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Asylum, sexuality and concealment: where are we a decade on from HJ (Iran)?

On 7 July 2010, the Supreme Court handed down its landmark decision in *HJ (Iran)* [2010] UKSC 31, in which it established how asylum applications are to be decided when applicants flee persecution on the basis of their sexual orientation. The ruling effectively ended the wrongful expectation that applicants remain in the closet if that was “reasonably tolerable” to them in order to avoid persecution on return to their home countries.

The impact of *HJ (Iran)*

Over the subsequent decade, the UK Lesbian and Gay Immigration Group (UKLGIG) has published two research reports on decision-making in asylum applications based on sexual orientation, gender identity or gender expression.

In September 2013, *Missing the Mark* found that *HJ (Iran)* had had a positive effect on the quality of decision-making by the Home Office. However, applicants were increasingly refused protection because they were disbelieved about their sexual orientation under the first of the four limbs of the test set by the Supreme Court. The report also found that the test was still not being applied properly by decision-makers, especially in respect of countries with a long history of homophobia, where internal relocation was deemed a valid option.

Still Falling Short came out in July 2018, two years after the Home Office revised its asylum policy on sexual orientation (version 6.0). The report noted several instances of applications continuing to fail on the grounds of adverse credibility. It also highlighted refusals that failed to correctly follow the Supreme Court’s guidance — particularly on fear of persecution being a material reason for someone choosing to be “discreet” about their sexuality (the fourth stage of the test).

We have come a long way since *HJ (Iran)*. There is no doubt that the judgment left decision-makers with fewer reasons for refusal. But this cannot be unrelated to the subsequent shift towards refusals on the ground of adverse credibility — and even when applicants overcome the challenge of proving their sexuality, they must still satisfy the remaining limbs of the test.

Situation in the home country

To satisfy the second limb of the *HJ (Iran)* test, asylum applicants will have to prove that lesbian, gay and bisexual people living openly in their home country are liable to persecution. Although this is normally an easy task for countries where persecution based on sexual orientation is widely accepted, applicants are being refused where country background evidence on that point is equivocal.

Those refusals may also cite outdated country guidance cases or dubious extracts from Country Policy and Information Notes. They often omit human rights considerations, including potential breaches of Article 3 of the European Convention on Human Rights.

Proving persecution can be daunting when countries make homosexuality a crime, as there will be instances where decision-makers will find that criminalisation is not necessarily persecution (see *OO (Gay Men) Algeria CG* [2016] UKUT 65 (IAC)). Although this principle stems from the Court of Justice of the European Union — cases C-199/12 to C201/12 *X, Y and Z* — that ruling still required a full assessment of the facts and circumstances of each case.

Despite the need for a holistic assessment, applicants continue to be refused because the decision-maker undertook a shallow analysis of the country background evidence and the individual circumstances that may generate additional risk.

This challenge requires practitioners to embark on a more in-depth engagement with the available background information for the benefit of their clients. Underreporting of persecution may also mean that commissioning country expert reports will be of little value if experts do not analyse the risk for those living openly and if they fail to consider the *cumulative* effect of any individual factors that may place the client at more risk.

Future behaviour

Without an understanding of the true meaning of “living openly” and the meaning of a “material reason”, practitioners and decision-makers will be ill-equipped to analyse whether an applicant would conceal and why they would do so.

Being open means being *completely* open. If an applicant chooses to hide their sexuality from a few people, they are not being completely open. Where the applicant would go beyond hiding to deceiving others about their sexuality, it may be better to refer to it as “concealment” rather than “discretion” (see paragraph 101 of *HJ* itself).

It is also worth remembering that applicants whose sexuality has been accepted continue to be refused because they were found to be willing to conceal for reasons unrelated to their well-founded fear of persecution (see the recently, unreported case of *CNKPA/00248/2019*).

Decision-makers take account of an applicant’s credibility when considering their reasons for concealment. If someone’s credibility is in doubt, it can have a particular impact when the background evidence on the applicant’s home country is limited. Securing protection in these instances requires a carefully combined analysis of both credibility and the country background evidence.

Trying to predict an applicant’s behaviour and the reasons behind their future decisions, as required by *HJ*, may sometimes feel counter-intuitive. But practitioners should aim to strengthen an applicant’s credibility and bring their fear of persecution to the forefront of their reasons for concealment. There can be several reasons why an applicant would conceal if they were returned to their country of origin, but they are not mutually exclusive — and only one of those reasons has to be a fear of persecution in order to satisfy all four limbs of *HJ*.

Conclusion

The test in *HJ* may have solved an issue of systemic discrimination, but different challenges have arisen.

A decade on, the judgment remains a compass for applicants, practitioners and decision-makers to avoid the previous wrongful expectation of the persecuted to conceal in order to avoid harm. Until the day that a different tool is found, it is hard to identify a group of applicants that would not be treated fairly if — but only if — *HJ* is applied correctly.

As long as our jurisdiction maintains its idiosyncratic emphasis on discretion, a proper understanding and application of the test remains necessary for people seeking asylum on account of their sexuality.

For a step-by-step guide on how to apply HJ (Iran) to sexuality-based applications, read UKLGIG’s briefing paper.

