

[2005] UKAIT 00168

ASYLUM AND IMMIGRATION TRIBUNAL

Date of hearing: 28 October 2005

Date Determination notified: 28 November 2005

Before:

Mr P R Moulden (Senior Immigration Judge)

Mr R Chalkley (Senior Immigration Judge)

Ms S E Singer

Between:

DW APPELLANT

- and -

Secretary of State for the Home Department RESPONDENT

For the appellant: Mr S Chelvan of Counsel, instructed by Southwest
Law

For the respondent: Mr M Blundell, Senior Home Office Presenting
Officer

1. The appellant is a citizen of Jamaica who was born on 19 December 1982. We heard both the first and second stage reconsiderations of his appeal against the determination of an Adjudicator, Miss J M Harries, dismissing his appeals on both Refugee Convention and human rights grounds against the respondent's decision to give directions for his removal from the United Kingdom following the refusal of asylum.

Immigration History

2. The appellant arrived in the United Kingdom on 31 March 2001 and claimed asylum on 1 October 2001. The notice containing the decision against which he appeals is dated 6 November 2001. The Adjudicator heard the appeal on 26 August 2004 and permission to appeal was granted by a Vice President of the Immigration Appeal Tribunal on 23 November 2004.

The Facts

3. The Adjudicator outlined the facts of the case in paragraphs 8 to 11 of the determination in the following terms,

"8. The appellant claims that he fears persecution in Jamaica because of his sexual orientation; he claims to be homosexual. The appellant says that he was born and lived in Kingston, Jamaica, all his life until he departed for the United Kingdom. He never knew his father and lived with his mother, stepfather and siblings until his mother left Jamaica for the United Kingdom in February 1999. The appellant then remained in Jamaica with his stepfather. His stepfather had a violent manner, treated the appellant badly and threw him out of the family home.

9. The appellant says that he was continually taunted and accused of being gay in Jamaica. He says that two serious incidents were the cause of his departure from Jamaica. The first was in early 2000 when the appellant was leaving a gay club with a male friend in New Kingston. They were on foot when a car pulled up in front of them. A man got out of the car and shouted "batty man" and "gay" at the appellant and his friend. He punched and kicked the appellant and his friend; the friend ran away. The man then pulled out a gun and pointed it at the appellant before getting back into the car and driving away.

10. The appellant claims the second incident occurred in December 2000, at around 11.00 pm when he was waiting at the roadside for a friend he was going to a club with. The appellant claims a man came up behind him and held a knife to his throat. The appellant claims this man made him walk with him to an open place of land nearby where he forced the appellant to perform oral sex on him whilst he held the knife to his throat before releasing the appellant.

11. The appellant says he reported neither incident to the police because they would not provide protection and are known to be corrupt and homophobic. The appellant claims that homophobia is endemic in Jamaica; he says hostility towards gay men and lesbian woman is rife throughout the

country and there is nowhere he could safely be returned to."

The Respondent's Reasons for Refusal

4. The respondent did not believe the appellant's account of events or that he was homosexual. The respondent took the view that those who harassed the appellant were not agents of persecution and any failure on the part of the police to apprehend the perpetrators did not show complicity in or support for such attacks. The respondent was also of the view that there were other parts of Jamaica to which the appellant could reasonably go.

Representation before the Adjudicator

5. Both parties were represented at the hearing before the Adjudicator, the appellant by Mr Chelvan, who appeared before us. The appellant gave evidence, as did his witness, Mr B.

The Adjudicator's findings of credibility and fact

6. The Adjudicator's findings of credibility and fact merit inclusion in full. In paragraphs 25 to 40 of the determination she said,

"25. In reaching a decision I have applied the burden and standard of proof previously set out in this determination.

26. The appellant gave oral evidence that his sexual orientation is homosexual and the respondent is wrong to reject the fact that he is gay. He described his own demeanour as feminine. The appellant said that it is obvious that he is gay, not straight, and said that he wears tight tops to show off his shape. The appellant says in his statement, dated 18 August 2004, that he has known since the age of 11 years that he is gay. The appellant says he always liked the company of girls and had more in common with them than boys; he enjoyed dancing, shopping and chatting.

27. The appellant said in oral evidence that his witness, Mr B, is a friend, but not a boyfriend, who has been known to him for 3 years. The appellant gave evidence of

homosexual relationships he had formed in the past; he named a former boyfriend as C and a more recent one as H. Mr B confirmed his own personal knowledge of these relationships and said he had been introduced to both C and H by the appellant. Mr B said that it is within his own knowledge that the appellant is gay and described him as very effeminate; he said that both he and the appellant are very involved in the gay community in a city in the UK, where they live.

28. In relation to the issue of the appellant's sexuality I accept his evidence. I am satisfied that he is homosexual. I find his evidence about this to be consistent throughout his claim, credible and supported by a reliable witness and plausible detail. I accept the evidence given by Mr B.

29. I accept the evidence of the appellant that he had a difficult time in Jamaica; he was verbally abused because of his presumed sexual orientation. He describes being referred to as "batty boy", a well known slang term for homosexuals in Jamaica. I find the evidence given by the appellant in relation to the incident in early 2000, when a man alighted from a car, beat him and his friend and pointed a gun, to be credible. The appellant gives a consistent account of the incident. In the circumstances of the incident I am satisfied to a reasonable degree of likelihood that the appellant was attacked because of his homosexuality. It is reported to have happened in an area where male prostitution is practised.

30. Questioned about the incident in December 2000, the appellant said that he was not injured, just "boxed and stuff like that", meaning he had been slapped to the face. I accept that this incident happened but I am not satisfied that there is a sufficient amount of evidence to show that the attack was because of the appellant's perceived sexuality, although he says he could have been identified as gay because he was dressed to go out.

31. I am not satisfied that the two major incidents complained of by the appellant posed a serious threat to

him. In respect of the two most serious incidents he describes the opportunity was there, but not taken up, to do him considerably greater harm. I am not satisfied that there was a serious intent on the part of his assailants to do him serious harm. I accordingly do not agree with the appellant's assessment of these two incidents as being occasions on which he "almost lost his life". Nor, as set out above, do I accept that the second incident is proved to be motivated by the appellant's sexual orientation. That is in no way to diminish the unpleasantness of the treatment received by the appellant or to condone such entirely unacceptable behaviour. The incidents, must, however, be assessed within the framework of asylum and human rights law and the general situation in Jamaica.

32. I am not satisfied that the appellant was genuinely in fear for his life when he left Jamaica or that he has a well-founded fear of persecution if returned to Jamaica. I consider there to be merit in the submission made on behalf of the respondent that the appellant's claim is undermined both by his delay in leaving Jamaica and his delay in applying for asylum after arriving in the United Kingdom. The delay in departing from Jamaica is not consistent with the appellant's claimed fear for his life. The appellant was cross examined about the 4 month delay in his leaving Jamaica; he said that he had been staying at a friend's house and was waiting for his mother to send him money.

33. I do not consider the explanation the appellant gives for the delay in applying for asylum to be adequate or credible. He applied at the end of the period when his visa expired, apparently because he had not been advised to apply for asylum. These are not, in my view, the actions of a person arriving in the United Kingdom in fear of his life, regardless of the advice he did or did not receive.

34. The appellant says, in effect, that he did not report the incident to the police in Jamaica because of their bad reputation and there would have been no point. It does not assist his claim, in spite of this explanation, to seek international protection before he looks for help in Jamaica.

The appellant's unwillingness to report to the police is not stated to be because he fears attracting adverse attention to his situation; he says he is readily identifiable as gay.

35. In interview, apart from the two major incidents he describes as causing him to leave Jamaica, the appellant says it was also because of the bad treatment he received from his stepfather and the friends he lived with after being thrown out by his stepfather. I accept the appellant's evidence in relation to these lesser events, but I am not satisfied that any of the treatment described amounts to evidence of persecution or ill-treatment to the necessary high threshold. Whilst the appellant has received unpleasant treatment at the hands of some individuals, I am not satisfied that he has established that he left Jamaica owing to either societal, police or the authorities' discrimination or persecution of him.

36. In the case of *Dawkins [2003] EWHC 375 (Admin)* the Judge indicated that a citizen of Jamaica would not normally be at risk because of his homosexuality. The case of *Dawkins* establishes that an applicant must establish something more than the mere fact that he is homosexual; there must be evidence that he is going to be subjected to substantial discrimination and/or violence and abuse. I am not satisfied there is such evidence in this case. It is argued that this appellant is particularly at risk because he can be readily identified as gay in Jamaica and his being a prostitute in the past. Whilst I accept that the appellant may be readily identified as homosexual and that he has acted as a prostitute in the past, I do not accept that these facts elevate his claim to the necessary threshold or put him at particular risk. His own evidence does not support that proposition.

37. In the light of the evidence and the decided authorities on the issue, I am of the view that homosexuals generally in Jamaica, and this appellant in particular, do not face a real risk of really serious ill-treatment. This appellant was not the victim of any systemised attacks.

38. Paragraph 6.21 of the CIPU reports sets out efforts by the Jamaican authorities to take firm steps and makes specific commitments to end unlawful killings with police impunity. Amnesty International have said that the disbanding of the crime management unit implicated in numerous human rights abuses is a particularly welcome step, albeit not enough.

39. Objective evidence makes clear the degree of disquiet and contempt many people in Jamaica feel and exhibit towards homosexual activity. Homosexuals are often the victims of the unpleasant and threatening acts. I am, however, of the view, based on the objective evidence taken as a whole, that the discrimination and homophobia in Jamaican society is not state sanctioned. I am satisfied that there is a sufficiency of protection. In the light of my findings of fact, the issue of relocation does not arise.

40. I come to my conclusions having considered all the documents, evidence, submissions and case law before me and not least the very competently prepared, comprehensive and helpful skeleton argument submitted by the appellant's representative."

Grounds of Appeal

7. There are four grounds of appeal and permission was granted in respect of all of them. The first is that the Adjudicator erred in her findings with respect to the intent behind the attack of December 2000 and that her findings in this regard are wrong and/or unsustainable. The second, not pursued by Mr Chelvan at the hearing, was that the Adjudicator's findings in relation to the delay in departure from Jamaica and delay in claiming asylum in the United Kingdom are unsustainable. The third is that the Adjudicator erred in her finding that the appellant had not been persecuted in the past. The fourth, that the Adjudicator erred in law in not finding that there was a future risk to the appellant on return to Jamaica.

The Secretary of State's Concession

8. At the beginning of the first reconsideration hearing Mr Blundell made an important concession. He told us that, after careful consideration, the

Secretary of State was not going to take any point in relation to sufficiency of protection in Jamaican homosexual cases. He was not saying that the Secretary of State would not argue the point in very particular circumstances but, as a general rule, he would not argue that the authorities would provide a Jamaican homosexual with a sufficiency of protection. Furthermore, although there is no specific concession, Mr Blundell has not argued that this appellant or other homosexuals at risk of persecution in their home area should be expected to relocate within Jamaica.

9. This concession as to what is now the considered general policy of the Secretary of State has been an important factor in our consideration of this appeal. It impinges on the appellant's decision not to seek protection from the police and our assessment of what may amount to persecution or infringement of an individual's Article 3 human rights against the background of a lack of state protection.

The Appellants' submission on the first stage reconsideration

10. Mr Chelvan submitted that the Adjudicator's finding that the appellant had not been persecuted could not stand. The Adjudicator accepted that the appellant had suffered what amounted to persecution because of his sexual orientation. There was past persecution and this was probative of current risk. In *Abdul Aziz Faraj v SHHD [1999] INLR 451* at page 113 Peter Gibson LJ said:

"Persecution may involve physical or mental ill-treatment. Torture is such ill-treatment carried to extremes. But persecution, unlike torture, always involves a persistent course of conduct.... Since the conduct may be directed against a particular person or a particular group of persons, an instant of torture of a person which is the sole instant affecting that person may amount to persecution if there are other incidents affecting a group of which that person is a member. But isolated incidents of torture are not enough to constitute persecution without more."

11. Mr Chelvan submitted that the Adjudicator did not reject any part of the appellant's account of events. She only differed from him in her assessment of how these events should be categorised and the potential consequences. Mr Chelvan argued that one attack on an individual who belonged to a particular social group, such as homosexuals in Jamaica,

amounted to persecution. He argued that, in the light of the Secretary of State's concession, he was in effect accepting that the appellant and others like him would be at risk. The evidence before the Adjudicator showed that gay men and those perceived as such were at risk in Jamaica. The Adjudicator erred in law by rejecting such risk, a conclusion not open to her on the evidence. In reply to our question as to whether what happened to the appellant amounted to torture, Mr Chelvan argued that it was not necessary for it to be torture. The attack was serious enough and the crucial factor was that the appellant was attacked because he was recognised as gay.

12. Mr Chelvan submitted that, on the facts found by the Adjudicator, it was perverse for her to conclude that the attack was not because of his perceived sexuality particularly as, in the same sentence, she said:

"He could have been identified as gay because he was dressed to go out."

The Respondents' submissions on the first stage reconsideration

13. Mr Blundell submitted that there was no material error of law. The Adjudicator's assessment of the appellant's history and the factual circumstances could not be categorised as perverse. There were three facets to the appellant's account and the Adjudicator made a proper assessment of them. She found that two of them were major incidents, but also accepted what she referred to in paragraph 35 of the determination as lesser events.
14. Mr Blundell relied on what he categorised as a "reverse *Demirkaya*" (*Hali Demirkaya v SSHD CA – IATRF 99-0144-4*) argument which we understood to mean that whilst past persecution is probative but not conclusive evidence of a current risk of persecution, the absence of such evidence, should lead us to the opposite conclusion. The first incident, accepted by the Adjudicator in paragraph 29, could not be categorised as a finding of past persecution and, on its own, was not sufficient to amount to persecution. Mr Blundell referred us to the head note in *Faraj* which states:

"Although isolated incidents of torture were not enough to constitute persecution without more, an incident of torture of a person which was the sole incident affecting that person might amount to persecution if

- there were other incidents affecting a group of which that person was a member."
15. As to the second incident, in December 2000, where Mr Chelvan had argued that the Adjudicator's finding that the attack was not caused by his perceived sexuality was perverse, Mr Blundell emphasised the use of the word "although", linking the two parts of the last sentence in paragraph 30. In his own account of the incident the appellant did not say that his attacker used abusive language.
 16. In relation to what amounted to perversity Mr Blundell referred us to the judgment of the Court of Appeal in *R v SSHD [2005] EWCA Civ 982* where Brooke LJ cautioned against too easy a use of the word perverse (paragraph 12).
 17. Mr Blundell submitted that it was open to the Adjudicator to come to the conclusion that there was no past persecution. In paragraphs 31 and 37 of the determination she gave herself a proper direction as to persistent and serious ill-treatment.
 18. Mr Blundell accepted that, in the light of the evidence before the Adjudicator, she erred in law in concluding that the authorities would provide the appellant with a sufficiency of protection. However, he argued that it was not a material error of law because of her findings, open to her on all the evidence, that the appellant had not suffered past persecution and did not have a current well-founded fear of persecution. Following the judgment of the Court of Appeal in *Faraj*, (at page 451), the question of whether a sole incident affecting an individual might amount to persecution was a question of fact for the Adjudicator. The judgment in *Faraj*, read in the light of the findings at F and G on page 452, showed that that appellant was involved in at least seven incidents between May 1992 and January 1994 when he was beaten or tortured by the police or members of KANU. Under the former "*Subesh*" jurisdiction we would not have been required to take a different view from the Adjudicator. Under the current "error of law" jurisdiction it could not be said that any of the Adjudicator's findings were perverse.
 19. Mr Blundell asked us to find that the violence the appellant suffered was opportunistic and the Adjudicator made proper findings. His delays in leaving Jamaica and claiming asylum were material factors which she was entitled to take into account. We were asked to uphold the determination.

The Appellants' reply on the first stage reconsideration

20. Mr Chelvan submitted that there was no such thing as a reverse *Demirkaya* principle. In any event, this did not fit with the Adjudicator's finding that on return to Jamaica the appellant would be identified as a gay man. The Adjudicator had clearly accepted that the appellant had come to harm. Those who were perceived as gay men in Jamaica were at real risk. Mr Chelvan asked the rhetorical question; how many further attacks the appellant needed to suffer before it could be said that he had been persecuted?
21. Mr Chelvan argued that *Faraj* must be read in line with the judgment of the Court of Appeal in *Bagdanavicius v SSHD [2003] EWCA Civ 1605*. *Faraj* said that one incident of torture could be enough and *Bagdanavicius* that the tests of torture and persecution fitted hand in glove. Mr Chelvan argued that, even if, contrary to his primary submission, the appellant had not suffered past persecution, his Article 3 human rights had been infringed. Nevertheless, he submitted that the two tests were effectively the same. The Adjudicator erred by following the judgment in *Dawkins*.

Our findings as to error of law

22. We find that there are material errors of law in the determination of the Adjudicator. The appellant had already, in early 2000, been the victim of a violent attack as a result of being recognised as a homosexual. Having accepted this and that the appellant was readily identifiable as a gay man, it was perverse and therefore a material error of law for the Adjudicator to find that the attack on the appellant in December 2000, was not motivated by his sexuality, given the manner in which he said he was dressed at the time and the violent and sexual nature of the attack upon him. The Adjudicator's finding was, in terms of paragraph 9(i) of *R v SSHD*, a perverse or irrational finding on a matter that was material to the outcome of the appeal. In reaching this conclusion we have taken into account the strictures of Brooke LJ in *R* that the perversity test represents a very high hurdle.
23. We find that there is a further error of law in the Adjudicator's conclusion that the authorities would provide the appellant with a sufficiency of protection. Mr Blundell concedes that, on the material before the Adjudicator, this was not a conclusion open to her and amounts to an error of law. We agree. He argued that it was not a

material error of law. This submission turns on the soundness or otherwise of Mr Blundell's submissions that it was open to the Adjudicator to come to the conclusion that the appellant had not suffered past persecution and did not have a current well-founded fear of persecution for a Convention reason. If these conclusions do not stand, a question to which we will return, then the Adjudicator's finding does contain a material error of law.

24. The first stage reconsideration hearing took place on 4 October 2005 at the end of which, we adjourned for lack of time. The second stage reconsideration was heard on 28 October 2005.

The Second Stage Reconsideration

25. On the second stage reconsideration we had the appellant's skeleton argument from Mr Chelvan, dated 24 October 2005, together with his earlier skeleton which was before the Adjudicator, the appellant's bundle running to 324 pages, the appellant's authorities bundle and the Tribunal determination in *MN (Findings on Sexuality) Kenya [2005] UKIAT 00021*. On behalf of the respondent Mr Blundell submitted the April 2005 CIPU report on Jamaica.
26. Mr Blundell confirmed that the Secretary of State's concessions in relation to sufficiency of protection, referred to earlier in this determination, still held good. He did not argue that internal relocation would be available to the appellant and said that he would not be attempting to persuade us that the appellant should not be regarded as a credible witness and his account of events accepted in its entirety.
27. Mr Chelvan took us to *MN Kenya* (page 308 of the appellant's bundle at paragraph 15) where the Tribunal said,
- "Mr Jorro emphasised that homosexuality is a matter of sexual identity rather than sexual activity. We accept that. Whether or not a person's homosexuality is an innate characteristic or chosen behaviour is immaterial. In either case it is not something that he should (not) be required to give up even if he could." We think that the word "not", which we have bracketed, should not appear.
28. He argued that the Convention reason was membership of both a particular social group and an imputed social group. He relied on the report from Mr Sobers. Mr Sobers standing had been addressed in two

judgments of the Court of Appeal, A and Atkinson. He was referred to as a distinguished expert in relation to his knowledge of gang related activities in Jamaica. Mr Chelvan submitted that we should find that Mr Sobers had a similar expertise in relation to the position of homosexuals in Jamaica.

29. Mr Chelvan reminded us that the Adjudicator had found that gay men in Jamaica belonged to a particular social group. Mr Blundell said that he did not intend to dispute this. Mr Chelvan sought to spread his net wider. He argued that "those seen as not conforming to what Jamaica sees as the norm of masculine identity in Jamaica are at risk of persecution and/or real risk of Article 3 harm by state and non-state agents and are without effective state protection". Mr Chelvan was reluctant to indicate what groups or individuals might come within this category, apart from the obvious one of gay men. However, he suggested that it would include transvestites, transsexuals and perhaps others.
30. Mr Chelvan emphasised paragraph 27 of Mr Sobers report and also relied on the Human Rights Watch Report, which was extensively drawn upon in the April 2005 CIPU report.
31. Mr Chelvan argued that, in effect, the Secretary of State accepted the risk category as he had defined it. The appellant would be at risk on return as a readily identifiable gay man.
32. Our attention was drawn to the Human Rights Watch Report at pages 229 and 292 of the appellant's bundle which, Mr Chelvan argued, showed the position of those, like the appellant, who were readily identified as gay men. The reality was that they could not resort to internal relocation. The appellant would be identifiable as a gay man wherever he went in Jamaica. Mr Sobers had said that internal relocation was not possible (paragraph 92 of his report at page 195 of the appellant's bundle). In relation to sufficiency of protection Mr Chelvan said that a number of cases relating to sufficiency of protection drew on the Public Defenders reported comments in 2001. It was thought that the Public Defender might bring civil cases or prosecutions against those thought to be guilty of homophobic crimes, but the reality was that no such action had been taken.
33. Mr Chelvan argued that the Secretary of State had put in no objective evidence to rebut the compelling evidence from Mr Sobers. He accepted that there might be some gay men in Jamaica who would not be at risk.

He pointed to Mr Sobers report in the footnote 70 at page 195 of the appellant's bundle where he said:

"I have observed that a gay man with wealth and status can be left alone as long as he remains within his social circles and does not cause his sexual orientation or his same sex partnership to attract any attention. His sexual orientation will be tolerated as long as he is not openly gay. At the same time, I have observed that the affluent gay man can be subject to extortion for fear that his sexual orientation becomes public knowledge.

34. Mr Chelvan said that in relation to Jamaican homosexuals perception was all.
35. Mr Blundell submitted that Mr Sobers had concentrated on gay men and suggested that we limit ourselves to consideration of those who were gay or perceived to be gay men rather than the wider category put forward by Mr Chelvan.
36. Mr Blundell accepted that, on the objective evidence, there was popular societal hostility to gay men, but argued that the level of risk did not cross the relevant threshold for either persecution or infringement of an individual's Article 3 human rights. He argued that, even in the light of the Sobers report, the appropriate thresholds were not crossed. He argued that there was little to sustain Mr Sobers conclusion that gay men generally faced serious ill-treatment in Jamaica. He referred us to paragraph 6.155 to 6.173 of the CIPU report, but indicated that he did not intend to say any more. Mr Blundell did not argue that the appellant or any other male thought to be homosexual could relocate within Jamaica.
37. In relation to the particular circumstances of this appellant, Mr Blundell asked us to follow the Adjudicator's conclusion that what happened to the appellant did not amount to persecution. The two incidents referred to by the Adjudicator, even if taken in conjunction with earlier discrimination, did not amount to serious and persistent ill-treatment. Mr Blundell continued to rely on what he referred to as the reverse *Demirkaya* point, which he argued should be the starting point for consideration of past persecution. He accepted that the Adjudicator had found that the appellant would be readily identifiable as a gay man.

38. Mr Blundell submitted that, on the appellant's own evidence, he had been identifiable as both effeminate and gay since a young age. As such he had suffered no more than two violent attacks, the first of which was in any event a case of mistaken identity. In reply to our question Mr Blundell accepted that, whilst the appellant's attacker may have thought that the appellant was another man, it was reasonably likely that he thought he was gay. He argued that the risk of repetition was not sufficient for there to be a breach of either Convention.
39. In reply Mr Chelvan argued that the appellant had identified a number of occasions on which he suffered abuse and items were thrown at him because of his perceived sexuality and that these, combined with the two serious attacks, crossed the required threshold to show that the appellant had suffered both persecution and infringement of his Article 3 human rights. He argued that the forced sexual attack would, on its own, amount to persecution. The appellant had established that the attacks on him were persistent. In relation to the question of the number of attacks he suffered during the period when he was identified as a gay man, Mr Chelvan pointed out that the appellant was born in 1982 and arrived in the UK in 2001, when he was approximately 18½ years old. Having discovered that he was gay at the age of 13, there was only a relatively short period between 1995 and 2001 where there would have been a public perception of his sexuality. The appellant referred to incidents where stones were thrown at him. When these were taken into account with the two major incidents there was no period of respite. Mr Chelvan relied on paragraph 6.167 of the current CIPU report. The country information did not support Mr Blundell's submission that there was no evidence to support the argument that the risk on return for those perceived as gay men would not cross the threshold for either Convention.
40. Mr Chelvan submitted that the real risk test set out by the Court of Appeal in *Zorig Batayav v SSHD [2003] EWCA Civ 1489* was satisfied. He relied on the Amnesty International report at pages 210 to 214 of the appellant's bundle and the Human Rights Watch Report starting at page 212.
- The expert evidence and country material before us**
41. Mr Sober's report is dated 16 September 2005. At page 170 of the appellant's bundle he sets out the questions he has been asked:

"Risk of harm to homosexual men as a result of homophobic violence;

Sufficiency of protection available to homosexual men by the Jamaican state;

The possibility of internal relocation to avoid the risk of homophobic inspired violence."

42. The summary of his opinion on the following page states:

"Based on the totality of the information I have, I consider that men who are, or who are perceived to be, homosexual are at risk of homophobic inspired violence in Jamaica. The agencies of the Jamaican government, primarily the police, lack both the capacity and the will to offer these men any effective protection from those who are hostile to them because of their sexual orientation. Internal relocation in Jamaica is unlikely to reduce or eliminate this risk."

43. Mr Sobers outlines his qualifications and experience, at paragraphs 1 to 4 of his report (pages 171 and 172 of the bundle) and in greater detail in Appendix One at pages 199 and 200.

44. The Court of Appeal in *A v SSHD [2003] EWCA Civ 175* said:

"Mr Sobers is a member of the Jamaica bar and a former executive Director of the Independent Jamaica Council for Human Rights. He is clearly a distinguished and reputable expert on matters concerning human rights in that country. Very fairly, Mr Clarke, on behalf of the Secretary of State, describes his report as a careful and considered one by somebody who knows what his is talking about."

45. In *Michael Atkinson v SSHD [2004] EWCA Civ 846* at page 203 of the appellant's bundle the Court referred to Mr Sobers as a "distinguished expert".

46. The Secretary of State has not submitted any expert evidence in reply to Mr Sober's report. Furthermore, Mr Blundell has made no criticism of Mr Sobers or his report. It is an impressive and comprehensive report. We find Mr Sobers as knowledgeable about the position of homosexuals

in Jamaica as he was in his reports before the Court of Appeal in relation to criminal gangs in Jamaica. With respect, we agree with the Court of Appeal that he is a distinguished and reputable expert. We find that his report is careful and considered and from somebody who knows what he is talking about.

47. The following passages assist:

"7. Homophobia is a deeply entrenched cultural norm in Jamaica that, at its worst, is capable of provoking murder or the infliction of serious bodily injury. The intensity (and veritable universality) of this norm is unconstrained by variables such as political orientation, social class, education, age, gender, and geography (urban/rural). Some of the most virulent expressions of anti-homosexuality that I have heard have come from the so-called "educated" classes in Jamaica."

9. It should be noted that the mere circulation of a rumour in Jamaica that one is gay would be sufficient to excite homophobic sentiments/violence".

48. In relation to the attitude of the authorities to homosexuals the footnote to paragraph 11 of the report refers to Articles 76 of the Offences against the Person, Act which are Jamaica's sodomy laws which criminalise consensual homosexual conduct between adult men. This law prohibits the "abominable crime of buggery, committed either with mankind or with any animal" and "gross indecency". "Buggery", which generally refers to all acts of anal intercourse and bestiality, is a felony punishable by imprisonment with hard labour for up to 10 years. "Gross indecency", generally interpreted to mean any sexual intimacy between men short of anal intercourse, is a misdemeanour punishable by up to 2 years with hard labour.

49. In relation to the attitude of senior politicians, paragraph 11 of the reports states:

"Prime Minister P J Patterson has made it clear that his government has no intention of repealing Section 76 of the OAPA (Offences against the Person Act). In 2000, Patterson declared at a People's National Party (PNP) Conference in Kingston that the laws relating to homosexuality would never be repealed while he was

Prime Minister. Mr Patterson in June 2001 found it necessary to declare his sexuality to the nation. "My credentials as a life long heterosexual person are impeccable". Mr Patterson said, "anybody who tries to say otherwise is not just smearing but is engaging in vulgar abuse".

50. There are references in the reports to the position of Jamaica's Public defender, Howard Hamilton, QC. Mr Sobers addresses these in paragraph 10 of his report, in the following terms:

"Jamaica's public defender Howard Hamilton, QC enjoys some statutory authority to protect the fundamental rights and freedoms of Jamaicans. However, he has maintained that he is unable to advocate the freedom of expression of homosexuals because homosexuality is against the law (Section 76 of the Offences against the Person Act)."

51. Mr Sobers sets the scene of crime and violence in Jamaica in paragraphs 14 to 22 of his report, recording that Jamaica is small Commonwealth Caribbean country of 2.6 million people. Almost half of the population resides in the Kingston Metropolitan area. It has the worst rate of violent crime in the Caribbean with a homicide rate four times the global average. The murder rate has risen significantly despite the introduction of Crime Plans in 2002 and 2004. He goes on to say, in paragraph 22:

"In the context of Jamaica's crime culture and the extremely high levels of interpersonal violence, homosexuals are at risk of more than verbal abuse; As a group they are likely to be the victims of violence and, on occasions, murder. Homophobic violence enjoys a certain impunity in Jamaica that has not changed since 2001 (the year DW left Jamaica), and I therefore have no reason to believe that homosexual men are any safer in Jamaica. Having regard to what I know of Jamaican cultures of crime and policing, gay men have very sound reasons to continue to be fearful of homophobic violence in Jamaica."

52. In paragraph 39 Mr Sobers says:

"The legislators apparently considered repealing the provisions of the Offences against the Person Act so

buggery between consenting adults would no longer be an offence. However, no legislator of any political party was likely to endanger his political career by standing up for tolerance to homosexuality."

53. Mr Sobers deals with the attitude of the police in paragraphs 52 and 53 in the following terms:

"Jamaican police have traditionally been a bastion of homophobia. My experience leads me to believe that homophobia is universal in the Jamaican police force. While there are police officers who do not personally subscribe to this prejudice, they have to co-operate with, and rely on fellow officers who do. As far as I am aware, the police have far more of a reputation for victimising gay persons than protecting them. I have frequently had members of the gay community complain to me of the indifference or contempt displayed to them by the Jamaican police. One of the typical modes of harassment is to prosecute or threaten to prosecute suspected gay men for buggery (buggery is illegal for both heterosexuals and homosexual men, but typically, prosecutions are only pursued against homosexual men).

The Jamaican police therefore largely mirror (and amplify) the homophobic attitudes which are universally manifested in all segments of Jamaican society. While there are police officers who are not homophobic, many, if not most, are unlikely to secure the necessary co-operation of their colleagues to investigate and prosecute homophobia inspired offences. It is the exception rather than the norm for Jamaican police to protect homosexuals from violent assaults. Homophobia in the police like the rest of Jamaican society, is very much a universal constant. "

54. Paragraph 61 of the report states:

"Gay men have reported being easy targets for extortion by state and non-state actors. In a homophobic environment, the discrimination suffered at the hands of the police, the fear of being identified as a homosexual and of being unable to obtain or pay for adequate legal representation,

the possibility of being prosecuted for buggery, combine to prevent gay men seeking redress when they are victims of extortion."

55. At paragraph 83 of his report, and for the reasons set out between paragraphs 69 and 82, Mr Sobers says:

"Based on the totality of the foregoing, and indeed my own professional experience with Jamaican Constabulary Force, I have little confidence that any homosexual man would enjoy a "sufficiency of protection" against homophobic violence in Jamaica."

56. and, in relation to internal relocation,

"84. Relocation within Jamaica is limited by the small size of the island (4,400 square miles). The longest distance between Jamaica's west and east coast does not exceed 150 miles by road. In the population of under 3 million people, homophobia is as strongly felt from one end to the other.

85. A gay man relocating outside the community from which he originated would not necessarily translate into avoidance or elimination of the risk of attack resulting in injury or even death. He would find it virtually impossible to relocate to an area where he would avoid the problems of the homosexual male in Jamaica.

86. Moreover, if a gay man were to relocate to another community, he would again be the stranger "suspected of being gay" who becomes the easy target of homophobia. He would lack the established roots which might give him a measure of protection if he were sufficiently discreet about this sexual orientation. A known (as distinct from open) gay relationship is not impossible to find in Jamaica. However, the men have to meet the class, status and wealth criteria that could allow them that small measure of liberty. Gay men who live and interact in some of the more affluent areas of Jamaica, and who do not call attention to themselves and their sexual orientation, can be left alone. As such, their homosexuality remains the subject of rumour and speculation and is not openly discussed. However, this "don't ask, don't tell" attitude is limited to their own community and circle of friends and family.

87. It should be specially noted that persons who offer (or appear to offer) support to homosexuals almost invariably become targets themselves. Few, if any persons will be willing to place their lives on the line in the long term."

57. Mr Sobers sets out his summary in paragraphs 88 to 93 in the following terms:

"Summary: risk/sufficiency of protection/internal relocation

RISK

88. In the context of Jamaica's crime culture, there is a real risk that any homosexual man will experience homophobic violence. Having regard to what I know of Jamaican society and its cultures of crime and policing, the overwhelming majority of homosexual men have very sound reasons to continue being fearful of homophobic violence/reprisals.

89. Homophobic violence enjoys a certain impunity in Jamaica that has not changed, and I therefore have no reason to believe that gay men are any safer in Jamaica than in 2001.

SUFFICIENCY OF PROTECTION

90. The Jamaican state has been quite ineffective in combating, much less neutralising violent crime. The institution or weaknesses of the police force reinforce the status quo. Against this background, I am not confident that the police have the capacity to protect homosexual men in Jamaica.

91. In my opinion, there is also no "sufficiency of protection" available in Jamaica to insulate gay men from violence or threats of violence from those who are antipathetic to their sexual orientation. Given the institutional and cultural norms of the Jamaican police, it is highly unlikely that the police will be willing or able to protect gay men from homophobic attacks. The lack of effective oversight bodies serves

to aggravate this status quo. There does not exist, in my view any adequate means of redress, if the police fail to protect. Having regard for the largely unrestrained culture of homophobia, the Jamaican authorities are unable and unwilling to effectively protect homosexual men. Organisations like J-FLAG have been unable to make any significant difference to this status quo.

INTERNAL RELOCATION

92. Relocating to other communities in Jamaica would not, in my opinion, reduce the risk of homophobic violence. Firstly, Jamaica is a small country in which it is difficult, if not impossible, to be anonymous (sic). Secondly, homophobic violence/intimidation continues to be a universal constant in Jamaica, which I would expect any gay man to be exposed to in Jamaica wherever he might relocate.

CONCLUSION

93. I am of the view that homosexual men remain at risk of harm in any part of Jamaica at this time. I am also of the view that the available state mechanisms lack the capacity for reducing or eliminating the risk."

58. We have a letter from Amnesty International dated 7 September 2005 expressing their views. Relevant passages read:

"Amnesty International receives frequent reports of on-going harassment of gay men and women in Jamaica, often amounting to violence. Such instances have been documented in Amnesty International reports including "Jamaica; killings and violence by police – how many more victims" (AI Index AMR 38/003/2001) and "Jamaica: crimes of hate conspiracy of silence – torture and ill-treatment based on sexual identity" (AI Index ACT 40/016/2001). Since the publication of these reports many other allegations have been received.

Gay men in Jamaica remain at risk of suffering violence, including sexual violence. It is certainly not implausible to suggest that a person would be singled out for ill-treatment or violence on account of his homosexuality. A man from Jamaica could face considerable risk of torture or ill-treatment, possibly even death, as a result of sexuality becoming known to the community." This organisation has interviewed many such individuals who have been forced to flee their areas in such circumstances. Reports of "vigilante" justice or mob violence are particularly common. Vulnerability such attacks would be increased by the familiar and social isolation that may occur that once a person's sexuality, or suspected sexuality, becomes known to the local community."

59. The US Department of State report for 2004, in the section relating to discrimination, societal abuse and trafficking in persons states, inter alia: (at pages 222 to 223 of the appellant's bundle)

"The Offences against the Person Act prohibits "acts of gross indecency" (generally interpreted as any kind of physical intimacy) between men, in public or in private and is punishable by 10 years in prison. Prime Minister Patterson stated that the country would not be pressured to change its anti-homosexual laws.

The Jamaican forum for Lesbians, all sexuals, and gays (J-FLAG) continued to report allegations of human rights abuses, including police harassment, arbitrary detention, mob attacks, stabbings, harassment of homosexual patients by hospital and prison staff, and targeted shootings of homosexuals. Police often did not investigate such incidents. Some of the country's most famous dance hall singers gained the attention of international human rights groups during the year for their homophobic lyrics, which incited violence against homosexuals. The 2001 poll found that 96% of citizens were opposed to legalising homosexual activity.

Male inmates deemed by prison wardens to be homosexual are held in a separate facility for their protection. The method used for determining their sexual orientation is subjective and not regulated by the prison system. There were numerous reports of

violence against homosexuals inmates, perpetrated both by the wardens and by other inmates, but few inmates sought recourse through the prison system.

Homosexual men were hesitant to report incidents against them because of fear for their physical well being. Human rights NGOs and government entities agreed that brutality against homosexuals, both by police and private citizens, was widespread in their community.

No laws protected persons living with HIV/Aids from discrimination. Human rights NGOs reported severe stigma and discrimination for this group. Although healthcare facilities were prepared adequately to handle patients with HIV/Aids, healthcare workers often neglected such patients".

60. We have, at pages 229 to 292 of the appellant's bundle, the Human Rights Watch Report of November 2000 entitled "Jamaica: hated to death". The lengthy summary, between pages 231 and 233 states:

"On June 9 2004, Brian Williamson, Jamaica's leading gay rights activist, was murdered in his home, his body mutilated by multiple knife wounds. Within an hour after his body was discovered, a human rights watch researcher witnessed a crowd gathered outside the crime scene. A smiling man called out, "Batty Man (homosexual) he get killed!". Many others celebrated Williamson's murder, laughing and calling out, "lets get them one at a time" "that's what you get for sin" "let's kill all of them". Some sang "boom bye bye," a line from a popular Jamaican song about killing and burning gay men.

Jamaica's growing HIV/Aids epidemic is unfolding in the context of widespread violence and discrimination against people living with and at high risk of HIV/Aids, especially men who have sex with men. Myths about HIV/Aids persist. Many Jamaicans believe that HIV/Aids is disease of homosexuals and sex workers whose "moral impurity" makes them vulnerable to it, or that HIV is transmitted by casual contact. Pervasive and virulent homophobia, coupled with fear of the disease, impedes access to HIV prevention information, condoms, and healthcare.

Violent acts against men who have sex with men are commonplace in Jamaica. Verbal and physical violence, ranging from beatings to brutal armed attacks to murder, are widespread. For many, there is no sanctuary from such abuse. Men who have sex with men and women who have sex with women reported being driven from their homes and their towns by neighbours who threatened to kill them if they remained, forcing them to abandon their possessions and leaving many homeless. The testimony of Vincent G, 22, is typical of the accounts documented by Human Rights Watch: "I don't live anywhere now... some guys in the area threatened me. "Batty Man you have to leave. If you don't leave, we will kill you".

Victims of violence are often too scared to appeal to the police for protection. In some cases the police themselves harass and attack men they perceived to be homosexual. Police also actively support homophobic violence, fail to investigate complaints of abuse, and arrest and detain them based on their alleged homosexual conduct. In some cases, homophobic police violence is a catalyst for violence and serious – sometimes lethal – abuse by others. On June 18, 2004, a mob chased and reportedly "chopped, stabbed and stoned to death" a man perceived to be gay in Montego Bay. Several witnesses told Human Rights Watch that police participated in the abuse that ultimately led to this mob killing, first beating the man with batons and then urging others to beat him because he was homosexual.

Because HIV/Aids and homosexuality often are conflated, people living with HIV/Aids and organisations providing HIV/Aids education and services have also been targeted. Both state and private actors join violent threats against gay men with threats against HIV/Aids educators and people living with HIV/Aids. In July 2004, for example, the Jamaican Forum of Lesbians, All-Sexuals and Gays (J-FLAG) received an e-mail threatening to gun down "gays and homosexuals" and "clean-up" a group that provided HIV/Aids education for youth. In a 2003 case, a police officer told the person living with HIV/Aids that he must be

homosexual and threaten to kill him if he did not "move (his) AIDS self from here".

Discrimination against people living with HIV/Aids in Jamaica poses serious barriers to obtaining the necessary medical care. In interviews with people living with HIV/Aids, Human Rights Watch found that health workers often mistreated people living with HIV/Aids, providing inadequate care and sometimes denying treatment altogether. Doctors failed to conduct adequate medical examinations of people living with HIV/Aids, sometimes refusing even to touch them. And, in some cases, lack of treatment in the initial stages made it even less likely that people living with HIV/Aids would receive healthcare services at a later date. Visible symptoms heighten the discrimination they faced, which in turn created further barriers to obtaining treatment. People suffering from visible HIV related symptoms were sometimes denied passage on public and private transportation, making it difficult to obtain any medical care facilities beyond walking distance.

People living with HIV/Aids said that health workers also routinely released confidential information to other patients and to members of the public, both through discriminatory practice that signalled patients HIV status (such as segregating HIV positive patients from others) and by affirmative disclosure of such information. Such actions violate fundamental rights to privacy and also drive people living with HIV away from services.

Discrimination also spreads HIV/Aids in Jamaica by discouraging at risk individuals from seeking HIV related information or healthcare. Men who have sex with men reported that health workers had refused treatment at all, made abusive comments to them, and disclosed their sexual orientation, putting them at risk of homophobic violence by others. As a result, many men who have sex with men delayed or avoided seeking healthcare altogether, especially for health problems that might mark them as homosexual, such as sexually transmitted diseases. Because

the presence of other sexually transmitted diseases heightens the risk of HIV transmission, such discrimination may have fatal consequences.

Jamaica is at a critical moment in its efforts to address a burgeoning HIV/Aids epidemic. An estimated 1.5% of Jamaicans are living with HIV/Aids, and HIV/Aids is on the increase. Jamaica's Ministry of Health has taken steps to combat discrimination against people living with and at high risk of HIV/Aids (such as men who have sex with men and sex workers), which it has recognised as a key factor driving Jamaica's HIV/Aids epidemic. Its national HIV/Aids programme has fostered important relationships with non-governmental organisations with established links to marginalised high risk groups, provided support for their HIV/Aids work with them, and looked to them for guidance in developing an effective response to the epidemic. It has also provided HIV/Aids training for health personnel addressing stigma and discrimination.

But other parts of Jamaica's government undermine these important efforts by condoning or committing serious human rights abuses. Abuses against men who have sex with men take place in a climate of impunity fostered by Jamaica's sodomy laws and are promoted at the highest level of government. Jamaican legal provisions that criminalise consensual sex between adult men are used to justify the arrest of peer HIV educators and to deny HIV prevention services to prisoners, among others. High level political leaders, including Prime Minister PJ Patterson and Minister of Health John Junor, repeatedly refused to endorse repeal of discriminatory legislation, ignoring not only international human rights standards but also reports by both the government's national HIV/Aids programme and its advisory national aids committee on the role of these laws in driving Jamaica's HIV/Aids epidemic.

Jamaican health officials acknowledge that Jamaica's sodomy laws make it difficult for them to work directly with men who have sex with men. As one high level health official told human rights watch:

"We don't promote direct programmes or services to MSM (Men who have sex with men) as a group because the existing laws impede this work (and) because (of) the high level of stigma and discrimination, they are not open to getting services through the public sector."

The police, however, actively impede government supported peer HIV prevention efforts among men who have sex with men and also among sex workers. AIDS outreach workers reported that the very possession of condoms, a key tool in HIV protection, triggers police harassment, and in some cases arrest and criminal charges.

Jamaica's failure to take action to stop human rights abuses permitted by state agents, to take measure to protect against abuses by state and private actors, and to ensure access to HIV/AIDS information and services to all Jamaicans violate its obligations as a state party to regional and international human rights treaties.

In 2004, Jamaica launched an ambitious project to provide anti-retroviral treatment to people living with HIV/AIDS and to address underlying human rights violations that are driving the epidemic. These are promising initiatives. They will be compromised, however, unless government leaders make a sustained commitment to end discrimination and abuse against people living with and at high risk of HIV/AIDS. The government knows that although HIV/AIDS is stigmatised as a "gay disease" in reality in Jamaica as in most of the Caribbean, the most common means of transmission is heterosexual sex. It also knows that if the epidemic in Jamaica continues to accelerate all Jamaicans will suffer. This fact should encourage high level Jamaican government officials to act quickly and forcefully to eliminate discriminatory laws and abusive practices that violate basic rights to equality, dignity, privacy, and health and undermine an HIV/AIDS prevention and treatment efforts. This includes speaking out strongly and acting forcefully against homophobic violence and abusive treatment of homosexual men and

women and of sex workers. If the Jamaican government chooses instead to let popular prejudices continue to undermine its attempts to establish right spaced HIV/AIDS policies, the consequences for all Jamaicans will be dire. Thousands of Jamaicans will be consigned to lives of horrific abuse and thousands will face premature and preventable death".

61. We have further reports from a number of organisations. We have read these but none of them paint a materially different picture. Mr Blundell did not draw our attention to any country information other than paragraph 6.155 to 6.173 of the latest April 2005 CIPU report. This states:

"Homosexuals

6.155 According to the International Lesbian and Gay Association [ILGA] website accessed 21 February 2005, Sections 76-79 [of the Jamaican] Penal Code criminalises homosexual intercourse between men with a penalty of up to 10 years imprisonment, with or without hard labour. Same sex female homosexual activity is not mentioned.

6.156 The Jamaica Forum for Lesbian, All-Sexual and gays (J-Flag) website, accessed 21 February 2005 states

"J-Flag is actively lobbying for legal reform. Our Parliamentary Submissions to amend the non-discrimination clause within the Constitution to include sexual orientation was reviewed by the Joint Select Committee on the Charter of Rights Bill. In December 2001, the Committee made its recommendations to Parliament. It declined to support our proposed amendment but did recommend that the House consider repealing the Buggery Law. We [J-FLAG] are now strengthening our efforts to ensure the successful passage of this bill through parliament, and will continue to push for the amendment to the constitution".

6.157 The J-Flag website also stated that

"Contrary to popular belief, it is not actually illegal to be homosexual in Jamaica. Being a homosexual does not contravene any of the existing laws; the law makes certain 'homosexual acts' illegal, and these laws are used to persecute gay men. They state that "acts of gross indecency" and buggery [anal sex] are illegal. Although buggery refers to anal sex between a man and another man, a woman or an animal, in practice the law is predominately enforced against two men. Lesbians are also discriminated against in the wider society, however no laws target lesbian or lesbian conduct."

6.158 The J-Flag website further noted that "The Offences Against Persons Act prohibits "acts of gross indecency" between men, in public or in private. (This is a very general term which can be interpreted to mean any kind of physical intimacy)." Under:

- Article 76 (Unnatural Crime); "whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years."
- Article 77 (attempt); "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour."
- Article 78 (Proof of Carnal Knowledge); "Whenever upon the trial of any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but

the carnal knowledge shall be deemed complete upon proof of penetration only."

- Article 79 (Outrages on Decency); "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding 2 years, with or without hard labour."

6.159 The J-Flag website also gave details on 'Your Rights, Duties and Responsibilities as a Jamaican Citizen' – one of them being that "as a Jamaican citizen you also have through the Constitution, the right to have your privacy respected within your home and family."

6.160 The J-Flag website stated that, J-Flag among other things: does significant personal development and community building in the gay community. They offer counselling and referral services to gay people and their families. They consult and collaborate with noted local and international figures and human rights/health/political interest groups. J-Flag are currently in the process of working for constitutional and other legislative changes and have made written submissions to the Joint Select committee of the Houses of Parliament for the inclusion of 'Sexual Orientation' as a basis on which the Constitution of Jamaica prohibits discrimination. They maintain a library and archive of resource for academic research.

6.161 There were no reports among the sources consulted by the Research Directorate of the Immigration and Refugee Board, Ottawa JAM35108.E dated 21 August 2000 accessed 25 February 2002, on the police protection available to homosexuals. However, a report in the Jamaica Gleaner – a Go-Jamaica Feature 2001 – on Gays in Jamaica stated that

"Homosexuals are increasingly becoming the targets of hate crimes in Jamaica but are afraid to press charges against their assailants for fear of bringing attention to their lifestyle... Earlier this year [2001], several students attending the Northern Caribbean University in Mandeville were attacked and beaten for alleged homosexual involvement... The police, too are aware of some of the attacks which have been made on gays but note that they hardly have enough evidence to go on. Several months ago [prior to publication of this feature in 2001] in St Catherine, police officers had to rescue two men from being killed by a group of angry residents. The men were allegedly caught having oral sex in the back seat of a car. 'Yes it is something that happens quite frequently.' Explained an officer attached to the Montego Bay police station. "Homosexuals are afraid to report some of the atrocities that have been carried out against them for fear of being exposed so they remain quiet while criminals walk free. Police officers many of whom are openly hostile towards gays, are also to be blamed for this. As a member of a human rights group, it is my belief that hate crimes, regardless of against whom, are wrong and should be condemned."

6.162 The above-mentioned 2001 feature in the Jamaica Gleaner states that "Public Defender, Howard Hamilton, said that he is outraged at the level of hate crimes going on in the country. Speaking recently at the annual general members meeting of the Cornwell Bar Association held in Green Island, Hanover, Mr Hamilton warned that he would soon be instructing lawyers engaged in private practice to file cases in the courts against the state and any other bodies on behalf of citizens who make strong allegations on breaches of their constitutional rights. He also noted that attorneys would be paid for their services."

6.163 The 2001 Jamaica Gleaner report feature also mentioned that "Clayton Morgan, President of the Cornwell Bar Association, said that his organisation would be

working closely with the Public Defender's office to stem the flow of hate crimes in the country. He said that the homophobic nature of the country makes it easy for homosexuals to be targeted and that people at times are reluctant to assist them for fear of being branded.

6.164 The USSD 2004 noted that

"The Jamaica Forum for Lesbian, All Sexuals, and Gays (J-FLAG) continued to report allegations of human rights abuses, including police harassment, arbitrary detention, mob attacks, stabbings, harassment of homosexual patients by hospital and prison staff, and targeted shootings of homosexuals. Police often did not investigate such incidents. Some of the country's most famous dancehall singers gained the attention of international human rights groups during the year for their homophobic lyrics, which incited violence against homosexuals. A 2001 poll found that 96 percent of citizens were opposed to legalizing homosexual activity."

6.165 An article dated 19 February 2004 in the Jamaica Observer mentioned that owing to the homophobic nature of Jamaica, gay men can hardly expect protection even from their parents. A father, concerned that his son might be gay, turned up at Dunoon Park Technical School in east Kingston and apparently encouraged other students to beat his son. School officials withheld the boy's name and the extent of his injuries was not immediately known. As students began to maul his son, the man is reported to have driven away. The Washington Blade noted in an article dated 27 February 2004 that law enforcements officers, [at the time] headed by Jamaican Commissioner of Police Francis Forbes, also were attacked when they arrived to save the teen, the Observer reported. The extent of the youngster's injuries was not known, according to the Observer. Police officials declined to take further action, claiming it was a family matter.

6.166 The USSD 2004 also reported that "On June 9 [2004], Brian Williamson, a prominent homosexual rights activist and founding member of J-FLAG, was found stabbed to death at his home in Kingston Human rights groups believed that the brutality of Williamson's death indicated a hate crime, but the JCF maintained that the crime was a robbery. A suspect was remanded in custody at year's end [2004]".

6.167 In November 2004, a Human Rights Watch report entitled 'Hated to Death; Homophobia, Violence and Jamaica's HIV/Aids Epidemic' noted that violent acts against men who have sex with men are commonplace in Jamaica. Verbal and physical violence, ranging from beatings to brutal armed attacks to murder, are widespread. For many, there is no sanctuary from such abuse. Men who have sex with men and women who have sex with women reported being driven from their homes and their towns by neighbours who threatened to kill them if they remained, forcing them to abandon their possessions and leaving many homeless. The testimony of Vincent G., twenty-two, is typical of the accounts documented by Human Rights Watch: "I don't live anywhere now.... Some guys in the area threatened me. "Battyman, you have to leave. If you don't leave, we'll kill you."

6.168 The November 2004 HRW Report also stated that "Victims of violence are often too scared to appeal to the police for protection. In some cases the police themselves harass and attack men they perceived to be homosexual. Police also actively support homophobic violence, fail to investigate complaints of abuse, and arrest and detain them based on their alleged homosexual conduct. In some cases, homophobic police violence is a catalyst for violence and serious – sometimes lethal – abuse by others".

6.169 The November 2004 HRW further mentioned that

"Jamaican health officials acknowledge that Jamaica's sodomy laws make it difficult for them to work directly with men who have sex with men. As

one high-level health official told Human Rights Watch: 'We don't promote direct programs or services to MSM [men who have sex with men] as a group because the existing laws impede this work [and] because [of] the high-level of stigma and discrimination, they're not open to getting services through the public sector.' The police, however, actively impede government-supported peer HIV prevention efforts among men who have sex with men and also among sex workers. AIDS outreach workers reported that the very possession of condoms – a key tool in HIV prevention – triggers police harassment, and in some cases, arrest and criminal charges."

6.170 Responding to the above mentioned November 2004 HRW Report, the Jamaica Gleaner dated 18 November 2004 reported that the

"Government yesterday [17 November 2004] dismissed claims by the international body, Human Rights Watch, that the authorities have been soft on police abuses on homosexual males and persons affected by HIV/AIDS. 'We find the approach of this organisation unacceptably insensitive,' Information Minister Burchell Whiteman said in a statement issued to the media yesterday [17 November 2004]. 'We also as the duly elected representatives of the people feel that it is the people who must set out agenda in respect of the legislation which we pass or the repeal of any existing laws. We are currently not about to respond to any organisation, external to this country, which may want to dictate to us how and when to deal with the laws of our land,' said Senator Whiteman... The international body also criticised the Government's stance on legislation (the buggery law) on homosexuality, which they say is a 'discriminatory legislation'."

6.171 The Jamaica Gleaner dated 19 November 2004 also noted that the Police Federation also condemned the

findings published in the November 2004 HRW and called on the minister of justice to slap sedition charges on the body and local groups, which they say were slandering both the government and the police force. The Jamaica Gleaner dated 29 November 2005 noted that "While careful to point out that they were not advocating violence against gays, panellists at Saturday's [27 November 2004] 'Men on a Mission' conference in Montego Bay denounced homosexuality as a moral defect, saying it should not be sanctioned by the Church."

6.172 A Human Rights Watch document dated 30 November 2004 stated that

"Jamaican authorities should reject a police demand to press criminal charges against local human rights defenders who have criticized police abuses against gay men and people living with human rights defenders who have criticized police abuses against gay men and people living with HIV/AIDS, Human Rights Watch said today [30 November 2004] in a letter to the Jamaican prime minister.... Five Jamaican human rights organizations – Families Against State Terrorism, the Independent Jamaica Council for Human Rights, Jamaica AIDS Support, Jamaicans for Justice, and Jamaican Forum for Lesbian, All-Sexuals, and gays – all joined Human Rights in the launch of the report. The report led to furious denials by Jamaican government officials, who claimed that police abuse doesn't take place. Officials also defended Jamaica's sodomy laws, Victorian-era legislation introduced by Britain when it was the colonial power, as basic to the country's sovereignty and culture. However, Jamaica is party to the International Covenant on Civil and Political Rights, a treaty that prohibits discrimination on the basis of sexual orientation... In an open letter to Prime Minister P J Patterson, Human Rights Watch responded in detail to criticism by Jamaica's commissioner of police and by the head of the National AIDS Program. The Jamaican police

should investigate allegations of homophobic abuse submitted to it months before, Human Rights Watch said."

6.173 As reported in an article dated January 2002 in SHAAN online – IPS e-zine on Gender and Human Rights, according to J-Flag, alleged homosexuals in the inner city are particularly at risk. In 2002, a homosexual man was shot to death as he sought refuge in a churchyard in central Kingston.

Death of gay rights activist Brian Williamson

6.174 An AI Press Release – AMR 38/010/2004 dated 10 June 2004 – 'Amnesty International mourns loss of leading human rights defender' stated that

"Amnesty International today [10 June 2004] mourns the loss of Brian Williamson, Brutally murdered on 9 June 2004, and urges that a thorough investigation be conducted into his death... the police have concluded that the motive for the murder was robbery due to the reported removal of a safe. Amnesty International urges the investigating authorities to keep an open mind as to the motive behind this killing... There remains a strong possibility that Brian Williamson's profile as a gay man and advocate of homosexual rights made him a target for those with homophobic views. That taking of money or other items may have been an afterthought by the perpetrators of the killing with the primary motivation for the murder being hatred to homosexuals."

6.175 In a release by the International Gay and Lesbian Human Rights Commission (IGLHRC) dated 14 June 2004 they stated that

"The International Gay and Lesbian Human Rights commission (IGLHRC) mourns the death of long-time friend and colleague, Brian Williamson, a gay activist from Jamaica found murdered in his home in

Kingston last week. Brian was a founding member of Jamaica Forum for Lesbian, All-Sexuals and Gays (J-FLAG) and one of the country's most visible and outspoken activists."

6.176 A Jamaica Gleaner news report dated 10 June 2004 stated that

"The death of Brian Williamson, outspoken gay rights activist and founding member of the Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), sent shockwaves throughout the local gay community yesterday [9 June 2004]. According to police reports, the 59-year old Williamson was found with multiple chop wounds in his apartment at 11:15 am. Investigators suspect robbery to be the main motive for the killing as a safe with valuables was missing, and the apartment had been ransacked. However, while the police suspect robbery as the main motive, the gay rights advocacy group J-FLAG was quick to label Williamson's death as a 'hate crime'."

6.177 The same article also quoted one of his friends as saying that

"He was very sweet, and the most adorable person you could find, very kind and trusting, and I believe that is what led to his death. He was my landlord, but he was like family to me, we would joke about the coincidence of us having the same last name, she said, in between sobs. I don't think he was killed because of his ... sexual orientation, he was just too trusting'."

Findings in relation to the appellant

63. We find that what happened to the appellant in Jamaica amounted to persecution for a Convention reason, his membership of a particular social group.

64. We repeat the passage in the judgment of Peter Gibson LJ in *Faraj* already referred to:

"Persecution may involve physical or mental ill-treatment. Torture is still ill-treatment carried to extremes. Persecution, unlike torture, always involves a persistent course of conduct... since the conduct may be directed against a particular person or a particular group of persons, an instant of torture of a person which is the sole instant affecting that person may amount to persecution if there are incidents affecting a group of which that person is a member. But isolated incidents of torture are not enough to constitute persecution without more."

65. This appellant did not suffer a single incident, but two serious and violent incidents and, in addition, over a lengthy period, a number of incidents of aggressive harassment. We find that, taken together, these did amount to persecution. They were persistent. It is not necessary that every incident should be as serious as the worst. What happened to this appellant amounted to persecution even without the assistance of the observations in *Faraj*. However, if such assistance is needed, it is available to the appellant because he was a member of a group, perceived homosexuals, many of whom have suffered in similar ways, as the country information makes clear. We have considered what is meant by "a particular group of persons" in *Faraj* and have concluded that it does include a group such as homosexuals in Jamaica.

66. As to causation, it is clear that the appellant was persecuted because he is or equally importantly because he was perceived to be homosexual.

67. We find that homosexuals in Jamaica belong to a particular social group and that the appellant is a member of that group. It is clear that homosexuals in Jamaica fulfil the required tests for membership of a particular social group. They are regarded as a group by the population at large. They are not identified solely by reason of the persecution they fear. We follow the reasoning of the Tribunal in *MN Kenya* already referred to and conclude that homosexuality is a matter of sexual identity rather than sexual activity. It is something an individual should not be required to give up even if he could.

68. Having concluded that the appellant suffered past persecution it does not necessarily follow that he has a current well-founded fear of persecution. We accept that he has a subjective fear. We do not find merit in Mr Blundell's submission that we should apply a

reverse *Dermirkaya* principle. On the contrary, this is a case where *Dermirkaya* principles obtain. The fact that the appellant has suffered past persecution is probative but not conclusive evidence of current risk.

69. In the light of the country material we find that the appellant does have a current well-founded fear of persecution for a Convention reason and there is a real risk that his Article 3 human rights will be infringed.

70. Mr Blundell accepts that the authorities will not provide the appellant with a sufficiency of protection. Had he not made the concession we would have come to that conclusion. Mr Blundell has not argued that the appellant could resort to internal relocation, but he has not conceded the point. We find that, in a small country like Jamaica, where homophobic attitudes are prevalent across the country and the appellant, because of his appearance and demeanour, would be perceived as homosexual wherever he went, he would be at risk of persecution and infringement of his Article 3 human rights throughout Jamaica. As he is at risk of persecution there is no question but that it would be unduly harsh to expect him to relocate.

General Conclusions

71. Mr Chelvan has submitted that we needed to consider both a particular social group and an imputed particular social group. We find that as the reasons for persecution must be found in the mind of the persecutor there is no need to differentiate between such categories. The only question we need to ask is whether an individual is a member of a particular social group. It may matter a great deal to an individual whether he is or is not homosexual but, certainly in the context of Jamaica, whether an individual is or is not homosexual, bisexual or asexual is of far less importance than the question whether he is perceived to be homosexual. There is some force in the suggestion, that "perception is all". Mr Blundell has conceded that gay men in Jamaica belong to a particular social group.

72. Mr Chelvan sought to persuade us that a widely defined group was at risk of persecution in Jamaica. He put this as "those seen as not conforming to what Jamaica sees as the norm of masculine identity in Jamaica." Whilst we accept that this formulation may assist in defining those who are thought to be homosexual, it is a wider definition than is required for the purposes of this determination both on the facts of the

appellant's case and in relation to the expert evidence and country material before us. We have not heard sufficient argument nor has the material before us been sufficiently targeted for us to address anything other than the core group of men who are or are perceived to be homosexual. This determination is not intended to address the position of Lesbians, Transsexuals, Transvestites or others who have encountered difficulties because of their actual or perceived sexuality.

73. In Jamaica buggery and almost all types of sexual activity between males are criminalised. There is no indication that the government intends to decriminalise such activities. On the contrary, senior and powerful politicians have indicated that they have no intention of doing so. In 2001 the Public Rights Defender indicated that he was minded to support criminal and civil action against homophobic acts, but there is no indication that any such action has been taken. However, there is no clear evidence before us as to whether and if so how often these criminal laws are enforced.
74. Those perceived to be homosexual are likely to face discrimination and harassment. There is a real possibility that discrimination and harassment can boil over into serious violence, including mob violence, and even death. The position of those perceived to be homosexual is exacerbated by the unpredictability of incidents of violence and the fact, conceded by Mr Blundell, that the authorities, usually the police, fail to provide a sufficiency of protection and are sometimes guilty of exciting or aiding and abetting violence against homosexuals.
75. Internal relocation is not, as a rule, available to a perceived homosexual who, as a stranger in another part of Jamaica, is likely to be regarded with suspicion, even before his homosexuality is identified. He is also likely to lose any protection he might have had from family and friends in his home area.
76. There are some early signs, for example in the Human Rights Watch report, of attempts to change the attitudes of health care professionals and also, amongst the population at large, by J-Flag. However, it is apparent that little progress has been made. The former head of J-Flag was murdered in circumstances where some people entertain suspicions that it was a homophobic crime, notwithstanding the police view that it was a robbery that went wrong. Others connected with J-Flag are understandably reluctant to be identified and there are signs that those

who might wish to support the decriminalisation of homosexuality and a more liberal approach are deterred by strong public prejudice, the risk of adverse political consequences and of being targeted by association with those whose cause they espouse.

77. Not all homosexual men in Jamaica are likely to be at risk of persecution or infringement of their Article 3 human rights. As Mr Sobers has pointed out "a gay man with wealth and status can be left alone as long as he remains within his social circles and does not cause his sexual orientation or his same sex partnership to attract the attention. His sexual orientation will be tolerated as long as he is not openly gay". However, Mr Sobers adds the caveat that "the affluent gay man can be subject to extortion for fear that his sexual orientation become public knowledge." A man who is not thought to be homosexual, perhaps because he has hidden his sexuality, is not likely to be at risk. There will be no perception of homosexuality and no history.

78. However, an individual may allege that, were he to return to Jamaica, he cannot be expected to modify his behaviour or hide his sexuality. How is such an allegation to be approached? In these circumstances the test is not whether he should be expected to accept any restraint on his liberties but would he in fact act in the way he says he would. We rely on the judgment of Buxton LJ in *Z v SSHD [2005] Imm AR 75* at paragraph 16 where it is said;

"Although S395 was presented to the court that granted permission in this appeal as a new departure in refugee law, and for that reason justifying the attention of this court, in truth it is no such thing. McHugh and Kirby JJ, at their paragraph 41, specifically relied on English authority, *Ahmed v SSHD [2000] INLR 1*. It has been English law at least since that case, and the case that preceded it, *Danian v SSHD [1999] INLR 533*, that, in the words of the leading judgment of Simon Brown LJ at pp 7G and 8C – D:

"In all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason.... The critical question: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer

persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."

It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution."

78. Every case will turn on both credibility and its particular circumstances. What happened to an individual before he left Jamaica will be important. If it is found that he suffered what amounted to past persecution then *Demirkaya* principles will assist him. If he did not, his task will be the more difficult, but not necessarily impossible. Factors to be taken into account include the extent to which an individual has been identified as homosexual, how widely spread is that perception, the extent of past acts of discrimination, harassment and violence, the extent to which an individual would present as homosexual (for example through dress, behaviour or demeanour), the extent to which he associates with other homosexuals, whether he is a homosexual prostitute, and the extent to which he is perceived to flout what many people in Jamaica regard as the norm of acceptable heterosexual behaviour.
79. With the possible exception of affluent gay men it is likely that a man who is thought to be homosexual will be at risk of homophobic intolerance, harassment and ill-treatment. The difficulty is in assessing whether this is likely to cross the threshold of persecution. It is clear that some of those who are perceived to be homosexual have suffered to this extent, what is not clear is how many. On the one hand it is likely that the most public and violent attacks will be reported, whilst on the other those who, understandably, decided not to complain to the police may also be reluctant to risk the consequences of press or other publicity. Whilst past persecution is probative of current risk the opposite is not necessarily the case. An individual who has not suffered past persecution may yet be at risk. There is no clear test to indicate when the threshold may be crossed. Homophobic violence is unpredictable. The acceptance by the Secretary of State of the absence of a sufficiency of protection is a vital factor. A man who is perceived to be homosexual and, as a consequence, has suffered past persecution is, unless there has been a

material change in his circumstances, likely to be at risk of persecution and infringement of his Article 3 human rights in Jamaica. A man who is perceived to be homosexual but has not suffered past persecution may also be at risk depending on his particular circumstances including, for example, the extent to which it is believed that he suffered threats before departure and will behave on his return.

80. It is not likely that an individual who is at risk of persecution or infringement of his human rights because he is perceived to be homosexual will be able to obtain protection from the authorities. The ability to relocate safely was not fully argued before us. It was effectively, although not specifically, conceded by the Secretary of State in this appeal. It may be an issue which requires full argument or a definitive view from the Secretary of State. Mr Sobers evidence appears to suggest that it is not readily available although other material makes it clear that it does occur. For the purposes of this appeal we accept that the Secretary of State does not seek to argue that internal relocation is available to this appellant.

81. The original Tribunal made a material error of law.

82. The appeal is allowed on asylum grounds.

83. The appeal is allowed on Article 3 human rights grounds

P R Moulden

Senior Immigration Judge
