health of LGBTI people is the treatment of homosexuality and gender non-conformity as an illness that can and should be cured. Dr. Pinnawala, a clinical psychologist, told Human Rights Watch that some transgender people she treats have been misdiagnosed as having psychosis. Before they come to her, she said, they do not know that they do not have an illness and do not need medication.159
>
> A number of LGBTI people who spoke to Human Rights Watch reported suffering from depression and contemplating or attempting suicide, or knowing people who had done so.
>
> Jeewani, a 20-year-old trans woman in Ambalangoda, said that after her father burned all her female clothes and compelled her to behave like a man, she attempted suicide by overdosing on pills. She was hospitalized and survived, but spent the next year hiding from everybody, she said.160
>
> Malith said one of his transgender friends committed suicide because of pressure from his family. "He was overwhelmed, and couldn't take it anymore," Malith said, adding that many other transgender friends had also considered suicide—as had he.'

Intersex:

42. The CPIN states in section 6.8 with respect to Intersex (page 31):

> '6.8 Intersex persons
>
> 6.8.1 CPIT was unable, within the sources consulted, to find any information on societal treatment of intersex persons.'

43. Noting the August 2016 Human Rights Watch report cited above is listed in the bibliography with specific extracts cited, the following country background evidence is referred to at page 47 of the report:

> Susan, who is intersex, is a devout Christian. For a long time, she had been confused about her sex and sexual orientation. Her parents had raised her as a boy. At 15, she became attracted to men. At 16, she started to develop breasts, and fell in love with a boy. By 17, she felt overwhelmed. "I wrote a letter to God," she said, "that if he didn't tell me by the next day if I was a boy or a girl, I'd take my own life." When a response did not arrive the next day, she drank poison, she said.'

44. The CPIN should be amended to include this evidence to provide clear cogent evidence from a recognised authority with respect to country background evidence

highlighting the procedures involved giving rise to violations of international human rights norms.

Internal relocation:

45. Internal relocation does not arise where it is established there is state persecution.

D. SUMMARY OF REVIEW:

PRIORITY URGENT ACTION

46. The CPIN inaccurately records the 2016 Sri Lankan Supreme Court judgment in **Galabada** by omitting part of the sentence (the five years suspension) was based on the added need to 'reform' (ie 'prove straight') and the Upper Tribunal have agreed, this leads to positive determinations on protection claims, and is a clear departure from the 2015 CG case of **LH and IP** (incorrectly recording no prosecutions since 1948 independence). Paragraph 4.1.2's omission of this crucial part of the judgment, when linked with the COI with respect to the use of 'aversion therapy' in Sri Lanka, establishes state persecution.

47. Paragraph 4.1.3 in effect contradicts the above paragraph, as the **Galabada** judgment is proof there has been a prosecution under the Criminal Code.

48. The Home Office have had access to the judgment prior to the July 2017 CPIN was updated, where no reference was made to this judgment. The October 2018 CPIN, by including reference to the judgment, does so, without highlighting the persecutory nature of this judicial measure. Since the November 2018 proceedings in **MKMR** before the Upper Tribunal, the Home Office have not succeeded in arguing the judgment does not amount to persecution.

49. The CPIN needs to be updated as a Priority to ensure decisions can be made with accuracy, certainty and with transparency.

28. TURKEY

Capital city: Ankara
Population:[1] 84,339,067
Predominant religion: Islam
FCO Travel Advice:[2]

> *'Homosexuality is legal in Turkey. However, many parts of Turkey are socially conservative and public displays of affection may lead to unwelcome attention.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews do address COI with respect to Turkey.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Turkey: Local laws and customs, last updated 25 January 2020 https://www.gov.uk/foreign-travel-advice/turkey/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008), pages96 to 99.
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 69 to 70: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. There are currently in force two relevant CPINs for Turkey. The first is the **June 2017 SOGI CPIN**.[5] The second relevant document is the **September 2018 CPIN on Military Service**.[6]

3. De Jong finds in the 2008 review of the COI evidence, reviewing prior to the 2010 judgment in HJ (Iran) and focus on risk to those who are 'open':[7]

> 'The report is fairly comprehensive, although it is poorly structured in parts and requires additional information on certain issues.
>
> The reports include specific information on transgender persons and clearly links the situation for lesbians to the status of women in general, which is very good practice.
> …
> Given the current situation in Turkey the report should probably concentrate on issues of '*honour crimes*' and level of protection available, the treatment of LGBT activists, discrimination and treatment in the Armed Forces, medical issues, treatment of sex workers and transgender persons, and – possibly – the status of LGBT persons requiring a divorce (from an opposite sex marriage), and custody and contact with their children.'

4. In a relatively short review of the August 2010 COI Report on Turkey, Leigh observes (2014):[8]

> 'This is an overall good report, which considers transgender persons and lesbians specifically. Some of the information could be restructured … especially as the violence reported seems to be part of a broader pattern of violence against LGBT persons in Turkey. Similarly, information on LGBT organisations could be mainstreamed under the main headings to avoid repetition.'

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/619683/Turkey_-_SOGI_-_CPIN_-_v2_0__June_2017_.pdf, last accessed 28 January 2020.
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738856/Turkey_-_Military_service_-_CPIN_-_v2.0__September_2018_.pdf, last accessed 28 January 2020.
[7] *De Jong (2008)* (n 3), page 96.
[8] *Leigh (2014)* (n 4), page 69.

b. Decision-making statistics (2015-2018):

5. Turkey is ranked 31st in the 2018 rankings for SO protection claims.[9] There were seven applications lodged in 2018 where SO formed part of the basis of the protection claim. For 2016 and 2017 the entries are with respect to supressed entries (less than five). In 2015 there were six SO based applications.

6. There are supressed entries (less than 5) for outcomes in both the initial decision and appeals tables for Turkey for 2015 to 2018.[10]

7. Only 2015 records five initial decisions made, with 2016 to 2018 recording supressed data.

8. For the appeals table in 2018 five appeals were determined with specific outcomes not recorded on the table.

B. CASE LAW:

Country Guidance and Reported Tribunal cases:

9. The current Country Guidance case is **SD (military service – sexual identity) Turkey CG [2013] UKUT 612 (IAC)** (Upper Tribunal Judges Latter and Dawson) (heard 5 October 2013, promulgated 5 December 2013, published on 20 December 2013).

10. The headnote states (emphasis added):

> *'(1) All Turkish males are required to undergo military service but exemption can be granted on the grounds of physical or mental disability which includes "sexual identity disorder".*

[9]UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.

(2) *Homosexuality is regarded by the Turkish army as a sexual identity disorder but the perception of homosexuality in Turkey is not reduced to a person's sexual preference but is informed by an assessment of his whole personality including his outward appearance and behaviour. It is associated with the passive role which is seen as unmanly whereas taking the active role does not attract the same disapproval and is not considered to undermine the essence of manliness.*

(3) *The exemption process for determining whether a recruit is entitled to exemption generally includes intrusive requirements which do not properly respect the human dignity of someone whose sexual identity would qualify him for exemption such that it can properly be categorised as degrading and involving a real risk of a breach of article 3.*

(4) *If during his military service a recruit (whether he has not sought exemption or has been refused) is discovered or is perceived to be homosexual as understood in Turkey, there is a reasonable degree of likelihood of ill-treatment of sufficient severity to amount to persecution on the basis of his sexual identity and there is no sufficiency of protection. The risk of such discovery or perception arising during his service will require a fact sensitive analysis of an individual's particular circumstances including his appearance and mannerisms, the way in which he describes his sexual identity, the extent to which he fits the stereotype of a homosexual as understood within Turkish society and the extent to which he will conceal his sexual identity for reasons not arising from a fear of persecution.*

(5) *Any such risk likely to arise during service is not negated by the fact that there is an exemption process as that process itself carries a real risk of a breach of article 3.*

(6) *MS (Risk- Homosexual) Turkey CG [2002] UKIAT is no longer to be regarded as providing country guidance.'*

11. On the basis the CG case requires investigation of demeanour and sexual activities, based on stereotypes, following the European Court of Justice's 2 December 2014 ruling in **C-148/13, C-149/13 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie.**

12. The Luxembourg Court gave four categories of impermissible methods of assessments -including for the purposes of cases following this Turkish CG case:[11]

    (i) stereotypes - such as knowledge of gay organisations or notions of how gay people behave, should not be part of the assessment. Assessment should be based on the individual and personal circumstances [paragraphs 60-63]: - prohibition on demeanour where assessment is 'basis solely of stereotyped notions associated with homosexuals' [par. 62]; and

    (ii) no questioning on sexual practice should not be asked as this would violate the right to respect private and family life (Article 7 of the EU Charter) [paragraphs 64-65].

13. There is a clear risk on a focus on sexual conduct rather than sexual and gender identity or expression. On this basis, the CG case should not be followed as a starting point to consider risk on return. There is a strong case for the CG list to be amended to no longer designate the case following the Luxembourg Court's reasoning in ABC.

14. There are no post-2013 CG reported cases.

Unreported Tribunal cases:

15. There are four cases that are listed by the Tribunals decisions database when searching 'Turkey LGBT'.

[11] See for Case Comment: Chelvan, S '*C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims*' (12 December 2014) https://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/

16. In **Secretary of State for the Home Department v SO (IA/16137/2013)** (Upper Tribunal Judges Southern and Finch) (heard on 15 July 2015, promulgated on 24 July 2015 and published on 20 October 2015) the Upper Tribunal allowed the SSHD's appeal and remitted the appeal to a new Tribunal relying on a material error of law for the earlier Tribunal not referring to, let alone applying **SD (Turkey)**. There is no reference to the CJEU case of **ABC**. None of the other unreported cases dealt with country background evidence and risk on return to Turkey.

C. HOME OFFICE COI:

A Sexual orientation and Gender identity:

17. The *Country Policy and Information Note: Turkey: Sexual orientation and gender identity* (version 2.0) (June 2017) [22 pages].[12]

18. There is no reference to **SD (Turkey)** within the CPIN – this is good practice in light of the arguably impermissible approach to fact-finding exercise.

19. The policy summary at section 3 states:

> '3.1.1 Although same-sex sexual activity is legal in Turkey, there have been reports of police harassment, occasional violence and interference in the lives of some LGBT persons – particularly sex workers – and LGBT organisations. LGBT persons may also face discrimination in accessing services, including health and education. 3.1.2 However, not all members of the LGBT community experience the same level of ill-treatment by state actors. In general the treatment of LGBT persons by the state is not sufficiently serious by its nature and repetition as to reach the threshold of persecution or serious harm.
>
> 3.1.3 Turkey is a conservative society where homophobic attitudes persist. LGBT persons may experience societal discrimination, stigmatization, intimidation and occasional violence by non-state actors. In general the level of

[12]

discrimination is not such that it will reach the high level of being persecutory or otherwise inhuman or degrading treatment. Personal circumstances may, however, place some LGBT persons at risk from non-state actors.

3.1.4 State protection is likely to be limited as there are shortcomings in the way that such crimes are investigated and prosecuted.

3.1.5 Internal relocation is likely to be possible where a person experiences local hostility but will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution.

3.1.6 Where a claim is refused, it is unlikely to be certifiable as 'clearly unfounded'.'

20. **However,** there is the 2018 CPIN on CPIN: Turkey: Military service (version 2.0) (September 2018) [37 pages] does address the 2013 CG in **SD (Turkey)** (page 9):

'2.4.13 However, it should be noted that at the time of the hearing of SD (military service - sexual identity) Turkey CG [2013] UKUT 612 (IAC) (heard 4 and 5 June 2013 and promulgated 5 December 2013) the requirement for a rectal examination and explicit photographs in the exemption process had only just been withdrawn by the Turkish authorities. The Tribunal is slightly ambiguous about this process, stating that they understood that these requirements were not generally imposed (paragraph 93), but also stating that they can be included in the exemption process (paragraph 98). The evidence strongly suggests that these are no longer required (see Sexual orientation).

2.4.14 Depending on the person's circumstances, the conditions and/or treatment likely to be faced by actual or perceived LGBTI persons required to undertake compulsory military service, or who undertake the exemption process as an LGBTI person, may amount to persecution (see also Sexual orientation).'

21. The withdrawal of the anal examination is cited at paragraph 4.2 from a 2015 article in Pink News:

22. However, by 2018, there is a ruling expulsion of a gay man discharged for 'unnatural acts' is constitutional, noting there is no factor distinguishing acts between 'active' or 'passive' (emphasis added):

4.2.3 LGBTI News Turkey published the following, which was based on a source dated February 2018: 'The Constitutional Court's verdict found the Martial Penal Code's ruling of expulsion from the Armed Forces for soldiers having homosexual relations to be in compliance with the Constitution. […] According to the ruling, a public action was filed against a soldier due to his homosexual orientation, with the allegation of "engaging in unnatural intimacy". The Chamber of the 1. Military Supreme Court ruled in favour of the Martial Penal Code's rule which states: "Soldiers engaging in unnatural intimacy with someone are subject to the sentence of expulsion from Turkish Armed Forces and soldiers are to be stripped of their rank" […]. 'The ruling explained that the regulation in question prohibited "engagement in unnatural intimacies". The clause "engaging in unnatural intimacies" being defined as "demonstrating unnatural sexual behaviour" […].'17

4.2.4 For further information about LGBTI people, see the country policy and information note on Turkey: Sexual orientation and gender identity.' Back to Contents

23. On this basis, the military code provision does not distinguish with respect to expulsion based on 'role' as outlined by the Upper Tribunal in **SD (Turkey)**. On this basis the ruling provides a constitutional basis to target the LGBT+ community in Turkey.

B Military Service:

24. The 2018 evidence post-dates the 2017 CPIN on SOGI on Turkey and the reference to the 2014 article at 6.2.3.

25. The 2017 CPIN on SOGI is clearly out-of-date and would lead to confusion and a real risk there would not be cross-referencing to the more-up-to date 2018 CPIN on Military service. It is clear reliance on the 2015 Pink News article on anal examination did not lead to lack of expulsion of gay men from the military. This blanket policy give rise to discriminatory measures (see **Smith and Grady v the United Kingdom (1999) ECtHR**). It is clearly arguable these discriminatory measures of the Turkish state amount to severe violations amounting to persecution (see **OO (Sudan) and JM. Uganda v. Secretary of State for the Home Department [2009] EWCA Civ. 1432 [21]**).

26. At 4.2.1 (emphasis added):

> 'In the report of November 2016, the European Asylum Support Office (EASO) stated that, 'In 2013, the army introduced a new category to the predraft exams, the "sexual identity and behavioural disorders", which replaced the long-criticised definitions of "unnatural" or "mental illness". While there is no legislation against homosexuality in Turkey, openly gay men are not believed to be welcome in the army. It is possible to avoid military service in Turkey by declaring one's homosexuality...'

27. This COI makes clear the approach of the Upper Tribunal is to be distinguished, where the COI records no factor distinguishing 'openly gay men' based on sex-role.

State persecution:

28. The June 2017 SOGI CPIN does provide the following helpful summary with respect to risk to SOGIE applicants [2.3.7] (page 5) (emphasis added):

> 'Same-sex sexual activity is legal in Turkey and there is an equal age of consent for same and different-sex sexual acts. However, incidents of discrimination in accessing health services and education have been reported. There have also been reports of police harassment, occasional violence and interference in the lives of some LGBT persons, particularly LGBT sex workers. Similarly, LGBT organisations have also experienced harassment by some members of the police.'

29. This real risk of violence is supported within this CPIN at section 5 (State attitudes) with authoritative COI evidencing discrimination and violence, with clear COI on lack of effective protection (section 5.2). The further sections on 'societal treatment and attitudes (section 6) and LGBT organisations (section 7) are read to provide an overview consistent with a positive finding with lack of effective support for SOGIE communities in Turkey.

Intersex:

30. Importantly, there are two sections relating specifically to intersex COI in Turkey.

31. Firstly, with respect to access to healthcare [5.4.2] (pages 15 to 16) (emphasis added) (**additional emphasis**):

> 'Contribution from Kaos GL, SPoD, Pembe Hayat, ILGA---Europe and ERA to Turkey's ILGA Report 2016 noted:
>
> 'On the 4th of May [2016], SES (Union for Health and Social Services Workers) organised an event on "Accessing Social Services for LGBTI people". Hospital staff tore up the poster for that event. '…Trans and intersex individuals face hardships in accessing healthcare due to discriminatory attitudes of the hospital staff. In a legal case concerning discrimination in access to health care against trans individuals, a doctor refused to examine a trans woman patient because of her gender identity. There has been no investigation into the doctor's conduct, but the victim was punished for allegedly insulting the doctor. **An intersex person was also faced with ill treatment and discrimination when they applied to be examined for a physical ailment.** Finally, a trans individual was refused by the university from which he graduated, when he asked them to reissue his diploma with his new name. He filed a complaint against the university's decision, but the court upheld it. He cannot practice his profession due to this.'

32. Secondly, with respect to LGBT organisations [7.1.4] (page 21):

> 'A Kaos GL article from February 2017 noted the existence of the newly founded LADEG+ (LGBTI+ Families and Relatives Support Group) which in part existed to offer information and guidance on intersex issues.'

Post CPIN material:

33. US State Department report 2018 (published in March 2019)) states in the summary (emphasis added):[13]

> 'Human rights issues included reports of arbitrary killing, suspicious deaths of persons in custody; forced disappearances; torture; arbitrary arrest and detention of tens of thousands of persons, including opposition members of parliament, lawyers, journalists,

[13] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/turkey/ , last accessed 3 February 2020.

foreign citizens, and three Turkish-national employees of the U.S. Mission to Turkey for purported ties to "terrorist" groups or peaceful legitimate speech; political prisoners, including numerous elected officials and academics; closure of media outlets and criminal prosecution of individuals for criticizing government policies or officials; blocking websites and content; severe restriction of freedoms of assembly and association; restrictions on freedom of movement; and violence against women, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, and members of other minorities.'

34. Section 6 states (specifically LGBT) highlights mixed COI:

'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity

While the law does not explicitly criminalize LGBTI status or conduct, provisions of law concerning "offenses against public morality," "protection of the family," and "unnatural sexual behavior" sometimes served as a basis for abuse by police and discrimination by employers.

Numerous LGBTI organizations reported a heightened sense of vulnerability under the state of emergency, as well as growing restrictions on their freedom of speech, assembly, and association. During the year the Ankara governor's office continued its indefinite 2017 ban on all public LGBTI events in the province, citing public safety concerns. In addition to prohibiting the annual pride march, the ban also prevented a screening of the film "Pride" at the Ankara Bar Association's training center on May 29. The Constitutional Court rejected a request by LGBTI groups for an injunction on the ban without rendering a decision on the case itself. Based on the court's action, LGBTI organizations appealed the case to the ECHR.

The criminal code does not include specific protections based on sexual orientation or gender identity. The law allows for up to three years in prison for hate speech or injurious acts related to language, race, nationality, color, gender, disability, political opinion, philosophical belief, religion, or sectarian differences. Human rights groups criticized the law's failure to include protections based on gender identity and noted it was sometimes used to restrict freedom of speech rather than to protect minorities. LGBTI definitions were not included in the law, but authorities reported a general "gender" concept in the constitution provides for protections for LGBTI individuals. KAOS-GL, a domestic NGO focused on LGBTI rights, maintained that due to the law's failure to recognize the existence of LGBTI individuals, authorities did not provide them social protection.

KAOS-GL reported that some LGBTI individuals were unable to access health services or faced discrimination. LGBTI individuals reported they felt the need to hide their identities, faced mistreatment by health-service providers (in many cases preferring not to request

any service), and noted that prejudice against HIV-positive individuals negatively affected perceptions of the LGBTI community.

As of March 2018, individuals were no longer required to undergo compulsory sterilization as a legal precondition to legal recognition of their gender identity.

During the year LGBTI individuals experienced discrimination, intimidation, and violent crimes. Human rights attorneys reported that police and prosecutors frequently failed to pursue cases of violence against transgender persons aggressively. Police often did not arrest suspects or hold them in pretrial detention, as was common with other defendants. When arrests were made, defendants could claim "unjustifiable provocation" under the penal code and request a reduced sentence. Judges routinely applied the law to reduce the sentences of persons who killed LGBTI individuals. Courts of appeal upheld these verdicts based, in part, on the "immoral nature" of the victim. LGBTI advocates reported that police detained transgender individuals engaged in sex work to extract payoffs and that courts and prosecutors created an environment of impunity for attacks on transgender persons involved in sex work.

Violence against LGBTI individuals continued throughout the year. On July 13, a 24-year-old transgender woman was killed in Samsun in an act of bias-motivated violence. Authorities arrested and sentenced him to prison.

On May 30, a refugee transgender woman was attacked by a group of men in Yalova. LGBTI activists stated it was the fourth attack in one week in that city.

For the fourth year in a row, the governor's office banned Istanbul's pride march, citing public safety concerns. Despite the ban and heavy police presence, several hundred activists and supporters took part in the event. Police used tear gas and rubber bullets to break up crowds and prevent participants from entering areas in and around Taksim Square, detaining 11 participants. Organizers did not hold a transgender march during the year due to security concerns.

Additional pride marches took place in Mersin, where approximately 100 persons participated despite an official ban, and Izmir, where more than 2,000 marched on June 11. The Adana governor's office banned the city's first pride march based on concerns about social sensitivities and public safety.

Some LGBTI groups reported harassment by police, government, and university authorities. University groups in cities across the country complained that rectors had denied them permission to organize. LGBTI organizations reported the government used regular and detailed audits against them to create administrative burdens and threatened the possibility of large fines.

KAOS-GL reported in its *2017 Hate Crime Report* that out of 117 cases of violence reported to the organization, only 19 were reported to the police and only seven resulted in a court hearing.

HIV and AIDS Social Stigma

Many persons with HIV/AIDS reported discrimination in access to employment, housing, public services, benefits, and health care. The Positive Living Association noted that the country lacked laws protecting persons with HIV/AIDS from discrimination and that there were legal obstacles to anonymous HIV testing. Due to pervasive social stigma against persons with HIV/AIDS, many individuals feared the results of HIV tests would be used against them and avoided testing

D. SUMMARY OF REVIEW:

EXCELLENT
NON-MILITARY SOGIE CLAIMS

& MILITARY SOGIE CLAIMS

35. For **non-military claims** the general 2017 SOGI CPIN is of a very high standard.[14] There is a variety of reliable sources and the inclusion of COI on intersex is to be applauded.

36. For **military SOGIE** claims, the ability to address the COI (specifically the 2016 EASO report) makes clear the route of investigation arguable arising from the 2013 CG case of **SD** is no longer to be travelled.

37. It is clear CPIT has taken on board all of the recommendations of the earlier 2014 Leigh review (see paragraph 4 above).

[14] The reviewer is specifically not being drawn into commenting on how this COI is interpreted in some passages of the Policy Summary section of the CPIN.

29. UGANDA

Capital city: Kampala
Population:[1] 45,741,007
Predominant religion: Christianity
FCO Travel Advice:[2]

> *'Homosexual activity is illegal and not tolerated in Uganda's conservative society. Public displays of homosexuality like kissing in public places could lead to arrest and imprisonment.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. The 2008 review did not address COI with respect to Uganda.[3]

2. The 2014 review did review the 2011 COI report on Uganda.[4]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Uganda: Local laws and customs, last updated 18 November 2019 https://www.gov.uk/foreign-travel-advice/uganda/local-laws-and-customs accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 70 to 76: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

3. In 2014, Leigh's overall assessment made clear:[5]

> 'The report is average, and could include more information. The report contains many links to information, without presenting key findings.
> …
> In particular, more information could be included on other charges (*legal rights*), police harassment, treatment of transgender, health care (*State treatment*), treatment from religious leaders, healthcare and violence towards lesbians, and more information on societal treatment of transgender persons (*Societal treatment and attitudes*) – see analysis and suggestions below.
>
> The report could benefit from restructuring, especially the *legal rights* section.'

4. The current COI is the April 2019 SOGIE CPIN on Uganda.[6]

b. Decision-making statistics (2015-2018):

5. Uganda is the fourth highest ranked country in the list of SO protection claims lodged in 2018.[7]

6. In 2018, a total of 95 out of a total of 171 asylum claims lodged (56 %) where sexual orientation formed part of the basis of the claim, ranked Uganda as *the* highest in the rankings for highest proportion of SO protection claims. [8]

7. In 2015, 201 SO applications were lodged. In 2016, 130 applications and in 2017, 63 applications were lodged.[9] Whilst there has been a gradual decrease in SO claims lodged, 2018's figure of 95 shows a small rise in applications.

[5] *Leigh 2014* (n 4), page 71.
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792036/CPIN_Uganda_SOGIE_EXT_April_2019.pdf, last accessed 28 January 2020.
[7] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[8] ibid. 'Table 1: Top 5 nationalities with the highest proportion of asylum applications where sexual orientation formed part of the basis for the claim in 2018', last accessed 28 January 2020.
[9] *SO Statistics* (n. 6).

8. Out of the 88 initial decisions made by the Home Office, a two-thirds grant rate with 58 applications granted some form of leave. 30 initial decisions refused leave to remain.[10]

9. This initial grant rate indicates a high level of positive credibility assessment for SO claims from Uganda and positive use of the CPIN to show how the current country conditions for these claims show persecution, rather than mere discrimination, providing a basis to depart of the 2008 CG case.

10. 34 statutory appeals were received in 2018, with 15 appeals allowed (17 were dismissed). In 2015 out of 49 appeals determined, 28 appeals were allowed and 20 dismissed. In 2016 (58 appeals: 31 allowed, 25 dismissed) and 2017 (69 appeals: 25 allowed, 41 dismissed).[11]

B. CASE LAW:

Country Guidance and Reported Case Law:

Gay and Bisexual men:

11. The current Country Guidance case is historic handed-down in 2008 **JM (homosexuality; risk) Uganda CG [2008] UKAIT 65** (Mr Goldstein (Chair) Mr King and Mrs. Cross De Chavennes) (heard 20 November 2007, promulgated 11 June 2008, designated 26 November 2013).

12. The country guidance is summarised at paragraphs 170 to 171:

Conclusion

170.

(1) Although there is legislation in Uganda which criminalises homosexual behaviour there is little, if any, objective evidence that such is in fact enforced.

(2) Although the President and government officials have made verbal attacks upon the lifestyle of homosexuals and have expressed disapproval of homosexuality in the

[10] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[11] The statistics show a marked rise in the percentage of successful allowed appeals from 2017 to 2018.

strongest terms, the evidence falls well short of establishing that such statements have been acted upon or would be provoked or should provoke in themselves any physical hostility towards homosexuals in Uganda.

(3) Although a number of articles have been published, in particular the Red Pepper article identifying areas where the gay and lesbian community meet and indeed identifying a number by name, the evidence falls very short of establishing that such articles have led to adverse actions from either the authorities or non-state actors and others in the form, for example, of raids or persons arrested or intimidation.

(4) Although it is right to note a prevailing traditional and cultural disapproval of homosexuality, there is nothing to indicate that such has manifested itself in any overt or persecutory action. Indeed there was evidence placed before us that a substantial number of people favour a more liberal approach to homosexuality.

(5) A number of support organisations exist for the gay and lesbian community and their views have been publicly announced in recent months. There is no indication of any repressive action being taken against such groups or against the individuals who made the more public pronouncements.

171. In general, therefore, the evidence does not establish that there is persecution of homosexuality in Uganda.'

13. This CG case is clearly out-dated noting the violence arising following the introduction of the Ant-Homosexuality Bill in 2009.[12]

Lesbians:

14. By February 2010, the higher Courts recognised this change in **R (SB (Uganda) v Secretary of State for the Home Department [2010] EWCH 338 (Admin)** (Hickinbottom J):[13]

[12] The 18 November 2009 appeal in JM (Uganda) before the Court of Appeal could not rely on this post-CG hearing [2009] EWCA Civ. 1432.

[13] See for further analysis on this point S Chelvan, 'SB (Uganda) - Case Comment' (2010) 24 (2) I.A.N.L, 191.

> '[47] There was therefore evidence before the Secretary of State on 11 February 2010 which strongly suggested that the place of Uganda on the continuum of conditions in which gay men and lesbians may be required to live in a particular state, as described by Schiemann LJ in Jain, has moved recently, and certainly since the time the evidence was submitted in IM (December 2007). Given the findings of the tribunal in relation to the Claimant's arrests, whatever view is taken of the other evidence, this claim is necessarily different from IM …, which was decided on the basis that the Ugandan authorities did not arrest or ill-treat gay men or lesbians (nor did the public ill-treat them), cannot be a determinative answer to the issue raised in this claim.'

15. Following remittal and grant of fresh claim the appeal was allowed.

Unreported Tribunal cases:

16. The following are post-Country Guidance case law. Following a search on 'Uganda LGBT' 17 unreported cases were identified. None of the cases deal with the country evidence as updated in the April 2019 CPIN.

17. Allowing an appeal by way of remittal in **Morris (K) v Secretary of State for the Home Department (PA/07832/2017)** (heard on 17 January 2019, promulgated 7 February 2019 and published on 8 March 2019) Deputy Upper Tribunal Shaerf held, in circumstances where the earlier Judge had no reference to the CPIN [24] (emphasis added):

> 'The interview record shows considerable sensibility and awareness of the approved approach to ascertaining information about a person's sexual orientation and identification in the CPIN.'

18. In **SN v. Secretary of State for the Home Department (PA/14010/2016)** (heard 15 October 2018, promulgated 22 October 2018 and published 13 November 2018) (Upper Tribunal Judge Hanson) remade the determination positively finding the appellant is a lesbian and would be at risk throughout Uganda [16]-[18] (**emphasis added**):

> '16. **It is not disputed that gay people in Uganda who live openly are liable to prosecution or persecution**. If the appellant returns to Uganda but is unable to live openly as a lesbian this will clearly, on the basis of her evidence, be to avoid being the victim of acts of persecutory violence. It was not disputed before the Upper Tribunal that a gay person who lives openly, or who cannot live openly

as a result of a fear of harm, is entitled to international protection in light of the situation that currently prevails in Uganda.

17. **Internal flight and sufficiency of protection were not issues the Upper Tribunal was asked to consider. The country information supports a contention there is no sufficiency of protection for the appellant if she was returned to Uganda or place within that country where she could safely relocate**.

18. The weight of the evidence supports a finding this appeal must be allowed.'

19. At paragraph 10 of **PCN v Secretary of State for the Home Department (PA/07818/2017)** (heard 27 February 2018, promulgated 1 March 2018 and published 20 March 2018) Upper Tribunal Judge Lindsey allowed an appeal of a lesbian from Uganda noting motivation for discretion on return would be connected to fear [18]. He observed as a starting point [10]:

> 'The respondent and the First-tier Tribunal accept both that the appellant is a lesbian, and also that people who are open about their lesbian sexuality are persecuted in Uganda,'

20. At paragraph 25 the Upper Tribunal dismissed an appeal in **LN v. Secretary of State for the Home Department (PA/10305/2016)** (Deputy Tribunal Judge Mandalia) (heard 10 January 2017, promulgated 11 May 2017, published 7 July 2017), where rejection of actual sexual identity had been upheld but an alternative submission was advanced raising mere attendance at LGBT events will lead to a perception an individual is gay where the following extracts were relied upon:

> 'In the skeleton argument relied upon by the appellant before the FtT, reference was made to the respondent's policy guidance that states that there is restriction on civil society groups in Uganda, including the arrest of activists and restriction on registration of NGOs and other groups. It was claimed by the appellant that "it is therefore likely that the Ugandan authorities monitor individuals who support LGBT rights and are outspoken activities against Uganda's restrictive laws.'

21. On this basis it is clear from the above cases it is now accepted post-CG 'openly LGBT persons' have a well-founded fear of persecution in Uganda.

Gender Identity or Expression:

22. In **BM v. Secretary of State for the Home Department (IA/22021/2015)** (heard 27 June 2017, promulgated 28 June 2017, published 23 August 2017) (Upper Tribunal Judge Lindsey), the Upper Tribunal held [17] on remittal, the fact-finding exercise would need to take into consideration views of Ugandan society in proportionality exercise where wife had written a play about being married to a "transgender person" and this fact was published on the internet.

23. This provides a clear evidential nexus of being connected with trans people can lead to a real risk of persecution in Uganda [17] (emphasis added):

> 'This history combined with what is set out in country of origin materials, including the respondent's Operational Guidance Note, about societal intolerance and legal action against people who write drama about such issues, means that this factor could well cause difficulties for the appellant's wife in Uganda and thus ought to have been considered by the First-tier Tribunal in connection with whether the appellant would face insurmountable obstacles to family life in Uganda.'

C. HOME OFFICE COI:

Country Policy and Information Note (April 2019):

24. The *Country Policy and Information Note: Uganda: Sexual orientation and gender identity or expression* (version 4.0) (April 2019) [44 pages].

25. The Home Office COI policy position is states at paragraph 2.4.1 to 2.4.2 (page 9) (emphasis added):

> '2.4.1 Where the person fears persecution/serious harm at the hands of the state, they will not be able to avail themselves of the protection of the authorities.
>
> 2.4.2 Where the person has a well-founded fear of persecution from non-state actors, the state is, generally, able but unwilling to provide effective protection. As

> same-sex sexual acts are prohibited in Uganda, it would be unreasonable to expect a person identifying as LGBTI, who fears persecution or serious harm by non-state actors, to seek protection from the authorities without themselves facing a risk of prosecution. Decision makers must, however, consider each case on its facts. The onus is on the person to demonstrate why they would not be able to seek and obtain state protection.'

26. The Home Office accepts at paragraph 2.4.18 of the April 2019 CPIN (page 9) 'However, since JM the situation for LGBTI persons has changed.'

27. Firstly, noting the very high grant rate by the Home Office and/or the Tribunals, it is clear the Home Office COI materials are being applied as showing real risk of persecution to 'openly' SOGIE on return to Uganda.

28. The first section (4) with respect to State Treatment as a range of sources, from international Human Rights Organisations (HRW) [4.2.1] (forced anal examinations including those of trans women by the police when in detention) to the Ugandan domestic LGBT NGO Sexual Minorities Uganda (SMUG) [see 4.2.2].

29. The section at 4.4 citing the 31 December 2015 Finnish report on Prosecutions makes clear the COI connects perception of sexual identity with risk ('Individuals are arrested due to suspicion of homosexuality' (page 16).

30. The other sections are equally detailed, providing accurate and transparent COI, enabling the reader to obtain a very detailed overview of the position of SO protection applicants from Uganda.

<u>Gender identity and expression:</u>

31. The CPIN also records various examples of ill-treatment of those who are trans (see [4.2.1] and [5.3.6]:

> 'In respect of societal treatment of trans persons, the [31 December 2015] Finnish Immigration Service report stated 'Transgender Ugandans and others who defy gender norms are subjected to the same discrimination as gay men and lesbian women, regardless of their actual sexual orientation. Violating gender norms can create a presumption of homosexuality and lead to harassment and arrest.'

32. The original source – Finish report (31 December 2015) is a general SOGIE report, using Uganda as one of the countries addressed.[14]

Intersex:

33. It is also cited as the source COI for assessment of risk for those who are intersex:

> 'The Finnish Immigration Service report Status of LGBT people in Cameroon, Gambia, Ghana and Uganda, dated 3 December 2015, stated: 'According to SIPD Uganda, an organisation that specialises on issues of intersex individuals, "[m]any people with intersex conditions experience significant stigma and discrimination in Uganda such as humiliation, ostracism, exploratory rape, evictions from accommodation facilities due to superstitions, ritualistic murder of intersex infants, lack of access to healthcare, employment, and education to exclusion from community and family life as well as domestic violence for mothers of such children". Intersex persons face unique circumstances and concerns, but these are often confused with issues concerning gender identity and sexual orientation.'

D. SUMMARY OF REVIEW:

EXCELLENT

34. The CPIN itself has clearly adopted the recommendations of the Leigh 2014 review and the report is clearly structured, with the source material generally cited from not before 2017.

35. The manner in which Home Office COI is now applied by decision-makers and the Tribunals, departing from the earlier 2008 CG case of **JM,** is testament to the high degree of reliance and certainty the CPIN provides.

[14] https://migri.fi/documents/5202425/5914056/64429_Status_of_LGBTI_people_in_Cameroon_Gambia_Ghana_and_Uganda_3.12.2015.pdf/678747c6-1b6f-477a-be13-984a62908e47/64429_Status_of_LGBTI_people_in_Cameroon_Gambia_Ghana_and_Uganda_3.12.2015.pdf.pdf , accessed 3 February 2020.

30. UKRAINE

Capital city: Kiev
Population:[1] 43,733,762
Predominant religion:
FCO Travel Advice:[2]

> *'Although homosexuality is not prohibited by law, public attitudes are less tolerant than in the UK and public displays of affection may attract negative attention. There's no provision under Ukrainian legislation guaranteeing freedom from discrimination on the grounds of sexual orientation. The Kyiv Pride parade in June 2018 passed off without incident.'*

,

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Ukraine.

2. There is no specific SOGIE CPIN for Ukraine.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Ukraine: Local laws and customs, last updated 11 December 2019, https://www.gov.uk/foreign-travel-advice/ukraine/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

3. The Home Office COI on Ukraine is published within the September 2019 'Country Policy and Information Note: Ukraine: Minority groups' report [3.3.3].[5]

b. Decision-making statistics (2015-2018):

4. Ukraine is not ranked in the 2018 rankings for SO protection claims lodged, initial decisions, or appeals determined.[6] However, SO claims could have constituted 'Other' countries not specified in the tables.[7]

B. CASE LAW:

Country Guidance:

5. The current Country Guidance case is **MV (Risk, Homosexual) Ukraine CG [2003] UKIAT 5** (heard 9 April 2003, promulgated 29 May 2003, published 20 November 2013) (Mr Freeman) [11]:

> 'The picture we do get from the Soros report is of a country where there is no legal discrimination against homosexuals, who wish to engage only in consensual practices, but where public attitudes remain somewhat unreconstructed. This is no doubt inevitable, where legislation leads public opinion, rather than following it: but, just as in this country not all that long ago, a process of general enlightenment is clearly taking place. On the basis of the Soros report, we see no present real risk for homosexuals in cities such as Kyiv or Rostov on Don, unless they deliberately advertize themselves as such.'

6. The approach of the Tribunal is clearly out-dated following the 2010 Supreme Court's ruling in **HJ (Iran)**. This specific Tribunal made judicial decisions based on a stereotype of gay men.

[5]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812080/Ukraine_-_Minority_Groups_-_CPIN_-_v2.0__June_2019_.pdf, last accessed 3 February 2020.
[6]UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[7] The reviewer is aware through his practice at the Bar of SO protection claims from Ukraine during 2015 to 2018, specifically one SO protection claim allowed before the First-tier Tribunal in 2016.

7. There are no post-CG reported or unreported cases on Ukrainian SOGIE cases stored in the Tribunal decisions database (url).

C. HOME OFFICE COI:

8. There is no SOGIE CPIN.

Country Policy and Information Note (September 2018):

9. The *Country Policy and Information Note: Ukraine: Minority groups* (September 2019).[8].

10. The Home Office SOGIE COI is found at paragraph 3.3.3 of the September 2019 report (with section 3 implementation of the law) (pages 15 to 16) [**emphasis added**]:

> '3.3.3 The same report stated: 'During the year [2018], human rights groups expressed growing concern about an increasingly organized set of nationalist hate groups committing violent attacks on ethnic minorities (especially Roma), LGBTI persons, feminists, and other individuals they considered to be "un-Ukrainian" or "antiUkrainian." **The HRMMU [Human Rights Monitoring Mission to Ukraine] noted that the failure of police and prosecutors to prevent these acts of violence, properly classify them as hate crimes, and effectively investigate and prosecute them created an environment of impunity and lack of justice for victims.** A June 13 [2018] joint open letter to Ukrainian authorities from Human Rights Watch, Freedom House, Amnesty International, and Frontline Defenders also expressed concerns about the spike in attacks and impunity, and noted "the inadequate response from the authorities sends a message that such acts are tolerated."

11. The above country information shows a clear departure in the risk profile of SOGIE applicants held by the 2013 CG case.

[8]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812080/Ukraine_-_Minority_Groups_-_CPIN_-_v2.0__June_2019_.pdf , last accessed 3 February 2020.

12. The 2018 US State Department report states (published March 2019) (in the summary section) states:[9]

    'Human rights issues included: civilian casualties, enforced disappearances, torture, and other abuses committed in the context of the Russia-induced and -fueled conflict in the Donbas region; abuse of detainees by law enforcement; harsh and life-threatening conditions in prisons and detention centers; arbitrary arrest and detention; censorship; blocking of websites; refoulement; the government's increasing failure to hold accountable perpetrators of violence against activists, journalists, ethnic minorities, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons; widespread government corruption; and worst forms of child labor.'

13. In section 4 on freedom and peaceful assembly states (contrary to the FCO view in January 2020) (emphasis added):

    > 'While the main 2018 Pride March in Kyiv was protected by thousands of police, police at times did not adequately protect smaller demonstrations, especially those organized by persons belonging to minority groups or opposition political movements. Events organized by women's rights activists or the LGBTI community were regularly disrupted by members of nationalist hate groups. On March 8, members of right-wing groups attacked participants in public events in Uzhhorod, Lviv, and Kyiv aimed at raising awareness of women's rights and gender-based and domestic violence. Police launched investigations of the incidents. Police briefly detained attackers but no charges were filed.'

14. Section 6 (Discrimination, Societal Abuses, and Trafficking in Persons):

    During the year, human rights groups expressed growing concern about an increasingly organized set of nationalist hate groups committing violent attacks on ethnic minorities (especially Roma), LGBTI persons, feminists, and other individuals they considered to be "un-Ukrainian" or "anti-Ukrainian." The HRMMU noted that the failure of police and prosecutors to prevent these acts of violence, properly classify them as hate crimes, and effectively investigate and prosecute them created an environment of impunity and lack of justice for victims. A June 13 joint open letter to Ukrainian authorities from Human Rights Watch, Freedom House, Amnesty International, and Frontline Defenders also expressed concerns about the spike in attacks and impunity, and noted "the inadequate response from the authorities sends a message that such acts are tolerated."

[9] US State Department Country Report: Ukraine, published 13 March 2019: https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/ukraine/, last accessed 3 February 2020.

15. Further in section 6 (emphasis added) (**additional emphasis added**):

> **'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> The labor code prohibits workplace discrimination on the basis of sexual orientation or gender identity. No law, however, prohibits such discrimination in other areas, and discrimination was reportedly widespread in employment, housing, education, and other sectors.
>
> There was frequent violence against LGBTI persons, and authorities often did not adequately investigate these cases or hold perpetrators to account. An increase in attacks was due to increasingly active nationalist hate groups (see national minorities above). **The HRMMU noted that attacks against members of the LGBTI community and other minorities were rarely classified under criminal provisions pertaining to hate crimes, which carried heavier penalties. Crimes and discrimination against LGBTI persons remained underreported.**
>
> For example on June 30, about 10 unidentified young persons attacked Boris Zolotchenko, the head of the organizing committee of the Kryvbas Equality march. Witnesses called police, who refused to come to the crime scene. An investigation into a prior attack on Zolotchenko that took place in January in which five unknown men beat him was closed due to "lack of suspects."
>
> According to the LGBTI rights group Nash Mir, nationalist hate groups consistently tried to disrupt LGBTI events with violence or threats of violence. For example, on May 10, members of a nationalist hate group disrupted a public discussion in Kyiv on LGBTI rights in Russia. More than 20 men arrived at the venue and threatened participants with violence unless they left. The venue owner joined in the calls and told the organizers to cancel the event and vacate the premises. Police officers present on the site refused to intervene.
>
> Although leading politicians and ministers condemned attacks on LGBTI gatherings and individuals, officials sometimes failed to protect LGBTI persons. Transgender persons continued to face discrimination and violence. On August 19, an unknown person made homophobic remarks and beat transgender activist Anastasia Kristel Domani. Police opened an investigation for minor assault charges, but as of late November had made no arrests.

Transgender persons reported difficulties obtaining official documents reflecting their gender identity, which resulted in discrimination in health care, education, and other areas.

According to Nash Mir, the situation of LGBTI persons in Russia-controlled parts of the Donetsk and Luhansk Oblasts. Most LGBTI persons either fled or hid their sexual orientation or gender identity.

HIV and AIDS Social Stigma

Stigma and discrimination in health-care centers were barriers to HIV-positive individuals' receiving medical services. UNICEF reported that children with HIV/AIDS were at high risk of abandonment, social stigma, and discrimination. Authorities prevented many children infected with HIV/AIDS from attending kindergartens or schools. Persons with HIV/AIDS faced discrimination in housing and employment.'

D. SUMMARY OF REVIEW:

EXCELLENT

16. The COI on SOGI, whilst cited in the 2019 Minority Group CPIN report, is fully supported by authoritative independent sources, providing an accurate and balanced resource for decision-makers. As the 2013 CG case finds discrimination, and not persecution, it is vitally important decision-makers are made aware this COI provides strong and cogent evidence for departing from the earlier Country Guidance (**SG (Iraq)** [45] to [46] applied)

31. VIETNAM

Capital city: Hanoi

Population:[1] 97,338,579

Predominant religion: Buddhism

FCO Travel Advice:[2]

> *'When entering religious or cultural sites respect local customs and dress in appropriate clothing.*
>
> *Vietnam is a generally tolerant and progressive place for LGBT travellers. Same-sex relationships are not criminalised by law and changing gender is recognised by Vietnam's Civil Code. Vietnam abolished a ban on same-sex marriage in 2015, although same-sex couples are neither recognised nor protected by law. In parts of society LGBT rights and issues are still more tolerated than accepted, but Vietnamese society has become significantly more tolerant in recent years.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did address COI with respect to Vietnam.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.

[2] Foreign travel advice: Vietnam: Local laws and customs, last updated 23 January 2020 https://www.gov.uk/foreign-travel-advice/vietnam/local-laws-and-customs, accessed 25 January 2020.

[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008), pages 103 to 106. Two core issues related to lack of COI on 'transexuals or other transgender issues in general' (page 103), 'no information about the (lack of) prosecutions and/or other enforcement of these laws (arrests, harassment, intimidation?)' and' some more information about treatment in society in general and on the position of significant religious or cultural authorities should be included' (pages 104 to 105).

[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 80 to 81: https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

2. There is no current specific SOGIE CPIN. However, the 2019 Fact-finding Mission report of 23 February to 1 March 2019 (published September 2019) provides a small collection of COI [see below].

3. De Jong in 2008 observed two core issues related to lack of COI on 'transexuals or other transgender issues in general' (page 103), 'no information about the (lack of) prosecutions and/or other enforcement of these laws (arrests, harassment, intimidation?)' and' some more information about treatment in society in general and on the position of significant religious or cultural authorities should be included' (pages 104 to 105).

4. Leigh in 2014 observed with respect to the LGBT section in the 9 August 2013 COI report on Vietnam:[5]

> 'On the whole, the report is good, with different sources covering many of the areas from the template for analysis.'

b. *Decision-making statistics (2015-2018):*

5. Nepal is ranked 37th in the 2018 rankings for SO protection claims.[6] There were five applications lodged where sexual orientation forms part of the basis of the protection claim in 2018. In 2015 the figure is supressed (less than five). In 2016 there were ten applications lodged and in 2017 there were seven.

6. Only in 2017 are nine initial decisions recorded for Vietnam. All the other entries have suppressed entries.[7] This corresponds to the only record for asylum appeals determined in five in 2017 with no outcomes recorded for that year or the other years.[8]

[5] ibid, page 80.
[6] Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[8] *SO Statistics* (n 3). The statistics show a marked rise in allowed appeals from 7 (2015), 8 (2016), 18 (2017) and 33 (2018).

B. CASE LAW:

Country Guidance and Tribunal reported cases:

7. There is no current Country Guidance case or SOGIE Tribunal reported cases.

Unreported Tribunal cases:

8. There were four hits 'Vietnam gay'.

9. In **Mr Trung Nguyen Nguyen v. Secretary of State for the Home Department (HU/22151/2016)** (heard 18 February 2019, promulgated 12 March 2019, published 24 April 2019) (Deputy Upper Tribunal Judge Roberts), the following background evidence was submitted [14] (emphasis added):

> 'The documents included extracts from the USSD reports dated 2014 and 2017, together with a "World Vietnam" article dated 18th January 2016 (this article was also referred to in the Respondent's Reasons for Refusal letter). Those documents set out that there is discrimination and bullying in respect of same sex marriages. This is material which the judge had in front of him and which he should properly have considered but which he had not. She continued her submissions saying that the above point in turn impacted on the Article 8 assessment. She pointed out that a reading of [23] shows that the judge has simply not turned his mind to undertaking the proportionality balancing exercise. Indeed he has closed his mind to an Article 8 assessment, focusing instead on Section 117B (iv) of the 2002 Act. The decision should be set aside and reheard.

10. At [21] when dismissing the appeal, the Judge held:

> 'I have looked carefully at the USSD reports and I agree with Mr Duffy that an examination of these reports shows they are not sufficiently detailed in themselves to further the Appellant's case. On the contrary what they say is that societal discrimination exists and remains pervasive but there was "no reported official discrimination". The same reports go on to acknowledge that same sex marriages are now legal and that Gay Pride marches take place.'

11. There was a single hit when 'LGBT Vietnam' was entered (search) which also appeared when searching 'Vietnam gay' and 'Vietnam lesbian'.

Gender Identity or Expression:

12. The unreported case of **Miss Hoang Duong Nguyen (IA/53130/2013)** (heard 13 February 2015, promulgated on 19 Feb 2015, published on 13 May 2015) (Deputy Upper Tribunal Judge Alis) (Vietnamese transitioning transwoman) accepted will not be able to access further surgery but not a breach of Article 3 or disproportionate breach of Article 8 ECHR.

13. At [17] the Judge referred to the single source document relied on for country background material:

> 'Both parties referred me to the "Being LGBT in Asia" report prepared by USAID. This reported conducted national dialogue and interviews with LGTB communities in Vietnam including over 650 LGBT people and 220 LGBT organisations. Page 18 of the report confirms that there have been many public events in Vietnam and in November 2013 Vietnam decriminalised same sex wedding ceremonies and gave same-sex couples the right to live together. Punishments for organising or participating in a same sex marriage ceremony were overturned. Mr Khan submitted that the situation for gay and lesbian citizens had improved but there were still many problems for transgender persons for the reasons set out on page 19 of the report but this report whilst containing some negatives also contained positives for the future:
> a. Limited resources dedicated to the specific needs of the transgender community especially female to male transgender persons.
> b. Difficult for transgender people to establish a separate and independent community although cyberspace has opened the doors to many transgender individuals, especially young people, to make friends and share information about gender identity and participate on various websites.
> c. Not legal for transgender people to have gender-confirmation surgery in Vietnam and surgeons are forbidden from performing such operations.
> d. Illegal for transgender people to change their name or gender on identification and legal documents. Transgender people who undergo gender confirmation surgery outside Vietnam cannot reflect the gender change on their legal documents.'

C. HOME OFFICE COI:

14. There is no SOGIE CPIN.

Fact-Finding Mission Report (2019):

15. The *Report of a Home Office fact-finding mission to Vietnam* (conducted 23 February-1 March 2019, published 9 September 2019) [8.1.2] (page 28) (emphasis added):

> 'Although the Constitution provides for the right to freedom of assembly, Vietnam has yet to adopt a law on assembly/demonstrations. According to diplomatic sources there are no protest laws in Vietnam, but the police have the right to disperse protestors as a risk to social order. There is a lively online protest movement but if it passes 'an unwritten red line' during sensitive periods or it calls for mass demonstrations then it could be cracked down on. Sometimes protests are allowed to go ahead but it can depend on the timing or subject of the demonstration. During sensitive periods, public security agents may be stationed outside of bloggers or activists' homes to prevent them from leaving in the fear that they might instigate mass protests/demonstrations. It is more likely the organisers of demonstrations will receive harsher sentences than participants to be made example of. It was also noted that if public opinion is behind a specific group/demonstration then it is sometimes difficult for the government not to support the protest. Over the last 10 years there have been improvements in certain rights and particularly LGBT rights have improved with the Pride marches or gatherings being allowed to go ahead without any issue despite not being registered.'

16. Annex D (page 36) (diplomatic source interviewed in February 2019):

> 'On the positive side, social economic rights have improved over the last 10 years as have LGBT rights, the pride march went ahead this year without registration or crackdown. There are some areas where there are positive signs.'

17. The 2018 US State Department Country report on Vietnam (published March 2019) states:[9]

'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity

The law does not prohibit discrimination against lesbian, gay, bisexual, transgender, and intersex persons in housing, employment, nationality laws, or access to government service. The civil code gives individuals who have undergone a "sex change" the right to register their new status. Sexual orientation and gender identity were still a basis for stigma and discrimination.

HIV and AIDS Social Stigma

HIV and AIDS social stigma and discrimination hindered HIV/AIDS prevention efforts.

According to the 2015 *Stigma Index*, the latest available data, 11.2 percent of persons with HIV, 16.6 percent of female sex workers, 15.5 percent of persons who inject drugs, and 7.9 percent of men who have sex with men reported having experienced violations of their rights within the 12 months prior to the survey. Individuals with HIV continued to face barriers accessing and maintaining employment.'

D. SUMMARY OF REVIEW:

GOOD

18. The Home Office Fact-finding mission cannot be directly compared to a CPIN where it draws from external sources, rather than visit the country in question to assess country conditions. On this basis, there can be no comparison with the observations made by the earlier reviews in 2008 and 2014.

19. Nevertheless, the points highlighted by the report, generally accord with what is cited in the 2018 US DOS report, cited above. However, as the research source pool on SOGIE is limited, this country review rates the COI as Good.

[9] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/vietnam/ , accessed 27 January 2020.

32. ZIMBABWE

Capital city: Harare
Population:[1] 14,862,924
Predominant religion: Christianity
FCO Travel Advice:[2]

> *'Conservative attitudes towards same-sex relations, especially between men, prevail in Zimbabwe. Sex between men is considered to be "sexual deviancy" and an "unnatural sexual act" under local law, which are illegal. Same-sex marriage is explicitly prohibited by the 2013 constitution. However, there is a small but active underground gay scene in Harare and prosecutions are rare. Public displays of affection may cause offence, regardless of gender or sexuality. See our information and advice page for the LGBT community before you travel. You can also find more local information on the GALZ Association website.*
>
> *Possession or importation of pornographic material is forbidden.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. *Earlier IAGCI SOGIE reviews:*

1. Both the 2008[3] and 2014[4] reviews did address COI with respect to Zimbabwe.

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Zimbabwe: Local laws and customs, last updated 21 January 2020 https://www.gov.uk/foreign-travel-advice/zimbabwe/local-laws-and-customs accessed 25 January 2020.
[3] Anisa de Jong, '*An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency*' (September 2008), pages 103 to 106. Two core issues related to lack of COI on 'transexuals or other transgender issues in general' (page 103), 'no information about the (lack of) prosecutions and/or other enforcement of these laws (arrests, harassment, intimidation?)' and' some more information about treatment in society in general and on the position of significant religious or cultural authorities should be included' (pages 104 to 105).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014), pages 78 to 80:

2. The current COI is the January 2019 SOGIE CPIN.[5]

3. The 2014 review suggestions to improvements was an amendment to paragraph 20.30[6] to include disorderly conduct contained at paragraphs 20.11, or to be cross-referenced in the legal rights section and inclusion of COI with respect to 'any problems in military service/prisons.[7]

4. The second suggestion for improvement was the deletion of the 1998 reference in section 20.35 to 'pederastic marriage' in the context of describing 'sexually intimate relations between males' on the basis of being an outdated source, where the rest of the section on societal treatment 'is rich with more-up-to-date information, rendering the use of this source questionable'.[8]

5. The COIS response was 'Thank you for the comments and source.'[9]

6. The January 2019 Chief Inspector's report on CPIN's on Burma, Iraq and Zimbabwe specifically addressed the 2018 earlier CPIN on Zimbabwe and summarised the reviewer's findings and recommendations (pages 120 to 121) (reviewer Kudzai Chatiza):[10]

'2. Summary of Review

2.1 Summary of the most important findings

https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775001/CPIN-_ZIM_-_SOGIE._V4.0e__Jan_2019_.pdf, last accessed 28 January 2020.

[6] COI report, 13 July 2012.

[7] (2014), page 79.

[8] pages 79 to 80.

[9] page 80.

[10] Independent Chief Inspector of Borders and Immigration, 'Inspection of Country of Origin Information January 2019 report' (June 2019): Annex I: Review of the May 2018 Home Office Country Policy and Information Note on Zimbabwe: Sexual orientation and gender identity' (pages 115 to 127): '[1.2]: These countries and topics were chosen because they had not been reviewed by IAGCI for some time (Iraq was last reviewed in 2015, Zimbabwe in 2014, and Burma in 2011) and because of the numbers of asylum applications and high refusal rates.' (page 2). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809931/Inspection_of_Country_of_Origin_Information_2019._Burma__Iraq_and_Zimbabwe.pdf, last accessed 1 February 2020.

A generally positive assessment of the Note is made. This flows from the quality of evidence cited and the balanced manner it is used to explain specific aspects in each theme of focus. Use or citing of current material from recognised institutions (Governments of Australia, USA, Zimbabwe etc. reputable international institutions like UN agencies, Afrobarometer, Human Rights Watch etc. and local organisations like ZLHR, GALZ etc.) on the theme of sexual orientation and gender identity provides credible evidence on which to competently rely. The Note particularly discusses why Zimbabweans who could potentially aid the LGBTI community, are unable to do so based on the fear of losing their societal standing as well as being under-prepared (point 2.3.12)

2.2 Specific Comments on the Sexual Orientation Note: Given the politicised nature of LGBTI issues in Zimbabwe the use/citing of foreign state-based and international-agency literature may not by itself help as it 'weaponises it for purposes of foreign policy'. Further, over-universalising opinions of political leaders as happened with former president Mugabe increases the risk of silencing other voices. This may explain why LGBTI rights campaigners became unwitting pawns in Mugabe-era anti-West conversations. As part of the review there are particular streams of literature that could potentially be more helpful in strengthening the Note. The first stream is of academic literature (e.g. Mabvurira et al 2012, Hunt et al 2017). This stream of literature provides i) more nuanced understandings regarding local-to-national struggles with gay rights issues in Zimbabwe, and ii) efforts as part of attending to key populations within the framework of HIV and AIDS to create professional capacities to respond to the needs of the LGBTI community. The second stream is of Zimbabwean case law, which provides a corpus of evidence of consolidation of the extent of the on-going institutional transformations regarding safeguarding LGBTI rights in Zimbabwe. Three particular cases to point to relate to i) that of former President Canaan Banana, ii) one relating to Kimumwe vs Gonzales, and iii) a 2015 case relating to a civil servant linked to a Gay Party (Raymond Sibanda). These two streams of literature as sources of evidence help better locate application of the 'case by case' approach frequently referred to in the Note. A third stream is of Zimbabwe's media. Beneath the polarisation related to the national political drama, media products engage with the debate on LGBTI rights in ways that can be helpful. For instance Zimbabwe's Daily News of October 1st 2018, among others, cited a representative of one of the Teachers' Unions acknowledging lack of workplace policies to '…handle these people because the moment when we identify somebody who is homosexual we go after them with arrows and chase them away and that will not kill or deal with the problem'.

Home Office:
We have responded to a number of the points raised above under 'Main Suggestions…' and the respective specific subsection below. It is perhaps, however, worth commmenting on what appears to be a common theme in the reviewer's

comments: the range and balance of sources contained in the CPIN (material up to April/May 2018 – the Daily News article above post-dates the CPIN). We aim to capture information from a diverse but informed range of local and international sources. However, material about the human rights of LGBT people is relatively limited and some of the most specific information is provided by foreign sources which may have more freedom to comment than Zimbabwean sources. We would welcome more credible and relevant local sources and therefore would be grateful if the reviewer can suggest specific sources with full document titles and, ideally, links, which we can review and include in the CPIN to help improve the depth and breadth of information.'

7. In the 17 January 2019 IAGCI meeting, the minutes record the following exchange between the Chair [LH], the Head of CPIT [MS] and the reviewer [KC]:[11]

'KC: Quality of the notes were generally good. Level of debate and analysis could have been expanded.

Sexual orientation and Gender Identity': concerns about the labelling of issues associated with sexual orientation.

Police are unable to support not only victims of rape or violence due to homosexually but also society in general. Would recommend adding to the literature used.

LH: summarised the key points –

x 'Opposition to government' CPIN focuses heavily on the government's activities and should be more about opposition groups x characterising the general approach to LGBT issues as "conservative" is an oversimplification and not true of attitudes across the community as a whole x the institutional response to LGBT protection reflects the capacity to provide effective support more broadly.
…
[MR] …. On sexual orientation, there was a need to draw a distinction between a general lack of access to services and discrimination. For example, beyond a general lack of access to health services, there was particular discrimination against LGBT, who were fearful about accessing services as a result.

There was little discussion of the experiences of transgender individuals beyond the acknowledgement that they had gained legal recognition of their status. The subject may warrant a sub-section in the CPIN.

[11] ibid, pages 13 to 14.

The same is true for women. A 2011 tribunal case highlighted that the situation was worse for lesbians than for gay men (women were not allowed to live in some areas and here there was more acceptance of homosexual relationships), so it would be helpful to have a sub-section for women in each section.

The description of societal attitudes towards LGBT was very detailed, but the point that violence was not frequent was contradicted by the description of how LGBT did not come forward to report it. The information presented in the CPIN undermines the conclusion.

MS: What under-reporting tells you was debatable. CPIT does not entirely agree that the conclusion needs to be changed but will look again at the wording of the relevant paragraph.

LH: It was well known that under-reporting is a problem. The CPIN could make be clearer about the lack of information from which to draw a conclusion about how big an issue it is rather than saying it is not an issue because there is little reporting.
LH: (to KC) Is information available about the different experiences for each sub-group within LGBT?

KC: Yes, court and police cases exist. The fact that there are only a few is less important than the details.

RT: CPIT would find it helpful if the reviewer could provide specific citations and references for researchers.'

8. The 2014 review and response clearly highlight a tension between the approach and findings of the 2011 CG case (see below), the COI report and concern the full picture of the interplay between state and non-state agent persecution needed to be investigated more intensely. It is clear even in 2020 from the FCO advice, what exists are two levels of social interaction, with the SOGIE community living within an 'underground scene'.

b. *Decision-making statistics (2015-2018):*

9. The most recent statistics published in June 2019 dealing with protection claims lodged in 2018, where sexual orientation formed part of the basis of claim, included Zimbabwe.[12]

[12]Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

10. In 2018, a total of 15 applications were lodged were made where sexual orientation formed part of the basis of the claim.[13] Out of the 26 initial decisions made by the Home Office, 6 were granted 20 were refused some form of leave to remain.[14]

11. 27 statutory appeals were determined in 2018; with eight appeals allowed (15 were dismissed, less than five withdrawn).[15] The pattern from 2015 to 2018 show a decrease in allowed appeals, noting this still shows some appellants are able to show country background evidence supports claim for protection.[16]

B. CASE LAW:

Country Guidance:

12. The current Country Guidance case is **LZ (homosexuals) Zimbabwe CG [2011] UKUT 487 (IAC)** (heard 14 October 2011, promulgated 8 January 2012, published 26 January 2012 and designated CG on 26 November 2013) (Mr Macleman, Mr Holmes).

13. The headnote states (emphasis added):

    (i) There has been much public expression of extreme homophobia at the highest levels in recent years.

    (ii) Male homosexual behaviour is criminalised, but prosecutions are very rare. Lesbianism is not criminalised.

    (iii) Some homosexuals suffer discrimination, harassment and blackmail from the general public and the police. Attempted extortion, false complaints and unjustified detentions are not so prevalent as to pose a general risk. There are

[13] ibid. The figures for claims were 41 (2015), 39 (2016), 32 (2017) and 15 (2018).
[14] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. The figures for decisions were for decisions made 56 (2015), 37 (2016), 35 (2017) and 26 (2018): Grants 10 (2016), 5 (2017), (* less than 5) (2017) and 6 (2018): Refusals 46 (2015), 32 (2016), (*)(2017) and 20 (2018): Withdrawn (all less than 5 for 2015 to 2018).
[15] The statistics show – appeals determined 20 (2015), 31 (2016), 42 (2017), 27 (2018): allowed 7 (2015), 12 (2016), 16 (2017) and 8 (2018): Dismissed 13 (2015), 19 (2016), 25 (2017) and 15 (2018). Withdrawn (all years * - less than 5 recorded).
[16] Noting this could be for refugee, humanitarian, subsidiary protection or human rights grounds.

no records of any murders with a homophobic element. "Corrective rape" is rare, and does not represent a general risk.

(iv) There is a "gay scene," within limitations.

(v) Lesbians, living on their own or together, may face greater difficulties than gay men.

(vi) GALZ (Gays and Lesbians of Zimbabwe) takes a realistic view: Zimbabwe is "not the worst place in the world to be gay or lesbian even though the President, government officials and church leaders have whipped up a climate of hysterical homophobia."

(vii) Applying HJ & HT [2010] UKSC 31, [2010] Imm AR 729, there is no general risk to gays or lesbians. Personal circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk.

(viii) The police and other state agents do not provide protection.

(ix) A homosexual at risk in his or her community can move elsewhere, either in the same city or to another part of the country. He or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances present risk throughout the country.'

14. The Upper Tribunal did allow the appellant's appeal based on her specific individual circumstances as a lesbian linked to the political elite would lead to real risk of persecution due to this profile.[17]

15. The following are post-Country Guidance (reported) case law is the case of **CM (EM country guidance, disclosure) Zimbabwe CG [2013] UKUT 59 (IAC)** (heard on 5 October 2012, promulgated on 31 January 2013, published on 1 February 2012 and CG designated on 26 November 2013) (Mr Lane, Mr Justice Blake and Mr Campbell).

[17] As the appeal was allowed there is no statutory basis for the appellant to appeal the determination based on any challenge to the approach of the Tribunal with respect to country guidance.

16. Antony Reeler, director of the Research and Advocacy Unit ("RAU"), provided a statement dated 25th September 2012 and highlighted the following with the Upper Tribunal [15].

> 'Notwithstanding legislation requiring the police to be non-partisan, the Police Act expressly forbidding policemen from belonging to a political party, the Commissioner General of the Zimbabwe Republic Police, Augustine Chihuri, has publicly expressed his support for ZANU-PF and recent weeks have seen attacks by the police on gays, lesbians and women.'

17. There is an unreported post-January 2019 CPIN: **Secretary of State for the Home Department v LK (PA/01193/2018)** (heard on 23 April 2019, promulgated on 13 May 2019 published 15 July 2019) (Deputy Upper Tribunal Judge McCarthy) (unreported). The Upper Tribunal dismissed the appeal on basis of viable relocation alternative to Bulawayo, where both parties relied on the current January 2019 CPIN [3]. The Upper Tribunal allowed the SSHD's appeal and held the appellant was not a refugee as she had an internal relocation alternative:

> 'I recall that it is for the respondent to establish that it is reasonably likely that it is unduly harsh to expect her to relocate to Bulawayo or another more tolerant part of Zimbabwe. The evidence I have is limited to inferences drawn from what she has previously suffered. I do not find such inferences to discharge the lower standard of proof that applies because the general background information indicates there is a place in Zimbabwe where the respondent could lead a relatively normal life without undue hardship.'

18. It is important to note, three years after the Upper Tribunal determined the CG case, there was clear evidence of state persecution of LGBT+ activists ('the martyrs') in the capital Harara and importantly Bulawayo, the second city identified by the Tribunal as a viable internal relocation alterative (see US State Department Report 2014 (published 25 June 2015) section 6):[18]

> '**"Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> …

[18] US State Department Report Country Reports on Human Rights Practices 2015: Zimbabwe (published 25 June 2015) (archived): https://2009-2017.state.gov/j/drl/rls/hrrpt/2014/af/236422.htm, last accessed 2 February 2020.

> On March 12 [2014], police officers arrested Natasha Dowell, a volunteer coordinator for the GALZ, and Tawanda Maguze. The two were facilitating a GALZ workshop on social media use at a Harare hotel. Their lawyers said police disrupted the workshop, alleging organizers had not sought police clearance as required under the law. Police charged Dowell with violating the law but released her. Police released Maguze without charge. Authorities indicated they would proceed by way of summons with the case, although Maguze had not been summoned as of the end of November.
>
> In contrast with GALZ, the Bulawayo-based Sexual Rights Center (SRC), an organization similarly dedicated to advancing the rights of "sexual minorities," faced minimal harassment. In January, however, police arrested one of the SRC's board members, a transgender woman. While detained at the Bulawayo Central Police Station, police subjected her to degrading treatment, including a nonconsensual medical examination.'

19. Noting the country background of intimidation and harassment of those perceived to be opponents of the regime is well-documented, the above January 2014 arrest in Bulawayo is cogent evidence of state persecution, specifically with respect to gender identity and expression. As this source is the US State Department report 2014 (published 2015) the reviewer identifies this evidence as a basis for departing from the 2011 CG case.[19]

C. HOME OFFICE COI:

Country Policy and Information Note (January 2019):

20. The current published policy is the *Country Policy and Information Note: Zimbabwe: Sexual orientation and gender identity or expression* (version 4.0) (January 2019) [38 pages]

[19] The legal test for departing from CG cases is outlined by the Court of Appeal in **SG (Iraq) v. Secretary of State for the Home Department [2012] EWCA Civ. 940** [47]:

> 'It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.'

21. At paragraph 4.2.2 CPIN refers to the following COI with respect to state treatment and prosecutions:

> 'The USSD report for 2017 noted that '… there were no known cases of prosecutions of consensual same-sex sexual activity.' The USSD report 2017 repeated the assessment from the 2014, 2015 and 2016 USSD reports; that there were no known cases of prosecutions of consensual same-sex sexual activity.'

22. The current US State Department Report 2018 (published 13 March 2019),[20] published post-January 2019 SOGIE CPIN, highlights the following with respect to the nexus between SOGIE persecution at the hands of non-state agents (**emphasis added**):

> The constitution does not prohibit discrimination based on sexual orientation and gender identity. According to the criminal code, "any act involving physical contact between men that would be regarded by a reasonable person to be an indecent act" carries a penalty if convicted of up to one year in prison or a fine up to $5,000. Despite that, there were no known cases of prosecutions of consensual same-sex sexual activity. Common law prevents gay men and, to a lesser extent, lesbians from fully expressing their sexual orientation. Members of Gays and Lesbians of Zimbabwe (GALZ), the primary organization dedicated to advancing the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, experienced harassment and discrimination.
>
> LGBTI persons were vulnerable to blackmail because of the criminality and stigma of same-sex activity. LGBTI advocacy organizations reported blackmail and being "outed" as two of the most common forms of repression of LGBTI persons. It was common for blackmailers to threaten to reveal one's sexual identity to police, the church, or family if the victim refuses to render payment.
>
> According to GALZ, LGBTI persons often left school at an early age due to discrimination. Higher education institutions reportedly threatened to expel students based on their sexual orientation. Members of the LGBTI community also had higher rates of unemployment and homelessness. **On September 21, a deputy headmaster at an elite private primary and secondary school publicly declared his sexual orientation. Parents protested the proclamation and hired attorneys to file suit, demanding the educator's resignation. He tendered his resignation September 28 after receiving death threats and threats of physical harm to his person and his pets**.

[20] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/zimbabwe/ , accessed 27 January 2020.

GALZ reports that many persons who identified themselves as LGBTI did not seek medical care for sexually transmitted diseases or other health problems due to fear that health-care providers would shun them or report them to authorities.

HIV and AIDS Social Stigma

The government has a national HIV/AIDS policy that prohibits discrimination against persons with HIV/AIDS, and the law prohibits discrimination against workers with HIV/AIDS in the private sector and parastatals. Despite these provisions, societal discrimination against persons living with HIV/AIDS remained a problem. Local NGOs reported persons affected by HIV/AIDS faced discrimination in health services, education, and employment. Although there was an active information campaign to destigmatize HIV/AIDS by international and local NGOs, the Ministry of Health and Child Welfare, and the National AIDS Council, such ostracism and criticism continued.

In the *2015 Demographic Health Survey*, 22 percent of women and 20 percent of men reported they held discriminatory attitudes towards those living with HIV/AIDS.'

D. SUMMARY OF REVIEW:

NEUTRAL:

23. The September 2018 report of the targeting of the deputy headmaster is not contained in the January 2019 SOGIE CPIN. The reviewer recommends its inclusion.

24. In the current January 2019 SOGIE CPIN there is no reference to disorderly conduct and with respect to prosecutions, CPIN cites the position as of January 2019 [4.2.2] (see below). This shows the recommendations of the 2014 Leigh report were adopted.

25. The neutral rating is solely due to the fact the January 2019 CPIN was amended to address the points raised in the 2018 detailed review (see paragraphs 6 to 7 above). Due to resource allocation, this reviewer is not able to provide a detailed cross-reference analysis of how many of the recommendations have or have not been adopted.

1. CAMEROON

Capital city: Yaondé
Population (2019):[1] 26,545,863
Predominant religion: Roman Catholic
FCO Travel Advice:[2]

> *'Homosexuality is not widely accepted in central African society and sexual acts between members of the same sex are illegal in Cameroon. There were arrests and prosecutions of homosexuals in the past.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008 and 2014 reviews did not address COI with respect to Cameroon.

2. The author has been informed a SOGIE CPIN is expected to be published in early-2020. Case workers currently have access to the May 2018 Information Request.[3]

b. Decision-making statistics (2015-2018):

3. The most recent statistics published in June 2019 dealing with protection claims lodged in 2018, where sexual orientation formed part of the basis of claim, Cameroon placing 8th highest in the table.[4]

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Cameroon: Local laws and customs, last updated 11 December 2019 https://www.gov.uk/foreign-travel-advice/cameroon/local-laws-and-customs accessed 25 January 2020.
[3] 'Cameroon – we had hoped the SOGIE CPIN would have been published early in the New Year, … We expect publication within the next 2 weeks, in its absence, case workers have access to a COI response from May 2018 – see attached': Email communication to the reviewer from IAGCI forwarding responses from the Home Office in answer to queries: 21 January 2020. The Information Request is found in Annex A.
[4] Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

4. Cameroon is importantly the 3rd highest ranked country for highest proportion, with 51 SO protection claims out of a total 211 claims lodged in 2018 (24%).[5]

5. The ranking and the lack specific SOGIE or any published COI on Cameroon formed the basis of why CPIT was approached for any internal documentation, to be addressed in this report.

6. In 2018, a total of 51 out of a total of 211 asylum claims (24%) were made where sexual orientation formed part of the basis of the claim.[6] Out of the 78 initial decisions made by the Home Office, 27 were granted some form of leave to remain.[7]

7. 55 statutory appeals were received in 2018, with 33 appeals allowed (24 were dismissed).[8]

B. CASE LAW:

8. The Supreme Court recorded the following acceptance with respect to Cameroon in **HJ (Iran) and HT (Cameroon) [2010] UKSC 31** [35 (b)] (Lord Hope) (emphasis added):

> '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.'

Country Guidance cases:

9. There is no Country Guidance case on Cameroon.

10. The Upper Tribunal addressed risk assessment with respect to Cameroon in **AETZ v Secretary of State for the Home Department (PA/10158/2017)** (unreported) (hearing date 23 July 2019, promulgated on 8 August 2019, published 25 October 2019).

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[5] ibid. 'Table 1: Top 5 nationalities with the highest proportion of asylum applications where sexual orientation formed part of the basis for the claim in 2018', last accessed 28 January 2020.
[6] ibid. The figures for claims were 63 (2015), 76 (2016), 77 (2017) and 51 (2018).
[7] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals.
[8] *SO Statistics* (n. 4). The statistics show a marked rise in allowed appeals from 7 (2015), 8 (2016), 18 (2017) and 33 (2018).

11. Deputy Upper Tribunal Judge Chamberlain recorded the following concession on risk on return made on behalf of the Home Office at the hearing [32]:[9]

> '[The Senior Presenting Officer] accepted on behalf of the Respondent that, were I to find the Appellant's claim credible, he would be at risk of persecution on return to Cameroon.'

12. On this basis, Cameroon is assessed as a country where there is a well-founded fear of persecution for SOGIE applicants.

C. HOME OFFICE COI:

Response to Information Request (25 May 2018):

13. The only COI published by the Home Office is a CPIN on Female Genital Mutilation.[10]

14. There is currently no published COI with respect to SOGIE protection claims either as part of a general or specific COI report.

15. The Response to an information request (05/18-081) was made on 25 May 2018.[11]

16. The Home Office issued the following response (page one) (emphasis added):

> 'CPIT found information that indicates gay men who are openly gay may be harassed and arrested by the police as same-sex activity is illegal in Cameroon. Some have been imprisoned for simply being homosexual. The police sometimes harass NGO activists who advocate gay rights and freedoms. State protection is not likely to be available as the police, acting as state agents, have harassed and arrested gay men. CPIT could not find a lot of information about societal attitudes towards gay men.'

[9] The appeal was allowed based on the concession and a positive finding on credibility. The determination records the SSHD's position regarding a lack of agreement on risk on return to his partner a gay man from Morocco [22]: 'He has been found by the Respondent to be gay, but the Respondent does not accept that he will be at risk on return to Morocco. He is waiting for his appeal against this decision to be heard.'

[10] (March 2017) https://www.gov.uk/government/publications/cameroon-country-policy-and-information-notes accessed 26 January 2020.

[11] See Annex A of this report.

17. The response provides just under five pages of COI, focussed specifically on state harm.[12] The material ranges from Human Rights Watch 2013 report (section 1.2.1) to a *Pink News* May 2018 on-line article reporting on the arrest and torture of 25 man for being gay (section 1.2.). The response is to be commended for the inclusion of COI recording arrests by the police since 2011, up to and including the time of the May 2018 request. There is consequently no internal relocation alternative to address. The response also accepts there will be a lack of state protection.

18. There is a brief overview of discrimination and harassment of gay men in 2016 in one paragraph (1.3.1) citing the US State Department country report of 2017.

19. The most recent 2018 US State Department report on Cameroon provides some insight into non-state agent harm (emphasis added):[13]

> '(CAMFAIDS), Humanity First Cameroon, Alternatives Cameroon, National Observatory of the Rights of LGBTI Persons and Their Defenders, and others reported several arrests of LGBTI persons. LGBTI individuals received anonymous threats by telephone, text message, and email, including of "corrective" rape, but authorities did not investigate allegations of harassment. Civil society members stated there were also cases where LGBTI individuals underwent corrective rape, sometimes through the facilitation of the victim's own family. Police were generally unresponsive to requests to increase protection for lawyers who received threats because they represented LGBTI persons. Both police and civilians reportedly continued to extort money from presumed LGBTI individuals by threatening to expose them.
> …
> The law does not explicitly prohibit discrimination against LGBTI persons in housing, employment, nationality laws, and access to government services such as health care. The constitution provides for equal rights for all citizens. In practice, however, security forces sometimes harassed persons on the basis of their real or perceived sexual orientation or gender identity, including individuals found with condoms and lubricants. This practice and the fear it generated in turn restricted access to HIV/AIDS services. Anecdotal reports also suggested some discrimination occurred in places of employment with respect to sexual orientation.

[12] 'Section 1.2 Arrests, detentions, and ill-treatment of gay men'.

[13] https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cameroon/ (published 2019), last accessed 26 January 2020.

> In a midterm report covering the period from January to May, Alternatives Cameroon recorded 64 cases of violence against LGBTI individuals, including three cases of arbitrary detention, 30 cases of psychological violence, one case of sexual violence, 18 cases of physical violence, and 12 cases of blackmail and extortion.'

20. Steeves Winner in a blog-post in March 2019 summarises the findings of the Alternatives Cameroon report (emphasis added):[14]

> '*Dramatic increase in violence against LGBT people in Cameroon'*:
>
> 'The report documents 1,134 cases of violence and abuse against LGBT people during 2018 – almost twice the figure of 578 such cases reported in 2017.
> During the year, three people were murdered because of their real or suspected sexual orientation.
> In a case that shocked the LGBT community, Kenfack Tobi Aubin Parfait, 20, was murdered by his older brother who had suspected him of being gay.
> Contributing causes behind such violent acts include a disregard for basic principles of human rights, and misconceptions about gender identity and sexual orientation.
> The yearly report seeks to reduce that kind of ignorance.
> It focuses on a wide range of discriminatory practices and policies against sexual minorities : arbitrary arrests, physical, psychological and sexual abuse, scams, blackmailing, bribery, and hate speech.
> Psychological abuse makes up most of the documented cases in 2018. These include threats, intimidation, insults, and much more.'

21. Human Dignity Trust in their May 2019 report, 'Injustice Exposed: The Criminalisation of Transgender People and its Implications' profile Cameroon within their case examples (footnotes omitted) (emphasis added):[15]

> 'LGBT organisations report that arbitrary arrests of LGBT people under Article 347-1 bis are common in Cameroon. The use of Article 347-1 bis to target trans people, in addition to those suspected of being engaged in same-sex sexual activity, is indicative of the way in which gender identity and expression can be misunderstood and conflated with sexual orientation in Cameroon and in many other countries.

[14] https://rightsafrica.com/2019/03/18/dramatic-increase-in-violence-against-lgbt-people-in-cameroon/ , last accessed 26 January 2020.
[15] Human Dignity Trust, 'Injustice Exposed: The criminalisation of Transgender People and its Impacts', May 2019, pages 49 to 50, at 50: https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf , last accessed 3 February 2020.

D. SUMMARY OF REVIEW:

VERY GOOD

22. With the forthcoming 2020 SOGIE CPIN the above evidence would be expected to be addressed evidencing non-state agent persecution in Cameroon. Noting the established acceptance of real risk of state persecution, there is no internal relocation alternative.

23. The review would have been 'EXCELLENT' if it was not for the fact there is a decade since the Supreme Court judgment relating to a SO protection claim, and noting the high percentage of grants (initial decisions and appeals), there is currently only unpublished guidance.

24. The reviewer assumes the publication of the SOGIE CPIN will be of similar, or on the basis of the recommendation below, of a higher standard of COI investigation.

25. The unpublished response highlights even 'perception' can lead to murder. On this basis investigation of social, cultural and religious norms of 'expected conduct' would highlight the steps required in order to evade identification, including those who are found to be discreet for personal or social reasons. The reviewer recommends for the CPIN to include a section specifically with respect to 'Social Norms' to ensure there is accessible COI on this point to be decided by decision-makers.

Cameroon
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2. EGYPT

Capital city: Cairo
Population:[1] 102,334,404
Predominant religion: Sunni Muslim
FCO Travel Advice:[2]

> *'Although same-sex sexual activity is not explicitly criminalised in Egypt, the charge of "debauchery" has been used to prosecute LGBT people. The flying of a rainbow flag at a concert in September 2017 led to the arrest of at least 66 individuals on debauchery charges. There is little public acceptance of homosexuality in Egypt. Public expressions of homosexuality and/or public displays of affection between same-sex couples are likely to attract a high degree of unwelcome attention.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Egypt.

2. There is currently no published COI on Egypt addressing SOGIE claims.

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[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Egypt: Local laws and customs, last updated 6 January 2020 https://www.gov.uk/foreign-travel-advice/egypt/local-laws-and-customs , accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014):

https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

b. Decision-making statistics (2015-2018):

3. The recent statistics updated in August 2019 record protection claims lodged from 2015 to 2018 where sexual orientation formed part of the basis of claim, included Egypt.[5]

4. Noting Egypt was a country known to the author through his practice at the Bar to be a SOGIE refugee-producing country, in light of no published Home Office COI report, the author approached the IAGCI to contact CPIT who provided the April 2019 response to an information request.[6]

5. In 2018, a total of eight applications for asylum from Egyptian nationals were made, where sexual orientation formed part of the basis of the claim.[7] Out of the eight initial decisions made by the Home Office by the year end on 31 December 2018, all eight outcomes were not recorded on the Home Office system.[8] In 2017 out of a total of 16 initial decisions, seven were granted leave and nine applicants were refused leave to remain.[9]

B. CASE LAW:

Country Guidance or reported cases:

6. The is no current Country Guidance case on SOGIE protection claims (there is only one CG on Coptic Christians).

[5] Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.
[6] E-mail from reviewer to IAGCI 7 November 2019: 'I have identified the following 5 countries where there currently is no published SOGIE CPIN/CIG and where either (a) the country comes within the top countries for decision-making for these claims and/or I am aware these countries would provide specific at risk SOGIE claims and/or there are reported/unreported case law'. Reply from IAGCI on 16 December 2019: 'Attached are SOGIE COI responses for Lebanon and Egypt – these are the only two the team have received in the past 2 years. They have had no requests from Malaysia or Sudan in that timeframe.' The five countries requested were (in alphabetical order) (1) Cameroon; (2) Egypt; (3) Lebanon; (4) Malaysia; and (5) Sudan.
[7] *ibid*. The figures for claims were 7 (2015), 14 (2016), 12 (2017) and 8 (2018).
[8] Where the number is less than five the figure is not recorded by the Home Office within the table.
[9] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. Seven appeals were determined in 2018 with no figure inserted for outcome, noting an Asterix is inserted in the table where the figure is less than five.

Unreported Tribunal cases:

7. The following are unreported cases. No positive searches for 'Egypt trans', 'Egypt lesbians', or 'Egypt LGBT'.

8. 8 searches were revealed when searched under 'Egypt gay'. The only one case dealing with an a position with respect to risk on return in light of the country position is **TA v Secretary of State for the Home Department (AA/01405/2014) (unreported)** (hearing 15 July 2014, promulgation 28 July 2014, published 6 November 2014) (The Hon. Mr. Justice McCloskey) who allowed the appeal noting the unchallenged finding of the First-tier Tribunal with real risk of persecution to gay men from the state [14]:

> '[14] Having made this finding [accepting the appellant is a gay man], it is necessary to address, and answer, the second of the HJ questions. I consider that the answer to this question is provided in the following passage in the determination of the FtT, at [77]:
>
> "?. I am satisfied that a person in the Appellant's position may be at risk of persecutory treatment if he were to come to the attention of the authorities for reasons of his sexuality and could face persecutory treatment including torture if he were to be detained."
>
> In common with the other material findings of the FtT, there was no challenge by the Respondent to this discrete finding. When one grafts onto this the further finding which I have made immediately above, the conclusion that this appeal must succeed follows inexorably.'

9. On the basis of the statistical information highlighted above, with just under 50% of applicants granted some form of leave to remain, the inference is the COI position of the Home Office accepts the country background evidence gives rise to a well-founded fear of persecution on return to 'open' SOGIE applicants. Where asylum is refused this could be non-COI reasons, including adverse credibility findings in not 'proving SOGIE'.

C. HOME OFFICE COI:

Response to Information Request (3 April 2019):

10. There are four published CPINs with respect to Egypt. None of them relate to SOGIE protection claims.

11. The 3 April 2019 Home Office Response on Egupt and LGBTI persons was to an information request on 'Treatment – gay people' (01419.005) [8 pages]:[10]

> 'Summary of request:
>
> Information needed about how gay people are treated and whether they are persecuted.'

12. The reliance on the **United States State Department Country Report on Human Rights for 2018 (published March 2019)** to provide the overview and then COI on 'treatment of gay persons and social attitudes' enabled the request for information on 'gay people' to read to apply to risk assessment of 'LGBTI individuals' thereby avoiding a limited response to only 'gay men' [2.1.1]:

> 'There were reports of arrests and harassment of LGBTI individuals. Intimidation and the risk of arrest greatly restricted open reporting and contributed to selfcensorship. Rights groups and activists reported harassment of police, including physical assault and forced payment of bribes to provide information concerning other LGBTI individuals or to avoid arrest…'

13. The use of commercial travel guides should not be used as they do not provide a reliable or authoritative source of country information [section 2.1.2: Rough Guides; 2.1.3 Lonely Planet undated article, LGBT Travellers; and 2.1.5 Frommer's Egypt guide, 'Tips for Gay and Lesbian Travelers in Egypt'].

14. The NBC 18 August 2018 article at section 2.1.4 is highly informative and provides a reliable source by also drawing from recognised sources, including Amnesty International.

[10] See Annex B of this report.

15. This report provides clear examples of not only state persecution to "gay, bisexual and transgender people", but also those who are "seen to be associated with the LGBTQ community" [interview with Omar][11].

16. The lack of Islamic conformity leading to persecution has recently been highlighted in the December 2019 Country Guidance case on Iraq in **SMO, KSP and IM (Article 15(c) identity documents) Iraq CG [2019] UKUT 400 (IAC)** (heard 26 June 2019, promulgated 20 December 2019, published 23 December 2019) (Upper Tribunal Judges Perkins and Blundell).

17. Section 1.1.1 of the Egypt response cites from the 2018 USDOS and provides cogent country background material with respect to requirement to conform to Islamic norms in order to evade persecution:

> ' "violating the teachings of religion" provides for prison sentences if convicted of up to 10 years. According to a local rights group, there were more than 250 reports of such arrests since 2013.'

18. This material addresses the persecutory pressures to 'prove' Islamic (hetero/cis-normative) and addresses a basis to show why even discretion for personal choice or social pressure engages ill-treatment and severe violations of fundamental human rights by requiring expression of an identity polar opposite to the protected Refugee Convention reason immutable characteristic.

19. The response could have also drawn upon the intersection with 'HIV and AIDS Social Stigma' recorded in the 2018 USDOS (section 6) highlighting discrimination platforms based on SOGIE and HIV status, the latter arguably leading to discovery of the first group membership based on 'non-Islamic' imputation.

> **'HIV and AIDS Social Stigma**
>
> HIV-positive individuals faced significant social stigma and discrimination in society and the workplace.'

[11] Omar's reference to "being arrested, having forced physical examinations" is corroborated by the US DOS 2018 (section 6): 'Rights groups reported that authorities, including the Forensic Medical Authority, conducted forced anal examinations. The law allows for conducting forced anal exams in cases of debauchery.'

20. Both particular social groups have a causative nexus between discrimination giving rise to persecution due to one identity giving rise to actual or perception of belonging to the

D. <u>SUMMARY OF REVIEW:</u>

<u>VERY GOOD</u>

21. Bar the use of the Travel Guide, the response is transparent, accurate and draws from a wide rage of respected sources of COI.

Egypt
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3. LEBANON

Capital city: Beirut
Population:[1] 6,825,445
Predominant religion: Sunni and Shia Islam
FCO Travel Advice:[2]

> *'The Lebanese Criminal Code includes a general provision concerning 'every sexual act against nature'. Lebanese courts consider that this provision includes homosexuality. A criminal offence under this provision is punishable by a sentence of up to a year.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. Earlier IAGCI SOGIE reviews:

1. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Lebanon.

2. There is currently no Home Office published COI on Lebanon.

b. Decision-making statistics (2015-2018):

3. The most recent statistics published in June 2019 dealing with protection claims lodged in 2018 where sexual orientation formed part of the basis of claim, do not include any

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Lebanon: Local laws and customs, last updated 20 January 2020 https://www.gov.uk/foreign-travel-advice/lebanon/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

applications, decisions or appeals decided where the country of origin is Lebanon.[5] Noting Lebanon was a country known to the author through his practice at the Bar to be a SOGIE refugee-producing country with judicial authority, the author approached the IAGCI to contact CPIT who provided the 5 March 2018 response to an information request.[6]

B. CASE LAW:

Country Guidance or reported cases:

4. None of the three current Country Guidance cases on Lebanon relate to SOGIE claims.

Unreported Tribunal cases:

5. A search on the Tribunal decisions database on 'Lebanon LGBT' received two results with no cases addressing country material.

6. 'Lebanon gay' – four results with only one case relevant to Lebanon and risk on return.

7. In **MK v. Secretary of State for the Home Department (AA/0304/2013) (unreported)** (Upper Tribunal Judge Kekic) (heard 4 July 2013, promulgated 5 July 2013 and reported 26 July 2013) the appeal of a gay man was allowed based on the country background material, noting the government had introduced anal testing to identify gay men (emphasis added):

[5]Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020.

[6] E-mail from reviewer to IAGCI, 7 November 2019:

'I have identified the following 5 countries where there currently is no published SOGIE CPIN/CIG and where either (a) the country comes within the top countries for decision-making for these claims and/or I am aware these countries would provide specific at risk SOGIE claims and/or there are reported/unreported case law'. Reply from IAGCI on 16 December 2019: 'Attached are SOGIE COI responses for Lebanon and Egypt – these are the only two the team have received in the past 2 years. They have had no requests from Malaysia or Sudan in that timeframe.'

The five countries requested were (in alphabetical order) (1) Cameroon; (2) Egypt; (3) Lebanon; (4) Malaysia; and (5) Sudan.

> 'With respect to the second challenge, I was referred to paragraph 53 of the determination. In that paragraph the judge accepts that the government introduced anal testing in order to identify gay men. [Counsel for the appellant] argued that despite the other articles before the judge on gay tourism (geared, it has to be said, towards foreign tourists rather than locals), this evidence and the judge's acceptance of same showed that the appellant would not be able to live freely in Beirut or anywhere else. Having considered the evidence contained in the bundle I concur with [Counsel's] submissions. Whilst it may be that the public have condemned such testing, the fact that they are continuing does demonstrate the attitude of the state towards homosexuality. It therefore directly impacts on the appellant's ability to live freely and openly as a gay man in Lebanon. This being the case, I did not consider it necessary to hear further oral evidence from the appellant and [the Senior Presenting Officer] did not indicate that he had any questions to ask. The judge erred in her finding that the appellant would be able to live freely and openly without any fear of persecution given the evidence before her on the attitude of the state (which she accepted).'

8. **MK** provides positive judicial authority for a finding of persecution pursuant to the second (objective) limb of Lord Rodger's guidelines in **HJ (Iran)**.

C. HOME OFFICE COI:

Response to Information Request (5 March 2018):

9. There is no CPIN on SOGIE for Lebanon.

10. On 5 March 2018 CPIT produced a response to an information request on Lebanon based on the keywords: 'Activists HIV treatment'. CPIT answered the following question:

> **How are LGBT persons treated in Lebanon, specifically LGBT rights campaigners? Is there sufficient protection for LGBT individuals? Is there adequate medical treatment for people who are HIV positive?**

11. At section 1.4.3 with respect to anal testing CPIT recorded the Human Rights Watch 2018 reporting (emphasis added):

> 'Human Rights Watch (HRW) noted in its World Report 2018, covering 2017 events, that: 'In recent years, authorities conducted raids to arrest persons

> allegedly involved in same-sex conduct, some of whom were subjected to torture including forced anal examinations.
>
> In January [2017], a judge challenged the legal basis of the arrest of men for same-sex conduct, declaring in a court ruling that "homosexuals have the right to have human or intimate relationships with any people they chose, without discrimination on the basis of sexual orientation".

12. CPIT had recorded no evidence indicating by May 2018 anal testing of gay men had ceased (page 3 of 4). This provides clear force in why the Upper Tribunal's unreported determination in **MK** still has force.

13. With respect to HIV, at section 1. 5.1 CPIT records the single substantive sources (page 4):

> 'According to the USSD HR Report 2016: 'HIV/AIDS is stigmatized due to sensitivities about extramarital relations. Few who contracted the disease did so in the course of homosexual relations, which are also taboo. The main challenge facing AIDS patients, in addition to stigma and discrimination, was that many were unable to pay for regular follow-up tests that the Ministry of Public Health does not cover. The law requires the government to offer treatment to all residents who are AIDS patients rather than deporting foreigners who carry the disease. 'NGOs such as Marsa, Soins Infirmiers et Developpement Communautaire, and Vivre Positif offered free testing services to HIV patients. According to Marsa, patients that tested positive for HIV risked losing their medical insurance – and in some cases their jobs – because of the stigma surrounding the disease. Patients were often reluctant to test themselves because the test gives rise to fear of infection and social stigma.'

14. The reviewer does not know how the source material would be able to conclude the above emphasised section with respect to self-reporting, where the country background evidence shows real risk of state persecution to those who are perceived to be gay. On balance, the source should be relied so far as it highlights severe discrimination and a nexus between status and disclosure of sexual identity, repeating the observations this author observed in the Egypt section of this report: intersectional interplay between health and SOGIE.

Updated country background material:

Discrimination amounting to persecution:

(i) Sexual identity:

15. The 2018 US State Department Country report on Human Rights Practices: Lebanon (published March 2019),[7] reports within the executive summary criminalization of SOGIE identity (emphasis added):

> 'Human rights issues included arbitrary or unlawful killings by nonstate actors; allegations of torture by security forces; excessive periods of pretrial detention; undue and increasing restrictions on freedoms of speech and press, including laws criminalizing libel and a number of forms of political expression; official corruption; criminalization of lesbian, gay, bisexual, transgender, and intersex (LGBTI) status or conduct; and forced or compulsory child labor.
>
> Although the legal structure provides for prosecution and punishment of officials who committed human rights abuses, enforcement remained a problem, and government officials enjoyed a measure of impunity for human rights abuses.'

16. Within Section 'C: Torture and other cruel, inhuman, or degrading treatment or punishment' (emphasis added):

> 'Although human rights and LGBTI organizations acknowledged some improvements in detainee treatment during the year, these organizations and former detainees continued to report that Internal Security Forces (ISF) officers mistreated drug users, persons involved in prostitution, and LGBTI individuals in custody, particularly through forced HIV testing, threats of prolonged detention, and threats to expose their status to family or friends.'

17. Forced HIV testing is persecutory, specifically when attaching to the known ill-treatment by state officials based on actual or imputed (perceived) sexual identity (see Section D: Arbitrary arrest:

> 'According to local NGOs, cases of arbitrary detention occurred, but most victims chose not to report violations against them to the authorities. NGOs reported that

[7] US State Department Country Reports on Human Rights 2018, published 13 March 2019, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/lebanon/ last accessed 26 January 2020.

most cases involved vulnerable groups such as refugees, drug users, LGBTI individuals, and migrant workers. Civil society groups reported authorities frequently detained foreign nationals arbitrarily.'

(ii) Gender Identity or Expression and Intersex:

18. The 2018 USDOS also cites at section 6 of the report (emphasis added) (**additional emphasis added**):[8]

> **'Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> The law prohibits sexual relations "contradicting the laws of nature" and effectively criminalizes consensual, same-sex sexual conduct among consenting adults. The law was occasionally enforced, and it carries a penalty of up to one year in prison, although there were no successful prosecutions under the provision during the year. Some government and judicial officials, along with NGOs and legal experts questioned whether the law actually criminalized same-sex sexual conduct. There are no provisions of law providing antidiscrimination protections to LGBTI persons based on their sexual orientation, gender identity or expression, **or sex characteristics**.
>
> …
>
> Most reports of abuse came from transgender women. An Arab Foundation for Freedoms and Equality and Marsa project highlighted employment discrimination faced by transgender women due to the inconsistency between official documentation and gender self-presentation.
>
> The government did not collect information on official or private discrimination in employment, occupation, housing, statelessness, or lack of access to education or health care based on sexual orientation or gender identity. Individuals who faced problems were reluctant to report incidents due to fear of additional

[8] ibid.

discrimination. There were no government efforts to address potential discrimination.'

19. This is one of the rare instances where intersex is raised within the country background material and should be cited in any future response to an information request to provide a fuller picture of risk in SOGIE claims.

D. SUMMARY OF REVIEW:

GOOD

20. On this basis, applying the bullet point approach to single or cumulative discriminatory measures amounting to persecution cited by the Home Office in the 2016 API on Sexual-orientation issues in the asylum claim,[9] there is clear and cogent country background evidence from an authoritative source to support a positive finding on real risk of ill-treatment for 'open' SOGIE returning to Lebanon.

21. The response's overview reflects an accurate position on SO claims, noting the nexus with HIV-status for some applicants. There is clear potential for a far more detailed overview on risk assessment, specifically where this can address all SOGIE strands, specifically intersex and sex characteristics assessment.

[9] 'Asylum Policy Instruction on Sexual Orientation Issues in the Asylum Claim' (version 6) (August 2016): 'Discrimination', page 16: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf , last accessed 26 January 2020.

4. TRINIDAD AND TOBAGO

Capital city: Port of Spain
Population:[1] 1,399,488
Predominant religion: Protestant Christians
FCO Travel Advice:[2]

> *'Male and female same-sex sexual activity remains illegal in Trinidad and Tobago. There is legislation in place that bars LGBT individuals from entering the country. In practice, these laws are rarely enforced and there is growing support for LGBT rights. However, public displays of affection between same sex couples may attract negative attention.'*

A. PREVIOUS REVIEWS & STATISTICS:

a. *Earlier IAGCI SOGIE reviews:*

22. Both the 2008[3] and 2014[4] reviews did not address COI with respect to Trinidad and Tobago.

23. There is currently no published COI on Trinidad and Tobago addressing SOGIE claims. The reviewer has relied on the June 2018 response to a request for country information (see below).

[1] Countries of the world by population (2020) (current estimate): https://www.worldometers.info/world-population/population-by-country/, last accessed 26 January 2020.
[2] Foreign travel advice: Trinidad and Tobago: Local laws and customs, last updated 7 January 2020 https://www.gov.uk/foreign-travel-advice/trinidad-and-tobago/local-laws-and-customs, accessed 25 January 2020.
[3] Anisa de Jong, 'An analysis of the coverage of LGBT issues in Country of Origin Information Reports produced by the COI Service, UK Border Agency' (September 2008).
[4] Vanessa Leigh, 'Evaluation of how LGBTI issues are dealt with in the Home Office's Country of Origin Reports' (2014): https://webarchive.nationalarchives.gov.uk/20160403150748/http:/icinspector.independent.gov.uk/wp-content/uploads/2014/11/IAGCI-evaluation-of-the-Home-Offices-COI-Reports-Coverage-on-LGBTI.pdf, last accessed 27 January 2020.

b. Decision-making statistics (2015-2018):

24. Noting Trinidad and Tobago was a country known to the author through his practice at the Bar to be a SOGIE refugee-producing country, specifically in light of the UK domicile of Jason Jones, the successful litigant in the constitutional challenge to the anti-sodomy legislation, the author approached the IAGCI to contact CPIT who provided the June 2018 response to an information request.[5]

25. In 2018, a total of 16 applications for asylum from Trinidadian nationals were made, where sexual orientation formed part of the basis of the claim, ranking the country 17th in the table. There is a steady rise in the number of applications from nine in 2015, 11 in 2016, 10 in 2017 and 16 in 2018.[6]

26. Out of the eight initial decisions made by the Home Office by the year end on 31 December 2018 all eight outcomes were not recorded on the Home Office system.[7] In 2015, out of a total of 10 initial decisions, five were granted leave and five applicants were refused leave to remain.[8] The following three years have no figures recorded.

27. Out of the five appeals determined in 2016 and six in 2017 no figures are recorded in the table for how many were allowed, dismissed or were withdrawn.[9]

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[5] E-mail from reviewer to IAGCI 17 January 2020: ' … (2) Whilst you are asking colleagues about Malaysia – Trinidad and Tobago - 47% grant rate – there is no published COI at all on T&T – where would decision-makers go to for COI material for these claims.' Reply from CPIT via IAGCI 21 January 2020: 'Trinidad and Tobago – we produced a COI response in June 2018, see attached.' (see Annex D of this report).

[6] UK Home Office, 'Immigration statistics, year ending June 2019 second edition 5: Data tables: Asylum claims based on sexual orientation Dec 2018', last updated 22 August 2019 (url), last accessed 26 January 2020. The figures for claims were 9 (2015), 11 (2016), 10 (2017) and 16 (2018).

[7] Where the number is less than five the figure is not recorded by the Home Office within the table.

[8] The Home Office makes clear within the table grants include 'asylum, humanitarian protection and discretionary leave'. This would also apply to the allowed appeals. Seven appeals were determined in 2018 with no figure inserted for outcome, noting an Asterix is inserted in the table where the figure is less than five.

[9] ibid.

B. CASE LAW:

Country Guidance or reported cases:

28. There are no Country Guidance cases on Trinidad and Tobago.

29. A search on 'Trinidad gay' resulted on two cases. There are no reported cases on Trinidad and Tobago. Both of the unreported cases at Upper Tribunal level were decided prior to the April 2018 landmark judgment.

Unreported cases:

30. In **Secretary of State for the Home Department v AAH (AA/04139/2014)** (heard 17 October 2014, promulgated 13 November 2014 and published 2 March 2015) (Deputy Upper Tribunal Judge Bruce) in an appeal against a positive determination on refugee status by the First-tier Tribunal, the Home Office position on the risk to gay men is summarised at paragraph 3 of the determination (emphasis added):

> 'The Secretary of State accepts that the Respondent is gay, and that he has had relationships with other men in both Trinidad and the UK. It is further accepted that he suffered physical and mental abuse from his own parents when they discovered the truth about his sexuality whilst he was still a young teenager. The Secretary of State did not however believe that the Respondent faced a currently well-founded fear of persecution in Trinidad. It was not accepted that the police had refused to protect him. Although homosexuality is unlawful there the country background material indicates that there have not been any prosecutions for many years. It is accepted that there is not widespread societal tolerance of homosexuality, but the Secretary of State considers there to be a sufficiency of protection such that the discrimination that is faced by gay men does not constitute persecution. Asylum was therefore refused.'

31. At paragraphs 8 to 9 Judge Bruce dismisses the Secretary of State's appeal on the following basis (emphasis added):

> '8. The first ground submits that the Tribunal failed to pay any or adequate regard to the country background evidence which showed that gay men in Trinidad suffer discrimination. As I understand it, it is suggested that this was relevant to the risk assessment because it showed that gay men are not persecuted in Trinidad, suffering "only" discrimination. As a preliminary observation I would note that none of the evidence cited in the refusal letter was actually made available to the First-tier Tribunal. It is therefore somewhat surprising that the Judge is now being criticised for failing to consider evidence that was

not in fact before him. In his Rule 24 response [Counsel for the appellant] highlights the potential problem in expecting the Tribunal to treat refusal letters as evidence: paragraph 71 of that letter sets out an article from 'Gaytimes.com" which, I am told, does not in fact exist. No source reference is provided for this article and it cannot be located by an online search.

9. All of that said I am not satisfied that the Tribunal did overlook the material set out in the reasons for refusal letter, since much of it is reproduced in full at paragraphs 28-32 of the determination, and referenced elsewhere. Moreover this argument overlooks two basic tenets of asylum law. The first is that there is no need for a claimant to establish that everyone in his social group faces a real risk of harm. There may well have been country background evidence out there showing that not all gay men are persecuted. The situation would for instance, be very different for a rich tourist than for a poor local. It is enough to show that the claimant himself, for whatever reason, is at risk. That leads to the second problem. That is the clear findings of fact that this claimant had already suffered persecution for reasons of his sexual identity, persecution from which the state was unable or unwilling to protect him. Paragraph 339K of the immigration rules states that this must be taken as a serious indication that such harm would be repeated, unless there were good reasons to believe that the situation had changed. There were no such reasons. The Tribunal took care in distinguishing the position of this claimant as opposed to the generality of gay men in Trinidad. Particular emphasis was placed on his mental state, and the great importance to his identity of not living in the closet. The Tribunal was entitled to reach the conclusions it did, notwithstanding the Secretary of State's recitation of the country background material in the refusal letter.'

32. In a different appeal by the Home Office heard a few days earlier in **Secretary of State for the Home Department v. NCC (AA/04056/2014)** (heard 4 November 2014, promulgated 6 November 2014 and published 24 February 2015), Upper Tribunal Judge Bruce [3]:

> 'The Secretary of State accepted that the Respondent is gay and that he is from Trinidad and Tobago. It was accepted that he is HIV+. It was further accepted that he had suffered serious harm including being carjacked and raped, being assaulted with a bottle, having his house broken into and homophobic graffiti sprayed on the wall. It was accepted that societal discrimination and harassment is an on-going problem. The Secretary of State was not however

satisfied that all, or any, of these incidents could be attributed to the fact that the Appellant was gay. A further claim, that the Respondent had been in attendance at a New Years Eve party which was attacked by homophobic thugs, was rejected because of perceived inconsistencies in the evidence. Overall the Respondent was not satisfied that the level of discrimination and harassment suffered by homosexuals in Trinidad and Tobago was "such that it reached the level of persecution"; it was further found that the state would offer a sufficiency of protection.'

33. At paragraphs 8 to 9 Judge Bruce dismisses the Home Office's appeal based on the individual risk profile of the respondent refugee (emphasis added):

'8. The matters in issue before the First-tier Tribunal were narrow. Much of what the Respondent had said had already been accepted. The reasoning of the refusal letter was that there was no reason to think that the atrocious persecution already endured by the Respondent was in any way connected to his sexuality. That was frankly nonsensical in light of the accepted fact that people had broken into his house and sprayed homophobic messages on the wall and that when he was being raped the Respondent was being called "pretty boy". Whilst some gay men may be able to live in Trinidad and Tobago and suffer no more than discrimination, harassment and the disapproval of society, it was clear from the facts that this was not the case for this gay man. The only matters in issue were whether the persecution was for a Convention Reason, and whether there would be a sufficiency of protection.

9. This is, for the most part, a perfectly lucid and clear determination. The First-tier Tribunal accepts that the persecution already endured was for reasons of the Respondent's membership of a particular social group. There had been no sufficiency of protection for him in the past, and there was no reason to conclude, on the evidence before the First-tier Tribunal, that this had changed. These findings are all well made and were open to the Judge on the evidence before her.'

10. On this basis the approach of the Upper Tribunal in **NCC** is to identify individual risk factors, based on evidence to show lack of state protection when persecuted in the past when the authorities are aware of the ill-treatment, to show risk on return. This approach is fully consistent with settled case-law (see **AW (sufficiency of protection) Pakistan [2011] UKUT 31 (IAC)** (Lord

Bannatyne, Senior Immigration Judge Storey) (heard on 11 November 2010, promulgated 24 January 2011, published 26 January 2011, designated 26 January 2013).

11. There are no results for search items 'Trinidad lesbian' or 'Trinidad LGBT' , 'Trinidad bisexual'. There was one hit for 'Trinidad trans', but this related to a claim from India.

C. HOME OFFICE COI:

Response to Information Request (26 June 2018):

12. There is no CPIN on Trinidad and Tobago: it is not listed within the list of reported countries.

13. On 26 June 2018 CPIT produced a Response to an Information Request: Trinidad and Tobago on 'Treatment of gay persons and HIV' (06/18-083/085) [five-page response].

14. The response is published following the High Court victory challenging the constitutionality of the anti-sodomy law (see **Jason Jones v Attorney General of Trinidad and Tobago (unreported)** (12 April 2018)).[10]

15. The response accurately and sensitively records the country background material evidencing the backlash to the LGBTQI community following the April 2018 ruling [sections 1.1.2 and 1.1.3].

16. At section 1.2.2 the Home Office rely on the full text of the 15 April 2018 Newsday article 'Gays Kicked Out'.[11] The author has not been able to locate any evidence prior to, or after the 26 June 2018 response to show any action taken by the police with respect to the complaint.

[10] see also Human Rights Watch, 'Trinidad and Tobago: Court overturns Same-Sex Intimacy Ban', 13 April 2018: <https://www.hrw.org/news/2018/04/13/trinidad-and-tobago-court-overturns-same-sex-intimacy-ban> last accessed 26 January 2020. If the decision is to be appealed, the case will first go to the Court of Appeal in Trinidad and Tobago and if appealed further, then the Privy Council in London, United Kingdom.

[11] http://newsday.co.tt/2018/04/15/gays-kicked-out/, last accessed 26 January 2020.

17. The response accurately reflects the position in 2018 where there were early signs of change. Section 1.1.4 of the response refers to a Pride celebration from June 22nd to July 22nd (2018). An online search leads to evidence of a second Pride celebration in June 2019 ('Pride 2019 EquALL').[12]

18. Noting the violent history towards the LGTBQ community in the past, the approach of the Upper Tribunal in the unreported cases cited above would require a case-by-case approach[13] outside the **HJ (Iran)** approach.

19. The evidence cited at section 1.2 onwards regarding HIV services indicates a positive approach and adoption towards supply and use of antiretrovirals. The report records 70 per cent of those tested positive in the recent past now being undetectable (unable to pass on the virus to others).

Internal relocation:

9. If the Home Office caseworker makes a decision where the particular circumstances of the risk of persecution emanate from a specific location, then internal relocation can be considered. There is no specific reference to differing country conditions, specifically outside the capital Port of Spain, in the response. The caseworker will need to identify a location in the decision, based on country information and particular circumstances for the issue of internal relocation to be addressed.[14]

D. SUMMARY OF REVIEW:

EXCELLENT

10. Both of the unreported cases at Upper Tribunal level were decided prior to the April 2018 landmark judgment. Noting the statistical data cited in this review, there is no certainty the lack of unreported cases since 2015 on the Tribunal

[12] https://pridett.com/about-us/pride-2019-equall/ , last accessed 26 January 2020.
[13] The US State Department Country report 2018 (published 2019) provides no examples of reported general violence towards the LGBTQ community in Trinidad and Tobago (refer to Appendix A of the website and also Part A of this report for significance)..
[14] **MB (Internal relocation Albania) [2019] UKUT 392 (IAC)** (reported on 17 December 2019).

decisions database means the appeals determined before the First-tier Tribunal were all finally determined (resolved without any further right of appeal to the Upper Tribunal exercised).

11. Noting the numbers of negative decisions in 2015, were appealed (five negative initial decisions, leading to five appeals being determined), noting the live issue is non-state agent persecution and whether there is effective protection for SOGIE applicants, it is arguable, noting the approach of the 2014 determinations, if credibility is accepted, then they would have been allowed based on positive finding on past-persecution being probative of future risk.

12. The sources cited are accurate, transparent and provide a clear picture of the emergence of an empowered SOGIE community on the path to liberation.

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ANNEXES

Home Office

Response to an information request

05/18-081

25 May 2018

Cameroon

Subject: LGBTI persons

Key words: Treatment of gay men

Summary of request:

The applicant that I am processing at the moment has made a claim for asylum on the basis of being a gay man in Cameroon.

I am looking for information in respect to the level of state-driven persecution or discrimination a gay individual from Cameroon may face if any.

I would also appreciate it if you could provide information in respect to any poor social/cultural ill-treatment individuals who are gay may face in Cameroon.

In addition to this, I would also need to know whether there is any sufficiency of protection for individual claiming to be gay in Cameroon and also what resources are accessible for the possibility of internal relocation.

Please provide as much information as possible in respect to the cultural and official treatment of gays in Cameroon, as this can be used in order to inform my asylum decision of this particular applicant.

Disclaimer: this response was compiled and researched by the Country Policy and Information Team within time constraints using publicly accessible information and/or obtaining information that can be made publicly available. Please read in full all documents to which this response refers.

Country information

Response

CPIT found information that indicates gay men who are openly gay may be harassed and arrested by the police as same-sex activity is illegal in Cameroon. Some have been imprisoned for simply being homosexual. The police sometimes harass NGO activists who advocate gay rights and freedoms. State protection is not likely to be available as the police, acting as state agents, have harassed and arrested gay men. CPIT could not find a lot of information about societal attitudes towards gay men.

Internal relocation is possible although the government sometimes restricts freedom of movement.

1.1. Legal position of same-sex relationships

1.1.1. The United States State Department 'Country Report on Human Rights Practices for 2017' stated: 'Consensual same-sex sexual activity is illegal and punishable by a prison sentence of six months to five years and a fine ranging from 20,000 to 200,000 CFA francs ($37-$373).' [1]

1.1.2. The Human Rights Watch report, 'Guilty by Association - Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law', stated:

'Cameroon's anti-homosexuality law dates to 1972, when it was imposed by executive order by former President Ahmadou Ahidjo. Article 347 bis of the penal code, headed "Homosexuality," punishes "sexual relations with a person of the same sex" with a prison term of six months to five years and with a fine of 20,000 to 200,000 CFA francs (approximately US$40-$400).

'In theory, the law only punishes homosexual conduct and not "homosexuality" per se (often understood as a homosexual identity). However, because the heading of the article uses the term "homosexuality," and because this is the term commonly used by law enforcement officials and in legal records in Cameroon, we use this term throughout the report when discussing criminal charges against those accused of consensual same-sex conduct.

'Prosecutions based on the law appear to have been almost non-existent before 2005, according to research by Alternatives-Cameroun, which examined prison files in Douala: the oldest case file found for homosexuality dated to 1997.' [2]

1.2. Arrests, detentions, and ill-treatment of gay men

1.2.1. The Human Rights Watch report, 'Guilty by Association - Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law', stated:

'Lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights organizations such as the Cameroonian Foundation for AIDS (CAMFAIDS), Humanity First Cameroon, Alternatives Cameroun, National Observatory of the Rights of LGBTI Persons and Their Defenders, and others reported several arrests of LGBTI persons. LGBTI individuals received anonymous threats by telephone, text message, and email, including of "corrective" rape, but authorities did not investigate allegations of harassment. Police were generally unresponsive to requests to increase protection for lawyers who received threats because they represented LGBTI persons. Both police and civilians reportedly continued to extort money from presumed LGBTI

[1] United States State Department, 'Country Report on Human Rights Practices for 2017', Cameroon, 20 April 2018, url. Accessed: 24 May 2018
[2] Human Rights Watch, 'Guilty by Association - Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law', 21 March 2013, url. Accessed: 24 May 2018

individuals by threatening to expose them.

'Humanity First Cameroon and Alternatives Cameroun claimed in their joint 2017 annual report that eight LGBTI persons remained imprisoned for homosexuality in the Kondengui central prison in Yaounde. The two NGOs also documented 578 other cases of human rights abuses related to homosexuality, including 27 arbitrary arrests.' [3]

1.2.2. A 'Pink News' report, 'Cameroon police arrest and torture 25 men for being gay', stated:

'Police in Cameroon have arrested 25 men on suspicion of being gay. Homosexuality is illegal in Cameroon, with those convicted of homosexuality facing up to five years in prison.

'The arrests were made in the early hours of Saturday morning, as police raided institutions in the capital city of Yaoundé which are known to be popular with the local gay community.

'The officers broke the door down at Le Mistral, a cabaret, after failing in their attempts to convince staff that they were simply customers trying to get into the locked venue.

'One of the seven people arrested at the cabaret – which included a dancer, a waiter and security guard – said: "We informed them that the tavern was already closed, but they forced the door open.

"Then they took us [to jail] without any reason," he added, according to news site Easing 76 Crimes.

'The raid on the bar had echoes of a similar incident in 2016, when dozens of men were reportedly arrested in Mistral on suspicion of homosexuality after being trapped inside by officers.

'After police carried out the raid on Saturday, they immediately moved on to a cinema often used by gay people in the area, arresting 18 moviegoers. The 25 men who were arrested were then taken to the police station.' [4]

1.2.3. A 'France24' news report, 'Cameroon police arrest and torture 25 men for being gay', dated 25 February 2015, stated:

'In Cameroon, where a homosexual act can get you six months to five years in prison, people defending members of the gay community are now being targeted as well.

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[3] Human Rights Watch, 'Guilty by Association - Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law', 21 March 2013, url. Accessed: 24 May 2018
[4] 'Pink News', 'Cameroon police arrest and torture 25 men for being gay', 15 May 2018, url. Accessed: 24 May 2018

'A report by the international human rights group Fédération internationale des ligues des droits de l'homme (FIDH) released on Wednesday shows that the lesbian, gay, bisexual and transgender (LGBT) community's allies and defenders face grave dangers in the West African country.

'LGBT activists say they are in danger of arbitrary arrests, having their homes burned, burglaries and "violent deaths". They also also say that they cannot rely on the police for protection…

'Intimidation is one of the primary methods used to target activists, who are regularly threatened by anonymous messages via SMS or Facebook…

'A member of the ACODEVO association, which seeks to repeal anti-gay laws and defend "poor and vulnerable communities", was the victim of an entrapment scheme in 2013. After receiving an SMS from a man and setting up a meeting, he was condemned to one year in prison for planning a "tentative homosexual act".

'Sometimes, it is more than just threats. The director of the human rights advocacy group

REDHAC, Maximilienne Ngo Mbe, received death threats while her niece, who lives with her, was sexually assaulted and tortured by a group of armed men. Previously, unidentified assailants had also tried to kidnap Ngo Mbe's son from his school.

'At first it was primarily activists who were threatened and assaulted. Now, more and more lawyers are being targeted. Out of 2,500 practicing lawyers in Cameroon, only four or five are willing to defend homosexuals. And those who do are often stigmatised by their peers, the FIDH report said.' [5]

1.2.4. A 'Daily Mail' report, 'Cameroon acquits two men a year after they were jailed for 'looking gay' because they wore women's clothes and drank Baileys', dated 8 January 2013, stated:

'Two men who were sentenced to five years in prison for 'looking gay' and ordering Baileys Irish Cream liqueur had their convictions overturned yesterday.

'Jonas Kimie and Franky Ndome had already spent a year in prison after being arrested outside a nightclub and sentenced to five years' jail in November 2011.

'Homosexuality is illegal in the West African country but recent incidents have highlighted the growing disparity between a largely conservative society and a younger generation less concerned by the issue.

'The men's lawyer, Alice Nkom, who also campaigns for gay rights, said the court's decision this week had been expected.

'She said: "Their conviction was against the law because they were not actually seen or caught doing anything at the time the police arrested them.

[5] 'France24', 'Cameroon police arrest and torture 25 men for being gay', 25 February 2015, url. Accessed: 24 May 2018

'They were arrested because they were just seen wearing women's clothes and because of the nature of their make-up, and only suspected to be homosexuals, which is against Cameroon law. 'That is why we appealed."She added: 'The judge who originally sentenced them had stated that the way they dressed, the way they spoke, and the fact that they drank Baileys Irish Cream proved they were gay…

'The court overturned the conviction on Monday, but it is not yet known whether the men, who suffered abuse from guards and other prisoners during their time in prison, have been freed yet.'Last month, a Cameroon appeals court upheld a three-year sentence against a man convicted of homosexuality for texting his male friend to say: 'I'm very much in love with you.'

'University student Jean-Claude Roger Mbede, 32, was arrested in 2011 after the man who received the message tipped off authorities.

'Miss Nkom, who also defended Mbede, said she hoped the supreme court would overturn that ruling.

'She said: 'A man cannot be found guilty of practising homosexuality simply because he sent a message to another man to say he loves him.

'At least two persons of same sex must be caught doing the act before they are arrested and convicted.' [6]

1.3. Harassment and discrimination of gay men

1.3.1. The United States State Department 'Country Report on Human Rights Practices for 2017' stated:

'On August 11, police summoned CAMFAIDS' leadership to the DGSN for "promotion of homosexual practices." On August 16, police interrogated four members of CAMFAIDS. While some questions concerned the legal status of the advocacy group and its funding sources, police also requested a list of its members and a list of similar organizations.

'Some LGBTI persons had difficulty accessing birth registration and other identification documents. Officials at identification units refused to issue identification cards for persons whose physical characteristics were not consistent with their birth certificate.' [7]

1.4. NGO organisations that support LBGT persons

1.4.1. The United States State Department 'Country Report on Human Rights Practices for 2017' stated:

[6] 'Daily Mail', 'Cameroon acquits two men a year after they were jailed for 'looking gay' because they wore women's clothes and drank Baileys', 8 January 2013, url. Accessed: 25 May 2018
[7] United States State Department, 'Country Report on Human Rights Practices for 2017', Cameroon, 20 April 2018, url. Accessed: 24 May 2018

'Human rights and health organizations continued to advocate for the LGBTI community by defending LGBTI individuals under prosecution, promoting HIV/AIDS initiatives, and working to change laws prohibiting consensual samesex activity. Organizations undertaking these activities faced obstacles securing official registration, as well as, limited or non-existent responses from police when they experienced harassment." [8]

1.5. Freedom of movement

1.5.1. The United States State Department 'Country Report on Human Rights Practices for 2017' stated:

'Although the constitution and law provide for freedom of internal movement, foreign travel, emigration, and repatriation, at times the government restricted these rights...

'In-country Movement: Police and gendarmes at roadblocks and checkpoints in cities and on most highways often extorted bribes and harassed travelers. Police frequently stopped travelers to check identification documents, vehicle registrations, and tax receipts as security and immigration control measures. Between September 29 an October 5, authorities in the two Anglophone regions closed regional land and sea borders, banned movement from one division to another, and in some cases, prevented people from leaving their homes on October 1.' [9]

[8] United States State Department, 'Country Report on Human Rights Practices for 2017', Cameroon, 20 April 2018, url. Accessed: 24 May 2018
[9] United States State Department, 'Country Report on Human Rights Practices for 2017', Cameroon, 20 April 2018, url. Accessed: 25 May 2018

Home Office

Response to an Information Request
Egypt

Reference Number: 0419.005

3 April 2019

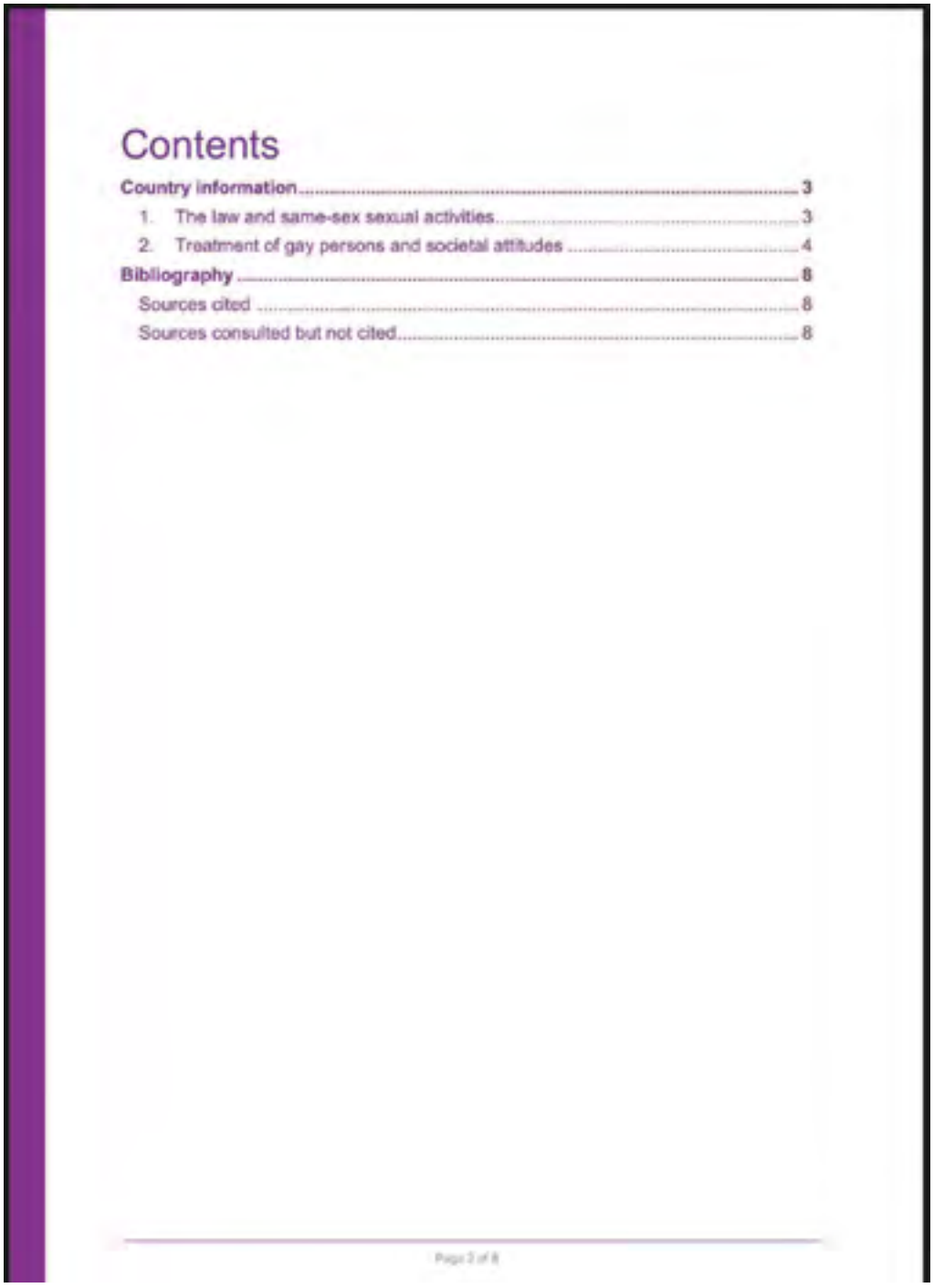
Subject: LGBTI persons

Key words: Treatment – gay people

Summary of request:

Information needed about how gay people are treated and whether they are persecuted

Disclaimer: this response was compiled and researched by the Country Policy and Information Team within time constraints using publicly accessible information and/or obtaining information that can be made publicly available. Please read in full all documents to which this response refers.



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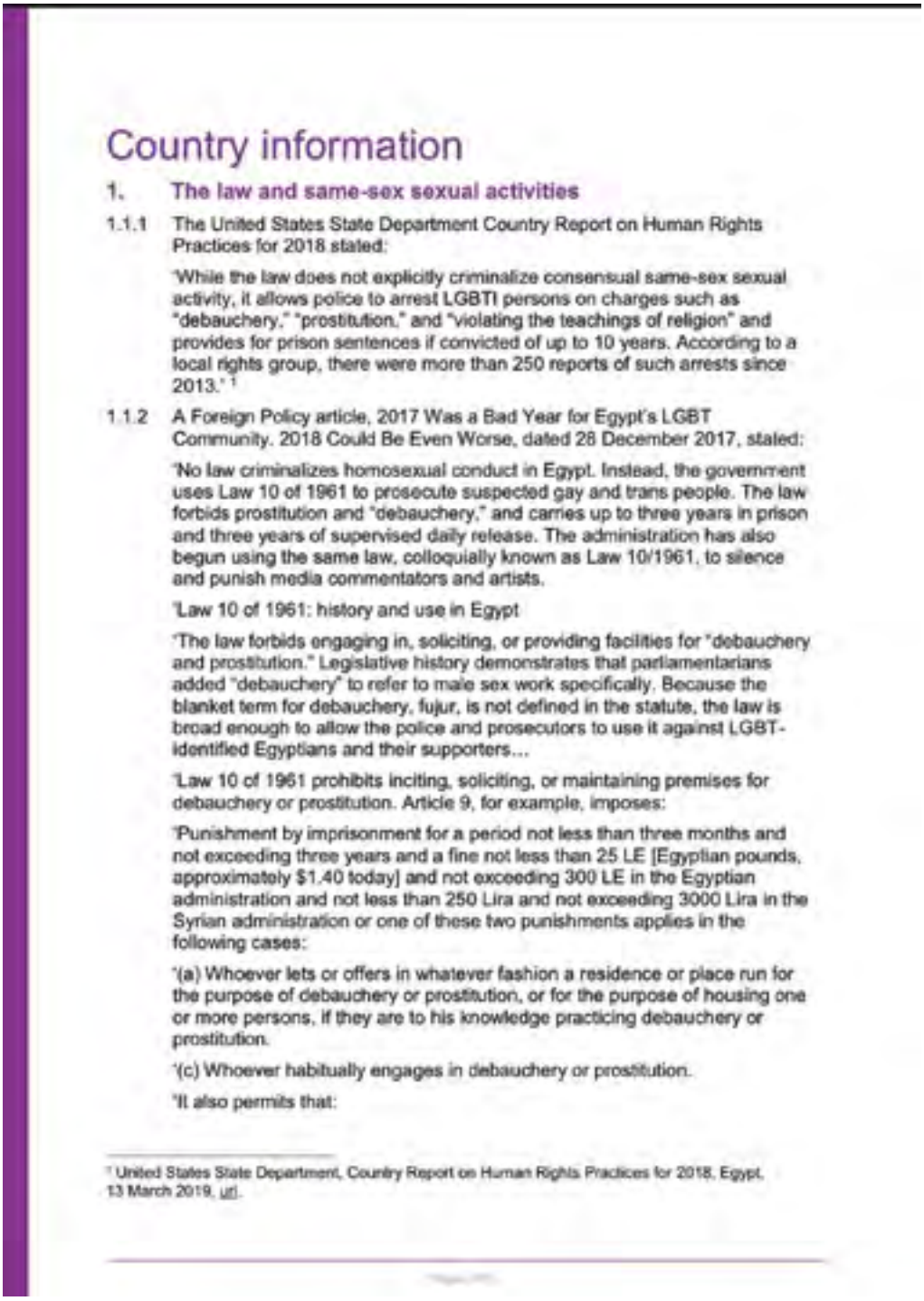

Country information

1. The law and same-sex sexual activities

1.1.1 The United States State Department Country Report on Human Rights Practices for 2018 stated:

'While the law does not explicitly criminalize consensual same-sex sexual activity, it allows police to arrest LGBTI persons on charges such as "debauchery," "prostitution," and "violating the teachings of religion" and provides for prison sentences if convicted of up to 10 years. According to a local rights group, there were more than 250 reports of such arrests since 2013." [1]

1.1.2 A Foreign Policy article, 2017 Was a Bad Year for Egypt's LGBT Community. 2018 Could Be Even Worse, dated 28 December 2017, stated:

'No law criminalizes homosexual conduct in Egypt. Instead, the government uses Law 10 of 1961 to prosecute suspected gay and trans people. The law forbids prostitution and "debauchery," and carries up to three years in prison and three years of supervised daily release. The administration has also begun using the same law, colloquially known as Law 10/1961, to silence and punish media commentators and artists.

'Law 10 of 1961: history and use in Egypt

'The law forbids engaging in, soliciting, or providing facilities for "debauchery and prostitution." Legislative history demonstrates that parliamentarians added "debauchery" to refer to male sex work specifically. Because the blanket term for debauchery, fujur, is not defined in the statute, the law is broad enough to allow the police and prosecutors to use it against LGBT-identified Egyptians and their supporters…

'Law 10 of 1961 prohibits inciting, soliciting, or maintaining premises for debauchery or prostitution. Article 9, for example, imposes:

'Punishment by imprisonment for a period not less than three months and not exceeding three years and a fine not less than 25 LE [Egyptian pounds, approximately $1.40 today] and not exceeding 300 LE in the Egyptian administration and not less than 250 Lira and not exceeding 3000 Lira in the Syrian administration or one of these two punishments applies in the following cases:

'(a) Whoever lets or offers in whatever fashion a residence or place run for the purpose of debauchery or prostitution, or for the purpose of housing one or more persons, if they are to his knowledge practicing debauchery or prostitution.

'(c) Whoever habitually engages in debauchery or prostitution.

'It also permits that:

[1] United States State Department, Country Report on Human Rights Practices for 2018, Egypt, 13 March 2019, url.

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Upon the apprehension of a person in the last category, it is permitted to send him for a medical examination. If it is discovered that he is carrying an infectious venereal disease, it is permitted to detain him in a therapeutic institute until his cure is completed.' [2]

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2. Treatment of gay persons and societal attitudes

2.1.1 The United States State Department Country Report on Human Rights Practices for 2018 stated:

'Authorities did not use antidiscrimination laws to protect LGBTI individuals. Legal discrimination and social stigma impeded LGBTI persons from organizing or advocating publicly in defense of their rights. Information was not available on official or private discrimination in employment, occupation, housing, statelessness, or access to education or health care based on sexual orientation and gender identity. There were no government efforts to address potential discrimination. An October 2017 Supreme Media Council (a semigovernmental body) ban on media supporting LGBTI persons and their rights continued.

'There were reports of arrests and harassment of LGBTI individuals. Intimidation and the risk of arrest greatly restricted open reporting and contributed to selfcensorship. Rights groups and activists reported harassment by police, including physical assault and forced payment of bribes to provide information concerning other LGBTI individuals or to avoid arrest. The government has the authority to deport or bar entry to the country of LGBTI foreigners.

'There were reports that authorities used social media, dating websites, and cell phone apps to entrap persons they suspected of being gay or transgender, a method LGBTI advocates described as especially effective as LGBTI-friendly public spaces had largely closed during the past two years.

'In January police in Alexandria arrested 10 men on charges related to debauchery and narcotics. Police reportedly stated one of the men rented an apartment for men "seeking pleasure from men."

'Rights groups reported that authorities, including the Forensic Medical Authority, conducted forced anal examinations. The law allows for conducting forced anal exams in cases of debauchery.' [3]

2.1.2 The Rough Guides undated article, Gay Life in Cairo, stated:

'There are currently no specific venues for gay men or lesbians in Cairo. In the past, venues such as Harry's Pub at the Marriott Hotel were popular, but that all changed in 2001 when police raided the Queen Boat floating disco, which was popular with both gay and heterosexual couples. Homosexuality as such is not illegal in Egypt, but 52 gay men ("the Cairo 52") were arrested, slung in a cell and charged with offences such as "debauchery" and

[2] Foreign Policy, 2017 Was a Bad Year for Egypt's LGBT Community. 2018 Could Be Even Worse', 28 December 2017, url.
[3] United States State Department, Country Report on Human Rights Practices for 2018, Egypt, 13 March 2019, url.

"contempt of religion", some receiving three-year prison sentences as a result. The religious lobby were delighted, but the gay scene made itself as invisible as possible, and any events that began to attract a gay crowd were quickly closed. After the revolution, things semed [sic] to relax for a bit, but the rise to prominence of the Muslim Brotherhood and the Salafists does not bode well. There's been a lesbian scene in Cairo since at least the middle ages, but it's always been more discreet than the gay male scene, and even harder for foreigners to make contacts in.' [4]

2.1.3 The Lonely Planet undated article, LGBT Travellers, stated:

'Egypt is a conservative society that increasingly condemns homosexuality. Although homosexuality is technically not a crime in Egypt, homosexual acts in public are, and gay men have been prosecuted using debauchery and public morals laws with prison terms of up to 17 years. In late 2017 the Egyptian government launched a large crack-down on the LGBT community, arresting 57 people in a series of raids.

'The situation for the local LGBT community remains very tense, and although there is a small and very underground gay scene in Cairo and Alexandria, tapping into it as a foreigner can be tricky and is risky. Solo male gay travellers should not use gay dating apps while here as the police are known to target app users.

'As long as common sense discretion is used and public displays of affection are avoided – the same goes for heterosexual couples – foreign gay or lesbian couples should have no issues. Most midrange and top-end accommodation will have no problem with a same-sex couple requesting a double bed (though you may notice a raised eyebrow from some staff), but it's advisable to steer clear of the very budget end of the accommodation market, particularly in nontouristy towns.

'Single gay men should exercise caution if propositioned by an Egyptian man as, although rare, there have been reports of set-ups targeting foreign gay males for theft. Gay male travellers should also be aware that signals in Egypt can be ambiguous; Egyptian men routinely hold hands, link arms and kiss each other on the cheek in greeting.

'Lesbian travellers are unlikely to encounter any problems in the country. For the majority of Egyptians, lesbianism is unfathomable and most would declare that there is no such thing as an Egyptian lesbian.' [5]

2.1.4 An NBC news report, 'You can't be out': Gay Egyptians continue to fear persecution, dated 18 August 2018, stated:

'Omar is a 30-year-old physician living in Alexandria, Egypt, the country's second largest city. He is also a gay man who has spent most of his life in what has become one of the most dangerous places to be a sexual minority.

"It's difficult to be gay in Egypt," he told NBC News. "You can't be out. If you're out, you can be subjected to discrimination, abuse, being arrested, having forced physical examinations or being sentenced to time in jail."

[4] Rough Guides, Gay Life in Cairo, undated, url.
[5] Lonely Planet, undated article, LGBT Travellers, url.

'Homosexuality is not explicitly illegal in this country that bridges northeast Africa with the Middle East, but people are routinely arrested and imprisoned on the basis of their actual or perceived sexual orientation and gender identity, according to Amnesty International.

'Last September was the worst crackdown in the country's history, with up to 76 people being detained, according to the human-rights organization. The crackdown was sparked after a gay man waving a rainbow flag was arrested during a concert in Cairo. The incident garnered international attention, but one year later, gay Egyptians and human-rights advocates say the persecution continues, and Egypt's LGBTQ community is living in fear...

'While same-sex sexual relations are not explicitly prohibited in Egyptian law, a 2017 report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) found that "the Law on the Combating of Prostitution, and the law against debauchery have been used liberally to imprison gay men in recent years." As such, ILGA includes Egypt in its list of 72 countries that criminalize homosexuality.

'Omar, however, said, "It's not just gay, bisexual and transgender people who the authorities are after."

"Just for waving a rainbow flag you can get arrested," he explained. "You don't even necessarily need to be gay to get arrested, just seen to be associated with the LGBTQ community."...

'Omar said the LGBTQ community has not always been so aggressively targeted. He said the 2011 Egyptian Revolution contributed to the growing hostility. The revolution, he explained, opened the floodgates to extreme politics in Egypt and forced the gay community underground.

'"There are spots that are, to some extent, gay friendly, but even these places declined after 2011." Omar recalled. "The Islamic Brotherhood coming to power meant that there was a lot of fear from the owners of these places. They didn't want to look like they were that friendly towards gay people, so they closed their bars and cafés and left."

'Subsequently, many are turning to social media and geolocation apps to meet other members of the LGBTQ community.

'"In our circle, we advise everyone to be as cautious as they can be when meeting somebody," Omar explained. "If I'm meeting somebody I don't know, I meet them in a public place, like a café, just to be generally cautious."

Omar's vigilance is understandable. There have been widespread reports of Egyptian authorities using gay dating apps to entrap gay men. Omar said his neighbor, a Syrian refugee, fell prey to this: The man was allegedly tricked into a meeting through Grindr by police officers. Omar said his neighbor was then arrested and deported from Egypt.

'The police are not the only ones using these apps to persecute gay men, according to Omar. Those with homophobic intents have also been known to use them. "It's not just about being arrested," Omar said. "You could be robbed or assaulted when meeting people from apps."

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'Moreover, Egyptian media is fueling society's negative views of LGBTQ people. Last month, a newspaper showed screenshots of gay dating app Grindr with the headline "Documenting the most dangerous online gay organization." Another Egyptian newspaper had an investigate article about "Polari," or gay slang. The writer claimed to be "exposing the secret dictionary of gay people in Egypt" and incited readers to report anybody heard using the "language."

'Amid the growing hostility toward the LGBTQ community, Omar said he and his friends have nonetheless developed a true sense of community.

"I count on the gay community to survive," he said. "You have your safe zones and your support networks, so you know you just have to make sure that everybody is safe and that you're safe, too, but sometimes, the fear can still be there." [6]

2.1.5 The Frommer's Egypt guide, 'Tips for Gay and Lesbian Travelers in Egypt', undated, stated:

'Egyptians have a somewhat schizophrenic attitude toward homosexuality. On the one hand, homosexuality is considered deviant and gay men are discriminated against; on the other hand, sexual relations between men are often ignored as harmless.

'The upside of the situation is that gay men can enjoy a variety of casual sexual encounters with relative ease. The downside is that, once identified as a homosexual, a visitor may experience discrimination and face problems with the police.

'Lesbians, meanwhile, have no public profile as a group, and there is no "scene" as such. Because of this, couples can hold hands in public – this is what friends do in Egypt – but any further display of affection is not recommended.

'You should also be aware that the security services actively work against the gay community. Cases of entrapment followed by detention and torture are regularly documented by human rights groups such as Human Rights Watch. Websites such as www.gayegypt.com are routinely monitored by the security services, and chat groups are used to set up fake meetings.' [7]

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[6] NBC news, 'You can't be out': Gay Egyptians continue to fear persecution, 18 August 2018, url
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Home Office

Response to an information request

02/18-103

5 March 2018

Lebanon

Subject: LGBTI persons

Key words: Activists, HIV treatment

Summary of request: How are LGBT persons treated in Lebanon, specifically LGBT rights campaigners? Is there sufficient protection for LGBT individuals? Is there adequate medical treatment for people who are HIV positive?

Disclaimer: this response was compiled and researched by the Country Policy and Information Team within time constraints using publicly accessible information and/or obtaining information that can be made publicly available. Please read in full all documents to which this response refers.

1. LGBT persons

1.1. Legal rights

1.1.1. Australia's Department of Foreign Affairs and Trade (DFAT) noted in its Country Information Report on Lebanon, dated 23 October 2017, that:

'Article 534 states that "Any sexual intercourse contrary to the order of nature is punishable by up to one year in prison", although the US State Department's Country Report on Human Rights Practices for 2016 suggest that a fine is a more common punishment. Enforcement of Article 534 varies throughout Lebanon. It has been used to prosecute individuals suspected of homosexuality. Since 2009, four judges have ruled against Article 534, the most recent ruling that "homosexuality is a personal choice, not a criminal offence" thereby questioning the interpretation of Article 534."[1]

1.1.2. The US Department of State noted in its human rights report for 2016:

'Official and societal discrimination against LGBTI persons persisted. There is no all-encompassing antidiscrimination law to protect LGBTI persons. The law prohibits "unnatural sexual intercourse," an offense punishable by up to

[1] DFAT, 'Country Information Report Lebanon', (paragraph 3.74), 23 October 2017, http://dfat.gov.au/about-us/publications/Documents/country-information-report-lebanon.pdf. Accessed: 2 March 2018

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one year in prison but rarely applied; however, it often resulted in a fine. The Ministry of Justice did not keep records on these infractions. Enforcement of the law varied and often occurred through occasional police arrests. There were, however, no reports authorities imprisoned anyone for violation of this law during the year.'[2]

1.1.3. The Freedom House report, Freedom in the World 2017, noted that Article 534 was rarely enforced[3].

1.2. Societal treatment

1.2.1. DFAT reported:

'Beirut enjoys a reputation as an open, relatively LGBTI-accepting environment and provides a degree of anonymity compared to other more conservative areas of Lebanon and the region more broadly. According to in-country contacts, the situation for LGBTI individuals has improved over the last decade. Lesbian and gay clubs exist in Beirut. Specific support groups for LGBTI individuals also exist although normally keep a low-profile in an effort to avoid negative attention.

'Despite this, studies of societal attitudes indicate that significant opposition, particularly to homosexuals and transgender women, remains.'[4]

1.2.2. The USSD HR Report 2016 noted:

'NGOs [non-governmental organisations] claimed LGBTI persons underreported incidents of violence and abuse due to negative social stereotypes. Observers received reports from LGBTI refugees of physical abuse by local gangs, which the victims did not report to the ISF [Internal Security Forces]. Observers referred victims to UNHCR-sponsored protective services. There was one confirmed case of a man who was physically abused and threatened with death by throwing him from the third floor of a building in Beirut because of his LGBTI status. It was unclear if the perpetrator was a family member or an acquaintance.

'A local NGO report on Lebanese attitudes towards LGBTI found clear instances of negative stereotypes, rejection, and, although to a lesser extent, readiness for violence.'[5]

1.2.3. According to the USSD HR Report 2016:

'Most reports of abuse came from transgender women. This circumstance was highlighted by graphic accounts of transwomen's testimonies in the "Transpowerment" project implemented by [the civil society groups] AFE

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[2] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

[3] Freedom House, Freedom in the World 2017 Lebanon', 12 July 2017, available at http://www.refworld.org/docid/59831e8cc.html. Accessed: 5 March 2018

[4] DFAT, 'Country Information Report Lebanon', (paragraph 3.75-3.76), 23 October 2017, http://dfat.gov.au/about-us/publications/Documents/country-information-report-lebanon.pdf. Accessed: 2 March 2018

[5] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

[Arab Foundation for Freedoms and Equality] and Marsa. The project highlighted that transgender women faced employment discrimination due to the inconsistency between official documentation and gender self-presentation, which rendered personnel paperwork practically impossible due to constraints related to social security registration, payroll, and opening bank accounts.[6]

1.2.4. According to DFAT:

'In-country contacts suggest that many LGBTI individuals either do not identify or keep a low profile to avoid societal and official discrimination and, potentially, violence. In-country contacts highlighted examples of LGBTI individuals moving frequently to ensure their protection. While in-country contacts noted that individuals can move to other areas in order to seek safety, it was largely dependent on the individual's financial ability to move from one area to another.

'Overall, DFAT assesses that lesbian, gay, bisexual, transgender and intersex people face a moderate risk of societal and official discrimination and violence. DFAT further assesses that, particularly in Beirut, an individual would be able to lead a relatively open life but would still need to keep a low profile and would be at risk of societal and familial ostracism.'[7]

1.2.5. Freedom House noted that social acceptance of LGBT persons was more common in urban and cosmopolitan areas, particularly in Beirut[8]. Reporting on LGBT persons in Lebanon, in December 2017 The New York Times (NYT) stated 'Lebanese society has slowly grown more tolerant as activists have worked for more rights and visibility.' Describing some LGBT persons lifestyles, the NYT added 'Some live discreetly. Some openly. And some have become activists so that others can come out.'[9]

1.3. Civil society groups and activism

1.3.1. DFAT noted:

'Civil society groups working on lesbian, gay, bisexual, transgender or intersex (LGBTI) issues are able to operate although normally keep a low-profile in an effort to avoid negative attention. No such group has received a receipt of registration from the Ministry of Interior and Municipalities pursuant to the Law of Associations. Although this does not affect such organisations' legal status, it can impact their operations, including their ability to manage finances. Employees of organisations focused on LGBTI issues have reportedly been intimidated by local authorities and, as such, many

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[6] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

[7] DFAT, 'Country Information Report Lebanon', (paragraph 3.75-3.76), 23 October 2017, http://dfat.gov.au/about-us/publications/Documents/country-information-report-lebanon.pdf. Accessed: 2 March 2018

[8] Freedom House, Freedom in the World 2017 Lebanon', 12 July 2017, available at http://www.refworld.org/docid/59831e8cc.html. Accessed: 5 March 2018

[9] The New York Times, 'Coming out in Lebanon', 30 December 2017, https://www.nytimes.com/2017/12/30/world/middleeast/lebanon-coming-out.html. Accessed: 5 March 2018

organisations maintain strict confidentiality with regards to their employees."[10]

1.3.2. The USSD HR Report 2016 noted 'Various NGOs, including Helem, Arab Foundation for Freedoms and Equality (AFE), LebMash, and Marsa, hosted regular meetings in a safe house, provided counseling services, and carried out advocacy projects for the LGBTI community."[11]

1.3.3. In 2016, around 50 LGBT rights activists protested by staging a sit-in in Beirut demanding the abolition of laws criminalising same-sex sexual activity[12].

1.3.4. In May 2017, Lebanon's first gay week, Beirut Pride, took place, although at least 2 events were cancelled following threats by religious groups[13] [14]. Beirut Pride included events such as safety trainings, open houses, university awareness days, and online awareness campaigns of photos and videos, held by LGBT rights groups and supporting NGOs[15].

1.3.5. The New York Times reported on George Azzi, an openly gay activist living in Beirut. The report stated 'For years, he [Azzi] faced harassment. He was interrogated by the police several times. His mother received phone calls from people she did not know, shaming her and her son. Today, he lives with his partner, Carl Bou Abdallah, and most of their neighbors know they are gay. It would not be the same, however, in a more conservative neighborhood."[16]

1.3.6. Azzi told the NYT that "While much more work needs to be done to encourage tolerance in other cities, "being gay in Beirut is no longer a scary thing."' However, another activist did not wish to give their full name as they did not believe Lebanon to be 'entirely safe' for gay men and lesbians[17].

1.4. State treatment

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[10] DFAT, 'Country Information Report Lebanon', (paragraph 3.58), 23 October 2017, http://dfat.gov.au/about-us/publications/Documents/country-information-report-lebanon.pdf. Accessed: 2 March 2018

[11] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

[12] The New Arab, 'Lebanese LGBT activists stage rare sit-in protest', 16 May 2016, https://www.alaraby.co.uk/english/news/2016/5/15/lebanese-lbgt-activists-stage-rare-sit-in-protest. Accessed: 5 March 2018

[13] Voice of America, 'Lebanon's first ever pride week shines light on LGBT', 22 May 2017, https://www.voanews.com/a/first-ever-pride-week-shines-light-on-lgbtqi-in-lebanon/3866273.html. Accessed: 5 March 2018

[14] The New Arab, 'Lebanon LGBT event cancelled after 'threats from religious figures', 16 May 2017, https://www.alaraby.co.uk/english/news/2017/5/15/lebanon-lgbt-event-cancelled-after-threats-from-religious-figures. Accessed: 5 March 2018

[15] IDAHOT, 'Beirut PRIDE: an analysis from the inside', undated, http://dayagainsthomophobia.org/beirut-pride-an-analysis-from-the-inside/. Accessed: 5 March 2018

[16] The New York Times, 'Coming out in Lebanon', 30 December 2017, https://www.nytimes.com/2017/12/30/world/middleeast/lebanon-coming-out.html. Accessed: 5 March 2018

[17] The New York Times, 'Coming out in Lebanon', 30 December 2017, https://www.nytimes.com/2017/12/30/world/middleeast/lebanon-coming-out.html. Accessed: 5 March 2018

1.4.1. The USSD HR Report 2016 stated 'The government did not collect information on official or private discrimination in employment, occupation, housing, statelessness, or lack of access to education or health care based on sexual orientation or gender identity, and individuals who faced problems were reluctant to report incidents due to fear of additional discrimination. There were no government efforts to address potential discrimination…

'In September 2015 the Court of Appeals granted a transgender man the right to rectify his legal status in the civil registry after taking into account his psychological, sexual, moral, and social status."[18]

1.4.2. DFAT reported:

'LGBTI individuals have been subjected to harsh treatment, including arbitrary arrest and detention, as well as rape while in detention. In 2012, the Minister for Justice issued a statement calling for an end to invasive medical tests undertaken to 'prove' that a homosexual act had taken place, but reports indicate such tests are still used as a threat. Incidents of mistreatment are likely underreported due to a fear of additional stigmatisation."[19]

1.4.3. Human Rights Watch (HRW) noted in its World Report 2018, covering 2017 events, that:

'In recent years, authorities conducted raids to arrest persons allegedly involved in same-sex conduct, some of whom were subjected to torture inclu ding forced anal examinations.

In January [2017], a judge challenged the legal basis of the arrest of men for same-sex conduct, declaring in a court ruling that "homosexuals have the right to have human or intimate relationships with any people they chose, without discrimination on the basis of sexual orientation".'[20]

1.4.4. Reporting on the Beirut Pride week, in which some events were cancelled, the International Day Against Homophobia, Transphobia and Biphobia (IDAHO), noted on its website that:

'Government agencies did not issue a public statement shutting down the events; nor did they produce official orders to prevent the events from happening. Instead, they resorted to coercion, intimidation and threats by proxy, clearly communicating to the NGO community that the government will be standing on the sidelines in case of riots and violence.

'What's more alarming, are the threats directed at the business establishments hosting these events. Both venues, Hotel Monroe and Metro Al Madina, are known for hosting progressive civil society convening. Such

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[18] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

[19] DFAT, 'Country Information Report Lebanon', (paragraph 3.76), 23 October 2017, http://dfat.gov.au/about-us/publications/Documents/country-information-report-lebanon.pdf. Accessed: 2 March 2018

[20] Human Rights Watch, 'World Report 2018 – Lebanon', 18 January 2018, available at http://www.refworld.org/country,,,LBN,,5a61ee55a,0.html. Accessed: 5 March 2018

threats have also the intention of crippling the right to assembly and gathering which is essential to the civil society work and independence.'[21]

1.5. HIV and AIDS Social Stigma, and treatment

1.5.1. According to the USSD HR Report 2016:

'HIV/AIDS is stigmatized due to sensitivities about extramarital relations. Few who contracted the disease did so in the course of homosexual relations, which are also taboo. The main challenge facing AIDS patients, in addition to stigma and discrimination, was that many were unable to pay for regular follow-up tests that the Ministry of Public Health does not cover. The law requires the government to offer treatment to all residents who are AIDS patients rather than deporting foreigners who carry the disease.

'NGOs such as Marsa, Soins Infirmiers et Developpement Communautaire, and Vivre Positif offered free testing services to HIV patients. According to Marsa, patients that tested positive for HIV risked losing their medical insurance – and in some cases their jobs – because of the stigma surrounding the disease. Patients were often reluctant to test themselves because the test gives rise to fear of infection and social stigma.'[22]

1.5.2. Lebanon's Ministry of Public Health provided information on its National AIDS Control Programme.

Additional sources consulted

Internet sites, including:

Arab Foundation for Freedoms and Equality, 'LGBT+ Issues in the Lebanese Media – Monitoring of media content between 2015 and 2017', 20 December 2017, http://afemena.org/wp-content/uploads/2017/12/MEDIA-MONITORING-REPORT-ENG.pdf. Accessed: 5 March 2018

The Washington Post, 'In Lebanon, gay activism is fueling a new conversation about democracy and civil rights', 20 May 2017, https://www.washingtonpost.com/news/democracy-post/wp/2017/05/20/in-lebanon-gay-activism-is-fueling-a-new-conversation-about-democracy-and-civil-rights/?utm_term=.b26b2d215280. Accessed: 5 March 2018

University Times, 'Helem: A home away from home for LGBT Lebanon', 22 January 2017, http://www.universitytimes.ie/2017/01/helem-a-home-away-from-home-for-lgbt-lebanon/. Accessed: 5 March 2018

[21] IDAHOT, 'Beirut PRIDE: an analysis from the inside', undated, http://dayagainsthomophobia.org/beirut-pride-an-analysis-from-the-inside/. Accessed: 5 March 2018

[22] US Department of State, Country Report on Human Rights Practices for 2016, (Section 6), 3 March 2017, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265508. Accessed: 28 February 2018

Home Office

Response to an information request

Reference number: 06/18-083/085

Date of response: 26/6/18

Country: Trinidad and Tobago

Subject: LGBTI persons / Medical issues

Key words: LGBTI/health

Summary of request: Treatment of gay persons and HIV

Disclaimer: this response was compiled and researched by the Country Policy and Information Team within time constraints using publicly accessible information and/or obtaining information that can be made publicly available. Please read in full all documents to which this response refers.

1.1. LGBTI

1.1.1. A Reuters article of 13 April 2018 noted:

'Gay sex between consenting men in Trinidad and Tobago could soon be decriminalised following a court judgment that campaigners said might spark similar decisions elsewhere in the Caribbean.

In his ruling on Thursday, judge Devindra Rampersad said sections of the Sexual Offences Act, which prohibit "buggery" and "serious indecency" between two men, criminalised consensual same-sex activity between adults, and were unconstitutional.

'...A final judgment on how to deal with the sections of the act is expected in July, rights groups and local media said.

'...Thursday's ruling was welcomed outside the courthouse by large crowds wearing rainbow outfits and singing the national anthem. Earlier this week, hundreds of people gathered outside parliament to show support for the case.

'Colin Robinson, director of the Coalition Advocating for Inclusion of Sexual Orientation, warned there was a long way to go.

'"I don't want to be alarmist, but I expect that this will take time for people to accept, and we hope the violence is minimal," he told the Thomson Reuters Foundation by phone from Trinidad and Tobago.

'The group, which works for justice on sex and gender issues, said it

expected the government would appeal the ruling." [1]

1.1.2. A Trinidad and Tobago Newsday article of 15 April 2018 noted:

'Members of the gay community are calling for calm and tolerance as three young men who were at the forefront of a human rights rally celebrating the historic court ruling on the unconstitutionality of the buggery and serious indecency laws, last Thursday, have been kicked out of their homes.

'The three men, social worker Luke Sinette confirmed yesterday, were evicted for being gay. Among them, one young man who was asked to leave his family home because he embarrassed them because he was seen at the rally. Another man was accosted and taunted as he arrived at his rented apartment and a third was told by his landlord that after his display at the rally he had to leave.

'Sinette's organisation, Friends for Life, has put out an appeal for people to open their homes for temporary accommodation for the displaced men who no longer have a home. Friends for Life is also asking for resources including couches and mattresses for them. He said the response has been good.

'Colin Robinson, head of Coalition Advocating for Inclusion of Sexual Orientation (CAISO), blamed the homophobic reaction on the protest mounted by several religious organisations including the T&T Cause and the sentiments expressed by its member Bishop Victor Gill that the ruling would be met with resistance.

'Robinson appealed to the politicians and religious leaders to end the violence by speaking out and joining their call to share the nation with all the diverse groups.

'"That is the most important thing that can happen now. Homophobic violence, the worst kind, psychic violence, happens in the home, in schools and in the workplace. It is sad that some of our brave folks who stood up with us have no place to live today."

'Robinson said they intended to sit with the police and work out a strategy to protect their members from hate crimes.

'Sinette remarked that there had been precedent around the world where laws favouring same sex marriages and other gay rights had sparked violence against members of the LGBQTI community. He called on people to deal with the outcome in a rational adult way.

'Activist Jason Jones who dared to seek the decriminalisation of Sections 13 and 16 of the Sexual Offences Act, said, he was expecting this kind of push back here as well.

'Gill, one of the advocates for keeping the laws intact, also said the court ruling was not only biased but could lead to some form of anarchy.

'Snippets of the backlash that could follow was demonstrated on the steps of

[1] Reuters, 'Trinidad and Tobago court says laws barring gay sex are unconstitutional', 13 April 2018 https://www.reuters.com/article/us-trinidadtobago-judiciary-lgbt/trinidad-and-tobago-court-says-laws-barring-gay-sex-are-unconstitutional-idUSKBN1HK21I, accessed: 26 June 2018

the Hall of Justice on Thursday when activist Rudy Hanamji filmed a video which went viral, showing the tensions between the religious and the LGBTQI groups after the ruling. Insults were hurled, threats made, and one member of the community was allegedly spat on.

'Sinette said one of the men who accompanied him and the female victim to the Port of Spain CID to report this matter was among those evicted.

"'Strangely enough, I was talking to this young man at the rally and he accompanied me to the police station to make a report that another demonstrator got spat on and pushed by a Muslim guy. I got a message from him yesterday, that his landlord said he had to leave.

"'The landlord identified his visibility at the rally for the decision he took," Sinette confirmed.

"'Another member, who is 'out' with his family, they know he is gay, was out front and centre at the rally, holding the banner and was covered by every media and in every newspaper. Because of this, his parents would have asked him to leave. I mean we were really shocked because his parents know, but perhaps he misjudged them or perhaps he embarrassed them because maybe their friends and relatives did not know."

'Sinette referred to the third situation in which a member who lives at Belmont, was attacked.

"'He was going home, when he got to his gate, he was attacked and taunted and had to make a report at the Belmont Police Station. Now he wants to leave his home, because he is terrified, afraid that he could be in the sanctity of his home or walk out of his gate and be attacked because people know where he lives. This guy, like most of the people who were at the rally are people who have come out. They are not in the closet, but I guess because they are more visible, having been seen on television, other people are now more emboldened to attack them. "

'Sinette said the police have been very professional so far in their dealings with them. He said they were now documenting every case, and were encouraging people to make reports because human rights abuses had been perpetrated on gay people in the past, but they had been too afraid to report them.' [2]

1.1.3. A Trinidad and Tobago Guardian article from April 2018 noted:

'The numbers of gays who have been thrown out of their parents' homes and evicted from apartments have increased to eight in the last week. Two LGBTQI members were also reportedly fired in the wake of last Thursday's major victory in the High Court after Justice Devindra Rampersad declared two clauses of the buggery legislation unconstitutional.

'In light of this, Coalition Advocating for Inclusion of Sexual Orientation (CAISO) board member Angelique Nixon says they will be taking these complaints to the Equal Opportunities Commission (EOC) to ensure the LGBTQI community is protected.

[2] Trinidad and Tobago Newsday, 'Gays Kicked Out', 15 April 2018 http://newsday.co.tt/2018/04/15/gays-kicked-out/, accessed: 26 June 2018

"'We are taking our complaints to the EOC. We want to go forward with the EOC campaign to amend its act to include protection for housing and employment against those who have been discriminated," Nixon told the T&T Guardian.

'While she could not say when they will go to the EOC, Nixon said the Equal Opportunities Act does not include sexual orientation and the EOC's hands may been tied.

"'We want the Government to step up because they have not said anything positive yet. So far, we've had eight complaints by people who were thrown out of their homes by their parents or guardians in the last week. There have also been a number of cases where people have been kicked out of their apartments by their landlords. There were also two complaints with regards to employment. These two individuals were faced with either trouble in the workplace or being fired."

'So far, Friends for Life (FFL), which is one of six LGBTQI groups under the coalition Alliance for Justice and Diversity (ADJ), has assisted the eight LGBTQI members who were evicted.

"'Reports are still coming in. We have a number of people who have volunteered their homes, a couch and even annexes. We have a good network system in place to help."

'These homes were offered as a temporary measure, Nixon said, adding FFL has been pushing the Government to create specific housing for LGBTQI members in communities. The FFL has also started a fund-raising drive to help those who were evicted.

"'We are pulling our resources and doing our best to assist," Nixon said.

'While the complaints have been mounting in the last week, Nixon said the issue was not new.

"'We regularly receive complaints anywhere from one to three people a month facing homelessness due to issues with their parents or by their landlords."

'But as a member of the LGBT community, she expressed concern over the growing number of complaints.

"'I am already open and public. But I am concerned about my friends and partner," Nixon said.

'Attorney Leah Thompson, who represents AJD, said the group will also be asking the EOC and Parliament for "HIV status, sexual orientation and aged individuals to be added to that legislation of the Equal Opportunities Act so that when these things happen LGBT people are given full protection."' [3]

[3] Trinidad and Tobago Guardian, 'CAISO taking LGBTQI firings, evictions to EOC', 18 April 2018 http://www.guardian.co.tt/news/2018-04-17/caiso-taking-lgbtqi-firings-evictions-eoc, accessed: 26 June 2018

1.1.4. An Erasing 76 Crimes article of 30 May 2018 noted that 'The LGBT+ Community continues its public outreach over the next few months with T&T Pride to be commemorated from June 22nd – July 22nd.' [4]

1.1.5. An Institute for War and Peace Reporting report noted:

'In Trinidad and Tobago, consensual same sex acts carry a possible penalty of up to 25 years in prison, while anal sex is subject to a maximum sentence of life in prison. These laws have not been enforced in the last four decades, but remain on the statute books. Trinidadian law also denies any LGBTI person entry to the country, although this law is not known to have ever been enforced.

'...It is impossible to know how widespread discrimination is in Trinidad and Tobago as there are no statistics about hate crimes against LGTBI citizens.

'...The government itself has long sent out contradictory messages over LGBTI rights.

'...prime minister Keith Rowley told parliament last year that the state had a duty to protect all citizens "regardless of whom they sleep with" but has not supported the repeal of the contentious laws.

'For now, in the absence of an open LGBTI scene, the dating app Grindr acts as a virtual gathering point for gay men in Trinidad seeking chat, casual sex and some kind of social connection.

'...A Venezuelan, who gave his name as David, said he had been living in Trinidad and Tobago for 13 years. There was a party and performance scene, albeit tiny.

'"There are drag queens in Port of Spain," he said. "You don't see them everywhere, only at gay parties...well, [there's] just one."

'A different Grindr user, who gave his age as 26 but asked to remain anonymous, said, "Life is hard for a gay man in Trinidad and Tobago. People talk. You can't live openly. Religion says you're a sinner. And a family doesn't want a sinner as a son."' [5]

1.2. HIV

1.2.1. The government of Trinidad and Tobago website noted a number of places where HIV services might be found in the country and noted:

'The Government of Trinidad and Tobago is committed to curbing the spread of sexually transmitted infections (STIs), with particular emphasis on the HIV/AIDS epidemic, and improving the lives of those living with HIV. A wide variety of services are offered through government ministries, committees and non-governmental organisations (NGOs). The government provides

[4] Erasing 76 Crimes, 'LGBT+ in Trinidad', 30 May 2018 https://76crimes.com/2018/05/30/lgbt-in-trinidad-clean-up-the-laws-now-clean-up-litter/, accessed: 26 June 2018
[5] Institute for War and Peace Reporting, 'Trinidad and Tobago: A Nation in the Closet', 19 September 2017 https://iwpr.net/global-voices/trinidad-and-tobago-nation-closet, accessed: 26 June 2018

anonymous testing, counselling services and treatment to all citizens, free of charge.' [6]

1.2.2. Another government weblink referred to the provision of the anti-retroviral treatment programme in the country http://www.health.gov.tt/sitepages/default.aspx?id=163 .

1.2.3. A Pan American Health Organisation report noted that The country has seven adult treatment centers, each providing services to over 500 patients, and six pediatric centers providing treatment services to fewer than 500 patients.' [7]

1.2.4. A Trinidad and Tobago Newsday article from December 2017 noted:

'A total of 569 people who were tested HIV positive and had dropped off treatment are now back on antiretrovirals, and 70 per cent of all tested positive in recent years now have their viral loads suppressed to the point of stopping the transmission of the virus.

"When we took office, our figures were abysmal," Health Minister Terrence Deyalsingh said at the launch of the medical outreach Treat All Programme yesterday at the Medical Research Foundation, Queen's Park West, Port of Spain. The outreach team was also in San Fernando yesterday and will head to Sangre Grande next week. The team visited Tobago on Tuesday.

'There are 11,000 people living with HIV in this country.

'On taking office in 2015, Deyalsingh said, 60 per cent of people living with HIV knew their status, 50 per cent were on treatment and 40 per cent, or less than half who tested positive, had their viral loads suppressed. That figure is now 70/65/70 he said. The programme, a medical outreach being undertaken by a team of clinicians from the foundation in collaboration with the US Centre for Disease Control (CDC), is a country initiative to achieve the UN target of 90/90/90 by the year 2020 for all people living with HIV.

'The 90/90/90/ target aim is for 90 per cent of people living with HIV to know their status, 90 per cent to be on treatment and 90 per cent to have their viral loads suppressed to the point where transmission of the disease is no longer possible. The other UN milestone, Deyalsingh said, is that the world must be free of HIV/AIDS by 2030. His vision, he said, is for TT to be the first country in the western hemisphere to achieve its 90/90/90 target by 2020.

'When this Government took office, he said, they understood the gravity of

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[6] Government of the Republic of Trinidad and Tobago website, 'HIV/AIDS and other Sexually Transmitted Infections', undated https://www.ttconnect.gov.tt/gortt/portal/ttconnect?urlp/a1/jdC7DoJAEAXCn6FIBsgasaNABEyM-LjtDJh1UXHX8PTzRTpF0elmom5yM0AhBCrl-sTj8RFnD13Ot77Sx2Jaxq4WKKJeuBgNhLfGK_1FkQvIH1CmLbCJNvO3BiL-i8cvY_3Mr5iAHdAh5nikB_o1QzDQwwPKM5t0P4kskRnjDjRnR5azXK3y9pvW5a2YKKhq0zQql5,nTD1ftbog-CmUyqKE8N3C7boJ7-6ZZPXceqDkvjhz/dl5/d5/L2dBISEvZ0FBIS9nQSEh/?WCM_GLOBAL_CONTEXT=/gortt/wcm/connect/gortt+web+content/TTConnect/Citizen/Role/AParent/HealthServices/HIVAIDS+and+other+Sexually+Transmitted+Infections, accessed: 26 June 2018

[7] Pan American Health Organisation, 'Antiretroviral Treatment in the Spotlight: A Public Health Analysis in Latin America and the Caribbean', 2012 https://www.paho.org/hq/dmdocuments/2012/ART-FS-Trinidad-Tobago.pdf, accessed: 26 June 2018

the HIV/AIDS problem facing the nation.

'There was a lack of resources and TT was on the verge of losing the US President's Emergency Plan for AIDS Relief (PEPFAR) funding.

'"2010 to 2015 were barren years as far as the programme for HIV/ AIDS was concerned," he said.

'For reasons unknown, he said, the last government did not access PEPFAR funding and "let millions of dollars of grant funding, not loan funding, free money, go to waste."

'With the help of former US ambassador John Estrada and CDC prevention specialist Dr Nyla Lyons, he said, they were able to access a US$250,000 ($1.5 million) grant which was made available in May this year. An analysis of reasons why the 569 people had dropped off treatment, he said, included lack of funds for transportation, nutrition and drugs shortage. The transportation issue was solved with the foundation buying Public Transportation Services Corporation bus tickets and providing nutritional support. In dealing with the antiretrovirals, Deyalsingh said, the ministry partnered with the Pan American Health Organisation (PAHO) for the purchase of antiretrovirals and was able to "not only buy more drugs, have a consistent supply, but save $70 million in the process by using the PAHO Strategic Fund and bypassing" NIPDEC's tender process. Among those present at the launch were US Embassy Charge D' Affaires, John McIntrye who reaffirmed the US Government's commitment to support the TT Government in its ongoing efforts to halt the spread of HIV/AIDS through the PEPFAR and through the CDC.' [8]

[8] Trinidad and Tobago Newsday, '569 People back on HIV treatment', 17 December 2017 http://newsday.co.tt/2017/12/01/569-people-back-on-hiv-treatment/, accessed: 26 June 2018

Neutral Citation Number: [2012] EWCA Civ 1930

Case No: C5/2012/1967

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
[APPEAL No: AA/01354/2011]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 17 December 2012

Before:

LORD JUSTICE LAWS

- - - - - - - - - - - - - - - - - - - -

Between:

GN (SOUTH AFRICA) **Appellant**

- and -

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

- - - - - - - - - - - - - - - - - - - -

(DAR Transcript of
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Official Shorthand Writers to the Court)

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Mr S Chelvan (instructed by Messrs MKM) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

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Judgment
(As Approved by the Court)

Lord Justice Laws:

1. This is a renewed application for permission to appeal and an extension of time in which to bring the application against a decision of the Upper Tribunal of 20 February 2012, by which the earlier decision of Immigration Judge Robson was set aside. However, the applicant's appeal against the refusal of the Secretary of State to grant him asylum remained dismissed by the Upper Tribunal on all grounds. Sir Richard Buxton refused permission to appeal to this court on consideration of the papers on 4 October 2012. Such an appeal would be a second appeal, which I should only allow to proceed if it would raise an important point of principle or practice or that there is some other compelling reason why this court should hear the appeal.

2. The applicant is a citizen of South Africa, born on 8 October 1959. He is gay. The Upper Tribunal has summarised the background as follows:

> "2. [...] He entered the UK in 2008 and was given six months' leave to enter on arrival. He then stayed on in the UK to assist his partner in a criminal trial which ended in 2009 and claimed asylum on 17th December 2010.
>
> 3. [...] He had a long term relationship between 1993 and 2001. During the course of that time his house was burgled on seventeen times occasions and, whilst he called the police each time, and they initially attempted to help, their attitude changed when they realised he was a gay man. He subsequently moved to the Western Cape coast where he was threatened and badly attacked and hospitalised for about a week.
>
> 4. The Claimant left South Africa in June 2004 and travelled to the UK returning to South Africa in November 2005. He came back to the UK again almost immediately, having broken up with his former partner, and in 2006 he met his second partner here.
>
> 5. He returned to South Africa in December 2006 for Christmas. In January 2007 the Claimant and his new partner were held up after going to a gay bar for New Year's Eve. He did not report the incident to the police. There was a further incident in Easter 2008 and the Claimant's partner returned to the UK. He was arrested and the Claimant came back to the UK to assist him in his trial. The couple split up in December 2010."

3. The immigration judge who found the applicant entirely credible upheld his asylum claim. The Secretary of State appealed with leave to the Upper Tribunal. Upper Tribunal Judge Taylor held as follows:

> "22. The Claimant is a freelance writer who mainly works from his home and who has set out his life history in a compelling account which draws the reader into his world. The homophobia which he has endured for most off his life is plainly and graphically described. He has suffered serious assaults, in particular in 2003 and he has lost the sight of an eye. No one would seek to minimise his troubles.

23. On return there is no evidence that he would do anything other than seek to live his life as an openly gay man in South Africa and his appeal must be considered on that basis.

24. It is not disputed that there is in place the apparatus of state protection in South Africa. The argument put forward by the Claimant is that the authorities are unable or unwilling to offer him the protection which is theoretically available. He cites his past experience as evidence that he would be at risk in the future and he relies on his extensive bundle of articles and letters which he says shows that the authorities are not in practice able or willing to protect him.

25. Whilst not seeking to minimise in any way the severity of the Claimant's experiences, he did come to the United Kingdom on a number of occasions, most recently in 2004, 2005 and 2006 and on each occasion he returned to his home area. The most serious assault which he had suffered took place before each of these visits and subsequent returns to South Africa. His behaviour is not consistent with his claim to have a subjective fear of persecutory ill treatment.

26. Moreover [GN] attributes the fact that he has been the victim of a number of crimes, including a large number of burglaries, to his sexual orientation. It is not entirely clear whether this is correct. South Africa has a notoriously high crime rate. Indeed, he himself accepts that at least some of the burglaries have nothing to do with his sexuality. Significantly he did go to the police on many occasions and some kind of investigation took place. That is neither evidence of the state being unwilling to assist the Claimant nor evidence that he did not believe they would be unable or unwilling to do so.

27. It is not asserted here that there is any one individual or group of individuals which the Claimant fears on return. His is a general complaint about the safety of South Africa for the gay community generally. However in his statement he acknowledges that there is a gay scene in Cape Town. He has been able to enjoy two long term relationships which he conducted in South Africa over many years since 1993.

28. South Africa has a clear system of protection in place for its gay community and whilst there is considerable evidence of homophobic attitudes not only in the general population but also within the police, the evidence shows, including the evidence adduced by the Claimant, that crimes on the gay community are investigated and the perpetrators brought to trial.

29. Taking the evidence as a whole, [GN] has not established that he would be at individual risk of persecutory ill treatment on account of homophobia in South Africa as a whole or indeed, if he did have problems in any one area, that it would

> be unreasonable to expect him to relocate to an area where he would be safe. The authorities are not required to guarantee protection, but to show that there is a system in place and a reasonable willingness to operate it. None of the evidence adduced by the Claimant establishes that this is not the case in South Africa."

4. The applicant seeks to challenge the finding that he would not be at risk of persecution if returned to South Africa. Other grounds of appeal have been abandoned. If his case was simply a disagreement with the Upper Tribunal's approach to the facts there would of course be no basis for an appeal, let alone a second appeal. But the applicant submits that in a document dated 6 February 2012, 14 days before the Upper Tribunal decision was signed, the Secretary of State changed her stance as regards the likely persecution of gays returned to South Africa. The document, entitled "Operational Guidance Note on South Africa", was not disclosed to the Upper Tribunal. It is to be noted that the hearing had taken place on 25 January 2012 before the OGN came into existence, but it certainly came into existence before the decision was finalised.

5. Mr Chelvan for the applicant draws attention to the following paragraphs of the OGN:

> "**3.7.2** ***Treatment***. The constitution and law prohibit discrimination on the grounds of race, disability, ethnic or social origin, colour, age, culture, language, sex, pregnancy, sexual orientation or marital status. However, entrenched attitudes and practices often resulted in the denial of these rights in practice. The post-apartheid constitution outlawed discrimination based on sexual orientation and in 2006 the country legalised same-sex marriages. There were no reports of official mistreatment or discrimination. However, in its annual Social Attitudes Survey released in 2008, the Human Sciences Research Council found widespread public intolerance of homosexual activity. While South Africa's constitution outlawed discrimination based on sexual orientation and same-sex marriages had been legalised, gay and lesbian people remained vulnerable to violence. The South African Human Rights Commission and other NGOs have suggested that the criminal justice system needs to take determined action to deal with hate crimes in the country, something that the government has yet to do.

> **3.7.3** A report published by the International Lesbian and Gay Association entitled *State Sponsored Homophobia*, published in May 2010, noted that all sections of the country's LGBT community faced homophobic abuse. South Africa was ranked the 4th country in the world with the highest rate of crimes and every year, there were numerous cases of hate crimes towards LGBT people. The report went on to note that the abuse was escalating."

6. It is of importance to note that the issue for the Upper Tribunal is articulated by Upper Tribunal Judge Taylor as follows, paragraph 16:

> "The question which the Immigration Judge should have engaged with was whether, having regard to the Claimant's past experiences, if he were to return to South Africa as an openly gay man, the authorities there would be able to offer him a sufficiency of protection. The issue is not whether homophobic attacks occur in South Africa, which they undoubtedly do, but whether the state offers legally adequate protection, i.e. a reasonable willingness to use the system which is in place. The State is not required to guarantee absolute protection for its citizens."

7. Mr Chelvan's essential case (and I should say he referred to the Supreme Court guidance in HJ (Iran) [2011] 1 AC 596 per Lord Rodger of Earlsferry at paragraph 82) is that once one sees the contents of the OGN in the passages I have read, the Upper Tribunal's critical conclusion at paragraph 28 is at the very least undermined -- he would say fatally undermined -- as a proper answer to the question which the Upper Tribunal judge had formulated at paragraph 16. In the ordinary way, even if this argument were good on the facts, it might well not be enough to pass the second appeals test, I have to consider whether, even if Mr Chelvan is right to submit that the OGN might perhaps promote a different answer to the case than was arrived at, nevertheless permission should be refused because the point is not fit for a second appeal.

8. However it seems to me, with some misgiving, that the fact that Mr Chelvan is seeking to rely on a document of some importance, which it may be contended was the Secretary of State's duty to put before the Tribunal notwithstanding that the argument had been completed when the document came into existence, that this is enough to bring the case properly within the ambit of a second appeal. It seems to me that Mr Chelvan may be right in submitting that the OGN might promote a different result from that arrived at by the Upper Tribunal and in the circumstances I have concluded, as I have indicated to Mr Chelvan, that permission to appeal should be granted.

9. I grant an extension of time and permission accordingly.

Order: Application granted

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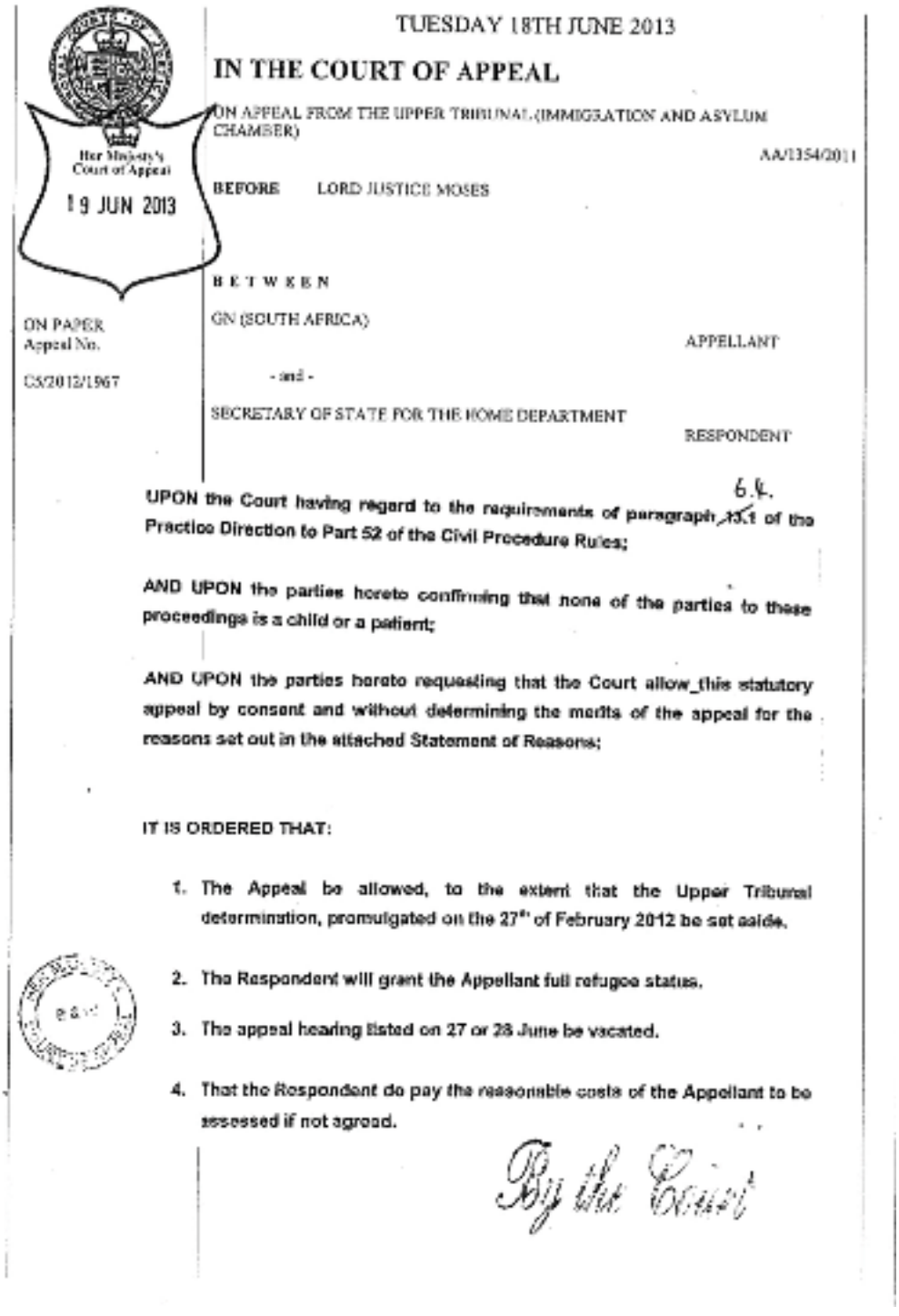

Her Majesty's Court of Appeal
19 JUN 2013

TUESDAY 18TH JUNE 2013

IN THE COURT OF APPEAL

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

AA/1354/2011

BEFORE LORD JUSTICE MOSES

BETWEEN

GN (SOUTH AFRICA)

APPELLANT

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

ON PAPER
Appeal No.

C5/2012/1967

UPON the Court having regard to the requirements of paragraph 6.4. ~~13.1~~ of the Practice Direction to Part 52 of the Civil Procedure Rules;

AND UPON the parties hereto confirming that none of the parties to these proceedings is a child or a patient;

AND UPON the parties hereto requesting that the Court allow this statutory appeal by consent and without determining the merits of the appeal for the reasons set out in the attached Statement of Reasons;

IT IS ORDERED THAT:

1. **The Appeal be allowed, to the extent that the Upper Tribunal determination, promulgated on the 27th of February 2012 be set aside.**
2. **The Respondent will grant the Appellant full refugee status.**
3. **The appeal hearing listed on 27 or 28 June be vacated.**
4. **That the Respondent do pay the reasonable costs of the Appellant to be assessed if not agreed.**

By the Court

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Case Reference: C5/2012/1967

THE COURT OF APPEAL
CIVIL DIVISION

ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
APPEAL NO: AA/01364/2011

BETWEEN:-

GN (SOUTH AFRICA)

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

STATEMENT OF REASONS

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1. The Appellant is a national of South Africa born on 8 October 1959. He is a white gay man. He entered the United Kingdom on 12 May 2006 and was issued with 6 months leave to enter as a visitor. Earlier he had visited the UK in 2005 when he met his last partner and following the expiry of his 6 months leave, he remained in the United Kingdom to assist his partner in a criminal trial which ended in 2009.

2. He claimed asylum on 17 December 2010 on the basis that he was a refugee under the 1951 Convention relating to the Status of Refugees (Geneva Convention) and it would be contrary to the obligations of the United Kingdom under that Convention for him to be removed from or required to leave the United Kingdom. This was based upon his claim to have a well founded fear of persecution in South Africa on the basis of his sexual identity.

3. On 17 December 2010, the Appellant underwent a screening interview followed by a detailed interview on 4 January 2010. The Respondent issued a reasons for refusal letter on 14 January 2011 and his applications for asylum and human rights were refused. He had a right of appeal against the decision under section 82 (I) of the Nationality, Immigration and Asylum Act 2002. A notice of appeal was lodged on 3 February and the appeal was heard before Immigration Judge Robson of the First Tier Tribunal on 3 March 2011. His determination was promulgated on 23 March 2011 finding the Appellant to be entirely credible and upheld the asylum and human rights appeals, in light of the Supreme Court's guidance in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 (§ 82) and the Immigration Judge's positive findings that (i) the Appellant is gay; (ii) openly gay people in South Africa will be liable to persecution; and (iii) the Appellant will live openly on return and thereby exposed to a real risk of persecution..

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4. The Respondent appealed against the determination of Immigration Judge Robson to the Upper Tribunal and the appeal was heard on 25 January 2012 before Upper Tribunal Judge Taylor. Her determination was promulgated on 27 February 2012 and the decision of Immigration Judge Robson was set aside and the Appellant's appeal against the reasons for refusal letter dated 14 January 2011 was dismissed on all grounds.

5. Permission to appeal was refused by the Rt. Hon. Sir Richard Buxton on consideration of the papers against the determination of Immigration Judge Taylor on 4 October 2012. The Appellant renewed his application for permission to appeal and sought an extension of time to bring an appeal against the Upper Tribunal decision. On 17 December 2012 Lord Justice Laws granted permission to vary the grounds of appeal, an extension of time and permission to appeal was granted.

6. The basis on which permission to appeal was granted, as outlined in the Advocate's statement, was that it was arguable that the Respondent had a duty to put before the Tribunal a document that could promote a different result in the Tribunal on the basis of the policy position on the treatment and sufficiency of protection for gay men in South Africa. In this case a document entitled "Operational Guidance Note on South Africa" was published on 6 February 2012. This was after the Upper Tribunal hearing had taken place on 25 January 2012 but before the determination was promulgated on 27 February 2012. This document was not disclosed to the Upper Tribunal.

7. The case of the Appellant on asylum was that he had a long term relationship in South Africa between 1993 and 2001. During that time his house was burgled several times, and, whilst initially helpful when they were called, the police then became uncooperative when they realised he was gay. Later he moved within South Africa to the Western Cape Coast where he was attacked and hospitalised for a week. In 2007 the Appellant was held up after a New Year's Eve party and there was a further incident in Easter 2008. These incidents related to the Appellant being identified as a gay man. His case was that he would be at risk of persecutory ill treatment if he returned to South Africa and there was insufficient state protection in place to prevent him being exposed to a real risk of persecution, on the basis of his sexual identity.

8. At the hearing on 27 January 2012, the Upper Tribunal judge concluded that there was no evidence to support his argument that the state was unwilling to assist the Appellant or that he did not believe that they would be unable or unwilling to do so. Further she concluded that South Africa has a clear system of protection in place for its gay community and the evidence showed that crimes on the gay community are investigated and the perpetrators brought to justice.

9. The Operational Guidance note published on 6 February 2012 referred to a report published in May 2010 which ranked South Africa as the fourth country in the world with the highest rate of crimes and with numerous cases of hate crimes towards the Lesbian, Gay, Bisexual and Transgender community. The same report noted that the abuse was escalating. The material cited in the Operational Guidance Note not only drew upon the 2010 report, but also reports from the 2011 Amnesty International report, the US State

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Department, the BBC, and the Respondent's own Country of Origin Information Report In summarising the Respondent's position on sexual identity claims, the Respondent's policy position at paragraph 3.7.10 of the Note conceded that 'LGBT persons remained vulnerable to violence' and in cases of persecution, there will be a lack of effective state protection. This position continues to be the Respondent's position in the current Operational Guidance Note, published on 7 March 2013 [paragraph 3.10.13].

10. The parties are in agreement that the Respondent will grant the Appellant full refugee status, in light of the agreed facts that the Appellant succeeds on the basis of the country background material on real risk and lack of effective state protection, mirrored in the Respondent's own published policy, and pursuant to the guidance of the Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 [§ 82].

11. The parties are therefore in agreement that the Appellant's appeal be allowed by consent.

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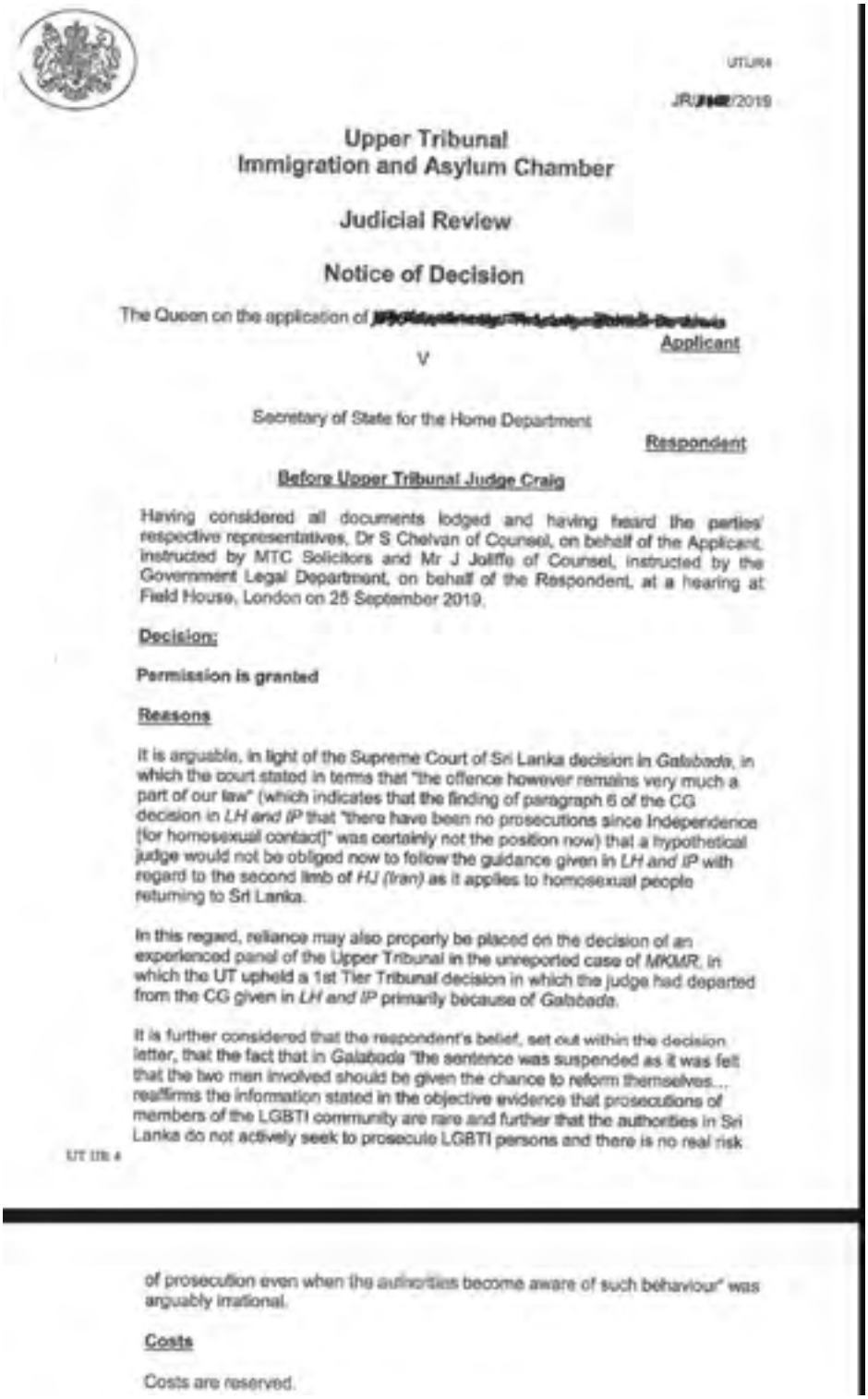

UTLIR4

JR/[redacted]/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision

The Queen on the application of [redacted]

Applicant

V

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Craig

Having considered all documents lodged and having heard the parties' respective representatives, Dr S Chelvan of Counsel, on behalf of the Applicant, instructed by MTC Solicitors and Mr J Jolliffe of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 25 September 2019.

Decision:

Permission is granted

Reasons

It is arguable, in light of the Supreme Court of Sri Lanka decision in *Galabada*, in which the court stated in terms that "the offence however remains very much a part of our law" (which indicates that the finding of paragraph 6 of the CG decision in *LH and IP* that "there have been no prosecutions since Independence [for homosexual contact]" was certainly not the position now) that a hypothetical judge would not be obliged now to follow the guidance given in *LH and IP* with regard to the second limb of *HJ (Iran)* as it applies to homosexual people returning to Sri Lanka.

In this regard, reliance may also properly be placed on the decision of an experienced panel of the Upper Tribunal in the unreported case of *MKMR*, in which the UT upheld a 1st Tier Tribunal decision in which the judge had departed from the CG given in *LH and IP* primarily because of *Galabada*.

It is further considered that the respondent's belief, set out within the decision letter, that the fact that in *Galabada* "the sentence was suspended as it was felt that the two men involved should be given the chance to reform themselves... reaffirms the information stated in the objective evidence that prosecutions of members of the LGBTI community are rare and further that the authorities in Sri Lanka do not actively seek to prosecute LGBTI persons and there is no real risk

UT 1TR: 4

of prosecution even when the authorities become aware of such behaviour" was arguably irrational.

Costs

Costs are reserved.

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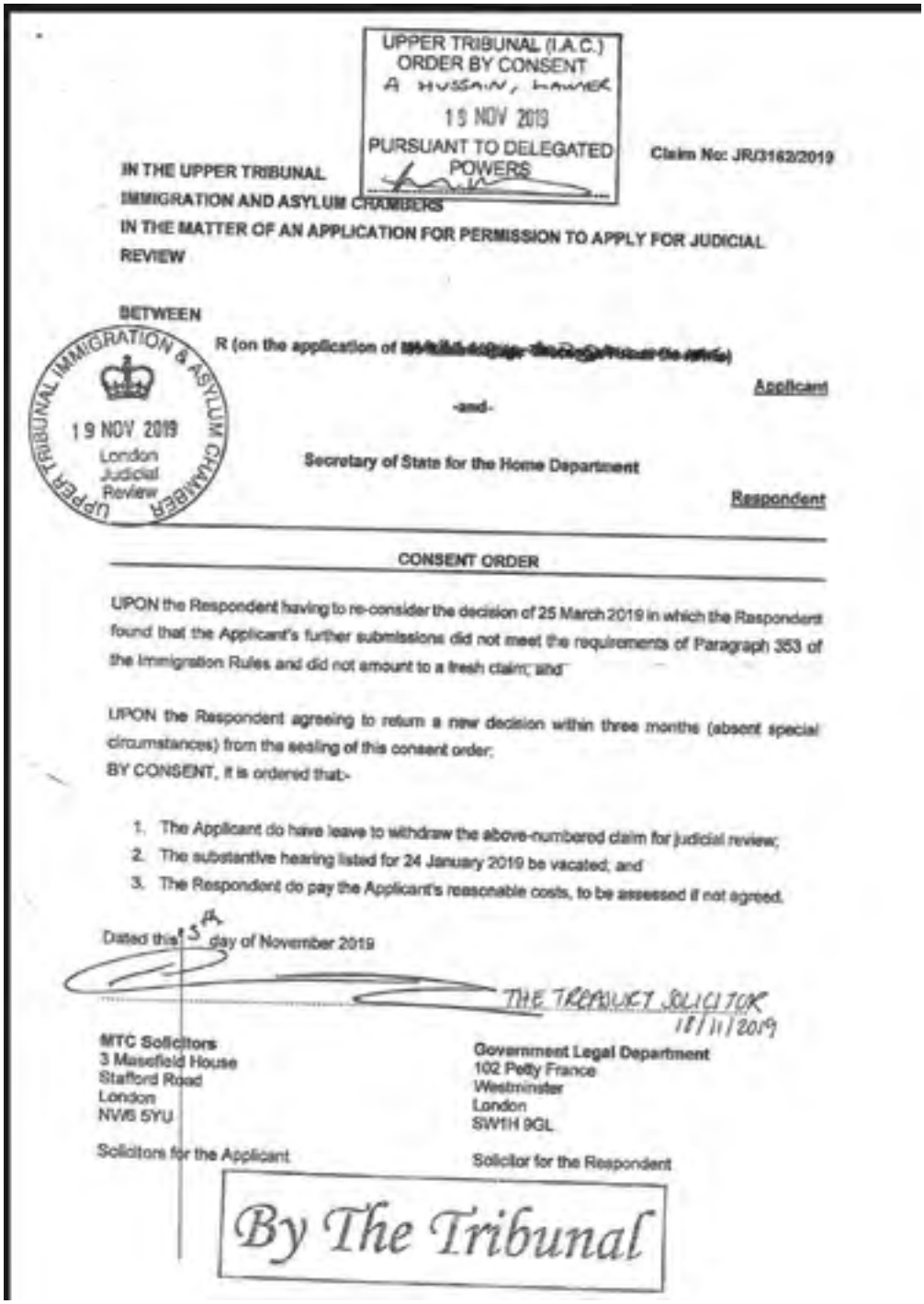

UPPER TRIBUNAL (I.A.C.)
ORDER BY CONSENT
A HUSSAIN, HAMMER
19 NOV 2019
PURSUANT TO DELEGATED POWERS

Claim No: JR/3162/2019

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBERS
IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

BETWEEN

UPPER TRIBUNAL IMMIGRATION & ASYLUM CHAMBER
19 NOV 2019
London Judicial Review

R (on the application of [redacted])

Applicant

-and-

Secretary of State for the Home Department

Respondent

CONSENT ORDER

UPON the Respondent having to re-consider the decision of 25 March 2019 in which the Respondent found that the Applicant's further submissions did not meet the requirements of Paragraph 353 of the Immigration Rules and did not amount to a fresh claim; and

UPON the Respondent agreeing to return a new decision within three months (absent special circumstances) from the sealing of this consent order;
BY CONSENT, it is ordered that:-

1. The Applicant do have leave to withdraw the above-numbered claim for judicial review;
2. The substantive hearing listed for 24 January 2019 be vacated; and
3. The Respondent do pay the Applicant's reasonable costs, to be assessed if not agreed.

Dated this 13th day of November 2019

THE TREASURY SOLICITOR
18/11/2019

MTC Solicitors
3 Masefield House
Stafford Road
London
NW6 5YU

Solicitors for the Applicant

Government Legal Department
102 Petty France
Westminster
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SW1H 9GL

Solicitor for the Respondent

By The Tribunal

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Annex D: IAGCI SOGIE review, February 2020: CPIT response to reviewer's summary assessment of countries requiring urgent or priority action

Reviewer's definitions

As set in his Addendum of 13 March 2020 to the review, the reviewer opined that:

"All these reports need to be urgently updated to address either an inaccurate/misleading COI and/or omission of important COI going to the core of "well-founded fear of persecution" of those who are open."

Priority action – "The difference between the two bands is negligible but nuanced in the fact that with the Priority Action examples (Sri Lanka and Kenya) it is clear that either inaccurate information is contained within the CPIN (Sri Lanka, the State persecution arising from criminalisation, so CG case should not be applied, or does inaccurately records no COI on intersex where the HRW report used as a source document does do so) – or the CPIN has missing post CPIN COI (Kenya – no reference to the May 2019 Kenyan High Court judgment and link to persecution due to judicial measure)."

Urgent action – "For Urgent Action – for example with respect to Afghanistan […] – the issue is with respect to lack of adoption of the key issues of concern in the 2008 and 2014 thematic reviews with respect to continued inclusion (January 2017) of the 'bacha bazi' (dancing boys) where this does not, as a matter of fact or law, relate to sexual orientation/identity protection claims. This approach is consistent with the 2017 EASO report.[…]

Arising from this is a need to explore what policy decisions were made to ignore the recommendations of the earlier reviewers and IACI minutes. There is additionally a need to address the issue of relocation to Kabul and 'prove straight' to not cause public outrage (in order not to be at risk), noting the lack of engagement with the detail within the 2009 CG case and the fact the COI relied from the 2016 BBC on-line article is either misleading (gay man left Kabul in 2013 due to individual targeting) or inaccurate (the COI records no evidence on trans where the same BBC article records the experiences of a trans woman)."

Country	Reviewer's Classification	SOGIE summary	HO response
Afghanistan	Urgent	The country material with respect to bacha bazi should be deleted. It is not known why this material continues to be cited, noting the concerns with respect to this point have been voiced by the reviewers in 2008 and 2014 and the sexual conduct comprises of child abuse. The inclusion has no weight in the assessment of a SOGIE protection claim as the sexual conduct is contrary to both UK law and thereby not able to come within the definition of the Particular Social Group Convention reason for SOGIE status determination. The CPIN additionally records inaccurately interpreted source material on Kabul, the place for internal relocation identified by the 2009 CG case and CPIN. Following the 2019 guidance of the Upper Tribunal in MB, the CPIN fails to highlight any reliable country background evidence specifically with respect to Kabul for SOGIE applicants. The accuracy of the CPIN is of concern, where it records a lack of evidence of risk to trans applicants, where within the same 2016 BBC on-line article used in the sections on risk to gay men and lesbians, there is also reference to the position of a trans woman in Afghanistan. Noting the 2009 CG case, when reassessed in light of HJ (Iran) can only lead to an acceptance of risk even in Kabul, the CPIN would greatly benefit from urgent revision, noting the concerning approach of the Upper Tribunal in the 2019 unreported case of ASR cited at paragraph 41 to 44 above. The December 2017 EASO report on Afghanistan, as well as the other sources cited in this country report, should be used to address the above points.	Thank you for your comments. We were in the process of updating the CPIN before we received the review and published an update on 27 February 2020. We explicitly refer to bacha bazi as a form of child abuse and have provided a link to our CPIN on children. We have included more recent information on transgender persons. We are unable to find information indicating treatment varies by location. In our assessment, we state that a person who is open about their SOGIE is likely to be at risk of persecution. We also assess relocation is not viable without fundamental (but unreasonable) changes to their behaviour. We have not been able to find information about intersex persons and therefore do not have a discrete section on this group.

Country	Reviewer's Classification	SOGIE summary	HO response
		There is no section on Intersex/Sex Characteristics protection claims. This needs to be addressed.	
Algeria	Urgent	Whilst there is a strong and commendable approach in the CPIN to Healthcare and HIV, the approach to risk on the basis of non-state agent persecution is either not linked appropriately by the CPIN (forced marriage of lesbians/bisexual women) and/or is outdated (due to the murder of an openly bisexual man in Algiers in February 2019). The approach to state persecution can be shown through the US DOS reports from 2016 onwards to show a growing pattern of state persecution, including evidence of sexual violence. Noting the statistical figures show a clear reliance on the 2016 CG case finding a complete lack of state persecution, hence reliance on internal relocation alternative away from family-centred harm, the CPIN needs to be urgently reviewed to address the above COI. There needs to be a specific section on treatment based on gender identity or expression, and some evidence of investigation of COI relating to intersex/sex characteristic claims.	We are updating the CPIN and this will be published shortly. The update will include information contained in the USSD human rights reports covering the period 2016 to 2019 as well as from other sources. We would also respectfully direct the reviewer to the Terms of Reference for the review which states that *'The CPIN should be reviewed in terms of the situation in the country up to the stated 'cut off' date for inclusion of information in the report'*. We have found limited information about LGBTI persons in general and almost nothing on intersex/ trans persons. We have made this plain in the CPIN and have taken it into account in the assessment.

Country	Reviewer's Classification	SOGIE summary	HO response
Ghana	Urgent	A lot of the source material is outdated, even when the CIG is published in 2016. This includes the reference to the 2011 Freedom House report on no registered LGBT organisations [sections 5.5.1 and 7.1.1] and the 2012 UN Human Rights Council report in 2012 [section 5.5.7] As is clear from the approach of the April 2019 Upper Tribunal in EA (Ghana), the document is not used by Home Office even when drafting the negative protection decision [sources pre-date the CPIN of February 2016 [33]], or is relied on by the Senior Presenting Officer at the hearing [simply relied on the RFL]. The May 2019 Upper Tribunal in SL makes clear, the objective evidence is accepted to show, 'gay people who lived openly would be liable to persecution' [47]. The 2016 CIG is out-dated and does not reflect the real risk on return for SOGIE applicants from Ghana. In order for the protection claims to have been allowed (as evidenced in the published statistics), the COI would have been determined to provide a source of cogent evidence of real risk of persecution to SOGIE appellants who lived openly in Ghana. As this source material is not in the public domain, the reviewer urgently recommends the updating of the 2016 CIG to include the COI used in order to assist decision makers (both administrative and judicial) and those representing refugees the basis for the Home Office's decision-making.	We are updating the CPIN and this will be published shortly. This will take into the findings of the 2 asylum determinations referred (the cases of EA and SL). We note that while the Upper Tribunal's remade the first-tier findings in SL this appears confined to this case. It was not based on a comprehensive review of available evidence concerning the situation of LGBTI persons and is not a reported case. The reviewer refers to source material not in the public domain – we assume he means the expert report by Dr Fumanti in EA (which appears to be based at least in part on publicly available information). We do not have access to the report either, other than material cited in the determination. We will, however, undertake a careful review of the determination and a thorough desk-based review of publicly available information.

Country	Reviewer's Classification	SOGIE summary	HO response
Kenya	Priority	CPIT should publish the expected updated SOGIE CPIN on Kenya as a priority. The reviewer cannot see how there can be publication of the India CPIN update on 2 October 2018, within weeks of the September 2018 section 377 Indian Supreme Court judgment, but no CPIN update with respect to this Kenyan High Court judgment in May 2019.	We are updating the CPIN and this will be published shortly. We published a COI response on the Home Office's intranet in August 2019 which provided officials with information about the High Court judgement and other relevant events in August 2019. Other priorities and finite resources meant we were not able to begin revising the CPIN until early 2020.
Malawi	Urgent	The CPIN need[s] urgent updating. It is clear there COI shows arrests as recently as April 2018, evidencing there is no moratorium; the law is being enforced. There is also clear and credible COI evidencing abuse and violence towards SOGIE in Malawi to be included and made publicly available to decision-makers.	We accept the COI in the CPIN needs updating. However, given the demands on our resources and the low and declining number of Malawi protection cases generally (a total of 31 in 2019, down from 36 in 2018 following a trend of steady decline since 2010) we do not intend to update this. Instead, we will publish shortly an updated country background note which will include detailed information relevant to considering LGBTI cases.
Malaysia	Urgent	The reviewer notes he has been informed a SOGIE CPIN on Malaysia is planned. In order to carry out functions of transparency and accessibility, noting the high level of grants of protection, then this separate CPIN with the additional material cited above would be recommended. Noting the high number of claims and initial decisions granting protection, it is recommended this is done as a matter of urgency, to save on public resources.	We accept that there is a business need for a discrete CPIN on SOGIE in Malaysia. A CPIN is in draft and will be published shortly.

Country	Reviewer's Classification	SOGIE summary	HO response
Myanmar	Urgent	Whilst the amendment to the response is assumed to have been done, noting the January 2019 CPIN on Critics of the government is the only publicly available document accessible for any COI from the Home Office on SOGIE, the reviewer highly recommends updating the published document, or publishing the response reviewed in January 2019 (paragraphs 2 to 3 above), adding the most recent evidence from the 2018 USDOS cited above.	The CPIN on critics of the government does not aim to address claims based on SOGIE but rather a person's actual or perceived criticism of the Burmese government. We do not intend to revise the CPIN to include treatment of LGBTI persons given this specific purpose. The COI Response was updated following the January 2019 IAGCI review and is available for internal Home Office staff. We, however, do not intend to publish the response. Our explanation for not publishing responses generally is set out in our response to recommendation 9 of the review.
Sri Lanka	Priority	The CPIN inaccurately records the 2016 Sri Lankan Supreme Court judgment in Galabada by omitting part of the sentence (the five years' suspension) was based on the added need to 'reform' (ie 'prove straight') and the Upper Tribunal have agreed, this leads to positive determinations on protection claims, and is a clear departure from the 2015 CG case of LH and IP (incorrectly recording no prosecutions since 1948 independence). Paragraph 4.1.2's omission of this crucial part of the judgment, when linked with the COI with respect to the use of 'aversion therapy' in Sri Lanka, establishes state persecution.	We will look again at the CPIN. We will ensure there is accurate reference to the Galabada judgement – changing reference from no prosecutions to one prosecution – as well as other relevant COI.

Country	Reviewer's Classification	SOGIE summary	HO response
		Paragraph 4.1.3 in effect contradicts the above paragraph, as the Galabada judgment is proof there has been a prosecution under the Criminal Code. The Home Office have had access to the judgment prior to the July 2017 CPIN was updated, where no reference was made to this judgment. The October 2018 CPIN, by including reference to the judgment, does so, without highlighting the persecutory nature of this judicial measure. Since the November 2018 proceedings in MKMR before the Upper Tribunal, the Home Office have not succeeded in arguing the judgment does not amount to persecution. The CPIN needs to be updated as a Priority to ensure decisions can be made with accuracy, certainty and with transparency.	

26 March 2020

Annex E: Removing the Mask: Locating the Martyr – Addendum 13/3/2020

REMOVING THE MASK: LOCATING *THE MARTYR – ADDENDUM 13/3/2020*

SHORT NOTE– Summary with respect to Bandings - For IAGCI Meeting on 31 March 2020

Whereas the 2008 and 2014 SOGI thematic reviews were able to use a Template provided to the reviewers from CPIT, with the 2020 SOGIE thematic review, no such template existed.[1] On this basis this reviewer had to construct a template to enable reviewing the consistency between the 31 in total analysed CPINs/CIGs/Responses to Information Requests.[2]

At pages 56-57 of the report (Part A), there is a table ranking the individual country COIs starting with Excellent, Very Good, Good, Neutral, Internal Review/Further Information, Poor/ Urgent Action and Priority Action. These bands are graded due to specific common issues with respect to the COI and the ability to address the second limb of Lord Rodger's guidance at paragraph 82 of HJ (Iran) and whether 'openly SOGIE have a well-founded fear of persecution?'.

1. What is the difference between **Urgent Action** (Afghanistan/Algeria/Ghana/Malawi/Malaysia/Myanmar) and **Priority Action** (Kenya and Sri Lanka)?

All these reports need to be urgently updated to address either an inaccurate/misleading COI and/or omission of important COI going to the core of 'well-founded fear of persecution' of those who are open.

The difference between the two bands is negligible but nuanced in the fact that with the **Priority Action** examples (Sri Lanka and Kenya) it is clear that either inaccurate information is contained within the CPIN (Sri Lanka, the State persecution arising from criminalisation, so CG case should not be applied,[3] or does inaccurately records no COI on intersex where the HRW report used as a source document does do so) - or the CPIN has missing post-CPIN COI (Kenya – no reference to the May 2019 Kenyan High Court judgment and link to persecution due to judicial measure).

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[1] See 10 February 2020 'Part A: Section D: No SOGOE CPIN Template for 2020 Review', paragraphs 36 to 39, pages 22-23. This notes the adaption of what a template in both the December 2019 SOGI COIN for Albania, page 40 (url) and the February 2020 SOGIE CPIN for Cameroon, page 32 (url) [published 11 February 2020, the day after submission of the Final report by the reviewer) (last accessed on 12 March 2020.

[2] FINAL REPORT Part A: Section E: 2020 Reviewer's Template, paragraphs 40-50, pages 23-26 and Part A: 3 – 2020 SOGIE Review Template, paragraphs 64-138, pages 32-55. See also Part A, pages 56-67 for a further explanation on categories for banding.

[3] The 2019 US State Department Country Report on Sri Lanka, published 11 March 2020, makes clear (url) (accessed 12 March 2020) (Section 6):

> 'The law criminalizes consensual same-sex sexual conduct between adults. Those convicted of engaging in same-sex sexual activity in private or in public face 10 years' imprisonment. Although prosecutions were rare, human rights organizations reported police used the threat of arrest to assault, harass, and sexually and monetarily extort LGBTI individuals. Antidiscrimination laws do not prohibit discrimination based on sexual orientation and gender identity.
> Transgender persons continued to face societal discrimination, including arbitrary detention, mistreatment, and discrimination accessing employment, housing, and health care.'

For **Urgent Action** – for example with respect to Afghanistan[4] – the issue is with respect to lack of adoption of the key issues of concern in the 2008 and 2014 thematic reviews with respect to continued inclusion (January 2017) of the 'bacha bazi' (dancing boys) where this does not, as a matter of fact or law, relate to sexual orientation/identity protection claims. This approach is consistent with the 2017 EASO report.[5]

Arising from this is a need to explore what policy decisions were made to ignore the recommendations of the earlier reviewers and IACI minutes. There is additionally a need to address the issue of relocation to Kabul and 'prove straight' to not cause public outrage (in order not to be at risk), noting the lack of engagement with the detail within the 2009 CG case and the fact the COI relied from the 2016 BBC on-line article is either misleading (gay man left Kabul in 2013 due to individual targeting) or inaccurate (the COI records no evidence on trans where the same BBC article records the experiences of a trans woman).

2. What does the banding **Poor** address (Bangladesh)?[6]

Gaps in COI and not addressing causative link - The CPIN was being used by Respondent to show lack of risk to lesbians (due to lack of COI) and need to address causative link between 2016 murder of gay journalists (activists) establishing real risk of persecution for 'openly SOGIE'.

3. What steps leading to banding of **Internal review**/**Further Action** (India/Morocco)?

Update (within a month) influenced by Court case whilst unamended COI provided evidence of risk (conflict?) (India) and SO Statistics show grant of status (nearly 50%) not supported by 2017 CPIN (Morocco).

4. What is the status of **Neutral** (Albania/Jamaica/Zimbabwe)? **[no need for action arising from this review] –**

Albania - the December 2019 SOGI CPIN, following the April 2019 CPIN, acts to record the approach of the Upper Tribunal and subsequent Court of Appeal refusal of permission judgment following the March 2019 CG case of **BF (Albania)**, then adopting the legal prism adopted for this review, no comment is made on the COI as this has already been subject to judicial decision-making. Jamaica – CPIN – not used by Tribunals due to very strong and in

[4] For the other examples, see paragraphs 160-171, Part A, pages 63-65 (noting for Algeria, the evidence from the US DOS reports clearly support a finding at odds with the 2016 CG case of *OO (Algeria)* reflecting state persecution and non-family based non-state agent persecution in Algiers following the murder of the openly bisexual medical student in Algiers.

[5] (*Op cit*. fn. 126, Part A, page 63). The Strasbourg Court in the very recent judgment in A.S.N and Others and the Netherlands endorsed the COI approach of EASO in Afghanistan (risk of Sikh minority in Afghanistan) (Application no. 68377/17 and 530/18) (judgment 25 February 2020) (url), see [63], [77-81] and [106].

[6] Part A, paragraphs 158-159, page 62.

force CG cases. Zimbabwe - January 2019 CPIN was amended to address 2018 IAGCI country review (this review did not have the time or resources to check the amendments).

5. How are the bandings of very good and good arrived at Iran/Iraq/Nepal/The Occupied Palestinian Territories/Pakistan/Cameroon/Egypt/Trinidad and Tobago- **Very Good** and South Africa/Vietnam/Lebanon – **Good**)?

"**Fit for Purpose"** (bar lacuna on COI on 'societal norms')- **The CPIN reports provided either a good and useful source of COI** (Good) or **The CPIN was consisted with (a) CG cases/reported cases; (b) accurate and reliable source information; (c) included COI on gender identity or expression;[7] (d) wide variety of domestic NGO sources; (e) clear and persuasive COI; and (f) addressed the second limb of Lord Rodger's guidance.**

6. What relevant factors are taken into consideration with respect to **Excellent** (Gambia/Namibia/Nigeria/Turkey/Uganda/Ukraine)?

These are CPIN reports CPIT should be congratulated upon, going the extra mile with respect to a COI report of an excellent standard. There was a clear recognition of COI on Gender identity or Expression and Intersex – but need to engage with COI on Societal Norms (from a straight/cis [potential persecutor perspective).

For example, Turkey – providing clear post-2013 CG case on military service, arguably determined contrary to binding December 2014 EU law, the COI report provides excellent examples of COI post-dating the CG case with respect to real risk not only with respect to military service. The CPIN was one of the few to have separate sections of Gender identity or Expression and also include a section of COI on Intersex.

The inclusion of 'Societal Norms and Public Opinion' in the Gambia report should be applied to all reports – in order to address analysis of the stigma attached to SOGIE identities. The reviewer notes there is a similar section (5.1) in the February 2020 SOGIE CPIN on Cameroon.[8]

However, this section does not address the COI on the 'steps' required for an individual to evade identification in order to conform to societal stereotype of the potential persecutor - the 'norms' from a cis or heteronormative viewpoint of what is expected by society to 'prove cis/straight' ('the silence fallacy') – hence **Recommendation Four.**[9]

Dr S Chelvan, 13 March 2020

[7] Noting the reviewer makes clear his inclusion of those who are non-binary or gender-fluid as being included within the definition of gender identity or expression.
[8] (url), pages 20-21 (published 10 February 2020).
[9] Part A, page 69.

Annex F: Home Office Response to the IAGCI-Commissioned Review on SOGIE

Response to Recommendations

Recommendation	HO Response
1. All COI reports to include Section on 'Risk to Open SOGIE applicants'	**Accepted.** We already consider the risk to openly gay persons. COI rarely makes the distinction the reviewer seeks and therefore this isn't always possible.
2. To accurately assess real risk – there are very few 'martyrs' in countries where there is well-founded risk (HJ (Iran)). COI reports need to identify sources specifically with respect to those who choose to be, or are identified as, 'open'	**Accepted.** We already do this. We collate information about the treatment of LGBTI people generally and, where it is available, about specific 'profiles'. However, the treatment of individuals may not always be representative of that faced by a group more generally – which is what a CPIN aims to cover – and further context may be needed to explain the individual's particular experiences.
3. Separate sections on COI on Lesbians and Bisexual Women, Trans and Intersex	**Accepted**. Where information exists, we will. However, many sources reporting on LGBTI issues tend to use the term generically.
4. All COI reports to include section on 'Social Norms and Public Opinion	**Accepted**. We're moving towards this now (it's in our suggested standard ToRs). However, as above, we are sometimes confined by the available information. Therefore, we agree in principle but in practice it is sometimes difficult.
5. All COI reports should include a section on specifically identified places of suggested internal relocation alternative, if this issue is to be relied on by Home Office decision-makers	**Partially accepted.** Disagree that it is for CPIT to dictate; it is as much for DMs to evaluate in individual cases. We will aim to provide information about geographical variation in treatment of LGBTI persons where it is available.
6. All CPIT undertaken research and drafting of the reports should be done in the knowledge of the approach of the Tribunals and Courts, specifically with respect to binding Country Guidance and reported cases	**Accepted**. CPIT staff receive training on RSD processes. We construct CPINs taking into account relevant country-specific country guidance caselaw. During the production process HO lawyers are consulted for advice on relevant caselaw and that the CPINs are compliant with the law.

Recommendation	HO Response
7. Need for on-going data collection for SO claims, to also include protection claims based on Gender Identity or Expression and Intersex claims	**Partially accepted**. We record data on sexual orientation/expression and we publish it. However, we do not currently record data on gender identity/ expression or trans expression. Therefore we are unable to agree to expand the scope of data collection in this area, though we are looking at the potential to do so.
8. Publication of Country Bulletin Updates	**Not accepted**. Unclear what is meant or how this is different to what CPINs, COIRs and "Inspired" COIRs and, increasingly, background notes (which we are looking to expand across more countries) do. However, the issue facing CPIT is resources and priorities; not the product – we are not resourced to provide running commentaries on country situations.
9. Publication of Responses to Requests for Information	**Not accepted**. We already make responses available via the decision letter and/or appeal bundle, which the applicants and the Tribunal get to see; Often there are disclosability issues if the response directly or indirectly provides information about the applicant which prevents wider publication; COIRs contain no stated position by the SSHD; The information is in the very large majority of responses already in the public domain (as can be seen in the responses reviewed). We are planning to produce more background CPINs on more countries, which will be published and we think are a better vehicle for contextual information about LGBTI persons. Logistically, we produce around 1,200+ responses a year and the process of organising, checking and publishing responses becomes a bureaucratic industry in itself – for CPIT and colleagues elsewhere – requiring limited resources with an unclear (if any) benefit.
10. Publication of basic country facts: including population and predominant religion provides useful background context to religious, social and cultural norms and approximate size of SOGIE population expected to be visible if living 'freely and openly without fear of persecution'	**Accepted**. As stated above, we are planning to produce more background notes. However, with finite resources and a near endless demand for COI, CPIT has to prioritise accordingly.

Other Key Observations

2.1 **Ranking of countries.** It is pleasing that 17 out of 31 of the countries reviewed were – in the opinion of the reviewer – excellent, very good or good. However, the absence of any key criteria, scoring system or methodology for how these countries were ranked, makes it difficult for CPIT to see how this is anything other than opinion or how we can learn anything from this in its current guise.

2.2 **Template.** There are repeated references to no "template" being provided to the reviewer by CPIT and it is unclear what is meant or inferred by this. However, the presumption – given the framing – is that it means an absence of a SOGIE CPIN template. To clarify: CPIT does not use a SOGIE- (or any issue-) specific template when previously we did; rather we use a standard Terms of Reference as a starting point to guide research to answer relevant questions. We shared this with the IAGCI in June 2019.

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