Gay Kenyan Rugby Player Kenneth Macharia Wins Asylum Appeal After Five-Year Battle – Dr Chelvan instructed – calls for Urgent Home Office Reform.

Dr S Chelvan, Head of Immigration and Public Law

Photo credit: Dale Upward-Sheppard

19 July 2021: Speaking last Friday (16 July) following confirmation the Home Office are not appealing the positive June 2021 Tribunal determination, Kenneth Macharia ('KM') reflected on his 5-Year Battle with the Home Office:

> ***"When I tell people close to me the news, they are jumping with joy and excitement, I put on a smile and pretend to share the same level of enthusiasm. It's been a very long struggle, since 2016. I have had my hopes crushed too many times. I can't help wondering what will go wrong. The sadness has not gone away. I used to be optimistic. It will be a while before I am again. I am very grateful for all the support I have received. Very many people came to my aid at my time of need. The list is very long, some I know, some I don't. Thanks to each and everyone of you. It will take me a bit of time to truly believe this nightmare is over and be at the same level of enthusiasm as you."***

The 24 June 2021 determination of the First-tier Tribunal provides legal certainty for KM, a gay man from Kenya, who will now be able to stay in the UK as a refugee. KM's story highlights the urgent need for the Home Secretary to review and apply structural reform to her Country Policy and Information Team ('CPIT'), as recommended by the Independent Chief Inspector last September, in order to improve Home Office decision-making currently affecting the lives of those unlawfully refused asylum in the UK.

KENNETH MACHARIA ('KM')) lawfully arrived in the UK in 2009 as a student, renewing his visa under successive work permits as a qualified mechanical engineer until October 2016. Fearing persecution as a gay man on return to Kenya, prior to his work visa expiring, KM applied for asylum in May 2016.

SECTION I - The Culture of Disbelief – KM had a Boyfriend but the Home Office Do Not Accept He is Gay:

In August 2011, the First-tier Tribunal ('FTT') heard KM's evidence in support of the successful appeal of his then boyfriend to join him in the UK, accepting KM is a gay man, and in a genuine and subsisting relationship with his boyfriend since 2003 (physically separated from 2009 following KM's arriving in the UK).

This did not stop the Home Office refusing KM's asylum claim in October 2016, refusing to accept he is a gay man, and finding based on their own analysis of the (March) 2016 country information report, he would only face discrimination, and not persecution on return to Kenya, and that his asylum claim was 'fabricated'.

The December 2016 FTT on the basis of the earlier 2011 earlier FTT determination, accepted KM is gay, but agreed with the Home Office decision with respect to discrimination, and not persecution on return as there would be effective state protection. The FTT held KM would be able to live openly on return to Kenya, due to the lack of persecution. This FTT determination was upheld on appeal to the Upper Tribunal in July 2017.

SECTION II - 2018 Fresh Claim and the BRISTOL BISONS RFC

The *#KeepKenHome* Campaign:

KM has immersed himself in life in the UK, including his membership of the **Bristol Bisons Rugby Football Club**, '*a group of gay, straight, and bisexual guys who get together to play rugby both on a friendly and competitive basis'*.

The Bristol Bisons had made clear through their **#KeepKenHome campaign** they would fight to prevent KM's removal from the UK. The November 2018 petition to the then Home Secretary Sajid Javid to prevent KM's 'deportation' is now in July 2021 supported with over 180,000 signatures. This campaign was recognised in 2019 by *Attitude Magazine* with a **2019 Pride Award for the Bristol Bisons and KM.** The campaign attracted both national and global **media attention**, including threats of physical violence to KM from commentators in Kenya.

A FRESH CLAIM was lodged in 2018, challenging the Home Office claim and earlier FTT finding of discrimination, and not persecution of gay men in Kenya. There was additionally a flood of support by the local community in Bristol and South Gloucester to support his human rights appeal, including by his former employer who highlighted their desire to employ KM who had skills vital to the success of their engineering company.

Irrespective of this volume of support, KM's appeal would need to be won on the basis of law, and this is where the Home Office approach with respect to reliance on flawed and inaccurate country background information is specifically troubling.

SECTION III - 24 May 2019 (*E G & Ors. v Attorney General)* Judgment of the Kenyan High Court

- Upholding Criminalisation of Gay Sex and 2010 Kenyan Constitutional Prohibition of Gay Couples to Live Together.

The Home Office refused KM's fresh claim on 30 May 2019. The Home Office continued to rely on a stated position of discrimination, and not persecution. They specifically relied on two 2018 Appeal Court judgments, the first reversing a 2016 High Court judgment upholding the constitutionality of anal examinations by police officers for those suspected to be gay, and a further 2018 Appeal Court judgment enabling the registration of gay rights groups.

The author was first instructed at this stage by Sarah Lattimer of Fountain Solicitors with respect to the challenge to this 30 May 2018 refusal of the fresh claim. Home Office 2016 published policy on Further Submissions (**currently in force**), stated all decisions are must be made in light of all new evidence including '*more recent country information or caselaw where applicable*' (page 17).

The 30 May 2019 Home Office decision had not taken into account the 24 May 2019 Kenyan High Court judgment in ***EG and Others v Attorney General*** upholding the constitutionality of the criminalisation of gay sex.

KM submitted the **24 May 2019 High Court of Kenya judgment** by itself, as a matter of law, amounted to a '*judicial measure amounting to persecution*'. Not only did the Kenyan judgment uphold the constitutionality of the criminalisation of gay sex, but did so on the basis of defending the wishes of the Kenyan people codified in the **2010 Kenyan Constitution**. Article 45 (2) of the 2010 Constitution provides for marriage to be only between members of the opposite-sex. The chilling effect of the judgment is at [396] (*emphasis added*) (***additional emphasis added***):

> 'Article 45(2) only recognizes marriage between adult persons of the opposite sex. *In our view, decriminalizing same sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2).* ***The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution****.'''*

The Home Office accepted the 30 May 2019 decision was unlawful, as it failed to consider all relevant case law at the date of decision, specifically the 24 May 2019 Kenyan High Court judgment upholding the Criminal Code (**sections 162 to 165 of the Penal Code** (imprisonment up to 14 years for consensual adult same-sex conduct, last amended in 2003 so not solely based on the earlier British colonial laws)). A new decision dated November 2019 was issued, granting KM an in-country right of appeal, rather than granting him asylum.

SECTION IV - 24 June 2021 Tribunal Determination allowing the appeal on Asylum and Human Rights Grounds*:*

A. The Central Question:

Sitting remotely on 4 June 2021 Judge Mensah of the First-tier Tribunal (Newport) summarised the main question, noting KM is accepted to be gay and would live openly on return, ([82] ***HJ (Iran)*** applied) [3]:

> **'Do openly gay men objectively face a real risk of serious harm/persecution in Kenya?'**

The important **point of law** KM advanced before the Tribunal with respect to 'judicial measure amounting to persecution' is summarised at [6] and [7] of the determination:

> **'[T]he judicial measures which are in place in Kenya through its law are cumulatively so discriminatory they are sufficiently serious to constitute a severe violation of an individual's basic human right/s. In other words, they amount to serious harm/persecution whether or not they are enforced.**
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> **…**
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> **Dr Chelvan argues the case law does not preclude a finding that even if there is no evidence of enforcement of those laws, they are together, or 'accumulatively', sufficiency serious to meet the definition of persecution under the Regulations. [the Presenting Officer] disagrees. They both ask me to interpret the law and evidence differently.'**

The Tribunal additionally addressed in the alternative individual specific harm to KM due to the media attention, and whether KM would face 'very significant obstacles' on return and should additionally succeed in his article 8 ECHR human rights appeal (paragraph 276 ADE (vi) of the Immigration Rules and Outside the Rules) [8].

B. A Historical Injustice:

At [42] of the determination the Tribunal addressed the 'injustice' towards the appellant in 2016, when the Kenyan High Court ruled as constitutional the anal examination of perceived gay men, at a time prior to the December 2016 FTT hearing (emphasis added):

> 'Dr Chelvan points out the very fact forced anal examination was being used on those accused of same-sex relationships at least until March 2018 is not a fact that was put before Judge Woolly or Judge Grubb. If that fact had been known the Appellant would have succeeded in his case as there can be little room for argument that such an act amounts to persecution, however he agrees I am not tasked to consider such an argument. What I do take from this evidence is it appears to reflect the attitude and behaviour of law enforcement officers as recently as 2018 in believing it was right to carry out such an examination and it suggests at least some active pursuit or implementation of the penal code by police officers. The fact the High court approved such behaviour in 2016 shows the level to which such views our fostered.'

C. Nexus between Judicial Measure and Persecution:

Relying on the earlier guidance of the England and Wales Court of Appeal in 1999 with ***Jain v SSHD*,** KM was able to highlight in his written and oral submissions the relevant agent for persecution is 'state enforcement' of the law, one not limited by the Court of Appeal to a narrow definition, such as solely police prosecutions. In November 2009, the Court of Appeal in ***OO (Sudan) and JM (Uganda)* [2009] EWCA Civ. 1238** importantly recorded a Home Office concession non-Article 3 ECHR violations may be serious enough to amount to persecution ([21]).

This approach enabled KM to distinguish the approach in the November 2013 judgment of the Court of Justice of the European Union in **X, Y, Z v Germany**, where the Luxembourg Court held unenforced criminal laws do not amount to persecution. Importantly, the UK litigation in *OO (Sudan)* was based on Article 9 (2) (b) of the **2004 Minimum Standards Qualification Directive** (Regulation 5 (2) (b) of the **2006 International Protection Regulations,** still in force) '*legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner' (emphasis added)*.

Article 9 (2) (b) measures do not require enforcement, whereas Article 9 (2) (c), the focus of the Luxembourg Court's analysis, does require enforcement based on '*prosecution or punishment, which is disproportionate or discriminatory'*.

The Home Office submissions distinguishing KM's reliance on the November 2020 Strasbourg

judgment in B and C v Switzerland in his written submissions were rejected by the Tribunal ([35]-[38]). The central issue was to identify the impact of the legislation/judicial measure had on ill-treatment of gay men in Kenya, accepting this nexus approach [40] (emphasis added):

> ' … I agree with Dr Chelvan, the evidence from the High Court decision in EG & others, demonstrates the current laws are not an overhang from the colonial era, but are the living representation of the views of the State and the general public in Kenya. If they were not, as the High court in Kenya made clear, the Constitution would have provided for it. The very approach of the High court to the petitioners' case and the Respondent's arguments, in my view demonstrates a societal pervasive attitude to same-sex relationships that does go to the heart of Kenyan society. It is clear Kenyan society does not recognise and does not wish to permit the very existence of same sex relationships, whether they are in private or public.'

In addressing the weight to be attached to the Home Office **April 2020 CPIN report on Kenya: Sexual orientation and Gender Identity and Expression**, the FTT held at paragraphs [46] -[47], and [49]-[51] (emphasis added):

'[46] Overall, the CIPN paints a picture of a lack of clear record keeping of the frequency of arrests/ detentions and the stages of/pursuit of prosecutions. It is also unclear to me, how long a case takes to proceed from arrest to prosecution in a country like Kenya. What is meant by 'few prosecutions' and if 534 people were arrested between 2013 and 2017, are these the recorded arrests of those that face prosecution, where they realised, are they still in detention or are they all arrests documented as under the penal code. If there are 'frequent' arrests accompanied by physical and mental abuse, for which there is no accountability, it paints a very different picture on how the discriminatory laws are impacting on the ground than that before Judge Woolley or Judge Grubb.

[47] Then the report appears to suggest significant under reporting and/or the need to hide ones sexual identity, due to the reaction of the general public, law enforcement and state agencies. The fact there exist an underground culture or 'scene,' in my view provides limited evidence when assessing the issue of risk to openly Gay men

…

[49] This does not sit well with the Respondent's position. This evidence appears to me to give some support to the proposition that the accumulation of the discriminatory laws on the ground is to give effect to pervasive and uncontrolled discrimination, violence and sexual and mental abuse. I see no reference to any victim support other than outside the State apparatus in the form of NGOs. The reference to police occasionally stopping mob attacks is not reassuring.

[50] My impression is people labelled LGBTQI live in sustained fear of harm and abuse from state actors, family and the wider public in Kenya that is serious. Living in this way must place a significant weight on their well-being and fulfil the definition of degrading treatment when it occurs. I considered the Appellant's country evidence. Firstly, there is reference to the Respondent's guidance to British travellers in the form of the **Foreign Office published advice** which states. "Homosexual activity is illegal. Public displays of homosexuality like holding hands or kissing in public places could lead to arrest and imprisonment. See our information and advice page (https://www.gov.uk/guidance/lesbian-gay-bisexual-and-transgender-foreign-travel-advice) for the LGBT community before you travel."

[51] I do not believe anyone is suggesting this advice is because British homosexuals are more at risk than Kenyan nationals. Dr Chelvan asks me to accept the reason this advice is there because it is a real risk….'

In summary, having recorded at [34] Counsel's submissions repeating his observations in the 2020 IAGCI Thematic Review the FTT held in allowing the asylum claim [**pages 114-127 of Review**] ([52]-[53]) (**emphasis added**):

> [52] **Overall, applying the lower standard of proof, I find the Appellant has demonstrated that the current laws in Kenya are not only discriminatory, but do force Gay man to live in secret as a result of a genuine fear of a real risk of serious harm at the hands of the general public and officials including police officers**. I do not accept the extracts in the refusal letter are evidence Gay men can live safely and openly. The reference to the comments made by a Mr Kevin Mwachiro who openly declared his sexuality in Kenya is of limited value, given it is couched in terms of him being 'brave', 'lucky' not to have been physically and verbally violated like 'many individuals from the community' and in circumstances where he identifies a 'real' threat of violence to his person. **I find openly gay men in Kenya are at real risk of persecution by reason of discriminatory laws that create a hostile environment in which Gay men are exposed to a real risk of discrimination in employment, in housing, in having or developing a family life with their partners and to sexual, physical and mental abuse. The impact of the laws accumulatively, in my view amounts to persecution as so serious a violation of basic rights**. However, the **country evidence also demonstrates a real risk of actual physical and sexual harm that is also persecutory**. I am also satisfied there is some evidence of police pursuit of individuals through prosecution, albeit the evidence is limited as to what happened to cases against individuals who were arrested and if the cases were dropped at some point.
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> [53] **The inability to even exist in the eyes of Kenyan society, pervades all aspects of a person's life and is not only degrading treatment under Article 3, but breaches the core of their private and family life under Article 8.'**

D. Article 8 ECHR Human Rights Appeal:

In allowing the human rights appeal under article 8 ECHR ('very significant obstacles' (paragraph 276 ADE (vi) of the Immigration Rules), the Tribunal held:

> '[61] Turning to Paragraph 276ADE(6), clearly as a result of the above, I accept the Appellant faces very significant obstacles to integration in Kenya. This is not dependent upon my legal analysis, but on the country evidence couple with his individual profile proving he will not be accepted in Kenyan society, his overt lifestyle as a Gay man developed over the years in the United Kingdom and encouraged by our open society and values, will not be accepted or tolerated, his subjective fear of harm will also hinder his ability to integrate, and these matters will create very significant obstacles to his ability to integrate if now returned. I also agree with Dr Chelvan, the current position in Kenya makes it extremely difficult, if not almost impossible for the Appellant to develop a family life with another man in Kenya, to cohabit with them, to live and share a life with them, and all that entails when a human being wishes to develop

relationships and interact with the wider community.

[62] Dr Chelvan has argued, in the alternative, the Appellant's appeal under Article 8 should be allowed because his employer identifies the Appellant as being employed in a specialist engineering role within his company and they have not been able to find anyone else suitable in the job market. Given my findings above, this is academic and therefore, I am not obligated to consider it here. I would simply record there was no dispute between the parties as to what the employer has said about the difficulties in finding anyone with the same specialist skills as the Appellant to perform the role.'

This determination has not been appealed by the Home Office. KM has now, after a Five-Year Battle, succeeded in his Asylum Appeal.

SECTION IV: Urgent Structural Reform to the Home Office Country Policy Information Team ('CPIT'):

THIS IS YET ANOTHER EXAMPLE OF where the Home Office are refusing asylum claims based on inaccurate country information compiled by their Country Policy and Information Team ('CPIT').

In September 2020, Sir David Bolt the former Independent Chief Inspector wrote at page 15 in his recommendations to my **Thematic review on Home Office Sexual Orientation and Gender Identity and Expression Country of Origin Information reports** (31 COI reports, 400 plus page report filed February 2020, published December 2020 - 6 out of 10 recommendations fully accepted by the Home Office, 2 partially accepted), with the (now former) ICI making this ultimate recommendation for Home Office structural and management reform of CPIT:

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

Importantly, the CPIT team engaged with Civil Society groups in 2019, promising an updated Country Policy Information Note following the May 2019 Kenyan High Court judgment. Instead of publishing this document publicly, the update was for internal purposes, and would only be disclosed following a negative decision for the appeal. Only in **April 2020** was the document published but as this case evidences with some force, the policy positions taken do not reflect accurate and reliable country information to enable lawful decision-making.

Kenya is not the only example of flawed approach to country information by the Home Office. In March 2021 (link in original 19/7/21 News Item), I submitted a paper to the Home Office National Asylum Stakeholder's Forum Equality Sub-group focussed on the Home Office's treatment of LGBT+ claims from Sri Lanka (Country Policy Information Note ('CPIN') on **Sri Lanka, Sexual orientation and Gender Identity and Expression, 30 September 2020).**

In November 2016, the Sri Lankan Supreme Court in the case of ***Galabada*** upheld the constitutionality of section 365A of the Penal Code (gross indecency provisions) and held a first time offender should be sentenced for 24 months, suspended for 5 years in order to provide them an 'opportunity to reform' (interpreted as gay conversion therapy in a country where this practice is highly prevalent). The February 2015 Country Guidance case of **LH and IP** held there had been no prosecutions since independence in 1948. This position was successfully not followed in successive FTT appeals, and notably upheld as a lawful basis for granting refugee appeals by the Upper Tribunal in November 2018 in **MKMR**.

The current Home Office policy position is based on an interpretation 'prosecutions are extremely rare', when the September 2020 CPIN does not draw upon a **2018 Police Performance Report** recording 33 prosecutions in 2018 (at page 36). The Home Office now has possession of October 2020 reports, including from **Human Rights Watch.** Recording examples of anal examination of men suspected by judicial officers in Sri Lanka to be gay, and additionally **continued arrests and prosecutions of gay men**, the Home Office continue to maintain refusal of gay asylum claims from Sri Lanka. The written response from CPIT is they are looking into updates in June/July, even though CPIT have had this material since March at the date of this Case Note (19 July), no update is publicly available.

In additional challenge to the status of CPIT was by the Upper Tribunal in the May 2021 Country Guidance case (**KK and RS**) on Sri Lankan Tamil Separatism, where the Upper Tribunal made clear their rejection of the Home Office Fact-finding report, and to reject asylum claims of Tamil separatists.

KM's journey through the UK's asylum-system proves why structural change to CPIT is urgently needed. The Home Secretary needs to address this lack of accountability towards this department and address this lack of public confidence and trust in Home Office decision-making, and ensure in KM's words ***'this nightmare is over'.***

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19 July 2021

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Chelvan holds an LLM from Harvard Law School (2001, Kennedy Memorial Trust scholar) and was awarded a PhD in (Refugee) Law from King's College London, in June 2019. He tweets from **@S_Chelvan**

Chelvan's approach to his practice successfully employs a symbiotic approach to strategic litigation, academic research and policy development. Chelvan has provided training to Judges, lawyers, NGOs, activists and those seeking-asylum. His public speaking has earned him an international reputation as a charismatic and engaging speaker. He litigates from First-instance Tribunals to the Supreme Court, and the European Court of Human Rights (two currently outstanding applications communicated to the UK). Awards include *Legal Aid Barrister of the Year* (2014), and *Attitude Magazine Pride Award* (2018). He is short-listed for the 'Outstanding Contribution to LGBT Life Award' for the British LGBTAwards (ceremony 27 August 2021). He is ranked as a Leading Junior at the London Bar in Immigration in both *Chambers Bar UK* (since 2006), and *Legal 500* (since 2007, Tier-1 since 2017). He identifies as an #ActivistLawyer. To view his full CV, click here:

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