

**Asylum and Immigration Tribunal**

**JM (homosexuality: risk) Uganda CG [2008] UKIAT 00065**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30<sup>th</sup> November 2007**

**Before**

**SENIOR IMMIGRATION JUDGE GOLDSTEIN  
SENIOR IMMIGRATION JUDGE KING TD  
MRS A J F CROSS DE CHAVANNES**

**Between**

**JM**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Chelvan of Counsel instructed by Wesley Gryk, Solicitors  
For the Respondent: Mr C Bourne, Counsel, instructed by the Treasury Solicitor

*Although there is legislation in Uganda which criminalises homosexual behaviour there is little, if any, objective evidence that such is in fact enforced. Notwithstanding a prevailing traditional and cultural disapproval of homosexuality, the evidence does not establish that in general there is persecution of homosexuality in Uganda.*

## DETERMINATION AND REASONS

1. The appellant is a citizen of Uganda born on 2<sup>nd</sup> May 1975. He first arrived in the United Kingdom on 17<sup>th</sup> August 2000 and was given six months leave to enter as a visitor. After that he did not seek to renew his leave but claimed asylum on 28<sup>th</sup> March 2002. Essentially, the basis of his claim was that as a homosexual he would face persecution or other degrading treatment in Uganda were he to return.
2. By a decision of 4<sup>th</sup> April 2002, the Secretary of State refused to recognise the appellant as a refugee and issued directions for his removal. The matter came before an Adjudicator, Mrs P Wellesley-Cole, for hearing on 12<sup>th</sup> March 2003. The appeal was dismissed in all respects.
3. The appellant sought to appeal to the Immigration Appeal Tribunal which appeal was heard by a panel of two Vice Presidents on 28<sup>th</sup> July 2003. The appeal was dismissed.
4. Thereafter an appeal was made to the Court of Appeal against the decision of the AIT. By an order of Keene LJ on 23<sup>rd</sup> November 2004, the decision of the Immigration Appeal Tribunal was quashed and the matter remitted to the AIT for a fresh hearing before a differently constituted Tribunal.
5. There was a further period of delay before the matter came back before the Asylum and Immigration Tribunal. The first stage for reconsideration was conducted by a panel of Senior Immigration Judges on 24<sup>th</sup> July 2006, the focus of that reconsideration being the original determination of the Adjudicator. The Tribunal did not find her determination to be clear as to the central issues. A material error of law was found giving rise to a second stage reconsideration, all issues to be at large. Details of the decision are set out as follows:-

### “REASONS FOR THE DECISION THAT THERE IS AN ERROR IN THE DETERMINATION:

This appeal came before an adjudicator (Mrs P Wellesley-Cole) on 12 March 2003. The adjudicator dismissed the appeal and an appeal against the determination of the adjudicator was dismissed by the Immigration Appeal Tribunal on 30 April 2004 following a hearing on 28 July 2003. The reasons for the delay are unclear. The appellant appealed successfully to the Court of Appeal who in a consent judgment quashed the decision of the Immigration Appeal Tribunal and remitted the appeal before a differently constituted Tribunal.

Unfortunately the reasons given by the parties in the consent order are not before the Tribunal but the representatives told us it revolved around the question of the Tribunal's approach to the British High Commission letter dated 20 July 2000.

The discussion before us centred on the interpretation to be given to the adjudicator's findings about the appellant's homosexuality. In paragraph 16 of the determination the adjudicator said “Whilst I accept this sensitive young man who nervously gave his evidence in barely a whisper is quite possibly homosexual, I believe that this application which was made some eighteen months after his entry to the United Kingdom and a year after his leave had expired does to some extent damage his

credibility to be in need of international protection. Despite his explanation that he needed to gather the necessary evidence, I am of the opinion that if genuinely fearing persecution in Uganda to which he returned after a sojourn in Kenya, he would have applied for asylum at the earliest opportunity and not ostensibly when he had no further leave to remain in this country.” One particular sentence in paragraph 22 of the determination was interpreted by Mr Chelvan for the appellant as evidencing an error. Having referred to the appellant’s belief that it would be a matter of time before his homosexuality was discovered on return to Uganda, the adjudicator observed:

“However, in my view this is mere speculation on his part if he indeed is in a discreet homosexual relationship which I consider he could be in.”

Mr Chelvan submitted that the adjudicator was in effect requiring the appellant to be discreet on return to Uganda. However, an alternative interpretation was that the adjudicator was simply making a finding that the appellant was being discreet in a relationship in the United Kingdom.

We gave Mr Chelvan the opportunity to take further instructions about whether further findings of fact were necessary because of an arguable lack of clarity in the adjudicator’s findings. The adjudicator appeared to have had at least reservations about the appellant’s general credibility and there are at least question marks about whether the appellant had a subjectively held fear at all. Having had the opportunity to speak both to his instructing solicitors and to the appellant counsel accepted that the case should be adjourned for a fresh hearing to enable clear findings of fact to be made. Mr Gulvin for his part accepted the need for fresh findings but stated that the appellant’s homosexuality would not appear to be in contention.

We do not find the adjudicator’s determination to be clear on what may prove to be a central issue. If the adjudicator was finding that the appellant was discreet in the United Kingdom then there would be no particular reason to suppose he would not be discreet in another country. In so far as it was necessary to be “discreet” in Uganda the appellant would not arguably be required to modify his behaviour and so it might be difficult to argue that his human rights had been infringed, although we appreciate there are other issues that require investigation.

This is an appeal where the issues are not limited to issues of law. We find the adjudicator’s findings to be lacking in clarity. Accordingly it is necessary to have fresh findings of fact and the Tribunal can then consider the up-to-date background material in addition. In view of Mr Gulvin’s statement as to the Secretary of State’s position, the Tribunal is unlikely to disturb the finding that the appellant is a homosexual.”

6. Thus the matter comes before us by way of that second stage reconsideration.
7. We were presented with a substantial volume of documentation and evidence which will be identified in greater detail in the annex attached hereto. Essentially Mr Chelvan, who is acting for the appellant, submitted detailed evidence in the form of statements, expert evidence and background evidence to be found in bundles 1 and 2. A large number of authorities were also submitted under cover of bundles 1, 2 and 3. In addition to the bundles, we were presented with further documents and reports which will be referred to below.
8. Mr Chelvan, who represents the appellant, submitted for our attention a skeleton argument dated 15<sup>th</sup> October 2007 and a supplementary skeleton argument dated 18<sup>th</sup> October 2007.

9. On behalf of the respondent, Mr Charles Bourne, Treasury Counsel, presented for our attention a skeleton argument and a number of documents contained in the respondent's bundle.
10. The appellant was interviewed in connection with his claim on 1<sup>st</sup> April 2002. There are some three statements which he made in response to the letter of refusal and in further amplification of his claim. The last such statement was dated 12<sup>th</sup> October 2007. In addition, the appellant gave oral evidence and called a number of witnesses.
11. In summary the appellant was born in Kampala as one of five children, all boys. At the time when the appellant submitted his statement of evidence in support of his claim for asylum, his eldest brother worked for UNESCO, another brother worked for the Post Office and a third for the United Nations in Sierra Leone. The last brother was then still at school.
12. After completing the formal part of his education the appellant studied for a diploma in Nairobi at a beauty school to learn the art of hairdressing and beauty care. He applied for a job in Nairobi and became a hairdresser in the Urumbo Beauty Centre in Nairobi. In Nairobi he attended gay nightclubs and would see gay men. However, the government began to close down such clubs and arrest gay people and the appellant decided to return to Uganda.
13. He opened a small hairdressing and beauty salon which he ran for a number of years. There came a time when he received an invitation from his cousin Josephine, who lived in the United Kingdom, to come and visit her. This he did. At first he was reluctant to speak about his homosexuality but eventually confided in her. It is the case, as advanced on behalf of the appellant, that in the United Kingdom he was able to express his sexuality to its fullest extent and enjoys frequenting gay bars and being with other homosexual or lesbian people as well as heterosexual people. It was his contention that if his family in Uganda were to know about his lifestyle they would reject him and that he would be the subject of persecution at the hands of the authorities in Uganda were he to return. Whilst in the United Kingdom the appellant has enjoyed a number of homosexual relationships, indeed one of his former partners was present at the hearing. The appellant in his written statements described himself as "feminine and softly spoken". From our observations of him this would be an accurate description. Recognising as we do the dangers inherent in subjective approaches to demeanour, it is right that we acknowledge that there will be a perception in certain quarters that the appellant is effeminate in manner and speech.
14. The appellant gave evidence in some detail before us and was the subject of cross-examination. He commenced a homosexual relationship with B in 2003 which lasted for some two to three years. It ended in May 2006. He had had a long-term friendship with M and A, both homosexuals. B was present at the hearing and A gave evidence in the course of that hearing. In addition to those friends, his cousin was also in attendance at court.
15. The appellant said that in Uganda gay relationships did not really exist. Such relationships were considered not to be normal. Homosexuality was a crime and he

would receive no protection from the police. If he were to tell his clients about his homosexuality he would lose their custom. If he were to tell a taxi driver in Kampala that he was gay he was likely to face a beating.

16. He wanted to live a gay life. He had “come out” as a gay man and did not want to “go back into the closet”. He was able to have open relationships with other men which he could not enjoy in Uganda. He was able to express himself as a gay man.
17. He is fearful of his family’s reaction to his homosexuality if they found out. At present they do not know about his inclinations and such will inevitably be revealed on the issue of marriage. The appellant is now of marriageable age and it is expected by the culture of the community and by his family that he would marry. He indicated that he maintained regular communication with his parents and was quite often asked whether they could find somebody for him. If they were to find out the reality of the situation they would disown him and ask him to live in another area. Moving to another area would be somewhat difficult because he would have to seek permission from the local counsellors who would, no doubt, check up to make sure that he has no criminal convictions. As a 32 year old man who is not married, it would not take many questions to elicit the fact of his homosexuality.
18. The appellant says that in the United Kingdom he attends gay clubs, home parties and mixes with both “straight” and “gay”. He wishes to be able to express himself freely as to who he is and what he does. In Uganda he would be unable to do that and would have to keep his feelings to himself and be guarded as to whom he speaks to, or what information he shares. It is his contention that to return to Uganda would be to live in fear of being caught, and in fear of the law.
19. The appellant indicated that he had been actively involved in running a salon and hairdressing for some seven years. The precise chronology was not entirely clear from his evidence, but it would seem that he had been training and then running a salon in Beauty and Hairdressing for four years in Uganda. He had then been in Kenya for two complete years and then returned to Uganda for a further year.
20. Although he showed his feminine character in the hairdressing business, his feminine characteristics helped him in communication with his female clients in particular. The fact that he was feminine in nature did not necessarily indicate that he was homosexual, as he was always able to deny that he was if asked. As he becomes older and, the issue of marriage arises, that will prove to be more difficult.
21. The appellant repeated that he came to the United Kingdom to visit his cousin. As the visa ran out she asked him when he was returning home and that was the point that he confided in her as to his sexuality.
22. He met CS through a gay and lesbian group in 2007 and A through B in the summer of 2003. They go to many clubs and parties. The appellant repeated that he wanted to “come out” as a gay man.
23. He was cross-examined as to his evidence. He first realised he was gay when he was 15. He decided to study beauty when he was about 20 and he was about 24 when he went to Kenya. He went there around April 1998. He formed a sexual

relationship with a man in Nairobi. He agreed that beauty and hairdressing were often identified with homosexuality, but it also had to do with a feminine touch. No one really asked him whether he was gay. The clients saw the feminine side of him and if they suspected him of being gay he denied it, saying that he was straight. He was the only male – all the rest of the staff were female. He had met a number of men in the hairdressing profession who exhibited feminine characteristics but, generally speaking, they were married.

24. He returned to Uganda from Kenya just before 2000 having spent one and a half years there. When he returned to Uganda he felt safe but, because of the relationship which he had had in Kenya, he found it hard to manage his feelings and to hold in his sexuality. In the years in Uganda he had been focused upon study and work and not focusing upon relationships. Before he came to the United Kingdom he did not know what it was like for gay men to “come out”. He had not come to the United Kingdom because of gay issues. He appreciated how different society was in the United Kingdom, he having “come out” here. Because he has been in the United Kingdom for a long time he will find it harder to go home and keep it a secret. He does not wish to go “back into the closet”
25. He was asked about the passage in his latest statement at paragraph 6 where he indicated that if he were to be returned to Uganda he would want to “come out” to those around him. He contended that he would not get into a relationship in Uganda without some legal protection. Otherwise it would not take long for a person to arrest him. He had not “come out” in Uganda and had tried to keep his feelings to himself. He did not have a friend in Uganda who was gay and did not know any gay people in Uganda. As to the understanding which he had gained about life and about the dangers to homosexuals in Uganda such had been gained from documents. He had had no personal knowledge or acquaintance and understood what was happening from reading the news and from articles.
26. The appellant confirmed that he had not been arrested by the police as he had not formed any relationships in Uganda because of fear of arrest and persecution. He did not know what would happen if he let his feelings towards men show, but he would find it difficult to manage them.
27. He said his four brothers, three were married and one still at university, viewed him as a normal person. There was no assumption made that because he was a hairdresser working in a beauty salon that he was gay. If the subject of marriage arose the appellant would have to “come out” to friends and family and he would be definitely arrested. He wanted a life free from harassment.
28. He had a good relationship with his mother and father and family. The family had not asked him about his sexuality. His feminine characteristics had not excited any comments. What he wanted was a committed relationship to be able to express that relationship openly, free from pressure or from fear.
29. CS was called as a witness and as an expert. His statement and related documents are to be found at pages 197 to 225 of bundle 1.

30. He is a gay man and was recognised as a refugee following the hearing of his appeal in April 2007. He indicated that society in Uganda was hostile and that gay people were not welcome and were regarded as social misfits. He said that protection would not be provided to any gay man, indeed any such man who went to the police to ask for protection would be arrested and sent to prison. Homosexuality was against Ugandan law. He went on to say that it was not possible for a person to have a gay relationship unless that relationship was hidden completely. He had had one gay relationship in Uganda with a man called Francis. As he had a wife, that gave him a measure of cover.
31. He said that there were some bars in Kampala where gay men congregate. He found this information from another gay person. He contended that there were no safe places where one could openly disclose one's homosexual inclinations.
32. Mr S produced the determination relating to his asylum application heard on 25<sup>th</sup> April 2007. It was recorded in paragraph 9 of the determination that Mr S went to bars in Kabalagala where he knew that gay people congregated and became involved in Integrity Uganda. This was in 1999. In 2000 he was appointed Vice President of Integrity Uganda and in September 2003 Bishop Senyonjo asked him to speak at the "Halfway to Lambeth" conference in the United Kingdom. He attended that conference in October 2003 in Manchester and spoke at the conference about gay identity in Uganda. After the conference he flew back to Uganda and was arrested by the authorities at the airport. He was released on bail by the police after paying a bribe. He discovered that there had been media coverage at the conference and that coverage had been negative. Death threats were made against him. He went to Buwasa and stayed with a distant relative in hiding for two weeks and then left Uganda in January 2004 before his house in Nsangi was burnt down and his daughter Alex, badly injured. It was his belief that that was done deliberately. A local newspaper article of 6<sup>th</sup> November 2003 was produced at the hearing together with an expert report of Professor Oliver Furley dated 17<sup>th</sup> April 2007. Mr Senteza was found to be credible by the judge. It was found that Integrity Uganda was a genuine organisation committed to working with lesbian and gay Christians. The report of Dr Oliver Furley is also produced for our attention and is to be found at pages 212 to 220 of bundle 1. An article from Feminist Africa issued 02/2003 by Sylvia Tameale "Out of the Closet: Unveiling Sexuality Discourses in Uganda" was also presented.
33. Mr S was cross-examined by Mr Bourne. He said that he had been Vice President of Integrity Uganda which was a group of some 50 members organised to provide some spiritual support and moral guidance. He was involved with its day-to-day running and organisation and spoke in Uganda on behalf of the organisation. Meetings took the form of church services and there would be entertainment. Integrity Uganda had already been established before he had become involved with it. Meetings usually would be on the last Sunday of each month, in particular a disused schoolhouse at Kitimu would be used. This was in a built-up area and the meeting would take the whole day, starting at 10 o'clock. The highest number of people would be 50 and sometimes 30. Kitimu was a small town and had a local police station. The meetings were openly held and were mixed boys and girls, teenagers and old people. The main purpose was to give support to gay people. Integrity Uganda closed down following the publicity after the conference.

34. As for the arrests carried out in the various bars frequented by the gay community, the witness had heard about matters from the grapevine. He heard of two people being arrested and taken to prison. He said that the government was openly critical of homosexuals and has a law against homosexuality on the Statute books. He agreed that there were a number of bars in Kampala where the gay people could meet and socialise. He had heard of the bars from his uncle who was also a homosexual. His uncle used to go to the gay bars and did not have any trouble with the authorities. The witness himself had no direct experience of police breaking up gay bars. He was asked about his relationship with Francis, and said that Francis was not married.
35. A was called to speak to his statement of 17<sup>th</sup> October 2007. He first met the appellant in the summer of 2003. He was in a relationship with B and during that time they would go to various clubs and bars. He was described as a “out” gay man who conducted himself in a gay manner and was affectionate and tactile with other gay males and enjoyed dancing. The appellant would let people know that he was gay and was expressive of his emotions and of who he was in public. When A first knew the appellant, the appellant was shy and quiet but he quickly gained more confidence and more ability in expressing himself in a social context. In the statement A said that it is dangerous for a homosexual to return to Uganda. He himself was not Ugandan and had never been there. His knowledge was from the media and from discussing matters with friends.

### **Expert Evidence**

36. Considerable reliance was placed by Mr Chelvan upon a number of expert reports contained within the bundles. The first being that of Professor Oliver Furley of 17<sup>th</sup> April 2007, produced essentially relating to the case of Mr S. That report made reference to the report of Dr Sylvia Tamale, a Lecturer in Law at Makerere University. A copy of that particular report is also attached.
37. According to Professor Furley, two recent articles published in the on-line “Afröl News” reinforced the view that the dangers for homosexuals and lesbians in Uganda were getting worse. One headed “Fears of Enhanced Gay Repression in Uganda” picks up the Ugandan Parliament’s vote of 5<sup>th</sup> July 2006 declaring same sex marriages to be unlawful. It was said that that proposed Constitutional change followed months of state-promoted controversy about homosexuality in Uganda. It said that in October the Ugandan Information Minister had ordered police to investigate and take appropriate action against a gay organisation at the Makerere University in Kampala. It was also noted by Professor Furley that on 6<sup>th</sup> July 2006 the government-owned newspaper, New Vision, urged the state to crack down on homosexuality, warning government departments to outlaw and restrict websites, magazines, newspapers and television channels promoting immorality.
38. The second article was headed “Persecution of Gays Intensifies in Uganda”. There was a report of 1<sup>st</sup> December 2006 by a Gay Rights Group which reported a dramatic escalation of intimidation and persecution of gay and lesbian activists in Uganda as the result of a government campaign. This was following the church in demonising homosexuality in the country after the Anglican Church of Uganda launched a strong campaign against homosexuality. This was at the time when the Church of England



and the Episcopal Church in the USA were opposing the proposed ordination of homosexuals as clergy in those churches. The Archbishop of Uganda strongly added his voice in opposition to the proposal. It was said that there was a talk show on Radio Simba which featured sexual rights activists, but the Broadcasting Council of Uganda imposed a fine of US\$1,000 on the radio station and the chairman of the council warned the station to be more responsible about the content of its programmes. A Ugandan weekly newspaper, "The Extreme" was said to have published a list of purportedly gay people, claiming that homosexuals had invaded and infested Uganda.

39. Reference was made to thirteen alleged lesbians being outed by the Ugandan newspaper, Red Pepper, on 8<sup>th</sup> September 2006. The sentence for homosexuality is life imprisonment, although Professor Furley had no record of the number of prosecutions. He accepted that the Home Office may be right in stating that prosecutions are rare. Significantly, Professor Furley commented in paragraph 3.3 of his report that the campaign against homosexuals up until 2006 was fairly low key but, that in recent months, it had thereafter rapidly escalated. Prison conditions in Uganda were also the subject of the report. Finally, Professor Furley indicated that in Uganda's close knit communities it was difficult to hide.
40. There were additional comments to the report that Section 140 of the Penal Code criminalises "carnal knowledge against the order of nature" with a maximum penalty of life imprisonment. Section 141 punishes "attempts of carnal knowledge" with a maximum penalty of seven years imprisonment and Section 146 punishes acts of procurement of or attempts to procure acts of gross indecency between men in public or in private, with up to five years imprisonment.
41. It is said in the report that the social attitude towards gay men is hostile because they are seen as disrupting the norms of Ugandan society of its traditional aspects and are also seen to be against the teachings of Christianity, which is the most widely held religion in Uganda. In traditional society in rural Uganda, homosexuality remains a taboo subject and homosexuals are likely to be disowned by their families. Professor Furley went on as follows: "In the more modern society of Kampala I am told that there are a few gay bars, but these keep a low profile."
42. Professor Furley next goes on to say that President Museveni has made strong comments on this issue which have been strongly echoed by police and politicians and church leaders. Red Pepper is a popular radical newspaper leading a fierce attack on homosexuals and is reportedly owned by the half brother of the president.
43. Dealing with the incidents of persecution of gay men, Professor Furley refers to the report by Uganda's Gay and Lesbian Alliance (GLAA) where men in army uniform attacked and outed a gay man and took him to the police station where he was forced to make a statement. The Chairman of SMUG (another homosexual group) reports that many of those named in Red Pepper are living in fear of being arrested, or ostracised by their families or sacked from their jobs. That was a report dated 12<sup>th</sup> September 2006. The author of the report "Juliet Mukasa" was herself the victim of a raid on her home in July 2005 by local council officials when they confiscated documents relating to SMUG (Sexual Minorities Ugandan). A radio talk show was

fined £1,000 and ordered to apologise for “having offended a wide section of the public”.

44. Professor Furley went on to say that the Ugandan Judicial System was reasonably fair. There was some support in groups such as SMUG, although they had little effective power or influence. He said that neighbours or families were usually hostile to homosexuals.
45. When asked the question,

“Is it possible to be openly gay in Uganda?”

Professor Furley said,

“It would be unwise and dangerous to show this in public, which might lead to arrest, or worst still by mob action. The only place they may be open about it is in the gay bars in Kampala, of which I am told there are a few.”

46. As to Integrity Uganda, it was noted to be a small group of homosexuals with about 50 members. The speech of Mr Senteza was on BBC News online 27.10.03. That he was sent to the conference as a spokesman of Uganda was an indication, according to Professor Furley, that Mr Senteza was well-known as a pillar of the community.
47. The report of Sylvia Tameale of February 2003 is to be found at pages 221 – 225 of bundle 1. According to her article the issue of homosexuality took centre stage in Uganda between the months of February 2003, with the media being dominated by emotive views and opinions from the public. A wave of homophobia was triggered, it is said, by a recommendation emanating from a section of the woman’s movement which urged the proposed Equal Opportunities Commission to address the rights of homosexuals as members of a category of marginalised social groups in Uganda.
48. Ms Tameale expresses herself in very strong terms, particularly in paragraph 2 of her report. We shall return to that report in due course. The report seems in general to be advocating gay rights rather than highlighting, with any particularity, the problems in Uganda. She makes reference to several stigmatised terms to describe homosexuals in Uganda, and expresses the view that society considers lesbians and gays to be a moral outrage. She contends that with repressive conditions of state and religious inspired homophobia in Uganda, homosexuals find it difficult to come out of their closeted lives or to be open about their sexual orientation. Most blend within the wider society and even live under the cover of heterosexual relations while maintaining their homosexual relations underground. Ugandan gays and lesbians identify themselves simply with the term “Kuchu”. There are well-recognised forms of self definition within the Kuchu sub-culture to identify one another within the system. Identification upon gay men often consists of gestures or mannerisms. She stated that there were several gay and lesbian organisations in Uganda, including Gay and Lesbian Alliance, Gay Uganda, Spectrum, Right Companion, Lesgabix and Integrity. Most of these act as support groups. Reference is made in a report to avoidance of public visibility by gay and lesbian organisations given the severity of the law. The

silence of homosexual rights within the Ugandan Women's Movement contributed in part to the taboos surrounding all sexual matters within the society.

49. In addition to the report of Professor Furley dated 17<sup>th</sup> April 2007, reliance is also placed upon a report which he specifically prepared for the appellant dated 18<sup>th</sup> January 2007. Professor Furley set out his qualifications which indicated a long experience in Uganda until 1973 and thereafter annual visits. Significantly his report begins with the sentence, "Until quite recently, issues of homosexuality were little discussed in Uganda". However, it has gradually become a subject of conversation. The Ugandan Joint Christian Council stating in June 2006 that it strongly and unequivocally deplores all activities linked to the encouragement or promotion of the practice of homosexuality and lesbians. Reference has already been made to the Penal Code Act in Uganda and to the remark made by President Museveni in March 2002 that there were no homosexuals in Uganda. Amnesty International stated in its report of June 1999 that President Museveni held the view that active homosexuals should be prosecuted, a view publicly opposed by a well-known professor in an address to a conference on constitutionalism at Makerere University in October 1999. The state had arrested and prosecuted culprits in a same sex wedding in Kampala in 1999. Vice President Bukonya took the side of the Church when he praised Archbishop Nkoyo's stand against homosexuality at a government meeting, according to the Monitor of 7<sup>th</sup> November 2003. Reference was made to homosexuals in Uganda forming lobbies or groups advocating their rights. In October 2004, a radio station was fined for hosting a live talk with sexual rights activists. In July 2005 the home of Juliet Mukasa was raided.
50. Professor Furley went on to say that according to Amnesty International, Red Pepper is openly and specifically harassing lesbian and gay people. It said that on 8<sup>th</sup> September 2006 it published a list of thirteen women who it alleged were lesbians. On 8<sup>th</sup> August it published a similar list of names of men whom it claimed to be gay. Following the publication of the list of men on 8<sup>th</sup> August 2006, Amnesty International received several reports of harassment of gay men who had been named. Some had been harassed by colleagues, others were ostracised by relatives. Amnesty said it was concerned that the continuing targeting of gay people put them at risk of discrimination. Amnesty urged its supporters to write letters to both Red Pepper and President Museveni over the matter and called upon the government to ensure that discrimination, hostility and violence against lesbians and gay men was forbidden. The US-based Human Rights Watch had criticised Red Pepper for its homophobic articles.
51. Professor Furley commented that President Museveni continued to back the Anglican Church's view to resist Western values being brought into Africa. His comment of September 2006 to that effect was quoted. In response, SMUG (Sexual Minorities Ugandan) called for Ugandan citizens to stand up for their human rights.
52. Once again, Professor Furley was asked whether there were any incidents of gay men being persecuted in Uganda and essentially quoted very few examples but repeated the same examples which had been quoted by him in his later report relating to Mr Senteza. It was the view of Professor Furley that for the appellant to have an open homosexual relationship or openly declare himself to be homosexual

would put him at serious risk. Now that the appellant was getting older and single this would attract suspicion and place him at risk.

53. There is an expert report from Professor Robert Wintemute dated 18<sup>th</sup> January 2007 to be found at pages 31 to 41 of bundle 1. Such a report is essentially one dealing with legal aspects rather than focusing directly upon the appellant's own situation. Dr Semugoma is a Ugandan medical doctor living and working in Uganda. He has taken some time to study same-sex sexual behaviour. He relates that there is considerable reliance placed upon the report of Dr Paul Semugoma which is to be found at pages 71 to 196 of bundle 1. On 15<sup>th</sup> August 2007, the gay community held its first ever press conference. It was a two hour session detailing the problems of the gay community in Uganda. Most wore masks, but others did not. Dr Semugoma was present to deal with certain scientific issues. This conference was widely reported.
54. Dr Semugoma went on to say that the Minister of State for Ethics and Integrity, Dr Buturo criticised the conference and wondered why the police did not arrest those who were at it. There was much preached in church about the evils and challenges of homosexuality and a demonstration was called "The Faithful Against Homosexuality". The demonstration turned into a rally in a field in the city. Significantly the march through the centre of the city was not allowed. A number of religious leaders attended and radio stations took up inflammatory rhetoric. There followed quite a debate in the country on the issue of homosexuality. The gay leader, Juliet Mukasa and a group of others, went on a round of radio stations to put across the views of gay Ugandans. They were interviewed by the press, on television and radio stations. Minister Buturo continued to make inflammatory statements. The gay leaders themselves had been informed that they would not be arrested for giving their point of view.
55. Dr Semugoma went on to speak about the rhetoric that ensued. A tabloid newspaper took up the "outing" of gay people. Over three weeks it named and shamed gay people. The media fascination with the issue of homosexuality calmed down. Reference is made to the report in the Steadman Poll showing 95% of Ugandans opposing homosexuality. Dr Semugoma spoke of the negative social attitude towards gay men. The loss of jobs, being disowned and being disinherited are considered as risks in this situation. He confirmed that there were meeting places for gay Ugandans. Red Pepper listed some of them and many members of the community disappeared from those places.
56. A substantial number of reports were attached to that main report of Dr Semugoma. On the last day of the hearing application was made to allow the admission in the evidence of a further report from Dr Semugoma dated 26<sup>th</sup> November 2007. He was a Ugandan, it was not possible for him to come in person to speak to the report, but he had been asked to make various comments and it was desired that those be placed before the Tribunal. Such was admitted into evidence.
57. The further report had attached to it a copy of the Homo Terror article published by the Sunday Red Pepper newspaper of 9<sup>th</sup> September 2007. It was an article which, amongst other things, purported to out prominent gay Ugandans and named certain gay bars. Dr Semugoma had been asked specifically as to what outcome that report had had in Uganda.

58. He commented that the places mentioned were not “gay bars” in the traditional sense as they were not exclusively gay. They were popular mixed drinking places where gay people went. On certain days the clientele were almost certainly exclusively or largely gay. He said that the gay Ugandans were comfortable when there were other “straight” people as their camouflage. The immediate effect of the article was that the places were shunned by the gay people for fear of repercussions. Such repercussions being, for example, a raid upon the premises although, significantly, Dr Semugoma did not hear of any such raid. According to him, certain people who were named did lose their jobs and others were under suspicion. One person had been sidelined and another not regarded as a member of the team. Once again, possibly significantly, Dr Semugoma heard of no subsequent arrests.
59. He went on in the report to criticise the police as being corrupt. The sting attached to being gay was that everyone would do his or her best to prevent this knowledge coming out. He said the cases were often settled out of court between the victims and the police and he was involved in one such case in early 2005. He spoke of his personal experience a few days before the writing of his report of the Commonwealth meeting (CHOGM) in November 2007 and of LGBT activists attending it. There was some form of fracas between the Bishops and the activists. The next day the gay activists were simply not allowed to present anything. The Police proceeded to throw out the gay activists and chase them away.

### **Background Evidence**

60. There was produced, particularly in bundles 1 and 2, a very considerable volume of articles, comment, reports and other material to be supportive of the case as advanced by the appellant. We do not deal with each and every article, but will comment upon those to which our attention was specifically referred to in the course of argument and submission.
61. It is right to note, however, that the respondent also produced a small bundle of documents relating to various matters within Uganda. There was, for example, a report from a Criminal Justice Baseline Survey of the Justice Law and Order Sector of Uganda 2002 published in June 2002. This was a survey focused upon criminal justice in order to establish the status and current trends. It represented a field survey carried out between October 2001 and May 2002 and the methodology is set out in some detail. Some 1,017 households were covered by the survey. The significant finding, which is relied upon by the respondent, is that a majority of respondents in all regions supported decriminalisation of adultery and homosexuality. In the Focus Group discussions, of which there were seen to be sixteen, the participants who had no experience of homosexuality in practice considered that it was a heinous offence and that it should be punished severely. That contrasted with the views of the household informants who were more liberal in their views, more than 70% favouring decriminalisation.
62. There was also published an article from Human Rights Watch “Uganda: Rising Homophobia Threatens HIV Prevention”, a report of 11<sup>th</sup> October 2007. It referred to the fact that in the August 16<sup>th</sup> a press conference was held by a coalition of LGBT groups in Uganda to launch a campaign called “Let Us Live In Peace”. This

conference led to a month long backlash in the country. It led to the tabloid paper Red Pepper publishing the first names, work places and other identifying information of 32 male homosexuals. The article promised to name and shame top gays of the city. It named a prominent campaigner who had listed Ugandan LGBT rights activists by name on a website, called them “homosexual promoters”. Pastor Ssempe was the key organiser of an August 21<sup>st</sup> rally at Kampala at which hundreds of demonstrators demanded government action to punish LGBT people, calling homosexual conduct a criminal act against the laws of nature.

63. Ugandan officials continued to threaten a new persecution of LGBT people. On August 21<sup>st</sup>, Radio 1 in Uganda announced that the Deputy Attorney General Ruhindi had called for criminal prosecutions of lesbian gays in Uganda. In late August the Uganda Broadcasting Council suspended Gaetano Kaggwa, a presenter of Capital FM Radio for interviewing a lesbian activist on air.
64. Meanwhile, Red Pepper threatened to name all lesbians and gays. In 2006 the newspaper published a similar list with 45 names.
65. On 12<sup>th</sup> September 2007, in Africa News it was indicated that a court agreed to hear the case of two women who claimed that they were tortured by police because of allegations that they were lesbians. The result of that case does not seem to have been stated.
66. Finally, there was produced the Operational Guidance Note of Uganda OGNV4.0 issued 17<sup>th</sup> January 2007 which spoke of the fact that in February 2006 there were presidential and legislative elections and that President Museveni was re-elected for a five year term. Much of that report was devoted to the issue of rebel groups and the possibility of settlement. Little mention was made in that report, however, about any ill-treatment of homosexuals.

### **Submissions**

67. The parties proceeded to make their submissions to us. Those submissions were very detailed, and indeed spanned some two days of court time. We do not propose to deal with the submissions extensively, rather we seek to highlight the main arguments which were made. We indicate that insofar as reference was made in such submissions to evidence, we have taken that evidence into account. In terms of legal authorities, they are substantial in volume. Although reference will be made to them, they will not be cited extensively unless such is necessary in the course of our analysis of the evidence and of the issues.
68. Mr Bourne, on behalf of the respondent, invited our attention to his skeleton argument of 17<sup>th</sup> October 2007. It was his contention that the removal of the appellant to Uganda would not expose him to serious risk of persecution or to a real risk of treatment contrary to Article 3 of the ECHR. It was his contention that the appellant’s rights in respect of Articles 8 and 10 of the ECHR would not be breached either.
69. It is not in dispute that the appellant is a homosexual and that generally speaking, save for a few exceptions, his credibility is not impugned. That concession is not, however, made in respect of the other witnesses called in support of his case.

70. It was also accepted on the part of the respondent that there was significant prejudice against homosexuals in Uganda and that it was illegal for homosexuals to engage in sexual acts. That having been said, however, the burden of the submission made by Mr Bourne, was that there was little evidence that such laws were in fact enforced, or that there was ill-treatment of homosexuals generally.
71. Despite the large quantity of material there was, he submits, a striking lack of specific well-documented cases of ill-treatment of homosexuals. There was much written in the articles, particularly by those coming from a particular view point as to what risks may arise or the fears that have been expressed, but very little by way of outcome or activity. We were invited to place greater weight upon background materials from inspected sources rather than from press cuttings or statements by complaining groups.
72. Mr Bourne submitted that an example of the lack of positive evidence of discrimination, harassment and arrest was that to be found in the last page of the report by Mr Semugoma to be found at page 80 of bundle 1. It said that when Red Pepper had listed a number of meeting places, the members of the gay community who had frequented them did not thereafter go back to them for fear of arrest. There was, however, no evidence adduced in that report that any raids or arrests in fact took place at all. The most that could be said was that certain individuals experienced harassment at work or discrimination in the terms of employment. There was nothing to indicate that the government itself, or indeed any agency of the government, whether police or security, had taken any untoward action against those individuals.
73. Much has been made of the climate of fear and the hostile attitude of the police, but little by way of positive examples of police activity were given relating to members of the lesbian and gay community.
74. Although the expert evidence, as adduced on behalf of the appellant, spoke of the public pronouncements by the government and other prominent individuals, there was little to indicate that such had been translated to any practical effect. Professor Furley was asked the specific question "Are there any incidents of gay men being persecuted in Uganda?" His reply, which was contained at page 46 of bundle 1, was to highlight very few actions taken against the lesbian and gay community by the authorities.
75. The COIR Report of April 2006 identified the criminalising provisions and referred to the government and media calling for a legal crackdown, but gives no evidence or indication as to whether that crackdown indeed materialised. Few specific incidents are cited. There are others said to have resulted in harassment, abuse and torture, but no details are given as to those individuals or any attempt at numbers specified. It might be considered that Juliet Mukasa and Sylvia Tameale, as clear activists and having a high profile, would be the subject of attack or arrest, if the policy of the government were to be carried into practical effect. In contrast the evidence would seem to be that in July 2005 the authorities arrested a friend staying with Juliet Mukasa and took certain documents. There was no indication of any persecution by the authorities in respect of any of the prominent leaders, particularly those who

featured in the media in 2007. The press conference of 15<sup>th</sup> August 2007 and the radio interviews which followed would have been such as to promote discussion and comment, but there is no indication of any persecution or harassment of those who took part. Mr Bourne further submitted that, although it may well be clear from the generality of the reports that the population generally in Uganda is conservative, its traditional values do not approve of the lesbian and gay culture. The view seemingly is one reinforced by church comment and controversy. There was little, however, to support the contention of mob violence or of a general pervasive atmosphere of harassment and persecution, directed towards members of the gay community.

76. Mr Bourne invited us to find that the evidence, looked at as a whole, supports the proposition that far from hiding away from society the lesbian and gay community are actively part of it. There are bars and restaurants to which they can go, seemingly mixing with “straight” clients without any suggestion of malice or difficulty. There are a large number of lesbian gay rights groups which have become increasingly vocal in recent years, seemingly with little adverse result. Even the campaigning group at the Commonwealth Heads of Government Meeting Convention in November 2007 had found themselves removed from the building, but not arrested. There was no indication that they had been, in any sense, targeted or abused for their prominent stand in relation to gay rights.
77. Mr Bourne submitted that there is no real risk in Uganda to those who give public expression of their homosexuality. Such is a matter for the Tribunal to determine within the context of cultural norms in Uganda generally. Reliance was placed upon the case of J v Secretary of State for the Home Department [2006] EWCA Civ 1238 to the extent that even if some modification of behaviour was required out of respect for social norms, such was not sufficiently significant in itself to place the appellant in a situation of persecution. It was Mr Bourne’s submission, that contrary to the contention advanced by the appellant and by his witnesses, he had not been forced to conceal his sexual identity and that any modification of conduct in public would not be such as to be considered to be intolerable or unreasonable.
78. On behalf of the appellant, Mr Chelvan invites our attention to the two skeleton arguments which he has prepared and drew our attention to a number of authorities.
79. The first proposition advanced on behalf of the appellant is that he would be at risk of prosecution, arrest, harassment were he to return. Mr Chelvan submits that there is a climate in Uganda which is hostile to homosexuality. The authorities have, through their various pronouncements, indicated their intention to crack down upon the same. He relies upon the witnesses who have been called, particularly the expert witnesses as to their experiences in Uganda. He relies heavily upon the Red Pepper article and its attempt to “out” gay men.
80. He develops his submissions to the effect that sexual identity is more than just sexual conduct. Thus, at the very least, the appellant’s removal would involve flagrant breach of his Article 10 rights to freedom to express his sexual identity to those around him and a flagrant breach of his Article 8 rights to a private life, both in the private sphere and in the outside world linked to his sexual identity. In the United Kingdom the appellant can express his sexual identity freely in whatever



circumstance, whereas that would not be the case in Uganda. At the very least he would be constrained by fear of such public or open expression.

81. Mr Chelvan further submits that any modification of conduct, particularly if such modification arises from a fear of harm would in itself be persecutory in nature. Mr Chelvan relies heavily upon the fact that the appellant is now a single 32 year old man with no wife and homosexuality would inevitably be discovered when expectations of marriage and questions about why he is not married will arise. It would not be reasonable or fair to expect him to lie in such circumstances.
82. Mr Chelvan further submits that having regard to the wording of Article 5(2)(b) of a Qualification Directive, any legislation criminalising homosexuality offends against the spirit of the Directive and would seem upon its interpretation to be in itself an act of persecution.
83. Mr Chelvan developed at length his primary submissions and invited our attention to various reports and to the decisions both of the domestic and international Courts in addition to the domestic legislation and decisions. We do not set out those matters in any great detail at this stage. Essentially they have been set out in the skeleton arguments as submitted and it would be duplication therefore to repeat the same. A number of the matters which have been canvassed will inevitably form part of our reasoning later in this determination.

### **The Law**

84. In determining whether or not the appellant is a refugee or qualifies for humanitarian protection by virtue of the 1951 Geneva Convention and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, we remind ourselves as to the lower standard and burden of proof to be applied in such matters, namely whether there is a serious possibility or a reasonable likelihood of persecution or of serious harm. We bear in mind also the Immigration Rules and particularly paragraphs 339A to 339P.
85. An “act of persecution” is defined in the Protection Regulations, at Regulation 5(1). Regulation 5(3) confirms that an act of persecution must be committed for one of the reasons set out in Article 1A of the Refugee Convention. Protection is defined in Regulation 4(1) and (2).
86. We bear in mind also that the same lower standard is to be applied in relation to the appellant’s human rights as enshrined in the European Convention on Human Rights in determining whether or not there is a real risk of a breach of such protected rights. In that connection we bear in mind in particular Articles 3, 8, 10 and 14 separately and in combination.
87. We remind ourselves that, in assessing credibility and the issues, we should consider the evidence both subjective and objective as a whole giving due weight to such factors as may be relevant and material within the overall context. We remind ourselves also of the legislation and the judicial decisions made relating to the same.

### **The Issues**

88. The central issue in this appeal is whether the appellant, if returned to Uganda as a homosexual, would face persecution, serious harm or breaches of his fundamental and protected human rights.
89. To determine such an issue requires consideration of a number of distinct and yet related factors, in particular:-
- (1) What is the current situation facing homosexuals in Uganda?
  - (2) How did the appellant behave as a homosexual in Uganda before he left the country?
  - (3) How will the appellant behave upon return?
  - (4) If he acts in that way will that expose him to persecution, harm or a breach of his protected rights?
  - (5) If not, is it reasonable to expect him to continue to act in that way?

#### **What is the Current Situation for Homosexuals in Uganda?**

90. We remind ourselves of the opening remarks of Professor Furley in his report of 18<sup>th</sup> January 2007, as submitted for this hearing, that issues of homosexuality were little discussed in Uganda until relatively recently.
91. It is in that context that the final report dealing with the Criminal Justice Baseline Survey of 2002, as produced by the respondent, has some significance. 1017 households were interviewed, such interviews being conducted at 58 sites in 29 counties. There were some sixteen focus group discussions and some 28 key informants in twelve institutions.
92. Although opinions as to what should be done with homosexuality were varied, there was a wide diversity of opinion from those who wanted stricter laws and punishments to those who supported decriminalisation of adultery and homosexuality. The report expressed there to be a widespread acceptance of decriminalisation. There were areas which were more conservative than others. Although care must be taken not to promote the significance of the report beyond its own ambit of statistics, it does not reflect a society focused upon the exposure and punishment of homosexuals.
93. It is to be noted that much of the attention of politicians and indeed of people as a whole who live in Uganda, was focused upon the issue of the rebel organisations, particularly the Lords Resistance Army and efforts to conclude peace with such groups. It would be surprising indeed, if the issue of homosexuality took centre stage in the light of those other political considerations.
94. It is clear from the background material that from time to time the President and other members of his government have spoken out against homosexuality and have promised a crackdown upon it and its eradication. Also, as Professor Furley has indicated in his report, the question of homosexuality has come more to the fore in

public debate and media comment, particularly arising from the Church's ban in relation to the ordination of homosexual priests and bishops. So much has been said of a potentially inflammatory nature that the issue before us is what has been done as a consequence.

95. Those who have been called to give evidence in support of the appellant's case have been at pains to paint a picture of harassment and fear, arrest and ill-treatment which, for our part, we find difficult to reconcile with the background material which has been presented. Mr Robertson, for example, maintains that it is unsafe for homosexuals to return to Uganda. He is not Ugandan, has never lived in Uganda and he agreed with the proposition put to him that his information came from the media and not from personal experience.
96. The report from Sylvia Tameale of February 2003 is of some significance in this context. We find that her report or statement is partisan to a very high degree and seeks to paint a somewhat distorted picture of the situation of homosexuality in Uganda. In paragraph 2 of her account she says as follows:-

"It is impossible to describe the depths of the ugliness, rage, revulsion, disgust and malevolence exhibited by the vocal homophobic public".

That statement made in 2003 stands in sharp contrast with that of Dr Furley in his report of January 2007 which indicate that issues of homosexuality were little discussed in Uganda until recently.

97. We considered the evidence of Mr S and conclude that he had sought to exaggerate the difficulties which he faced whilst living in Uganda. It was his contention in paragraph 11 of his statement to be found at page 198 of bundle 1, that it is not possible for a person to have a gay relationship. "The only relationship would be one where you hide yourself 100%". He claims that he had one gay relationship with Francis which was concealed to some extent by the fact that he was married.
98. Such is, however, to paint a somewhat distorted picture of his involvement and activities as a gay man in Uganda. In his evidence Mr S spoke of bars in Kampala where gay men meet. He spoke of his uncle being a gay man who used to frequent such bars. His uncle seemed to have little trouble in that connection and, as Mr S agreed, the uncle nor himself had no experience of police breaking up the gay bars. Although it was not his evidence before us, it is to be noted, that in his evidence before the Adjudicator, in pursuance of his own appeal, Mr Senteza indicated that from 1991 he began to go to bars in Kabalagala where he knew that gay people congregated. This would seem to be a period until October 2003 when he spoke at the Halfway to Lambeth Conference in the UK. Thus there would seem to be a four year period when he was able to frequent such bars. Further, during this period, he became involved with Integrity Uganda, a support group for Lesbian and Gay People which on his own account met relatively openly at a disused school house in a small town in Uganda. Meetings were on a regular basis on the last Sunday of each month and lasted all day. We did not find it credible that the existence of such a group would be unknown to the authorities in the local area, but seemingly nothing of a hostile nature was done to them before October 2003 or at all. There was a paucity

of evidence on the issue as to what happened to Integrity Uganda after October 2003.

99. In connection with the gay bars, it was the evidence of Dr Semugoma that they were not bars solely for gays but that lesbian and gay people met up at such bars mixing with “straight people”. He seeks in his account to put a slant to that by seeking to suggest that it was by mixing with the straight people which gave the cover to the homosexual community. For our part we do not find that to be credible in any way at all. There is no doubt that it would be readily apparent to those members of the “straight” community visiting such bars that homosexuals were also frequenting them. Such would be readily gained not only by behaviour and mannerisms, but also by the nature of the conversation. What is of more significance to our consideration is that certain “straight” people seem to take no exception to the homosexual community in their midst. There is little if any evidence to support the contention that such bars were raided or individuals arrested from them. There is nothing to indicate any significant government or security interest in such bars.
100. The appellant in his evidence makes the point that he would wish as a homosexual man “coming out of the closet” to be able to go to nightclubs and parties and to enjoy the company of other homosexuals. There is little in the background evidence as placed before us to indicate that that was something that was not open to the homosexual community in Uganda in any event.
101. The claim of Mr S centred upon his claim that arising from his remarks at the conference in 2003 he was arrested by the Ugandan authorities and that subsequently his house was burnt down and his daughter injured. We note that upon arrest, Mr S was released after paying a bribe and there was no suggestion of any charges or any ill-treatment being exercised against him. The cause of his house being burnt down remains largely unclear as does the identity of whoever it was that did so.
102. The suggestion mooted by the evidence of the witnesses generally was to the effect of mob violence and harassment and repercussions taken against homosexuals. There is, however, a paucity of any information identifying any specific incident. We find that to be of utmost significance in assessing the matter of the country conditions. As we have indicated, there are substantial volumes of material, both on the web site and from interested groups, including Amnesty, US State Department, Human Rights Watch and many other NGOs and organisations focused upon human rights. Save for a very few incidents to which we will return, little by way of detail is forthcoming concerning any actions taken against homosexuals. We cannot conceive, given the amount of scrutiny which has been applied to Uganda by these various organisations, that they would be unaware of specific incidents and would not have reported them.
103. Mr Semugoma, in his evidence, seeks to suggest that there would be a climate of concealment on the part of the authorities as to whom they had arrested and whom they had dealt with. For our part we very much doubt the accuracy of that particular remark in the context of homosexuality. If, as seems clear, there were public pronouncements by the government expressing the intention to crack down on homosexuality, it would possibly serve its purpose to make an example of people so

as to demonstrate that zeal. There is no reason at all why their activities would not be publicised. Similarly there would be possibly every reason for the aggrieved victim, through the medium of human rights and gay rights groups, to publicise such ill-treatment as was received. In the absence of clear evidence on this issue, much must be speculative. We were struck, however, by the paucity of such specific incidents in the totality of the objective evidence which we have received. It is serious indeed if Mr S's house was burnt down, but there is little evidence of other similar incidents being conducted specifically against homosexuals. Although the Immigration Judge in the appeal of Mr S found him to be credible we, for our part, can find his evidence of little of assistance in our task of evaluating the evidence as a whole.

104. Much reliance is placed upon the evidence of Dr Paul Semugoma. In his supplementary report dated 15<sup>th</sup> October 2007, he seeks to say that by openly telling people of one's sexual orientation the reaction would be negative, possibly violent. He adds that mere suspicion that one is gay can set off mob behaviour. Thereafter he speaks of public lynching and stoning, suspicions of witchcraft and robbery, apart from expressing the view that mob violence in Uganda is a definite possibility. However he gives no specific examples in which that has happened.
105. In support of his contention, Dr Semugoma includes as an annex to his report, live testimonies as published in the Monitor Newspaper on 11<sup>th</sup> August 2007. The report speaks of a group of religious leaders holding a demonstration in the city, saying that homosexuals have no place in society. There is an account of one Jane Rose Nassuuna being stoned to death accused of witchcraft. The report goes on to talk about mob violence in Uganda and how 97 people were killed, 108 cases of which involved theft, others robbery, witchcraft, murder, burglary and other suspected crimes. The statement, although going into considerable detail, has little to say about homosexuality or attributing any of the deaths to that cause. There is an account of one Brenda Kizza Entebbe. She lives as a woman, but it is common knowledge in her community that she used to be a man. She spoke of problems with the police and with the community as a result. Another, Juliet Mukasa, was said to be rejected by her family and fired from her jobs because of being a lesbian. She said she was raped by men and that the government broke into her home and arrested her friend. Another person, Nabageser, seemingly was suspended from university because of her sexual orientation. Richard, age 30, is gay and has been accepted by his family. He is happy because he has a community and has been with his partner seven years. He finds it hard however to go to church. Julian makes the comment that it is not only in Kampala that gay people exist or make a fuss about rights. He knows gay people in Jinja, Lira, Arua everywhere. In his village of Arua rumours spread that he was a gay. "I finally went in 2005, people were really chill, most just said "So what, it's her life." He met an undercover policeman at a bar once with a bunch of gay people hanging out together. Juliet was afraid that the policeman would arrest them but he did not. When asked why he was not arresting them the policeman told him that they were sensible people and that there was no case to take against them. Finally, Helena who works for Freedom and Roam Uganda speaks of being bothered in a bar on one occasion.
106. Having considered the documents on which Dr Semugoma seeks to rely heavily we can find little, if anything, to indicate the cause for concern as he has expressed it to

be. It is apparent to us from the articles that there are quite a number of gay bars and areas where gay people can meet, not only in Kampala but throughout Uganda. Despite the rhetoric there would seem to be little in reality that is done about it by the authorities or by anybody else.

107. Three particular incidents are cited more recently. The first is the publication by the Sunday Tabloid, Red Pepper, of the identity of a number of gay people and specifying a number of gay clubs. Little of consequence would seem to have flowed from that. Dr Semugoma seeks to indicate that because of the article, many gay people sought to avoid those bars, fearing arrest. There is, however, no evidence that such bars were raided or that any significant arrests were made arising from the information contained in that article. Dr Semugoma seeks to suggest that he is intimately involved with the Gay Rights organisations in Uganda. It is not entirely clear whether he is of that sexuality or not, but it would be reasonable to suppose that given his intimate involvement, any actual raids upon bars or arrests of individuals would have come to his attention or indeed to the attention of the active rights groups which now clearly exist. The fact that no such information has been forthcoming is of itself significant. That one individual may have been sacked or sidelined by his boss at work as a result of the article is scarcely an indication of widespread or endemic harassment of gay people.
108. The second event is the gay community holding its first ever press conference on 15<sup>th</sup> August 2007. Most of those who took part were masked, but not all. This conference was widely reported, which was the purpose of holding it in the first place. The purpose of the conference was to provoke debate and that seemingly was the result, positive or negative from the standpoint of those holding the conference. Notwithstanding the strong comments made in the press or the media, there was no indication that those who took part were arrested and no indication of any wider mob violence or repercussions against gay and lesbians in general. Once again, given the presence in Uganda of so many gay rights organisations as well as the usual Human Rights Watch and other NGO and other human rights organisations, it is surprising that no information has come to light in relation to overt violence, arrests, harassment or intimidation, arising from this conference or generally.
109. The final matter being the expulsion of a group of homosexuals from the Commonwealth Heads of Government meeting in Kampala on 23<sup>rd</sup> November 2007. A press article attached to the supplementary report of Dr Semugoma recounts the LGBT speakers remaining outside the gates in quiet protest waiting to be allowed back to deliver their speeches. They were there for seven hours. Once again there is no indication that any action was taken against those in the group by arrest or by violence.
110. Mr Chelvan relies also upon an article by Max Neghicheam who is an Advisory Board member of the Sexual Health Rights Programme of the Open Society Institute in New York City and also a Programme Director of ILGA – Europe. He produced a statement dated 15<sup>th</sup> October 2007. He spent three weeks in Uganda between August 28<sup>th</sup> and September 13<sup>th</sup> of 2007 researching lesbian, gay, bisexual and transgender activity. He interviewed ten LGBT groups and other individuals in Kampala, Jinja and Masaka. He speaks of an atmosphere of fear for personal integrity and noted cases of gay people being fired from their jobs, or being disowned

from their family. The case of Paul who appeared on TV speaking out for gay rights was cited in particular. Red Pepper was mentioned. Pastor S S Empa of the Makarere Church was also cited.

111. Apart from such matters, little evidence was given of any other specific instances and none seemingly for violence, arrest or imprisonment of gays or lesbians. It is not entirely clear from what perspective the witness is coming from, or indeed as to the extent to which he is objective about the problem which he seeks to describe. He describes himself as an activist but it was not entirely clear whether he was an activist within the Lesbian and Gay Rights Movement. He seems to suggest in the course in the report that he is homosexual. Reference is made to Victor Mukasa and the security which has to surround him. This picture of a person living in a remote but well-guarded house in Kampala bears little relationship with descriptions elsewhere in the background evidence as to the life-style of that individual. In any event the report does not assist materially, nor does it throw any new light on the aspects of the matter which we are considering.
112. Thus we return full circle to the report of Professor Furley of 18<sup>th</sup> January 2007, and the specific question asked of him as to any incidents of gay men being persecuted in Uganda. He cited that in July 2005 the home of Victor Juliet Mukasa was raided in her absence and a friend arrested and subjected to humiliating and degrading treatment. Reference is made to the Red Pepper article. According to Amnesty International Red Pepper is "openly and specifically harassing lesbian and gay people".
113. It is significant that in Uganda there are a substantial number of human rights groups and, indeed gay and lesbian groups. All have particular interest in monitoring what happens in Uganda and we have no doubt that if any significant event or arrest took place, that that would be the subject of comment or media attention.
114. As we have indicated before, notwithstanding the enormous quantity of material which has been placed before us, we can find very few specific incidents set out in detail as to harassment, arrest or prosecution. Understanding the polemic which is addressed, either by government ministers or the media, we can find little by way of concrete example of any violence being inflicted or arrest and prosecutions instigated.
115. Mr Chelvan submits to us that it is not necessary that there should be actual arrest or ill-treatment. He submits that the legislation is in itself discriminatory against the lesbian and gay community such as to infringe at the very least Article 14 of the ECHR. He submits that the pronouncements are at the highest level and are designed to instil fear into the gay and lesbian community, so as to force them to act in secret or under a feeling of constraint. He submits that the pronouncements are designed to provoke the wider community into anti-gay attitude and behaviour. He asks us to find that that in itself is persecutory behaviour such as to come within the 1951 Convention or to infringe or to breach the obligations in relation to Article 3 by exposing the gay and lesbian community to humiliation, abuse and degrading treatment.

116. In that connection our attention was drawn to the decision of the European Court of Human Rights in Strasbourg in the matter of Smith and Grady v the United Kingdom (Application nos. 33985/96 and 33986/96) [1999] EHRR 493. This was a matter raised as to the policy applied in the armed forces which made homosexual conduct a disciplinary matter leading to dismissal from the services. It was contended that the operation of such a policy would breach the fundamental human rights or those wishing to engage in same sex relationships. It was argued on behalf of the Ministry of Defence that such a policy was necessary to promote discipline and enable the military to function as it should. It was argued that homosexuality was undermining the general military efficiency.
117. The Court at paragraph 89 of its judgment recognised that an interference would be considered “necessary in a democratic society” for a legitimate aim if it answered a pressing social need and if, in particular, it was proportionate to the legitimate aim pursued. The Court underlined the link between the notion of “necessity” and that of a “democratic society”, the hallmarks of the latter including pluralism, tolerance and broadmindedness. The Court recognised it was for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient would be one for the court. They further highlighted that where the relevant restrictions concerned “a most intimate part of an individual’s private life” there must exist, “particularly serious reasons” before such interference can satisfy the requirements of Article 8 of the ECHR. At paragraph 116 of the judgment, the Court considered that the appellant’s complaints under Article 14, in conjunction with Article 8, did not give rise to any separate issue.
118. The claimants in Smith and Grady maintained that their discriminatory treatment based on crude stereotyping and prejudice, denied and caused affront to their individuality and dignity and “as such” amounted to treatment contrary to Article 3. It also noted that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all the circumstances of the case, including the duration of the treatment and its physical and mental effects. It is also recorded that such treatment may be considered degrading if it is such as to rouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.
119. In paragraph 122, however, the Court, whilst accepting that the policy, taken together with the investigation and discharge which ensued, “were undoubtedly distressing and humiliating for each of the applicants, did not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.”
120. The claimants further argued that the right to give expression to one’s sexuality encapsulated opinions, ideas and information essential to an individual and his or her identity. It was said that the policy of the Ministry of Defence forced them to live secret lives denying the simple opportunity to communicate openly and freely their own sexual identity which, in turn, had a chilling effect on them and was a powerful inhibiting factor in their right to express themselves.



121. The Court made a comment upon which Mr Chelvan strongly relies in the context of this case as follows in paragraph 127:-

“The Court would not rule out that the silence imposed on the appellants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression.”

122. However the Court noted that the subject matter of the policy and consequently the sole ground for the investigation and discharge of the appellants was their sexual orientation which is “an essentially private manifestation of human personality”. It considered therefore that the freedom of expression element of the case was subsidiary of the appellants’ right to respect for their private lives which in principle was that in issue. The Court considered it was not necessary to examine the appellants’ complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14. It went on to find that the appellants’ right to respect for their private lives was violated by the conduct of the Ministry of Defence.

123. Mr Chelvan also invited our attention to the case of Pretty v United Kingdom (29<sup>th</sup> April 2002) (Application No. 2346/02) [2002] 2 FLR 45. Such a case revolved around the issue as to the right of an individual to assisted suicide under the European Convention on Human Rights. In that case the Court did not find any breach of the Convention. Mr Chelvan, however, invited our attention to certain passages in that judgment relating the Court’s assessment as to the applicability of Article 8(1) of the Convention. He wished to highlight, in particular, paragraphs 61 and 62.

124. The Court in those paragraphs recognised that the concept of “private life” was a broad term not susceptible to exhaustive definition. It covered the physical and psychological integrity of a person. It could sometimes embrace aspects of an individual’s physical and social identity. Elements such as gender identification and sexual orientation and sexual life fell within a person’s sphere protected by Article 8. It also protected a right to personal development and a right to establish and develop relationships with other human beings in the outside world.

125. The Court observed that the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the Criminal Law to protect people from the consequences of their chosen lifestyle has long been the topic of moral and jurisprudential discussion.

126. Mr Chelvan seeks to argue that the climate of fear which has been deliberately engendered by the Ugandan government media breached the human rights of the appellant and in particular Article 3 and Article 8. We observe that a common theme throughout the evidence both as presented by the experts and by the individuals concerned, was that there was a climate of fear and of the prevailing societal disapproval.

127. The central and perhaps most recent example of such overt expression of anti-homosexual views was that of the Red Pepper article. Much has been made of it. There is little evidence, however, that members of the public or indeed elements of the community were incited to act by reason of what was printed in that article. Apart from perhaps two individuals being discriminated against at work, there has been no evidence of arrest or harassment either by the authorities or by the population generally. Again, although the report speaks of mob violence, there is no evidence that any such violence was directed towards homosexuals or for that reason.
128. It is very easy to paint popular opinion as being only in one direction but, as was made clear by the baseline survey of the justice, law and order sector of Uganda, there was quite a substantial body of opinion from those who were spoken to favouring a more liberal view, both as to the law and to the approach to homosexuality. We make it clear that we are not seeking to suggest that persecution can only arise if there is a monolithic societal hostility towards homosexuals. Clearly it can also arise from a number of non-state actions, particularly if there is no protection. For our part, however, we have been presented with little reliable evidence of such hostility or activity.
129. A specific question was asked of Professor Furley, as recorded in his report of 18<sup>th</sup> January 2007. That question was in these terms:-

“Is it possible for a person to have an open gay relationship without suffering adverse consequences?”

The answer was in these terms:-

“It would be very risky. Ugandan society consists of very close-knit family groups, neighbours, as well as clans and other networks such as work mates or former pupils of schools. In any locality, everybody knows everybody else’s business, and privacy is hard to come by. If you are discovered to be a homosexual then there is a risk of arrest and imprisonment, in addition to violence and discrimination. As explained there is no protection available.”

130. As we have already indicated, the background evidence gives very few examples of any arrest or imprisonment arising from that matter and very little evidence of any overt violence or discrimination. We find, therefore, that the risk has been exaggerated and that in reality that which is feared does not arise.
131. A further question asked of Professor Furley was:-

“What steps would a gay man have to take in order to avoid the risk of serious harm in Uganda?”

Professor Furley replied:-

“His best chance to avoid risk would be to hide himself in a big town where he might avoid notice (Kampala being the only sizeable town) or possibly in some very remote region.”

132. Given the background material and the nature thereof, we place very little weight upon that particular assertion. There are gay bars and places where the lesbian and homosexual community can meet in a number of towns not simply confined to Kampala. There are a significant number of active groups promoting gay rights and indeed there has been much overt publicity in the press and in conferences.
133. Much reliance was placed on the article "Behind the Mask" produced from a website magazine on lesbian and gay affairs in Africa. It was a report dated 23<sup>rd</sup> August 2007 of at least 500 adults interviewed in a weekly Steadman Group survey. It said that 95% of that group said that homosexuality should not be legalised. It said that most Ugandans have conservative views about gay culture. The fact remains, however, that although people might disapprove of homosexuality, it is not the same thing as actively taking steps to harass or discriminate or in any way make life unduly difficult for the individuals concerned. We do not consider that "disapproval" without more constitutes persecutorial behaviour which in any way breaches the protected human rights of the individual.

### **How Did the Appellant Behave in Uganda and What Will Be the Situation Facing Him On Return?**

134. We turn to consider, therefore, how the appellant would behave were he to return to Uganda. He indicated to us that he wishes to live life as a gay man and to express himself as a gay man. He indicated to us at the outset of his evidence that he wanted to live in a committed relationship with another. Such is also borne out by the manner of his living in the United Kingdom. Essentially he had a long-term relationship with B and a "one night stand" with another before that relationship. We, for our part, can see no reason, having regard to the evidence which has been adduced, why a similar committed relationship could not be established and maintained in Uganda.
135. The starting point for our consideration must of necessity be the experiences of the appellant himself whilst living in Uganda. At the time that he was in Uganda he experienced no hostility either from the authorities or seemingly from any quarter. He was able to study and gain experience in the beauty treatment and hairdressing profession. Although obviously effeminate in his manner, the appellant does not speak of incurring any unpleasantness at the hands of individuals or of the authorities. He lived with his family and although they would seem to be very traditional in their outlook at no stage, according to him, did the issue of homosexuality arise.
136. The appellant enjoyed a homosexual relationship in Kenya and chose to return to Uganda as seemingly the Kenyan authorities were cracking down on gay bars and arresting individuals. Given that concern it would be surprising indeed if the appellant were to move to Uganda where the same was happening. Indeed, the evidence of police or government action does not come from the appellant but from those called to give evidence in this appeal.
137. The appellant was able to work within the beauty salon/hairdressing profession for some seven years without encountering any difficulty whatsoever on account of his sexuality. In his oral evidence before us the appellant indicated that despite his

characteristics nobody had really asked him whether he was gay. He subsequently modified that reply to say that if clients did suspect that he was gay, he would say that he was not and was straight. It is difficult to reconcile those two statements other than drawing the inference that the issue of his being gay was not something which was regularly raised with him. As Mr Chelvan has remarked, however, sexual identity is wider than conduct. There were feminine qualities of the appellant's behaviour which he would not have been able to hide and would have been apparent to all whom he would have met. We have little doubt that his effeminacy would have raised questions in the minds of some as to his homosexuality. Significantly the appellant did not seemingly encounter any hostility or violence towards him throughout the lengthy period of his residence in Uganda.

138. We note that in his interview conducted on 1<sup>st</sup> April 2002 he was asked specifically the question at question 9: "Why did you leave Uganda?" His answer was, "It's because I was gay and I was tired of keeping it a secret any more." Such stands in some contrast to the evidence which the appellant gave to us, namely that he left Uganda because his cousin Josephine had invited him to visit her. It was only after having experienced a greater sense of freedom in the United Kingdom in relation to his sexuality that he decided to make his claim for asylum. This matter, perhaps, has been clarified in a further passage of the appellant's evidence before us which was to the effect that while he was in Uganda he was focusing upon his work and not focusing upon relationships. He also added, "Before coming to the UK I did not know what it was like for gay men. I came for a visit and not because of any gay issues." The appellant added that it was only afterwards that he appreciated how different it was and was therefore unwilling to return to Uganda.
139. We do not accept on the totality of the evidence, applying the lower standard of proof as we do, that the appellant would be unable to live in Uganda as a gay man or indeed express himself as such. The appellant indicates that he wants to go out to bars and parties and be with his friends. Clearly before the Red Pepper article many such meeting places existed, at which members of the lesbian and gay community could meet together with members of the heterosexual community. We remind ourselves of the evidence of Mr S that often the bars in which the gay people met were also frequented by heterosexuals. We recognise that the publication of the article in Red Pepper may have caused members of the lesbian and gay community to move from certain bars. There is no reason to believe however that other bars and clubs have not been frequented. It is clear that there are many lesbian and gay support groups in existence, no doubt providing the facility for communication and for social intercourse.
140. We recognise that homosexual identity is a wider concept than merely sexual conduct. We do not find that the appellant's sexual identity would be unduly constrained. The appellant, as we have remarked before, completed his education and ran a business seemingly without difficulty. Part of his sexual identity is clearly his sensitive tactile and effeminate manner. There is no reason to believe that that was not very much a part of his identity from an early age and expressed by him in his day-to-day activities. He expressed such in the past and no doubt will do so in the future.

141. Much has been made in the course of these submissions to us about the expressions “coming out” and “going into the closet”. We understand the phrase “coming out” to be one enabling a homosexual to recognise his sexuality and to express that sexuality to others. We see no reason why that cannot be done in Uganda.
142. We emphasise that we do not make light of the strong comments which have been made by those in authority in Uganda. Such falls to be considered as part and parcel of the general situation which we have to determine after assessing the likelihood of any real risk to the appellant upon return.
143. Much is also made of the fact that Ugandan society consists of very close knit family groups, neighbours, clans and other networks. It is said that everybody knows everybody else’s business and that privacy is hard to come by. In particular, that the appellant will find it increasingly difficult to conceal his sexuality, particularly given the expectations of marriage. Such may well depend upon the particular circumstances of the appellant at that time, including where he was living and the community in which he was living.
144. The appellant contends that were he to reveal his sexuality to his clients he would lose them and were he to reveal his sexuality to his family he would face rejection or worse. The appellant is, as we have observed, very effeminate in manner and we have no reason to believe that such was not his situation and circumstances from a relatively early age. He ran a successful business – a beauty salon and hairdressing for a number of years by displaying characteristics which no doubt appeared to some to be representative of gay behaviour and yet the appellant seemingly did not experience any harassment or rejection.
145. The appellant seeks to suggest that he would be ostracised from his family if they came to know. He has a number of brothers who are clearly mature adults having responsible jobs and families. It is difficult to imagine, given the manner in which the appellant presents himself, that the issue of his homosexuality would not have been raised at home. This was a matter that was of particular concern to us and indeed we felt it right to alert parties to that concern in order that they may address the issue should they wish to do so. The appellant indicated that he had never been asked about that matter from his family. Even now that he is in the United Kingdom, when he contacts his parents they are always asking him whether he has met somebody special or the right person. The appellant has been in the United Kingdom for some seven years and his family have never really asked him when he is coming back or why he remains. The family have not asked him how long he is staying. This does not portray, in our view, a family that is keen to control or to taint the lifestyle of another member. When the appellant first came to the United Kingdom he considered that his cousin J would disapprove of his behaviour, but when he revealed his sexuality to her he received nothing but support. We find it surprising that his sexuality was not a matter which was raised in the course of his growing up with his family. Even if that were the case, we find little basis to consider that the family even if they knew would in fact ostracise him from their midst. It is to be noted that several of the brothers are employed by UNESCO and the UN, perhaps not as “narrow-minded” or “traditional” as the appellant would have us believe. In any event, even were the family to disapprove of his behaviour, the appellant could live apart from them as he has done for many years.

### **How Will the Appellant Behave on Return?**

146. We turn therefore to our assessment of the evidence of the appellant and our assessment as to his sexuality expressed by him verbally and by his demeanour. We find him to be a mature and thoughtful individual seeking to enjoy without fear a committed sexual relationship which he can acknowledge with others. He is someone who would wish to engage socially with others who may or may not share his sexual identity, but who would enjoy his company or social intercourse. He is someone who has worked hard to build up a business and is committed to living his life, not only sexually but also economically and socially. Clearly the issue of demeanour, particularly in the somewhat artificial confines of court proceedings, should be approached with care but we would observe that the appellant appeared far more restrained than certain of his witnesses, particularly A, who presented himself as a somewhat flamboyant character, expressing his wish to “come out” to all whom he met.
147. We have considered with great care all that the appellant has written, and all that he has said and the comments made as to his nature by those witnesses called on his behalf. We do not find that were the appellant to return to Uganda and live and behave in the way that he would wish to that he would be at risk of persecution either from the authorities or at risk of harm from individuals. We are fortified in that conclusion by the fact that the appellant was able to live in Uganda without any form of harassment or ill-treatment for a number of years.
148. We recognise that his life-style may not be approved of by certain of those with whom he comes into contact, and possibly by his family. Such disapproval without more does not, seem to us, to cross the threshold into persecutory activity. It is very relevant to our consideration that the appellant came to the United Kingdom not to avoid persecutory treatment but to visit his cousin. The appellant has expressed his fear of revealing his sexuality. To some extent we find that fear to be an exaggeration and, in any event, ill-founded. His sexual identity encompasses his tactile nature, and feminine mannerisms, such characteristics having existed since his youth. We find that the appellant was able to conduct his life style in Uganda for many years exhibiting such characteristics without harm or harassment and we can find little reason to find that he cannot continue to do so. However, we do not find that the appellant is somebody who is reasonably likely to proclaim his homosexuality to all and sundry whom he meets or to taxi drivers in the course of a journey.
149. We observe the appellant to be a sensitive and attentive person who would be discreet in his public behaviour, being mindful of his society’s concepts of good manners and the general social mores. We find as a matter of fact that he will on return act in the same relatively discreet way he did before. We recognise that such discretion in his case may extend to avoiding kissing in public or of a public act or remark which might provoke comment or outrage.

### **Is It Reasonable for the Appellant To Continue to Behave in the Way in Which he Will?**

150. The issue of homosexuality and risk on return has been considered by the Tribunal in a number of decisions. The most relevant being as follows:-

EK (non-overt- homosexual) Uganda [2004] UKIAT 00021

YL AND RL (Kosovo – Risk to homosexuals) Serbia and Montenegro CG [2005] UKIAT 0005

MN (Findings on Sexuality) Kenya [2005] UKIAT 00021

HS (Homosexuals: Minors, Risk on Return) Iran [2005] UKAIT 00120

DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168

LD (Article 14: same-sex relationships) Brazil [2006] UKIAT 00075

151. The issue of behaviour has been considered in a number of recent decisions of the Court of Appeal, particularly:-

Jain v Secretary of State for the Home Department [2000] Imm AR 76

Z v Secretary of State for the Home Department [2004] EWCA Civ 1578

Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600

RG (Colombia) v Secretary of State for the Home Department [2006] EWCA Civ 57

J v Secretary of State for the Home Department [2006] EWCA Civ 1238

152. In particular we would seek to highlight a passage from the judgment of Schiemann LJ in the case of Jain which perhaps puts into sharp focus the task which is currently before us:-

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

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

In most states, however, the position is somewhere between these two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from so doing. Some pressures may come from the state – e.g. state subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the community, without those members being subjected to effective sanctions by the state to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-makers is when to ascribe the word “persecution” to those pressures on the continuum.”

153. The matter was considered by the Court of Appeal in J v Secretary of State for the Home Department [2006] EWCA Civ 1238 in which an appeal was allowed on the basis that the AIT should reconsider a number of matters as set out in the judgments of Maurice Kay and Buxton LJ.

154. In allowing the appeal, Maurice Kay LJ said that this Tribunal:-

“.. will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for ‘discretion’ before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether ‘discretion’ is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to ‘matters following from and relevant to, sexual identity’ in the wider sense recognised by the High Court of Australia (see the judgment of Gummow and Hayne JJ at para 83 [5395/002 2003 HCA71]). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the ‘discretion’ which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that are ‘related to or informed by their sexuality’ (ibid, para 81). This is not simply generalisation; it is dealt with in the appellant’s evidence.”

155. Buxton LJ added a further point:-

“The question that will be before the AIT on remission will be whether the applicant can reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgment of Gummow and Hayne JJ in S, in circumstances where failure to do that exposes him to the extreme danger that is set out in the country guidance case of RM and BB (Iran) CG 2005 UKAIT 00117. The Tribunal may wish to consider whether the combination of these two circumstances may have an effect on their decision as to whether the applicant can be expected to tolerate the situation he may find himself in when he returns to Iran.”

156. It was recognised in the Court of Appeal judgment that persecution was a “strong” word, requiring a high threshold. It would constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. That test has been adopted in a number of recent authorities. The judgment stressed that regard must be had to what the appellant himself had to say about his experiences and that the words “fear” and “forced” are particularly important in that context.



157. Mr Chelvan, in his submissions, seeks to persuade us that any restraint of whatever nature would be persecutory or in breach of the appellant's fundamental human rights. We do not accept that argument. We prefer the approach which has been highlighted by the Court of Appeal as set out in the judgment as summarised above.
158. We consider that separate issue therefore as to whether, given how he will behave, it is reasonable to expect that he so behave. We note his expressed desire for a committed sexual relationship with another and can find nothing in the evidence before us to indicate that such would not be reasonably possible in Uganda. We have found that it is possible for the appellant and other members of the gay and lesbian movements to enjoy a fulfilling and social life with others. There is no reason why the appellant cannot continue to express himself and exhibit his fundamental qualities and characteristics as he has done in the past and how we find that he will do so in the future.
159. We do not find that any limited restraint or discretion exercised by the appellant so as not to give rise to offence in public would in any event cause the appellant to act otherwise than his integrity or sexual identity would allow.
160. We find therefore, having considered all the evidence placed before us that the appellant upon return will act discreetly and that it is reasonable to expect him to do so.
161. In the circumstances, therefore, we do not find that the appellant would face persecution such as to engage the Refugee Convention, nor do we find that he would experience such harm as to call for humanitarian protection, nor do we find that he would face treatment of a violent or degrading nature such as to cross the threshold of Article 3.
162. We turn therefore to consider the aspect of the appellant's human rights as enshrined in Article 8 of the ECHR. We apply the structured approach to such considerations as has been set out in Razgar [2004] 2AC 368.
163. The appellant arrived in the United Kingdom in August 2000 aged 25. He had spent his formative years in Uganda and had developed both his training and a business in beauty therapy and hairdressing. The appellant has not developed any business in the United Kingdom.
164. We recognise the measure of family life which the appellant has with his cousin Josephine, living as he does with her and enjoying her company and support. We do not find, however, that his emotional dependency is significantly above that which would be normally expected from family relations and friendship between extended family members.
165. We observe from his wide circle of friends that he has enjoyed a relationship in the past but, at present, does not have such a firm relationship of such a nature. He expresses his freedom to visit bars and to enjoy the company of his wide circle of friends.

166. We recognise therefore that he has developed an element of private and family life in the United Kingdom. To return the appellant to Uganda would clearly be an interference with that private life. However we would envisage little difficulty in the appellant maintaining contact with his friends by communications and possibly by visits to them, or by them to him.
167. It is to be noted that the appellant has family in Uganda, his parents, his brothers and their families and children. He has demonstrated his ability to establish and to maintain good relationships with his clients. The appellant has of course contended that his homosexuality will cause such clients to avoid him. We find little reason to believe that this is indeed the case. We note also the immigration history of the appellant in that he came as a visitor and thereafter remained without leave. We find the fears which he has expressed to be unfounded for the reasons which we have already set out at great length.
168. Balancing all matters as we do, we do not find that his removal from the United Kingdom would be interference to such a degree to engage his Article 8 rights. Even were that to be the case we find that his removal would in any event be proportionate to the proper management and control of immigration.
169. Mr Chelvan seeks also to rely upon Articles 10 and 14 in their own right or to bolster the claim under Article 8. We do not find, however, for the reasons we have been at pains to set out, that such considerations have any material effect upon the assessment of risk on return as has been conducted.

## **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 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.

172. We considered the particular circumstances of the appellant, particularly as to his intended expression of sexual conduct and sexual identity on return to Uganda. We find that he would face no real risk of persecution, serious harm or treatment contrary to his human rights were he to return to Uganda.

173. In all the circumstances the appellant's appeal in respect of asylum, humanitarian protection and human rights is dismissed.

Signed

Senior Immigration Judge King TD

**APPENDIX 1: LIST OF BACKGROUND MATERIALS BEFORE THE TRIBUNAL**

	Undated	<b>Report from Dr Paul Semugoma</b> (additional report): <i>Additional Answers to Questions raised (Behind the Mask article)</i>
	Undated	<b>Immigration Appeal Tribunal:</b> <i>Grounds of appeal to Immigration Appeal Tribunal for permission to appeal to the Court of Appeal appendices.</i>
1.	Undated	Statement from Appellant
2.	Undated	Witness Statement of Mr Christopher Kalyango Senteza (with accompanying documents)
3.	Circa 2000	British High Commission letter 2000.
4.	Circa 2002	Extracts from A Criminal Justice Baseline Survey of the Justice Law and Order Sector of Uganda - 2002
5.	Circa April 2003	<b>Immigration and Nationality Directorate</b> - Country Information and Policy Unit: <i>Uganda - Country Report</i>
6.	Circa October 2003	<b>Immigration and Nationality Directorate</b> - Country Information and Policy Unit: <i>Uganda - Country Report</i>
7.	Circa April 2004	<b>Immigration and Nationality Directorate</b> - Country Information and Policy Unit: <i>Uganda - Country Report</i>
8.	Circa 2005	<b>Amnesty International:</b> <i>Report on Uganda for period January to December 2005</i>
9.	7 July 2005	<b>Behind the Mask:</b> <i>'Ugandan lawmakers pull the plug on homosexual activities'</i> - Article by Musa Ngubane. ( <a href="http://www.mask.org.za">www.mask.org.za</a> )
10.	12 July 2005	<b>Human Rights Watch:</b> <i>"Uganda: Same-Sex Marriage Ban Deepens Repression In Uganda, Colonial—Era Sodomy Law Already Mandates Life in Prison"</i> . ( <a href="http://www.hrw.org">www.hrw.org</a> )
11.	2 August 2005	<b>Amnesty International:</b> <i>Public Statement 'Uganda: Intimidation of lesbian and gay activists', News Service No. 208</i> ( <a href="http://www.amnesty.org">www.amnesty.org</a> )

12.	13 October 2005	<b>International Gay and Lesbian Human Rights Commission:</b> <i>'IGLHRC Condemns Uganda's Targeting of Lesbian and Gay Men; Calls Ban on Same-Sex Marriage "Legislative Overkill"'. (www.iglhrc.org)</i>
13.	March 2006	<b>Bureau of Democracy, Human Rights and Labour:</b> <i>US Department of State Uganda: Country Reports on Human Rights Practices 2005'. (www.slate.gov)</i>
14.	April 2006	<b>Home Office:</b> <i>Extracts from Home Office 'Country of Origin Information Report Uganda', April 2006 and October 2005 editions.</i>
15.	1 May 2006	<b>Behind the Mask:</b> <i>'We need to regulate IT laws in East Africa, says Buturo' - Article by Al-Mahdi Ssenkahirwa. (www.mask.org.za)</i>
16.	3 May 2006	<b>Topix.net:</b> <i>Transcript of 'topix.net' website posting by Muhumuza Gerald, dated 3 May 2006, regarding article in The News Watch dated 27 April 2005</i> <b>Re: treatment of homosexuals in Uganda.</b>
17.	3 July 2006	<b>Behind the Mask:</b> <i>"Buturo slams gays" - Article by Ronnie Kijambo. (www.mask.org.za)</i>
18.	Circa 2007	<b>Amnesty International:</b> Report
19.	4 January 2007	Directions dated 11 December 2006 and amendments to those Directions
20.	15 January 2007	<b>Home Office:</b> <i>Home Office Operational Guidance Note - Uganda</i>
21.	18 January 2007	Expert Report of Professor Robert Wintemute
22.	18 January 2007	Expert Report of Professor Oliver Furley
23.	21 January 2007	Letters from Wesley Gryk Solicitors to <b>AIT</b> and <b>HOPOU</b> since 21 January 2007
24.	21 February 2007	<b>Behind the Mask:</b> <i>"Christians warned on homosexuality"</i>
25.	6 March 2007	<b>US Department of State:</b> Report
26.	20 March 2007	<b>Afrol News:</b> <i>"Uganda's gays left out of HIV/AIDS strategy"</i>
27.	23 March 2007	<b>Africa News:</b> <i>Uganda; Lesbian Survives Deportation From the US</i>
28.	April 2007	<b>International Lesbian and Gay Association :</b> <i>"State sponsored homophobia"</i>

29.	29 June 2007	<b>Behind The Mask:</b> <i>"Anti-gay Ugandan minister receives hate mail"</i>
30.	11 July 2007	<b>Afrol News:</b> <i>"Fears of enhance gay repression in Uganda"</i>
31.	17 August 2007	<b>BBC News:</b> <i>"Uganda rejects a gay rights call"</i>
32.	17 August 2007	<b>Behind the Mask:</b> <i>"Homosexuals demand acceptance in Society"</i>
33.	21 August 2007	<b>Christian Today:</b> <i>"Christian Groups hold anti-gay protest in Uganda"</i>
34.	21 August 2007	<b>New Vision Newspaper:</b> <i>"Religious group demonstrate against homosexuals"</i>
35.	21 August 2007	<b>Pink News.co.uk:</b> <i>"Ugandan churches demonstrate against gay acceptance"</i>
36.	23 August 2007	<b>Human Rights Watch:</b> <i>Letter to Ugandan President</i>
37.	23 August 2007	<b>Human Rights Watch:</b> <i>"Uganda: State homophobia threatens health and human rights"</i>
38.	24 August 2007	<b>Behind the Mask:</b> <i>"Ugandan government accused of state homophobia"</i>
39.	27 August 2007	<b>ABC Premium News (Australia):</b> <i>Gays, Lesbians fight for rights Uganda</i>
40.	28 August 2007	<b>Behind the Mask:</b> <i>"Tabliqs plan squad to fight gays",</i>
41.	29 August 2007	<b>Behind the Mask:</b> <i>"Migrate, Buturo tells gays"</i>
42.	30 August 2007	<b>Gay Republic Daily:</b> <i>"Anti gay censorship in Uganda"</i>
43.	31 August 2007	<b>Behind The Mask:</b> <i>"Anti gay group hits back at rights activists"</i>
44.	31 August 2007	<b>New Vision Newspaper:</b> <i>"Anti Gay group hits back at rights activists"</i>
45.	31 August 2007	<b>New Vision Newspaper:</b> <i>"Parents start campaign against homos"</i>
46.	9 September 2007	<b>Sunday Pepper:</b> <i>"Homo terror: we name and shame top gays in the City"</i>
47.	11 September 2007	<b>International Gay and Lesbian Human Rights Commission:</b> <i>"Threats of Arrests and State-Sponsored Violence Against Gay Men, Lesbian, Transgenders' in Uganda"</i>

48.	12 September 2007	<b>Africa News:</b> <i>Uganda; Court Agrees to Hear Lesbian Case</i>
49.	13 September 2007	<b>Doug Ireland:</b> <i>"Uganda's anti gay witch hunt continues"</i>
50.	13 September 2007	Letter from UK Lesbian and Gay Immigration Group
51.	14 September 2007	<b>Pink News.co.uk:</b> <i>"Ugandan newspaper continues outing strategy"</i>
52.	1 October 2007	Report of Dr Paul Semugoma with enclosures
53.	15 October 2007	Report of Maxim Anmeghichean with enclosures
54.	16 October 2007	<b>African Veil:</b> <i>Gay Sympathiser Attends Mass</i> <i>(www.africanveil.org)</i>
55.	17 October 2007	<b>Human Rights Watch:</b> <i>Uganda: Rising Homophobia Threatens HIV Protection</i>
56.	17 October 2007	<b>Letter from Christophe Dendaletche:</b> Re: JM
57.	17 October 2007	Letter from Alexander Robertson
58.	16 November 2007	<b>Letter from Laura Willett:</b> <i>Re: JM v SSHD</i>
59.	16 November 2007	<b>Letter from Barry O'Leary:</b> <i>Re: JM, Country Guidance case</i>
60.	20 November 2007	<b>Letter from Barry O'Leary:</b> <i>Re: Letter of support for UK asylum case.</i>