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Why Gay Asylum Seekers Aren't Believed (By The Home Office, 2017)

by Max McClellan on June 9, 2017

The Home Office is obsessed with consistency of LGBT applicants when it should be worried about its own, writes Max McClellan

Less Formality More Humanity

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Anecdotal evidence suggests an increase in the numbers of asylum claims in the UK based on sexual orientation and gender identity. As legal practitioners, we are seeing disturbing trends and inconsistencies in Home Office decisions on LGBT asylum claims, especially the claims of young gay men.

Are gay refugees 'new'?

At least 80 countries still criminalise sexual conduct between consenting adults including some where the act is punishable by death. When the 1951 Refugee Convention was drafted no one anticipated (although they should have) how critical the document would become for protecting LGBT asylum seekers. Unfortunately, the persecution of LGBT people is not a new phenomenon, however the understanding that an LGBT person can fit squarely into the refugee definition has only been properly recognised in the last decade.

Of course, persecution because of sexual orientation or gender identity is not a distant memory in the UK. Indeed, it was not until 2003 that all homophobic sexual offences legislation was finally repealed. Only in January this year did the UK Government decide to [posthumously pardon thousands of gay men](#) convicted of offenses based on old laws criminalising 'homosexuality'. Such history should engender compassion in the UK for individuals fleeing countries

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where such laws and attitudes still exist, but sadly this is not playing out in the way the Home Office assesses LGBT asylum claims.

Believe me, I'm gay!

For many years those who feared return to their countries because of their sexual orientation were told they could return and keep quiet about it. Immigration departments and Courts all around the world told gay asylum seekers to go home and be discreet – to live in the closet. But this began to change with new international jurisprudence. Notably in 2002, Australia's Highest Court determined that gay asylum seekers could not be returned and avoid persecution only by being discreet about their sexual orientation. As the Court said in *S395/2002 v. MIMA*: “persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.” This approach was followed by the UKSC decision in *HJ(Iran)* in 2010 and has since been developed in *MSM (Somalia)* in 2015, a case concerning a Somali journalist. MSM quotes from the Judgement in the CJEU case of *X,Y and Z*, which observed that the prospect of a gay person avoiding persecution by ‘exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account [...]’

The judgements in *HJ(Iran)* and subsequently in *MSM (Somalia)* were serious victories for LGBT rights and the protection of asylum seekers in the UK, however what has followed is a disturbing change of tactics from the Home Office with legal providers reporting that asylum seekers are now more likely to be refused because the Home Office does not believe they are gay. Organisations like *Asylum Aid*, *UKLGIG*, *Stonewall* and UNHCR have followed this dangerous “culture of disbelief” at the Home Office. ECRE has recently produced a *report* on the implementation of CJEU judgements (X, Y, Z and A, B, C) on asylum policies, including sexual orientation cases, in 8 European countries including the UK. The report identifies that more restrictive practice exists in the UK with regard to the concealment of sexual identity in order to avoid persecution.

All about the interview

Because of the difficulties in evidencing sexual orientation, great focus is placed by decision makers on the 3-4 hour Home Office interview. But quizzing someone about their sexual orientation is a complex task, very different, for example, from asking about when the militia came to someone's village or when a political protest took place. To question someone about their sexual orientation takes great skill. In 2014 the Independent Chief Inspector, John Vine, raised serious concerns with the interview process, finding that the Home Office was asking bad questions based on LGBT stereotypes and accepting sexually explicit material (see the *Vine Report*). The report recommended the Home Office provide more training the Difference, Shame, Stigma and Harm model (DSSH), an internationally accepted, UNHCR-supported best practice model for interviewing asylum seekers about their sexual orientation. *The DSSH model*, developed by S Chelvan of No 5 Chambers, teaches interviewers and decision makers that discovering one's sexual orientation or gender identity is a complex and often gradual process, especially in countries where LGBT people are persecuted.

Splitting hairs

Sadly, in the legal community, we are not seeing the Chief Inspector's recommendations taking proper effect – decision makers and interviewers fail to understand the way individuals discover their sexual orientation and minor or non-existent inconsistencies form the pillars of many Home Office refusals. I have had clients disbelieved because they said they liked same sex classmates in primary school: "Too young to have these feelings" the Home Office refusal read. I have had clients disbelieved because they said they were attracted to boys at age 10 but later said they knew they were gay at age 14 – this was inconsistent, the Home Office determined. [The best available guidance](#) developed in [the CREDO training manual](#) suggests that searching for a bright line of gay self-awareness usually proves futile, and using such a fiction as a point on which credibility turns is dangerous.

One client was told that because he mixed up where he hugged a man (inside his room, or outside in the corridor) this affected his overall credibility. Another refusal was based almost entirely on an old marriage interview during which my client forgot when his same sex partner last went to the dentist. I see gay asylum seekers who came to the UK as students, discover the freedom of living openly and only then realise they cannot return home. Home Office refusals say such individuals ought to have claimed asylum earlier – but these are people who often haven't declared their sexual orientation to more than a few people in the *world*, how can we expect they take a leap and declare their sexual orientation to the Home Office while they still have leave to remain as a student? Such interviews and decisions plainly show that the Home Office is not properly grasping the DSSH model.

And if the Home Office is obsessed with consistency they should certainly be worried about their own. As practitioners, we are often confused why one claimant is refused who has strong evidence and another is accepted with a much weaker claim.

Interviews and Decision makers

Proving you are gay during a four-hour interview is a challenging prospect and we hope desperately that our clients face well trained interviewers. I have recently attended asylum interviews for gay clients and have been pleased to observe interviewing officers who have clearly received training in the DSSH model – you can hear it in the more gentle questions at the beginning of the interviews. But time and again I see interviewers pushing for accounts of long term relationships or clandestine gay sex in countries where it is punishable by death. Interviewers do this either by asking direct questions or only finishing a line of questioning once a client has provided detailed information about a sexual relationship. The latter approach clearly signals to applicants that these are the accounts that interviewers need to hear. However, many of our clients left their country in their early 20s before they had been sexually active and have no such stories to tell. Others were simply too frightened in their countries to have sex or long term relationships.

These problems are then compounded because (as we understand) the Home Office interviewer is not the same as the person who makes the decision. A Home Office interviewer told me that "the separation is for efficiency". It is harrowing to think that decisions are often entirely based on 20 sheets of faceless interview transcript that is often incorrectly recorded.

What document says I'm gay?

Proving your sexual orientation or gender identity is frustrating and confronting especially as sometimes the only hard evidence is very personal. The Home Office thankfully clarifies that sexually explicit material is prohibited in their guidance as clarified in the 2014 CJEU case of [ABC](#). But even when a client has evidence that will be accepted, they are often reluctant to share personal correspondence even with their lawyers. It can take a long time to build up enough trust with a client before they will show you their chat history on a dating app. And even if a client plucks up the courage to submit non-explicit chat history from Grindr (a popular gay dating app) for example, the Home Office often determines that such evidence could be obtained by anyone.

“Gay bars are open to the general public” the Home Office says in refusals. So receipts from gay bars and clubs make weak evidence, even if one wonders what a straight Pakistani man might be doing night after night at London’s most famous gay bars.

The Home Office naturally wants to know about gay relationships an asylum seeker has had in the UK, and evidence of such can certainly strengthen a client’s case. But dating is difficult for many LGBT asylum-seekers who have recently arrived. My clients tell me they are simultaneously excited and terrified by the prospect of walking into a gay club or using a dating app – excited for their new found freedom, terrified by the memory of the dangers and stigma back home. Many are put off also what they have heard about health risks involved in dating in the gay community and don’t know where to turn for advice. Add to this to the fact that few potential partners want to invest in a relationship where the person might be forced to leave the country soon.

Back in the closet?

Even the important principles developed in HJ(Iran) MSM(Somalia) and are now being swept aside with new Home Office Guidance on Afghanistan (2017) suggesting that gay asylum-seekers can return to Afghanistan if they [pretend to be straight](#). Same sex sexual acts are punishable by death in Afghanistan and we would certainly expect that any Home Office decision which followed the new guidance on discretion would be struck out in the courts.

This week I attended the First Tier Tribunal to watch the Secretary of State (SSHD) argue that a gay Pakistani asylum-seeker could return home and live a discreet life there. The SSHD produced an article which they say shows that sex is available for gay men in Pakistan. As the article describes, men can gather behind a shrine in Karachi, form a tightly packed circle and be groped by others from the outside. This is not how my client wants to live his life, his sexual orientation means more to him than anonymous groping; he wants to live openly, marry perhaps and do so without fear of arbitrary arrest, blackmail and death threats from his family and society. What my client is required to show it that he faces a real risk of persecution because of his sexual orientation, and that the possibility that he can find people with whom to have sex is not definitive to whether he faces a real risk of persecution.

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