

MISSING THE MARK

**Decision making on Lesbian, Gay
(Bisexual, Trans and Intersex)
Asylum Claims**

September 2013

UK Lesbian & Gay

Immigration Group



Since 1993 UKLGIG has been supporting lesbians and gay men to gain fair and equal treatment in immigration law. The group brought about the first ever legal recognition of lesbian and gay relationships in the UK.

This sowed the seed for future lesbian and gay legal rights and ultimately led to civil partnership legislation in December 2005.

As the area of need changed, UKLGIG's focus shifted to those who, persecuted in their home countries because of their sexuality, have escaped to the UK. There is currently no other national organisation dedicated to tackling the multifaceted problems faced by LGBTI asylum seekers.

UKLGIG works directly supporting asylum seekers to ensure that they have the best possible chance of gaining fair and just treatment within the asylum system. The group also works to influence and change policy and practice to ensure long-term benefit for all LGBTI asylum seekers.

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Foreword

Amazingly, this report concludes that there has been some improvement in the quality of initial decisions on LGBTI asylum applications since UKLGIG last examined the situation three and a half years ago. This was against the background that the UKBA had been a troubled organisation from its formation in 2008 to its abolition last March, operating as it did in a culture described by the Home Secretary as “closed, secretive and defensive”, with a backlog of casework running into hundreds of thousands.

The Home Office remedy for these shortcomings, is to downgrade the decision makers from Higher Executive Officer to Executive Officer. The idea was that because of the recession it would be easy to fill the posts at lower pay, but the result is the loss of a whole layer of experienced case owners. Since EOs are not qualified to appear in court, HEOs will still be needed to do that job, requiring extra time within the system for presenters to familiarise themselves with case details.

From the cases that do come to UKLGIG’s attention, it appears that the Supreme Court’s 2010 decision in the case of *HJ and HT*¹, that claimants were not obliged to conceal their sexual identity in their countries of origin to be successful, was a key factor in the improvement of first decisions. However, dispensing with that ‘voluntary discretion’ policy has led to a greater emphasis on claimants having to prove their sexuality, and there is no clue as to what will satisfy the caseworker².

Yet the culture of disbelief, which infects all Home Office decisions, has not been eradicated for gays and lesbians. In the overwhelming majority of refusals, the Home Office said they did not believe that the applicant was gay, lesbian or bisexual.

This study finds, however, that in over a third of these ‘credibility’ refusals, the claimants had been telling the truth about their sexual orientation. Compare this with the 25% of all appeals that are allowed.

Caseworkers are still citing minor discrepancies to cast doubt on the general credibility of applicants; failing to act on Home Office guidelines on sexual identity, and relying on out of date Country of Origin information. The major defects identified by this study are unlikely to be rectified in an era of further cuts.

Although legal aid remains for asylum cases, practitioners are having to do unnecessary work inside diminished time allowances to rebut wrong arguments still being used by decision makers. In two thirds of the cases reviewed, for instance, the possibility of internal relocation is still being cited as a reason for refusal.

The study also pinpoints the fact that caseworkers and judges are not always properly aware of the wide spectrum of behaviour between individuals, recognised in *HJ and HT*, and apply their limited preconceptions in deciding issues of credibility.

¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010].

² Alison Harvey, ILPA, Oral Evidence taken before the Home Affairs Committee July 2, 2013, Q 286 et seq.

One important question UKLGIG is unable to answer is whether lesbian and gay asylum seekers from so-called safe countries like Mali or Jamaica are being disbelieved at initial interview, fast-tracked, and returned to their countries of origin. Since the Government say this doesn't happen they have no valid reason for refusing to guarantee LGBTI asylum seekers from homophobic countries the same rights of appeal as are accorded to women from misogynistic countries.

A little progress has been made overall, thanks to the courts rather than the Government. Much still remains to be done before it can be said that gay and lesbian asylum seekers are getting a fair deal from the immigration system; UKLGIG has an essential role to play for many years to come.

The Right Honourable The Lord Avebury



Introduction

Asylum claims based on sexual orientation and gender identity have been recognised in the United Kingdom since 1999. However, from 1999 to 2009 having a right to seek refugee status and actually gaining asylum were two very different things as evidenced in UK Lesbian and Gay Immigration Group³ (UKLGIG)'s report "*Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum*", April 2010.⁴ The research report found that 98 to 99% of asylum claims made by lesbians and gay men were rejected compared to 73% of general asylum claims. Through a qualitative study of 50 UK Border Agency (UKBA) refusal letters, the report identified a number of trends in the initial decision making of Home Office case workers and examined why the denial rate for lesbians and gay men was so high. Most notably, UKBA refusal letters often required asylum seekers to be 'discreet' about their sexual identity or to 'relocate' within countries where persecution and homophobia are prevalent.

Since the publication of the report, the law on lesbian and gay asylum claims has undergone a significant development. In 2010, the Supreme Court decided the seminal case of *HJ (Iran) and HT (Cameroon)*.⁵ In this case the Court set down

the test for sexual identity asylum claims and found that the UK could not send back lesbian and gay asylum seekers and ask them to be 'discreet' without consideration of the reason why someone is being 'discreet'. The *HJ and HT* judgement represents a major breakthrough in the law in this area.

While *HJ and HT* has had a positive effect on sexual identity asylum claims, the law in this field develops quickly, meaning that there is a real need for accurate and thoroughly researched work. The issue of LGBTI (lesbian, gay, bisexual, trans and intersex) asylum is a hot media topic with newspaper articles and journalists reporting widely on the subject with various degrees of accuracy and sensationalism.⁶ Many of these reports are based on asylum claims which pre-date the *HJ and HT* judgment, meaning that some of what is reported is out of date and based on small pools of research material.

In 2013 UKLGIG began a new research project as an update to the "*Failing the Grade*" report with a broadened focus to take into account the wider asylum process. The report analyses the asylum process for sexual identity claims starting from the screening interview up until the first determination by an immigration judge. This research aims to highlight some of the on-going challenges and concerns affecting lesbian and gay asylum seekers in the UK.

³ UK Lesbian and Gay Immigration Group is a registered charity committed to assisting those seeking asylum on the basis of sexual or gender identity.

⁴ See also paragraph 10 of *HJ and HT* per Lord Hope: There is no doubt that gay men and women may be considered to be a particular social group for this purpose: *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 643-644, per Lord Steyn.

⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

⁶ For example, see UKLGIG Press Release 'Sensational Headlines Risk Lives of LGBT Asylum Seekers' 25 May 2010, in response to Independent article by Emily Dugan and Jane Merrick 'Virtually all gay asylum-seekers sent back to persecution' Sunday, 23 May, 2010. Available at <http://www.independent.co.uk/news/uk/home-news/virtually-all-gay-asylumseekers-sent-back-to-persecution-1980486.html?origin=internalSearch>

In addition to the changes in the law, the report attempts to reflect some of the improvements in the process for LGBTI asylum seekers. The Home Office has trained case workers on sexual identity issues and the Asylum Policy Instructions on sexual orientation, gender identity and gender have been enacted to guide case workers. Where case workers do fail to follow the guidelines, the Home Office has been willing to address complaints. UKLGIG is happy to report that the Home Office in Kent recently dealt with a complaint about a case worker in Folkestone by issuing an apology to the asylum seeker and by re-emphasising the need for sensitivity when approaching sexual orientation to the case worker.

While the situation for lesbians and gay men claiming asylum has improved since the last report was published, the study identifies a number of troubling reasons why genuine asylum claims are refused at both the initial decision making stage and subsequently by First-tier Tribunal (Asylum and Immigration Chamber) (hereafter Tribunal).⁷ The report concludes with updated recommendations to further improve the process so that claims based on sexual identity are better understood and adjudicated.

As with the former report, this report does not purport to be a definitive piece of research but rather a study that maps out the current trends and developments in this area. Although the report focuses on lesbian and gay asylum seekers, the term LGBTI is still used at certain points in the report where the findings can be equally applicable to bisexual, intersex and trans claimants. The report does not purposely exclude gender identity claims; however, within the empirical data collected there was insufficient information to make any findings. Whilst UKLGIG offers support to anyone claiming asylum on the basis of sexual or gender identity, the organisation receives very few requests for support from bisexuals or people claiming on the basis of gender identity. UKLGIG believes that there may be people who have gender identity claims who are unaware of the fact that they can claim asylum and further unaware of the support that is available.

Instead, this report reflects the fact that UKLGIG assists hundreds of lesbians and gay men navigate their way through the asylum process each year. From monthly meetings where advice can be sought on the asylum process, to therapeutic group sessions or one-to-one support, the organisation provides a unique service to those who wish to make a claim on the basis of LGBTI status. This year, the courts have recognised the work that UKLGIG does in a number of cases. The individual contributions of UKLGIG staff have also been mentioned in the judgments. For example, one judge commented in August 2012 that: "I attach weight to the letter of support from Jill Power, asylum support co-ordinator for the UKLGIG." He went on to state:

I am prepared to accept that it was his introduction to UKLGIG which prompted the Appellant to gain confidence and 'find his feet' as it were, here in the United Kingdom. The UKLGIG is there precisely to offer support to asylum seekers and would-be asylum seekers. It is plausible that the Appellant would have met other gay men through his attendance at meetings. It is credible that his new social life coincided with his involvement in UKLGIG.

In another case, which did not involve a client of UKLGIG, a judge commented:

It is noticeable that the UKLGIG have not assisted the Appellant in his claim. The Appellant sought to explain this in oral evidence to me by saying that they do not carry out one-to-one work. That is plainly false as can be seen from the e-mail which the organisation sent to the Appellant's solicitors. UKLGIG are obviously careful not to be used by people seeking to make false claims. They are not prepared to give out letters to confirm that someone has been to one of their meetings, as that is of no value in indicating someone's sexual orientation. What they are prepared to do in genuine cases is offer one-to-one support.⁸

⁷ The Asylum and Immigration Tribunal (AIT) became the First-tier Tribunal (Immigration and Asylum Chamber) on the 15 February 2010.

⁸ Tribunal decision, Egyptian man, Hatton Cross, fast track, February 2013.

It is with this in mind that the organisation seeks to share its expertise and continue its dialogue with the Home Office and immigration judges in order to highlight areas where improvements both have been made and could be made.



Executive Summary

Since UKLGIG published its report “*Failing the Grade*”, the Home Office has made substantial efforts to improve the decision making process for lesbian and gay asylum claimants. Sexual identity claims are no longer routinely refused as in 2010, when UKLGIG found that 98% of claims were refused. Following the Supreme Court decision on *HJ and HT* and the enactment of the asylum policy instructions on sexual orientation issues in asylum claims, there has been an improvement in decision making at the initial stages.⁹ Lesbians and gay men with genuine claims are increasingly successful both at the Home Office and appeal levels. Where case workers do follow the policy instructions, they have demonstrated sensitivity and well-reasoned responses to lesbian and gay asylum claims.

Whilst this report highlights some of the improvements in the process, the exact number of successful claims on the basis of sexual identity remains unknown. The numbers recorded by UKLGIG of claimants who have contact with the organisation clearly show that things have improved with only 18 lesbians and gay men granted asylum in 2008 and 25 in 2009. This figure jumped in 2010, undoubtedly due to the change in the law on discretion, to 70 lesbians and gay men granted asylum. In 2011 and 2012 the numbers decreased to 49 and 55 respectively, with 47 lesbians and gay men granted asylum as of August 2013. Out of circa 1,000 people who contact UKLGIG every year about claiming asylum, the number of lesbians and gay men supported by the organisation who eventually are granted asylum remains a small proportion.

The numbers above are unofficial statistics collected on the basis of information available to UKLGIG and no doubt reflect only some of the successful claims. Although the Home Office collects statistics, these numbers are not published. The publication of statistics on the number of sexual identity claims refused or granted; whether decisions are made within or outside of detention and the

countries of origin of the claimants would greatly assist UKLGIG in its efforts to provide updated and accurate research reports on LGBTI asylum in the UK.

This report outlines some of the advances in decision making on sexual identity asylum claims, providing examples of good practice and highlighting some of the persisting concerns UKLGIG has identified in sexual identity claims for asylum. A review of 35 substantive interviews, 37 refusal letters and 50 Tribunal decisions reveals several troubling issues regarding the handling of sexual identity claims by some Home Office case workers and immigration judges. These include:

- Inappropriate and sexually explicit questioning by case workers;
- Disbelieving a person is lesbian or gay due to the decision maker’s misconceptions about sexual identity. The change in the law in this area means that today case workers overwhelmingly refuse sexual identity claims on the grounds of ‘credibility’. In the majority of the decisions analysed, case workers and judges disbelieved that the person is a lesbian or gay man;
- Falsely assuming that internal relocation is a valid option and that it is possible to live as a lesbian or gay man in countries where homophobia is prevalent “*as long as someone is not ostentatious about it*”;¹⁰
- Stereotyped assumptions about female sexuality and about lesbian and gay relationships;
- Use of out dated Country of Origin Information or ill-informed sources such as the Spartacus Guide;
- The continuing invisibility of lesbian asylum seekers and failure to recognise the intersectional factors based on both gender and sexuality which affect their lives and their claims.

⁹ Asylum Policy Instructions include: ‘Sexual Orientation Issues in the Asylum Claim’; ‘Gender Identity Issues in the Asylum Claim’ and ‘Gender Issues in the Asylum Claim’. Available at www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/

¹⁰ Refusal letter to Pakistani man, June 2013.



Methodology

Between October 2010 and January 2011, Home Office case workers received compulsory training on sexual identity asylum claims. This qualitative research is based on a review of 35 substantive interviews carried out since January 2011 and 37 Home Office refusal letters issued since January 2011. The report therefore only takes into account interviews and decisions made after the provision of training. The report only analyses Home Office refusal letters as decisions granting asylum do not provide any reasons or information which can properly be analysed for the purposes of this report. In addition, the research analyses 50 decisions of the Tribunal made from 2009 onwards. All of the claims focused on sexual identity as the primary basis upon which the person sought asylum. The interviews, refusal letters and Tribunal decisions relate to asylum seekers from a range of countries including Nigeria, Uganda, Cameroon, Egypt, Trinidad and Tobago, Bangladesh, Malaysia, India, Pakistan, Jamaica, Malawi, Vietnam, the Philippines, the Gambia, Ghana, Iran, Kenya and Morocco.

The selection of material was based on the availability of documents to UKLGIG and interviews, refusal letters and Tribunal decisions were picked at random from a pool of material. In some cases, the report only analyses one document from a claimant's case file (such as a substantive interview because the person has been granted asylum). The report also analyses a number of cases, where all the documents are available – screening interview, substantive interview, Home Office refusal letter and Tribunal decision. In the analysis of the Tribunal decisions, over 100 decisions were

initially considered from 2003 onwards. All decisions made on the basis of 'discretion' prior to 2010 were excluded and from the remaining pool 50 decisions were chosen at random.

UKLGIG analysed the substantive interviews in order to determine what type of questions case workers are asking lesbian and gay claimants. UKLGIG was concerned about the types of questions lesbians and gay men are being asked in interviews, as case workers attempt to assess 'credibility' and evidence of sexuality.¹¹ Refusal letters were analysed for the reasons given and language used by case workers and finally appeal determinations were analysed in order to identify on what grounds immigration judges dismissed or allowed the appeals.

Given the selection of random materials, some of the outcomes of the cases are unknown or have pending appeals. Whilst the report aims to give statistics where possible, the aim of the research is qualitative rather than quantitative in nature.

¹¹ See for example, Claire Bennett "Claiming Asylum on the basis of your sexuality: The views of lesbians in the UK" *Women's Asylum News*. Issue 115, Jan/Feb 2013.



Analysis

1. Credibility

Just as prior to the 2010 Supreme Court decision, the terms “discreet” and “discretion” were used to understate asylum decisions that told a person to go back to their country of origin and lie about who they are for the rest of their lives whatever the consequences, the term “credibility” is used to diminish the impact of decisions where a person is told they are a liar. Decision makers seem unaware of the double standard of expecting a person not to lie to the Home Office or courts when until recently they were happy to expect someone to lie to everyone else in their life.

It is also troubling that whilst accepting that someone will have lied in their home country to protect themselves, decision makers expect a person to break the habit of a lifetime the moment they get off a plane. This is one of a number of reasons why small discrepancies should never be the basis of a refusal of protection because of a lack of ‘credibility’.

In its 2010 report, UKLGIG highlighted that many claims made by lesbians and gay men were rejected because the person was not believed to be lesbian or gay. The report also found that claims were rejected due to serious misconceptions about how lesbians and gay men behave when forced to conceal their sexual identity. For example, many claims were dismissed because the case worker did not believe that the person would engage in “risky” behaviour that is likely to

lead to harm or exposure. When lesbians and gay men are not believed to be telling the truth or give accounts which do not fit with the case workers conception of life in their country of origin, they are told that their claim lacks ‘credibility’.

In 2012, UKBA (as it was then) issued new ‘credibility’ guidance to its staff.¹² Despite the guidance, recent reports by Amnesty International and Women’s Asylum Aid have indicated that the Home Office continues to refuse claims on the basis of ‘credibility’ for small inconsistencies which are used to dismiss the entire claim.¹³ Case workers have been found to dismiss claims by using speculative arguments, not properly considering available evidence, and not making proper use of country of origin information. According to these reports approximately 25% of cases refused by the Home Office are overturned on appeal, with a considerably higher figure in cases of women asylum seekers.¹⁴

¹² See the Asylum Process Guidance, Considering the protection (asylum) claim and assessing credibility at: www.ukba.homeoffice.gov.uk

¹³ Amnesty International and Still Human, Still Here. A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK. April 2013, Women’s Asylum Aid. Unsustainable: the quality of initial decision making in women’s asylum claims. January 2011.

¹⁴ April 2013 Women’s Asylum Aid. Unsustainable: the quality of initial decision making in women’s asylum claims. January 2011. This report cites a Home Office email confirming the appeal rate of 35-41% for women, and 26% for women, 15th December 2010.



This section focuses on ‘credibility’ findings relating to sexual identity asylum claims. In 86% of the refusal letters issued since 2011, the Home Office refused a sexual identity asylum claim because they did not believe a person to be gay, lesbian or bisexual. This number is considerably higher than in Tribunal decisions, where only 60% of cases were rejected on this basis. Further, in 32.5% of the cases, the Tribunal accepted the asylum seeker’s sexual orientation where the Home Office had refused to find a person to be gay or lesbian.¹⁵ This means that the decisions of Home Office case workers are being overturned by the courts in nearly a third of sexual identity claims. Some of the reasons provided by various decision makers in finding that a person lacks ‘credibility’ are explored below.

Screening Interview

The screening interview is the first step in the asylum process after making a claim for asylum. During the short interview, a Home Office case worker asks a number of questions in order to establish the nationality and identity of the claimant. During the interview, the claimant will also be asked to explain BRIEFLY why they cannot be returned to their country of origin. Following the screening interview, the case worker will decide whether or not the person can be placed in Fast Track Detention. The Asylum Policy Instruction on Sexual Orientation Issues in the Asylum Claim make it clear that lesbians and gay men may find it difficult to talk about their sexuality. The Instructions state:

¹⁵ Out of 40 Tribunal decisions analysed from 2009; in 13 cases the Tribunal found the person to be gay or lesbian when the Home Office had not.

Although an individual’s appearance or demeanour may have a bearing on the persecution suffered in the country of origin, stereotypical ideas of people – such as an ‘effeminate’ demeanour in gay men or a masculine appearance in lesbians (or the absence of such features) should not influence the assessment of credibility. Nor should an adverse judgement be drawn from someone not having declared their sexual orientation at the screening phase.

Lesbians and gay men can find talking about their sexuality to strangers, especially officials, extremely difficult, and have stated that they do not feel comfortable talking about their sexuality in the public forum in which the screening interview takes place. In one substantive interview, a lesbian accompanied by her young son, said that she did not mention her sexuality in the screening interview, as she did not want to discuss such matters in front of him. In another substantive interview, a gay man from Gambia stated that he was not given sufficient time to talk about his claim in order to mention his sexuality.¹⁶ His refusal letter stated:

It is not accepted that you were not given enough time to mention the problems you have suffered due to your sexuality. Your failure to mention this at your screening interview leads to this aspect of your claim having no credence attached to it. It is also considered that you had a further 5 days between your asylum claim and substantive interview, where you had the opportunity to submit any further additional information that you may have forgotten to submit in your screening interview. It light of these points, it is therefore not accepted that you are a genuine homosexual and fear return to the Gambia as you claim.

In his appeal, the immigration judge also found that the failure to mention sexual identity in the screening interview was indeed

¹⁶ Refusal letter to Gambian man, January 2011.

a reason upon which an adverse finding as to 'credibility' could be based.

Despite the clear Home Office instructions, case workers and immigration judges continue to draw adverse judgements where a person has not mentioned their sexual identity at the screening interview. A judge granting refugee status to a gay man from Albania found in March 2013:

If he had fabricated his account of sexuality, I doubt that he would have omitted to give this as a reason for fearing return when asked at his screening interview. I find that his failure to disclose his sexuality at that interview does not damage his credibility; and note in the UKBA guidance on Sexual Orientation Issues in the Asylum Claim, it states 'nor should an adverse judgment be drawn from someone not having declared their sexual orientation at the screening phase'.

As this judge suggests, if a claim is fabricated, it is more rather than less likely that the claimant will mention it at the screening interview. Both the Home Office and immigration judges should follow the approach above, and not make adverse findings on 'credibility' where a person has neglected to mention their sexuality during the screening interview. As the policy instructions note, lesbian and gay asylum seekers often struggle to talk openly about their sexual identity and may never have spoken about their feelings or the development of their identity before. Decisions about whether or not a person is believed should be based on the evidence and open and sensitive questioning during the substantive interview as instructed in Home Office policy.

Evidence in Sexual Identity Claims

Within Home Office refusal letters and Tribunal decisions there are differing approaches to 'credibility', with opposite outcomes based on similar evidence. An analysis of the materials makes it difficult to ascertain what are the exact evidentiary requirements for claimants. A recent report published in 2013 has also noted this concern calling for evidentiary requirements to be

clearly circumscribed in cases of sexual identity asylum claims.¹⁷

Instead of taking into consideration all the material facts of the case, comparing the evidence submitted cumulatively and together with objective information about the claim and country, and considering the consistency of the account, case workers and judges often make their decisions on the basis of sexual practice or lack thereof, minor discrepancies and inconsistencies and their own judgments about 'risky' behaviour. As one judge recently stated in rejecting a claim by a man from Cameroon:

There is no evidence in this case that the appellant is gay apart from what he has himself stated and the documents which he has produced from Cameroon. In particular he has had no other relations with men, and there is no evidence from the gay community in the United Kingdom about the fact that he is a homosexual.¹⁸

In order to establish a claim on the basis of sexual identity, asylum seekers are required to provide evidence to help establish their claim. Home Office case workers have cited evidence of the following as means of proving one's sexual identity:

- knowledge of the legal position of 'homosexuality' in the country of origin;
- details of relationships in the country of origin and in the UK;
- how the person first became attracted to same sex partners;
- when the person first realised that they were gay or lesbian;
- how the person came to terms with their 'homosexuality';

¹⁷ Senthorun Sunil Raj. Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims. August 2013.

¹⁸ Tribunal decision, man from Cameroon, Hatton Cross, July 2013.

- how the person reconciled their 'homosexuality' with their religious beliefs;
- credible details of gay friendly places they have visited in the UK;
- contact with the gay community in the UK;
- introspection, self-awareness or uncertainty as to sexual identity, "such feelings might be expected to be evident in the experience of a young individual becoming aware of their homosexuality in a homophobic society".¹⁹

Whilst in some cases, these indicators may be used to 'prove' that a claimant is lesbian or gay, Home Office case workers and immigration judges should keep in mind the cultural diversity and differences in practice between asylum seekers and within the LGBTI community. The following section highlights some problems UKLGIG has identified in cases involving sexual identity claims and negative 'credibility' findings.



Minor Discrepancies Used to Doubt Sexual Identity

In some cases decision makers relied on small or minor discrepancies in order to cast doubt on a person's sexual identity. Home Office case workers have cited a lack of attending gay clubs or bars, belonging to gay organisations, attending gay parades or parties or reading gay magazines as factors

¹⁹ Refusal letter to Gambian man, April 2011.

of consideration in determining whether a person is lesbian or gay. The inability to recall the names, addresses and the atmosphere of clubs and bars is often cited as a reason for doubting a person's sexuality²⁰ with even minor discrepancies negatively affecting 'credibility', for example one refusal letter states:

You initially said that the club was in Camden Town. Then you stated that it was in Kentish Town. While it is accepted that these locations are very close it is considered that you would be able to disclose full details of this club, if you ever attended it. (The club being referred to is half way between Kentish Town and Camden Town tube stations).

Even in cases where asylum seekers do mention gay bars and clubs visited, case workers and judges have found this as a reason to cast doubt upon 'credibility'. For example, judges have pointed out that asylum seekers do not have the funds to pay to go into nightclubs. One judge rejecting the claim of a Uganda lesbian, who was eventually granted refugee status on appeal, found that "*She has not been working and any money she has received has come from friends where she has stayed. In those circumstances I do not accept that she would be able to fund a lifestyle of going to gay clubs, these clubs did not have free entry and the Appellant would not be able to take her turn at buying drinks.*"²¹ In some cases even where applicants do give details of gay bars and clubs, Home Office refusal letters have stated that this is 'generic' knowledge and would be known by residents of a city. These examples illustrate that lesbians and gay men are often in a catch-22 situation with the same evidence considered to be favourable or unfavourable depending on the decision maker.

²⁰ UKBA refusal letter, Malawian man, Nov 2011; UKBA refusal letter, Gambian man, April 2011; UKBA refusal letter, Pakistani man, Jan 2013; Tribunal decision, Pakistani man, Harmondsworth IRC, June 2012, "I find it remarkable that he was unable to name the area of Manchester where this was situated. He could not even recall the name of the road where the gay village was nor the name of the restaurant where they first met".

²¹ Tribunal decision, Ugandan woman, Yarl's Wood IRC, Dec 2011, – dismissed but eventually granted.

In a number of cases, gay men and lesbians who do not know the full names of their partners or their dates of birth are found to lack 'credibility'.²² Although these details seem basic to people from the United Kingdom, in many countries, it is common for people not to have a street address or to know the full names and dates of birth of close friends. This is especially the case in homophobic societies, where concealing one's identity, including birth date and real name, are a means of protection. The lack of knowledge of these details is therefore not always an indicator that a person is lying, as evidenced by a number of cases where the asylum seeker has explained in the interview that they only know the nickname of the person with whom they had a relationship.

In the case of a Nigerian gay man who was granted asylum after representing himself at the Tribunal, the Home Office refused his decision on the basis that he could not provide the names and addresses of the places he lived between the ages of 18 and 25 and because he hesitated when asked the name of the first person he told about his sexual identity. The immigration judge granted him asylum and found that the appellant provided a consistent account of having realised his sexuality at an early age and of relationships in Nigeria and in the UK.

Minor discrepancies should not affect the overall 'credibility' of a claimant when their account has been otherwise consistent.

Decisions Based on Religion and Culture

Whilst the focus on interaction with the gay community - going to gay clubs and bars and knowledge of symbols such as the rainbow flag, may in some cases help prove a person's sexual identity, decision makers should not substitute their own stereotypes and assumptions about lesbians and gay men in making their decisions. This is especially the case when asylum seekers have recently arrived to the United Kingdom and where lesbians and gay men are from different cultural and religious environments. In one case, an immigration judge cited the case of *HK v SSHD*, noting that:

²² UKBA refusal letter, Ghanaian man, May 2012; UKBA refusal letter, Ugandan man, April 2012; UKBA refusal letter, Cameroonian man, Dec 2011; UKBA refusal letter, Ugandan man, June 2012.

It was made clear that the social and cultural background from which an asylum claimant has come is likely to be very different from the background with which a Tribunal Justice is perfectly familiar. It may be very dangerous to characterise as implausible, behaviour which seems so against a United Kingdom background, when it may not be so at all against the background of the claimant's home country.²³

In many cases, case workers and immigration judges did not take these cultural differences into account when assessing the authenticity of a person's sexual identity. For example, in one case, decided in November 2011, the letter refusing asylum to a Nigerian man claiming on the basis of his sexuality provided the following reason:

You state that you have not been to any 'gay establishments' in the UK and you can not name any famous gay people. Your explanation for this is that you do not drink or smoke and therefore don't like going clubbing. You state that people would come to you because of your 'eyes' and the way you walk. The behaviour that you have demonstrated in the UK is not considered to be indicative of your sexuality, the reason you have given for not going to gay establishments due to not smoking or drinking is not considered reasonable especially given that smoking in clubs in the UK had been banned since the summer of 2007 and whether or not you drank would be a personal choice. Further you claim that people would know that you were gay simply by looking at your eyes and the way you walk is considered to be unfounded and completely subjective and in no way supports your claim to be homosexual.

The reasoning above fails to acknowledge or explore cultural differences which might account for the inability to recall names and surnames (because people are referred to by nicknames or other names) or the lack of willingness to attend bars and clubs (religious reasons or lack of funds).

²³ [2006] EWCA Civ 1037.

Further, case workers and judges have also viewed what they consider to be an incompatibility between a person's religious beliefs and sexual identity as having a negative impact on 'credibility'. Lesbians and gay men are frequently asked during their substantive interview how they reconcile their religion and their sexuality. In some cases, lesbians and gay men are informed by case workers that their religion does not accept their sexuality. In June 2012, one case worker stated to a Ugandan woman in her substantive interview:

There are religious leaders in Africa, including Uganda, who demonise homosexuality. Ugandan society does not accept homosexual behaviour. Why did you believe God would accept your sexuality when it goes against what Ugandan religious and societal leaders would preach?



The same case worker from Yarl's Wood Immigration Removal Centre asked another Ugandan woman claiming asylum on the basis of sexuality identity in 2013 "you said that you considered being attracted to girls a sin and that society would be against it. How did you accept that you were attracted to girls, even if it was a sin". Throughout the course of the interview, the case worker randomly repeats questions about sin to the asylum seeker, stating things like "there is also the sanctity of the confessional, but you never confessed your sins".

In these cases, the case worker is clearly subjecting his own version and understanding of Catholicism onto the women, something that the asylum seeker herself said in answers to his repeated questioning about why she did not find it necessary to confess her sexuality to a priest.

Both case workers and immigration judges have found negative 'credibility' findings about a person's claimed sexual identity if the person has not struggled with coming to terms with their religion and their sexuality. For example, an immigration judge in Hatton Cross commented in December 2012:

There does however, seem to me to be rather more force in the suggestion that the appellant provided no explanation of reconciling in any way his sexuality and his religion, bearing in mind that he was raised as a Muslim in a strict family and was by his own account aware, at the same time as he became aware of the notion of homosexuality as such, that this was something forbidden in Islam. That this seems never to have occasioned him any difficulty at all as he was growing up is in my judgment surprising.

In a similar decision from 2012, both the Home Office and immigration judge found that a Pakistani man was not gay because he had previously supported a political party that called for the implementation of Sharia law in Pakistan. As *HK v SSHD* notes, it is dangerous for both case workers and immigration judges to characterise behaviour as implausible or incredible where they are not familiar with the cultural background of the asylum seeker. Many lesbian and gay men continue to retain their faith or religious beliefs regardless of the religion's views on 'homosexuality' and case workers and judges should not use this as a reason to deny a claim based on sexual identity. As one lesbian asylum seeker answered in her substantive interview when asked why she believed that God would accept her sexuality:

God is not human. Those religious leader and them, they are all human. I believe God accepts us for who we are and never judges us. That is why we are all one in his eyes. Humans are judgmental regardless of being leaders or preachers. They do errors. They ignore these things.²⁴

Where a person's feelings about their religion and sexual identity are explored this should be done in a sensitive and respectful way, and lesbians and gay men should not be told that their religion rejects their sexuality.



²⁴ Substantive interview of Ugandan woman, June 2012.

2. Considering Inappropriate Material

Sexual Practice

For some decision makers, lack of frequent sexual activity or interaction with the gay community point to negative ‘credibility’ findings on a claimant’s sexuality, especially in the case of gay men. Lesbians on the other hand face other stereotypes, with case workers and judges finding it “concerning” when lesbians have spoken about one night stands or meeting other lesbians in parties in their countries of origin. Lesbian sexuality is thus treated in a manner either bordering on the pornographic or as invisible.

In *HJ and HT*, the Supreme Court recognised the wide spectrum of behaviour between individuals when it comes to a person’s sexual orientation. The spirit of the decision is reflected in some substantive interviews and Home Office refusal letters. Home Office case workers have recognised that claims and decisions should not be based exclusively on sexual practice or on “*common stereotypes often associated with homosexuality*”.



The Asylum Policy Instructions on Sexual Orientation makes it clear that:

The fact that an applicant has not had any same-sex relationship(s) in the country of origin or in the country of asylum does not necessarily mean that s/he is not lesbian, gay or bisexual – it may be that the individual was fearful of the implications of acting on his or her sexual orientation, and wary of doing so in the UK.

The Instructions clearly state that previous heterosexual relationships or parenthood should not be automatically taken as evidence of a lack of ‘credibility’. These instructions are reflected in some refusal letters and Tribunal decisions. In a well-reasoned refusal letter, the case worker rejected a claim based on sexual identity for the following reason:

It is considered that many of the answers you have given in relation to your sexuality are vague and if anything entirely focus on sexual behaviour and show little or no emotional aspect. Your answers in this respect are considered to be based on stereotypes of homosexual behaviour and therefore undermine your credibility and your assertions that you are a homosexual.²⁵

In a Tribunal decision from August 2012, granting asylum to a Ugandan man who claimed on the basis of sexual orientation, the immigration judge found the claimant to be a gay man even though he had been married and had three children. Further the judge stated:

There is nothing suspicious about the Appellant not having had sexual relationships in the United Kingdom between 2008 and 2011. Gay men are not required to have sexual relationships in order to ‘prove’ that they are gay, in the same way as heterosexual men are not so required in order to show that they are ‘straight’.

Due to the violence suffered in their countries of origin, some women who identify as lesbians may not feel ready to have sexual relationships. The Home Office has refused to recognise lesbians on this basis even where they have been subjected previously to sexual abuse and other serious harm. In one decision from 2013 concerning a Gambian woman who was granted asylum, the immigration judge highlighted the flawed reasoning of the Home Office:

²⁵ Refusal letter to Nigerian man, July 2012, Harmondsworth IRC, detained fast track.

We further find that it is simplistic to note that because the appellant has not had a lesbian relationship that she is not a lesbian. The appellant's inability to enter into a relationship has to be viewed in light of the psychiatric reports and the appellant's mental ability at present to form any such commitment.

To the lower standard we are prepared to accept in light of the various reports that although the appellant may not have entered into a lesbian relationship that she clearly identifies herself as one and that people who have been working with her over the last eighteen months or so (people in our opinion who have the necessary expertise) have formed an opinion that the appellant is a lesbian.

However, many stereotyped behaviours and beliefs of decision makers continue to negatively affect sexual identity asylum claims. Case workers continue to place an emphasis on sexual practice (or lack thereof) in claims involving sexual identity sometimes passing their own judgment on relationships or reasons for engaging in sexual practices.

The issue of 'credibility' is closely linked to the types of questions that are asked throughout the process. In some interviews, Home Office case workers have reminded claimants that they need not talk in detail about their sexual encounters and have demonstrated sensitivity in the use of language regarding terms concerning sexual identity. For example, one case worker stated at the beginning of the substantive interview of a gay man from India in February 2013:

I am going to ask some questions about your sexuality and personal life. I understand that it may be difficult for you to talk about your sexuality to a stranger. I will only ask questions that I need to ask in order to assess your asylum and human rights claim. Please tell me if there are any questions that you do not feel comfortable in answering.

In another case involving a Cameroonian gay man who was granted asylum in 2013, the case worker asked:

Would you like for me to use the word gay in this interview or would you prefer for me to use homosexual or something else.

These statements are in line with the Asylum Policy Instructions on Sexual Orientation Issues in the Asylum Claim which state:

Lesbian and gay applicants may feel a strong sense of shame and stigma about their sexual orientation and may feel that persecution they have experienced was caused by this identity. They may also come from cultures where they have never openly discussed their sexual orientation.

For these reasons lesbian and gay asylum seekers may struggle to talk openly about their sexual orientation. An open and reassuring environment will help to establish trust between the interviewer and the claimant, and should help the full disclosure of sensitive and personal information.



However, an analysis of the 35 substantive interviews, highlights that some case workers remain fixated on sexual practice rather than on sexual identity. In one decision, the immigration judge rebukes the Home Office in strong terms:

I want to make a comment about the Appellant's asylum interview. The Appellant was asked a series of increasingly explicit questions about her sexual activities with an alleged lover. These questions were quite inappropriate and unnecessary, bordering as they did on the pornographic. They were of absolutely no probative value: they were all leading, and could have little bearing on whether the Appellant, or anyone else considered her to be a lesbian... I therefore suggest that the Respondent desists from having officers ask such intimate questions: it is pointless and humiliating for interviewees and interviewers alike.²⁶

Despite the judge's comments that case workers are to desist from asking such intimate questions, asylum seekers are subject to extremely personal and inappropriate questioning by case workers. Some case workers focus on sexual practice asking detailed questions about sexual encounters when they are of no probative value. In the interviews analysed, as recently as 2013 a number of inappropriate questions are still being asked such as:

- Was it loving sex or rough? (2013)
- What have you found is the most successful way of pulling men? (2013)
- So you had intercourse with him and not just blow jobs? (2013)
- How many sexual encounters have you had with your partner? (2013)
- Can I ask you why you did not have penetrative sex at any time in Nigeria up until December 2009? (2012)
- You have never had a relationship with a man. How do you know you are a lesbian? (2013)

In addition to asking inappropriate questions about sexual encounters, Home Office case workers often voice their own prejudices about gay and lesbian relationships and

lifestyles. For example, in 2013, a case worker "struggled to understand" how the man could continue to sleep with other men whilst in a relationship:

- Since you have been with X have you had any other partners or one night stands or sexual encounters with any other man?
- But you say you love each other so why are you cheating on him?
- But you love X and want to get married, yet you have not had sexual intercourse with him but have had sexual intercourse with other men in the sauna, why is this?
- I am struggling to understand why you have sex with other men but not your partner who you say you love and want to marry. What do you have to say?

Case workers should stick to the policy instructions and ask "open questions that allow applicants to describe the development of their identity and how this has affected their experiences both in their own country and in the UK". The asking of inappropriate questions leads to the consideration of sexual practice in the refusal letters of the Home Office. For example, an immigration judge stated in December 2011, in a case involving a lesbian who was eventually granted asylum:

At the start of the hearing I indicated that the letter from the Respondent giving reasons for refusing the application contained irrelevant and prurient detail about the appellant's experiences at her boarding school in 2001, and that in light of the fact that this was not an all female court I felt it would not be appropriate or necessary to call evidence relating to this period of the Appellant's claim.

Sexual practice and intimate details about a person's sex life or lack thereof should not be the litmus test for sexual identity claims. The emphasis on sexual practice leaves lesbians and gay men vulnerable to exploitation and has resulted in the false belief that pornographic evidence will support an asylum claim.

²⁶ Tribunal decision refusing asylum to a woman from Cameroon. Sept 2010, Hatton Cross.

The Home Office should follow their own guidelines and immigration judges should make it clear that detailed questioning and discussion of sexual practice is irrelevant and inappropriate.

Disbelief That a Person Would Engage in 'Risky' Behaviour

In a third of refusal decisions the person's 'credibility' was damaged by their so-called 'risky' behaviour. Refusal letters issued since 2011 continue to find accounts of 'risky' behaviour as damaging a person's 'credibility'. The refusal letters rely on some of the following reasons, cumulatively or singly as reasons for not accepting a person's account as credible:

- public displays of affection in homophobic countries;²⁷
- saying that you are gay or lesbian when asked is not accepted as credible "considering the consequences";²⁸
- remaining in the same house or the same village after being caught and conducting a new relationship;²⁹
- making sexual advances to someone when unsure that that person is gay;³⁰
- entering into a homosexual relationship, despite knowledge of Sharia law and its consequences;³¹

²⁷ UKBA refusal letter to a Nigerian man, Feb 2011, "it is not accepted that two men would risk being open and publicly affectionate with each other in a pub as claimed by you".

²⁸ UKBA refusal letter to a Ugandan man, Feb 2011, "Furthermore you have stated that whilst you lived in Uganda if someone had asked about your sexuality you would have stated that you were gay is not accepted as credible considering the consequences."

²⁹ UKBA refusal letter to a Ugandan man, April 2012 "It is not credible that, following the incident with X, the warnings from the local council chairman and the death threat from your father, you would expose yourself to such a high risk by remaining in the same house and village, and conducting a new relationship in the same manner as you had previously."

³⁰ UKBA refusal letter to a Cameroonian man, Dec 2011.

³¹ UKBA refusal letter to a Pakistani man, June 2013.

- tolerating a level of violence without receiving medical attention.³²

Public displays of affection, 'coming out', any type of sexual relations or non-conformity with gender norms is seen as 'risky' behaviour, and therefore in need of explanation. Questions about 'risky' behaviour are often asked during the substantive interview. For example:

- Was it not risky having sex in his room?
- But earlier you said you used to just walk in and out of each others room without knocking. Someone could have walked in at any time and caught you. Can you explain why this was not risky?
- According to what you have said before and your statement you have submitted you said that you *and A. were in a pub and you were openly affectionate with him. Therefore considering you were aware of the offence and the social attitudes towards gay people, why did you take the risk by being affectionate with him?*

In "*Failing the Grade*", UKLGIG highlighted the flawed reasoning that places an irrational and unrealistic burden on lesbians and gay men to avoid the behaviours that resulted in their persecution. It called on case workers to understand that these behaviours should be expected and understood as supporting, rather than undermining the asylum seeker's account. An analysis of more recent materials demonstrates that case workers and judges continue to place this burden on lesbians and gay men.

³² UKBA refusal letter to a Nigerian man, Feb 2011 "It is not credible that you would have been able to tolerate the violence that was inflicted upon you and then taken to the police station where you were then subjected to more beatings without medical attention."

3. Country of Origin Information and Operational Guidance Notes

It is well established in refugee law that an applicant may be returned or required to live in a place of relocation within his or her country of origin so long as it would not be unduly harsh to require the person to do so.³³ In 2010, UKLGIG identified that in 68% of the cases reviewed case workers cited the ability to relocate as the basis for denial and refusal of the claim. The report highlighted how internal relocation is especially difficult for lesbians and gay men coming from countries where homophobia permeates all levels of society and all regions of a country.³⁴ The report identified that case workers were using internal relocation as a viable option in cases pertaining to countries such as Jamaica and Iran.

The Supreme Court decision in *HJ and HT* acknowledged that while it is correct to consider internal relocation, this option will not be appropriate for certain countries. Lord Hope states in [21]:

There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.

In 24% of cases, UKBA refusal letters found that a person could be returned or internally relocate and consequently refused the asylum application. Factors taken into account in making this decision include the health, age, sex, education, family ties, language and work skills of an asylum seeker. Further, the asylum seeker must provide a reasonable explanation as to why they cannot relocate within their home country. The Philippines,³⁵ Pakistan³⁶ Malaysia,³⁷ Uganda,³⁸ Trinidad and Tobago, Ghana and Egypt were all countries to which the Home Office and judges found that a gay man or lesbian could return.

Whether a person can be returned or internally relocate if found to be lesbian or gay is a part of the test set down in the *HJ and HT* decision. The Supreme Court decision established a new test which necessitates a four stage enquiry by decision makers:

- a) Is the applicant gay or someone who would be treated as gay by potential persecutors in the country of origin;
- b) If yes, would gay people who live openly be liable to persecution in that country of origin;
- c) How would the applicant behave on return? If the applicant would live openly and be exposed to a real risk of persecution, he has a well-founded fear of persecution even if he could avoid the risk by living discreetly;
- d) If the applicant would live discreetly, why would he live discreetly? If the applicant would live discreetly because he wanted to do so, or because of social pressures (e.g. not wanting to distress his parents or embarrass his friends) then he is not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if he lived openly, then he is a refugee.³⁹



In many of the refusal letters analysed, the case worker does not consider whether internal relocation or return is a viable option.

³³ *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426.

³⁴ UNHCR Guidance Note, para 33.

³⁵ UKBA refusal letter to a Filipino man, April 2013.

³⁶ UKBA refusal letter to a Pakistani man, June 2013.

³⁷ UKBA refusal letter to a Malaysian man, Jan 2011.

³⁸ UKBA refusal letter to a Ugandan man, June 2012.

³⁹ Para [35].

Instead, the case worker finds that the asylum seeker is not 'credible' disbelieving that the person is a lesbian or a gay man. However, in cases where country information is considered, immigration judges have found that case workers have relied on out of date information. As one 2012 decision granting asylum to a woman from Uganda states:

Turning to the Appellant's risk on return to Uganda, I have found above that she is a lesbian. The Respondent did not consider the risk on return as she did not believe that the Appellant was a lesbian... I bear in mind the Appellant's representative submissions relating to the fact that the case law is out of date and the situation has changed in Uganda since 2008 when JM (homosexuality: risk) Uganda CG (2008) UKAIT 00065 was decided. I find that the situation for gay men and lesbians in Uganda has changed since then and that it is now more dangerous than it was.

In this case the immigration judge relied on updated operational guidance notes, the decision of *HJ and HT* and the Country of Origin Information (COI) Report and found that there was no effective protection for lesbians in Uganda. In another case from 2013, the immigration judge granted asylum to a gay man from Albania finding internal relocation not to be an option:

Despite the advances that Albania has made in decriminalizing homosexual acts in private, the country material makes it plain that gays are still heavily stigmatized; that police brutality against them takes place and that this is openly supported by one government minister. There is no guarantee that police will take action to protect a gay man who reports a homophobic crime.

However, in some cases accurate information about serious harm and persecution of lesbians and gay men is unavailable or absent from the operational guidance notes or COI reports. This is the case for Trinidad and Tobago, where a judge commented in March 2013 that there was "no country guidance on homosexuality".

Relying on decisions which are out of date or which have not been seriously researched puts the lives of lesbian and gay asylum

seekers at risk upon return. As *NA v The United Kingdom* (Application no. 25904/07) [2008] ECHR on the assessment of country information and expert evidence states:

In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.

Home Office case workers and immigration judges should desist from using the Spartacus International Guide as a reliable source. This document, produced in Germany for wealthy European travellers, does not reflect the situation in the countries of origin of asylum seekers and is not a reliable or serious investigation into the lives of lesbians and gay men in those countries.



The New Discretion Test

Until 2010, in many lesbian and gay cases, analysis focused on whether the asylum seeker could return to their country of origin and be 'discreet' about their sexual identity. In 2010, UKLGIG identified that in 56% of the cases reviewed, case workers found that the person could return to a hidden life in their country of origin, even where people provided clear evidence of having suffered severe harm due to their sexual identity. Following

the decision of *HJ and HT*, decision makers can no longer refuse asylum claims on the grounds of 'discretion'. In *HJ and HT* the Supreme Court made it clear in reference to sexual identity that:

*To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are – of the right to do simple, everyday things with others of the same orientation such as living or spending time together or expressing their affection for each other in public.*⁴⁰

The change in the law means that during the substantive interview, lesbians and gay men are often asked about how 'out' they are. A standard question that often appears in interviews is "Did you lead an openly gay or discreet lifestyle?" Sometimes the questions are more subtle such as "let's talk about your time in the UK. What changed in the way you express your sexuality when you moved to the UK".⁴¹ These questions seek to ascertain whether the person is living openly as a lesbian or a gay man in the UK or whether they remain 'closeted'.



The answers to these questions form the basis of Home Office decision making on whether a person has been living openly as a lesbian or a gay man. The Home Office needs to ascertain under the test whether, if returned to their country of origin, the person

would choose to keep their sexual identity 'discreet' due to societal pressures from within their communities or due to fear of distressing family members rather than a well-founded fear of persecution. In cases where a lesbian or gay man has chosen to be 'discreet' due to the social stigma attached to being a 'homosexual' the Home Office will reject the claim on the basis that "there is nothing indicative in your evidence of how you chose to express your sexual orientation that would demonstrate that you would be at risk of persecution on return".⁴² Similarly, an immigration judge dismissed a claim on the basis that an asylum seeker had not 'come out' in the UK:

I am satisfied the appellant is at least bisexual... The country evidence shows Malawi to be a dangerous country for practising homosexuals. What would she do if removed there? Homosexuality is not a crime in the United Kingdom and there is no bar to anybody who is gay to be open about their sexual orientation. The appellant has chosen to hide it. That is her prerogative, her free choice. If she can hide it in the United Kingdom, where tolerance rules (very effectively it would seem), then she can hide it in Malawi.⁴³

Although the judge has applied the new discretion test correctly in this case, the reasons why an asylum seeker has not been open about his or her sexuality in the UK should be considered. Further under the *HJ* and *HT* test the judge should have considered if one material reason for hiding in Malawi was fear of persecution.⁴⁴ In some cases, where a person has only been in the UK for a short period of time, it may be difficult for a lesbian or gay man from a homophobic country to express openly feelings they have suppressed all their lives. In other cases, an asylum seeker may for economic reasons be living within their home country community where it is difficult to be open about their sexuality due to homophobia. These circumstances explain why some lesbians or gay men are not

⁴⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 at [11].

⁴¹ Refusal letter to Pakistani man, January 2013.

⁴² Refusal letter to Malawian man, Nov 2011.

⁴³ Tribunal decision, Malawian woman, Bradford, August 2010.

⁴⁴ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] [60] - [62]

immediately open about their sexual identity despite being in the UK.

It is worth noting that there are discrepancies between decision makers as to whether there is a risk on return regarding some countries where a person has satisfied the first limb of the test and is found to be a lesbian or a gay man. Although some judges and case workers have found Pakistan to be a country to which lesbians and gay men can be returned or internally relocated, a decision in March 2013 casts doubt on this. The immigration judge granting asylum to a gay man from Pakistan states:

In the circumstances of this particular case having accepted as I do, that the Appellant is indeed gay, it is my judgment that in view of the background material provided in the Country of Origin Information Report coupled with this Operational Guidance Note, it is clear that internal relocation is not a viable option. I have reminded myself of the House of Lords judgments in Januzi and in AH (Sudan). In my judgment it is clear it would be unreasonable or unduly harsh for the Appellant to have to internally relocate. The reason I conclude internal relocation is not a viable alternative is because the only basis upon which the Appellant in reality could seek to live in Pakistan is by hiding his sexual orientation. That is clearly impermissible and the Supreme Court made that clear in its judgment in HJ (Iran).

However, in a refusal letter to a Pakistani man in June 2013, after a consideration of country information the case worker found that:

It is concluded that contrary to your claim homosexual behaviour is common enough in Pakistan and it is possible to live there as a homosexual as long as someone is not ostentatious about it.⁴⁵

Despite the change in the law, UKLGIG has found that in some cases, decision makers are still finding that lesbians and gay men can be refused asylum on the basis of 'discretion'. Lesbian and gay asylum seekers should not be sent back and asked to conceal their identity to some degree in order to avoid persecution.

⁴⁵ Refusal letter to Pakistani man, June 2013.



4. Intersectional Discrimination and Invisibility Issues for Lesbians

In “*Failing the Grade*” UKLGIG drew attention to two main trends in cases involving lesbian asylum seekers. Firstly, case workers discounted the fact that compared to men, lesbians often experience different violence and human rights abuses. The interrelation of gender and sexuality was often ignored, with case workers concluding that rape, domestic violence, forced marriage and other acts were separate to a claimant’s sexuality. Secondly, the report highlighted the dearth of information concerning the serious harm suffered by lesbians in many countries of origin, with case workers incorrectly assuming that that meant no such persecution exists. An analysis of 20 out of 50 Tribunal decisions regarding lesbian claims from 2007 onwards illustrates that these two trends are equally prevalent in decisions made by immigration judges.

Violence Against Lesbians: Sexual Identity and Gender

Many judges and case workers continue to separate out sexual identity and the violence lesbians face because of their gender. In a decision from 2009 of a Ugandan woman fleeing violence, the judge noted that “*her friend’s husband raped her, taking opportunistic advantage of her vulnerable situation*”. In the case of a 19 year old Belarusian lesbian gang raped along with her girlfriend and then mocked by the police to whom she made a complaint, the judge stated that “*The appellant appears to have been targeted only because of her sex and*

vulnerability rather than her sexuality”.⁴⁶ In both of these cases, the judges were at pains to differentiate the violence and to point out that the women had only suffered from ‘crimes’ rather than persecution.

In cases where women have spoken about sexual violence or rape, case workers continue to disbelieve lesbians or tell lesbian asylum seekers that they should have sought help from the authorities. For example in the case of a Ugandan woman, the Home Office refusal letter of September 2012 states:

It is considered of significance to note that you did not report the alleged abuse/rape by your step-father to the police authorities at any time, and that you continued to live with your mother and step-father until 2005. It is considered reasonable to expect that an educated 20 year old, such as you were at the time you allegedly fell pregnant, would have availed herself to the authorities to seek protection from an abusive step-parent.

Upon appeal, the immigration judge granted the woman asylum on the basis of her sexual identity as a lesbian and also due to the persecution she suffered at the hands of her step-father and other family members. The immigration judge highlighted that it would have been financially impossible for the Appellant to move away from the family home and further, notes:

The nature of domestic abuse and sexual abuse within the home mean that it is under-reported all over the world. This is especially the case in countries which do not have sufficient resources to deal with it, or where there are cultural barriers to overcome regarding the treatment of women.⁴⁷

The fact that lesbians often speak about rape and sexual violence in their substantive interviews means that often lesbians are subjected to different questions and considerations by case workers and judges. Lesbians are subject to invasive questioning about their sexual relations with other women “*bordering on the pornographic*” which is

⁴⁶ Tribunal decision, Belarusian woman, Yarl’s Wood IRC, November 2007.

⁴⁷ Tribunal decision granting a Ugandan lesbian asylum, Hatton Cross, November 2012.

particularly concerning when the interviews also ask detailed questions about experiences of sexual violence and rape. In a substantive interview from 2013, a Ugandan woman was asked inappropriate questions about both her sexual relations (including how much noise she and her partner made in the shower) and detailed questions about the rape she suffered, including questions about how she was “violated”. As some judges have expressly stated, from the series and types of questions asked in the substantive interview, it is difficult to see how these questions aim to prove or disprove that the applicant is or is perceived to be a lesbian.

Invisibility of Lesbians in Country of Origin Information

Lesbian asylum seekers are often further disadvantaged in a decision maker’s consideration of risk upon return or internal relocation. This is because serious harm such as domestic violence, rape and other forms of gender harm are considered as individual acts rather than as persecution. For example, in one case the judge accepted that the woman was a lesbian but that “*she is now in middle age and less likely to be a focus of sexual attention than in the past*”, the judge noted that “*She may face abuse from men about her sexuality*” but that this did not amount to persecution, finding that she could return to Jamaica.⁴⁸



⁴⁸ Tribunal decision, Jamaican woman, Yarl’s Wood IRC, March 2008.

Further, laws criminalising ‘homosexuality’ are often only applicable to gay men, with other less obvious laws used to persecute and prosecute lesbians. As one judge noted in a decision granting asylum to a lesbian from the Gambia in June 2013:

The appellant’s claim that she had had a lesbian relationship and therefore would be at danger because of her sexual orientation is considered at para 15 and it was decided that the law in Gambia prohibited intercourse between men but did not include female same sex relationships and therefore the appellant would “not have a reason to fear persecution based on this reason”.

The judge in this case rejected this reasoning and found that overall the Home Office’s considerations had been too “*simplistic*”. Reports on violence and persecution on the basis of sexual identity often neglect to consider the plight of lesbians, rendering their persecution invisible. The invisibility of lesbians is not only present within country of origin information documents but also within the UK judicial system. This is clear given that country guidance on lesbians from Jamaica was only given in 2010 – six years after guidance on gay men.⁴⁹ *SW v Secretary of State for the Home Department* gave country guidance on the risk to lesbians and perceived lesbians in Jamaica and found *inter alia*, that lesbianism (actual or perceived) brings a risk of violence, up to and including ‘corrective’ rape and murder; and that internal relocation does not enhance safety.⁵⁰

⁴⁹ DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168, §. 71. See also S. Chelvan “How does a lesbian come out at 13?” Women’s Asylum News. Asylum Aid, Issue 105, October 2011.

⁵⁰ SW (lesbians – *HJ and HT* applied) Jamaica CG [2011] UKUT 000251 (IAC), 24th June 2011.

5. Fast Tracking LGBTI Claims

After a screening interview, asylum seekers are either placed in detention for their claims to be 'fast tracked' or are given an appointment for a substantive interview. Recently, UKLGIG has found that the majority of LGBTI asylum seekers are being placed in detention. Although some Home Office refusal letters and appeals decisions consider the suitability of fast track detention for lesbians and gay men, the decisions simply carry out a cut and paste assessment regarding detention. Under the heading Suitability for Fast Track, the decisions usually state as follows:

Consideration has been given to the Detained Fast Track Processes Suitability Policy which states "An applicant may enter into or remain in DFT/DNSA processes only if there is a power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently), it appears that a quick decision is possible, and if none of the Detained Fact Track Suitability Exclusion Criteria apply".

The Policy states with regard to timescales, that "For DNSA cases, the indicative timescale from entry to the process in the appropriate Immigration Removal Centre (IRC) to decision service will be around 10-14 days. For DFT cases, the respective indicative timescale will usually be quicker. The timescales are not rigid and must be varied when fairness or case developments require it."

These decisions usually state that the suitability criteria and individual circumstances have been considered and that the asylum seeker is suitable for the fast track. However, in the majority of cases, the individual circumstances of lesbian and gay asylum seekers do not seem to be considered. This is especially clear in light of the Court of Appeal decision of *R(on the application of JB(Jamaica) v. The Secretary of State for the Home Department*.⁵¹ This case concerned the detention of a man from Jamaica who had claimed asylum on the basis of his sexual identity. Although the man was eventually granted asylum upon appeal

he commenced judicial review proceedings arguing inter alia, that his claim for asylum, as a gay man, was not capable of being determined quickly in accordance with the DFT/DNSA policy. The Court considered whether the Home Office could have made a decision within two weeks during which the applicant was detained and concluded:

Given the nature of the appellant's claim, I find it difficult to see how it could. Homosexuality is a characteristic that cannot be reliably established without evidence from sources external to the claimant himself. On the face of it, therefore, the appellant did need additional evidence to support his claim and since some of that evidence was likely to be available only in Jamaica or elsewhere abroad, it was likely that he would need additional time in order to obtain it. A failure to allow him that time was likely to lead (as in the event it did) to a decision that was neither fair nor sustainable.⁵²



The judge clearly recognises the difficulty of proving claims on the basis of sexual identity and highlights that the claimant needed time to obtain evidence. Lesbian and gay asylum seekers should not be detained at the screening interview or the substantive interview when they have not sought advice from a legal representative or when they have not had the opportunity to gather evidence.

An analysis of refusal letters and decisions also highlighted another worrying trend in lesbian and gay asylum cases. In one case, regarding a Ugandan woman detained in Yarl's Wood Immigration Removal Centre

⁵¹ [2013] EWCA Civ 666.

⁵² [29].

both the Home Office and the immigration judge found that the woman was not a lesbian as she had used contraception:

It is noted that when you were inducted by the healthcare team at Yarl's Wood, you were asked "are you using any form of contraception?" to which you answered "yes – implant". It is considered that as a lesbian, you will not have any benefit from using an implant contraceptive. You also state that you have never been attracted to men or been "interested in boys at all".

However, in Court when asked by the judge why she uses contraception the woman stated that she had had medical problems and needed contraception in order to regulate her menstrual cycle. Lesbians and gay men taken to detention are given a medical examination and are asked to sign a consent form.

During the medical examination asylum seekers are asked a number of questions including questions regarding their sexuality. The Home Office in its decision making then uses this information, without giving asylum seekers an opportunity to explain their answers. The medical examination is carried out immediately upon arrival at the detention centre, which may be in the early hours of the morning, when the person is disorientated and unsure of what is happening to them.

The use of medical notes, without the **informed** consent of asylum seekers is extremely worrying. Home Office case workers and immigration judges should not have access to this information unless they are sure that proper consent has been obtained.

Conclusion

Since the publication of the last UKLGIG report in 2010, there have undoubtedly been numerous improvements both by the courts and by the Home Office in assessing lesbian and gay claims. The decision in *HJ and HT* has completely altered the way in which sexual identity claims are adjudicated. Lesbians and gay men can no longer be sent back to be 'discreet' in countries where they are in danger of suffering serious harm. At the same time, the Home Office has implemented the majority of the recommendations in the "*Failing the Grade*" report. Between the end of 2010 and early 2011, case workers received training specifically addressing the unique issues arising in sexual identity asylum claims and this has resulted in a marked improvement in the quality of initial decisions. The Home Office has also enacted the Asylum Policy Instruction on Sexual Identity which follows the UNHCR Guidance Note on Sexual Orientation and Gender Identity. These instructions offer specific guidance to case workers and as noted by immigration judges, should be followed to ensure good practice.

It is acknowledged that it is difficult to make broad conclusions about sexual identity asylum claims based solely on the materials analysed. A particular restraint has been the inability to analyse the exact figures for sexual identity claims and further the reasons for which refugee status is granted by case workers. However, encouraged by the improvements since the last report, this report aims to highlight some of the persisting problems with decision making by Home Office case workers and also with immigration judges who did not form part of the last report. An analysis of both refusal letters and Tribunal decisions reveals that many of the same problems are common to both stages of the decision making process.

With this in mind, this report has aimed to highlight both the improvements and the persisting problems unique to sexual identity asylum claims. Whilst the quality of decisions greatly improved following *HJ and HT*, case worker training and the issuing of Policy Instructions, the analysis of recent material shows that old problems are creeping back in, with some case workers focusing on sexual practice during the substantive interviews and considering inappropriate material. The consideration of 'risky' behaviour and out of date country of origin information is a persisting problem which must be addressed. Alongside these issues, the report has flagged up some new areas where work needs to be done. The quality of decision making in cases where lesbians and gay men are in detention needs further attention. This is particularly urgent given the seemingly high number of lesbian and gay men who are placed in fast track detention. The use of medical information obtained from the medical examination within detention is a further serious concern.

This report ends with a number of recommendations for immigration judges and the Home Office. UKLGIG hopes that the Home Office similarly to the last report, will take on board these recommendations to improve further the asylum process. It is also hoped that immigration judges will be receptive to the recommendations to improve the asylum appeals process for lesbians and gay men fleeing persecution.





Recommendations

- The Home Office should publish the data it is recording relating to sexual and gender identity asylum claims;
- Evidentiary requirements in a sexual or gender identity asylum claim should be clearly described;
- Minor discrepancies should not affect the overall ‘credibility’ of an LGBTI asylum claimant when their account has been otherwise consistent;
- All decision makers, including judges, should be provided with specialist training on sexual and gender identity to facilitate better decision making;
- Case workers and judges should receive regular training on issues unique to sexual identity in order to ensure effective implementation of guidelines and policy instructions;
- Decision makers should follow Home Office guidelines on sexual identity asylum claims and immigration judges should make it clear that detailed questioning and discussion of sexual practice are irrelevant and inappropriate;
- Decision makers should be made aware of the intersection of sexuality and gender in the violence suffered by lesbians and should not separate their sexual identity from their gender;
- Decision makers should take into account information on gender specific persecution in the country of origin generally, even where not specifically

related to lesbians;

- Case workers and judges should not rely on out dated Country of Origin Information or ill-informed sources such as the Spartacus Guide to find that a person can be returned or internally relocate;
- Home Office case workers and immigration judges should not use medical information without ensuring that proper informed consent has been obtained;
- LGBTI asylum seekers should not be placed in detention and should only have their claims processed through a **non-detained** fast track system if:
 - they arrive for a screening interview having already consulted an expert legal representative,
 - or they arrive for a substantive interview with their legal representative,
 - AND they have all the necessary documentary evidence that will be required to support their claim.⁵³

⁵³ **COUNCIL OF THE EUROPEAN UNION, Brussels, 31 May 2013, LEGISLATIVE ACTS AND OTHER INSTRUMENTS.**

Subject: Position of the Council at first reading with a view to the adoption of a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common procedures for granting and withdrawing international protection (recast). **COMMON GUIDELINES**, Page 11:

(29) Certain applicants may be in need of special procedural guarantees due, *inter alia*, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection. (30) Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures.

These new rules will apply after they are transposed into Member States’ national laws, except for the United Kingdom and Ireland who opted out of the process.

Missing the Mark
Decision making on Lesbian, Gay
(Bisexual, Trans and Intersex) Asylum Claims

A report from UK Lesbian & Gay Immigration
Group

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