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# International protection for LGBT applicants

**Mr Justice Max Barrett offers some pointers for solicitors on advising LGBTI+ applicants on whether they have received fair process in any international protection applications – and whether there are grounds for appeal or judicial review**

*“Right now, someone, somewhere is fleeing persecution because of their sexual orientation or gender identity ... Protecting the persecuted and sheltering the uprooted are part of the foundations of our societies”* (Filippo Grandi, UN High Commissioner for Refugees, address on International Day Against Homophobia, Transphobia and Biphobia, 2019).

Around the world, people are treated badly and attacked because they are LGBTI+. People forced to leave their country to escape such treatment may be able to claim international protection.

In this article, I briefly explain what procedures LGBTI+ people can expect to apply when such claims are being processed. Breaches of these expectations may in some instances offer good grounds for an appeal or a judicial review application.

This article leverages off the content and language of the UNHCR’s useful *Guidelines on International Protection No 9*.

It proceeds by identifying what type of process applicants can expect. It then identifies ‘useful questions’ that applicants and their advisors might ask themselves in terms of identifying whether they got what they rightly expected to receive.

## General

LGBTI+ individuals require a supportive environment throughout the international protection application process.

A safe environment is important during consultations with legal advisors.

*Useful questions:*

Was the applicant provided with (a) a supportive environment throughout the refugee application procedure, and (b) a safe environment in which to meet with legal advisors?

Discrimination, hatred, and violence can affect an LGBTI+ person’s capacity to present their claim. It should not be counted against an applicant that they did not declare their sexual orientation or gender identity at the earliest opportunity.

Claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of ‘safe country of origin’ concepts.

*Useful questions:*

- Were adverse judgements drawn from the applicant’s not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview?
- Were the applicant’s claims concerning sexual orientation and/or gender identity subject to accelerated processing or the application of ‘safe country of origin’ concept?

## Interview process

- Was the interview conducted in an open, reassuring environment?
- Did the interviewers assure the applicant at the outset that all aspects of their claim would be kept in confidence?
- Was the interpreter (if any) bound by confidentiality obligations?
- Did the interviewers maintain an objective approach and avoid reaching conclusions based on stereotypical, inaccurate, or inappropriate perceptions of LGBTI+ individuals?
- Were the presence/absence of stereotypical behaviours or appearances relied upon to conclude the applicant possessed a particular sexual orientation or gender identity?
- Did the interviewers proceed on the basis that there are universal characteristics or qualities that typify LGBTI+ individuals? • Did the interviewers proceed on the basis that life experiences of LGBTI+ individuals can vary greatly, even if from the same country?
- Did the interviewers avoid expressing, verbally or through body language, any judgement about the applicant?
- Had specialised training been provided to interviewers on the particular nature of LGBTI+ claims?
- Did the interviewers use vocabulary (particularly in the applicant’s own language) that was non-offensive and showed a positive disposition towards diversity?
- Were specific requests by the applicant regarding the gender of interviewers/ interpreters considered favourably?
- Was any questioning about sexual violence conducted with the same sensitivity as in the case of any other sexual assault victims?
- Did the interview process show respect for the human dignity of the asylum-seeker?
- If the applicant is a woman, were they interviewed separately, without the presence of male family members, to ensure they had an opportunity to present their case?

If the answer to any of these questions is ‘no’, it seems ostensibly arguable that the applicable interview process was flawed.

## Credibility

Whether an applicant’s LGBTI+ claim is successful turns ultimately on whether an applicant’s contentions are believed. This falls to be judged on a case-by-case basis and handled sensitively.

The interviewer is required to focus on an applicant’s experiences, feelings, and perceptions, not their sexual practices.

*Useful questions:*

- Was credibility assessed by reference to the applicant’s circumstances and in a sensitive way?
- Did the interviewer focus on the applicant’s experiences, feelings, and perceptions?
- Did the interviewer avoid focusing on the applicant’s sexual practices?

## Self-identification

If someone says they are LGBTI+, this should be seen as an indication of their sexual orientation or gender identity. A person’s social and cultural background can influence how they identify.

People from very intolerant countries may not easily identify as LGBTI+. This should not rule out their claim based on sexual orientation or gender identity if there are other signs of their sexual orientation or gender identity.

*Useful questions:*

- Was the applicant’s self-identification as LGBTI+ taken as an indication of their sexual orientation and/or gender identity?
- Was there consideration of how the applicant’s social/cultural background may affect how they self-identify?

- Was there consideration of the fact that (if it is the case) the applicant harbours shame and/or internalised homophobia, leading them to deny their sexual orientation and/or to adopt perceived 'heterosexual' behaviours?
- If the applicant comes from a country highly intolerant of LGBTI+ people, was it accepted that a failure readily to identify as LGBTI+ should not be fatal to their claim?

## Childhood

Some LGBTI+ individuals may feel ‘different’ as children. The core attractions that form the basis for adult sexual orientation may emerge between middle childhood and early adolescence; however, some may not experience same-sex attraction until later in life.

Persons also may not be aware of their full gender identity until adolescence, early adulthood, or later in life.

*Useful questions:*

- Was there consideration of the fact that (if this is so) the applicant felt 'different' as a child?
- Was there acceptance that (if this is so) same-sex attraction was not experienced by the applicant until later in life?
- Was there acceptance that (if this is so) the applicant did not become fully aware of their gender identity until later in life?

If the answer to any question is ‘no’, the applicant may have cause for complaint about the process through which they have been put.

## Self-realisation

‘Coming out’ can mean an LGBTI+ person accepting their identity and/or telling others about it. Asking about ‘coming out’ can help an applicant talk about their identity.

Some people know they are LGBTI+ for a long time before they have relationships or openly express their identity. Prejudice and discrimination can make it hard for people to accept their sexual orientation or gender identity, so it can be a slow process.

*Useful questions:*

- Was the applicant asked questions about 'coming out' or self-realisation
- Was there an acceptance that some people know they are LGBTI+ for a long time before they pursue relationships with other people and/or express their identity openly?
- Was there an acceptance that prejudice and discrimination may make it difficult for people to come to terms with their sexual orientation and/or gender identity and that it can, therefore, be a slow process?

## Gender identity

Just because a transgender person has not had medical treatment or changed their appearance does not mean that they are not transgender.

Some transgender people identify with their chosen identity without medical treatment, or they might not have access to such treatment.

It is considered permissible by the UNHCR for an interviewer to ask (sensitively) about any steps a transgender person has taken during their transition.

*Useful questions:*

- Was there acceptance that the fact that (if this is so) the applicant had not undergone any medical treatment or other steps to help their outward appearance match their preferred identity should not be taken as evidence that the person is not transgender?
- Was there an acceptance that the fact that some transgender people identify with their chosen identity without medical treatment, while others do not have access to such treatment?
- Was the applicant asked about any steps taken in their transition?

## Non-conformity

LGBTI+ applicants for international protection may come from places where their sexuality or gender identity is seen as bad or is forbidden.

This can make it hard for them to understand themselves or feel accepted. They might feel like they do not fit in with their families, friends, or communities, and this can make them feel ashamed or alone.

*Useful questions:*



- Was there an acceptance that the fact that (if this is so) the applicant grew up in a culture where sexuality and/or gender identity is shameful/taboo
- Was there an acceptance that the fact that (if this is so) the applicant struggled with their sexual orientation or gender identity?
- Was there an acceptance of the fact that experiences of disapproval and of 'being different' or the 'other' may result in feelings of shame, stigmatisation or isolation?

## Family relationships

Some applicants might not have told their family about their sexuality or gender identity. They might also be (or have been) in a mixed-sex marriage or have children. But these things alone do not mean that they are not LGBTI+.

If someone's credibility is questioned because they are in a mixed-sex marriage, they can be asked about the reasons for the marriage.

But if they give a consistent, reasonable answer, this part of their testimony should be found credible.

*Useful questions:*

- Was there acceptance that a lack of general openness about sexual orientation and/or gender identity does not mean that an applicant is not LGBTI+?
- Was there acceptance of the fact that just because an applicant may be or have been in a mixed-sex marriage and/ or has children is not determinative as to whether they are LGBTI+?
- If an applicant is in a mixed sex marriage and concerns as to their credibility arose, were they asked questions surrounding the reasons for marriage?
- If they were able to provide a consistent and reasonable explanation of why they were in a mixed-sex marriage and/ or have children, was this portion of their testimony found credible?

## Romantic and sexual relationships

Not everyone, especially young LGBTI+ people, will have had romantic/sexual relationships. The fact that an applicant has not had any relationship(s) in the country of origin need not mean that they are not LGBTI+.

It may be an indication that they have been seeking to avoid harm. Interviewers need to be sensitive when questioning about past/current relationships, since it involves personal information that the applicant may be reluctant to discuss in an interview setting.

Detailed questions about an applicant's sex life are required to be avoided. Interviewers are required to bear in mind that sexual orientation and gender identity are about a person's identity, whether or not that identity is manifested through sexual acts.

*Useful questions:*

- Was there acceptance that not everyone, especially young LGBTI+ people, will have had romantic/sexual relationships?
- Was there acceptance that the fact that an applicant has not had any relationship(s) in the country of origin need not mean that they are LGBTI+?
- Was the interviewer sensitive as regards questioning about past/current relationships?
- Were detailed questions about the applicant's sex life avoided?
- Was there acceptance of the fact that sexual orientation and gender identity are about a person's identity, whether or not that identity is manifested through sexual acts?

## Community

Applicants who were not open about their sexual orientation or gender identity in the country of origin may not have information about LGBTI+ venues or culture. Ignorance of commonly known meeting places and activities for LGBTI+ groups is not necessarily indicative of the applicant's lack of credibility.

Lack of engagement with other members of the LGBTI+ community in the country of asylum or failure to join LGBTI+ groups may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices, or a fear of exposure.

*Useful questions:*

- Was there an understanding of the fact that (if this is so) the applicant does not have information about LGBTI+ venues or culture because they have not generally been open about their sexual orientation or gender identity in the country they come from?

- Did the interviewer/decision-maker seem to accept that ignorance of commonly known meeting places and activities for LGBTI+ groups is not necessarily indicative of an applicant's lack of credibility?
- Did the interviewer/decisionmaker appear to accept that lack of engagement by the applicant with other members of the LGBTI+ community in their country of asylum or failure to join LGBTI+ groups may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices or a fear of exposure?

## Religion

Where an applicant's personal identity is connected with their faith, religion, and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity.

The influence of religion in the lives of LGBTI persons can be complex, dynamic, and a source of ambivalence.

*Useful question:*

To the extent that religious factors are of any relevance to an applicant's life or experiences, was the applicant asked about them?

## Principle of non-discrimination

As humans, we all have basic rights under international law. Article 1 of the *Universal Declaration of Human Rights* states that “all human beings are born free and equal in dignity and rights”.

Article 2 states that “everyone is entitled to all the rights and freedoms in this declaration”. The *Refugee Convention* (1951) and international refugee law focus on respect for fundamental rights and non-discrimination.

A country's international protection application process is required to respect fundamental rights and the principle of non-discrimination, and not to discriminate on the ground of sexual orientation or gender identity.

Observation of the above procedural precepts and propositions is critical to attaining these ends. Failure to observe such precepts and propositions may, in the right case, offer good grounds to an applicant to bring an appeal against, and/or to seek judicial review of, a decision adverse to their claim.

*Dr Max Barrett is a judge of the High Court of Ireland. Any views expressed herein are personal. This article is not intended to be and should not be relied upon as legal advice. Law (including 'soft' law such as that considered in this article) can be a clumsy instrument when it comes to describing and defining matters as personal and delicate as sexual orientation and gender identity. So I apologise for any perceived (unintended) clumsiness of phraseology that arises from my description of the applicable (soft) law.*

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**Mr Justice Max Barrett**

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