



## **UKLGIG submission in response to the invitation of the Independent Chief Inspector with respect to the Inspection of Asylum Casework**

The UK Lesbian and Gay Immigration Group (UKLGIG) is a registered charity dedicated to supporting, and advocating for the rights of, lesbian, gay, bisexual, transgender and intersex (LGBTI) asylum seekers and refugees. Founded in 1993, UKLGIG successfully campaigned for equality in immigration law for same-sex couples. UKLGIG provides support to in excess of 1,500 LGBTI people every year. We support our clients by providing a range of services tailored to respond to the multifaceted problems they experience, including by facilitating access to specialist legal advice as well as other types of practical support. We advocate for improvements in law and practice to ensure LGBTI people are treated with dignity and respect. We are the only LGBTI organisation represented in the Home Office National Asylum Stakeholder Forum and Strategic Engagement Group.

We are grateful for the opportunity to input into the Independent Chief Inspector's inspection of asylum casework. We would like to take this opportunity to highlight certain themes that we have become aware of in relation to some of the issues identified for inspection.

### **1) Screening and routing of asylum applicants**

UKLGIG has been concerned as to the use and recording of the correct gender in the case of transgender persons in the asylum process. As a rule, the gender at birth is used by the Home Office. Transgender asylum seekers come from countries where being transgender is a cause for persecution and where access to gender-affirming surgery treatment or gender recognition is limited or non-existent<sup>1</sup>. We are concerned that mis-gendering in the asylum process perpetuates the discrimination which gave cause to the persons to seek asylum. Further, it leads to potential detention in the wrong detention population, and may have the capacity to engender incorrect assumptions in relation to decision-making. An alteration of the forms so as to record both the gender at birth and also self-identified gender and name would be a step towards improving the process. The application registration cards (ARCs) should state the individual's self-identified gender and the chosen name of transgender asylum seekers.

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<sup>1</sup> In many countries there is no scope for legal recognition or alternation of gender other than that at birth. In many countries there is no effective access to surgical or other gender affirming treatment due to its cost, limited availability, waiting times etc. For a full analysis of protections of Trans people across 107 jurisdictions, see International Lesbian, Gay, Bisexual, Trans and Intersex Association: Chiam, Z., Duffy, S. and González Gil, M., Trans Legal Mapping Report 2016: Recognition before the law (Geneva: ILGA, November 2016).

Currently, the Adults at Risk policy does not recognise LGB people as a vulnerable group for the purposes of detention, and yet ECHR caselaw<sup>2</sup>, and experiences of UKLGIG<sup>3</sup> and across jurisdictions<sup>4</sup> document the fact LGBTI asylum seekers are a vulnerable population and that the detention environment is a source of danger and an affront to their dignity. Further, detention impedes case preparation and traumatises LGBTI asylum seekers. The need for accessing evidence of one's sexuality including by way of social media, personal contacts and persons in the country of origin is detrimental to their ability to present their case. It is plain from all this that LGBTI asylum seekers should not be in immigration detention. UKLGIG experience also demonstrates that LGBTI persons experience abuse, bullying and discrimination in shared accommodation.

The vulnerabilities and special needs of LGBTI asylum seekers have been documented in the recent EU Fundamental Rights Agency project<sup>5</sup> identifying the need for special accommodation provisions (so as to prevent incidents of abuse), training of reception staff, and for special healthcare provisions for transgender asylum seekers whose health is at risk should there be interruption in cross-sex hormones provision.

It needs to be borne in mind that irrespective of the basis of a claim being advanced by a LGBTI asylum seeker (for example a LGBTI person could be pursuing a legitimate claim on grounds of political opinion and not raising a claim on the basis of sexual orientation or gender identity), they remain vulnerable within detention population and have special needs in relation to safety of their accommodation because of deeply entrenched prejudices in many countries of origin where other asylum seekers come from.

The routing of all applications by LGBTI asylum seekers needs to be under continuous review, especially in the context of detention, so that post-screening disclosure of sexuality or self-identified gender leads to appropriate assessment of vulnerability for the purposes of detention as well as for accessing safe and appropriate accommodation. This means establishing and maintaining effective channels of communication between the different decision-makers within the Home Office (those assessing suitability for detention, making substantive decisions on asylum as well as those working on appeals – all of whom at different times may become aware of relevant information) as well as with detention centres.

UKLGIG is of the view that there is a need for regular sensitisation and equalities training of all interpreters used by the Home Office at every stage, be it Screening Interviews or subsequently. In UKLGIG's experience, there is inappropriate conduct of some interpreters during asylum interviews in LGBTI claims.

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<sup>2</sup> *O.M. v Hungary* (App. no. 9912/15; Judgment 5 July 2016). The European Court of Human Rights referred (§23-24) to concerns expressed by the UNHCR about detention of LGBTI asylum seekers, and at §53 concluded that the Hungarian authorities had failed to consider "*the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons*".

<sup>3</sup> For example the research UKLGIG and Stonewall 'No Safe Refuge' October 2016 [http://uklgig.org.uk/wp-content/uploads/2017/03/no\\_safe\\_refuge.pdf](http://uklgig.org.uk/wp-content/uploads/2017/03/no_safe_refuge.pdf)

<sup>4</sup> Tabak, S and Levitan, R '*LGBTI migrants in immigration detention*'; Forced Migration Review, 'Sexual orientation and gender identity and the protection of forced migrants' (Issue 42 / April 2013) – Page 47 <http://www.fmreview.org/sogi> . See also International Detention Coalition Position Paper June 2016 <http://idcoalition.org/publication/view/lgbti-persons-in-immigration-detention-position-paper/>

<sup>5</sup> <http://fra.europa.eu/en/news/2017/lgbti-asylum-seekers-lack-adequate-support>

The Home Office should expressly recognise the fact that discrimination, harassment and victimisation on account of protected characteristics, which include gender reassignment and sexual orientation, are prohibited by virtue of the Equality Act 2010. The Equality Act duties extend to a public sector duty to eliminate conduct prohibited by the Act and to promote equality under section 149 of the Act. Where the experience of LGBTI asylum seekers in immigration detention and asylum accommodation has been documented as singularly adverse, the duty to promote equality is of paramount importance in asylum process. As a result, there should be equalities training with a special focus on LGBTI asylum seekers of all UKVI staff and those contracted by the Home Office.

## **2) Processing of asylum decisions, including the management and impact of case delays**

We observe that where a delay occurs with decision-making - which is a more general phenomenon - the cases that slip beyond performance targets suffer further delay as there is no incentive to move them forward. We are aware of LGBTI cases being affected in this way. The impact of delay and uncertainty on persons who are extremely isolated, such as LGBTI asylum seekers – who are isolated from diaspora communities – is likely to be greater than the general population.

## **3) Processing of asylum decisions, including the management and impact of case delays**

While the Asylum Process Instruction: Sexual Orientation in Asylum Claims v 6<sup>6</sup> broadly provides a positive framework for assessment of sexual orientation issues, in practice the following issues are identified.

We observe the following themes in decisions to refuse asylum applications:

- 1) Inappropriate expectations of sophisticated accounts of self-realisation ('coming-out stories') frequently feature in the refusals of LGB asylum claims. The country conditions where there is repression and absence of recognition of non-traditional forms of expression of sexual orientation and/or gender identity result in extremely limited understanding of sexual orientation by LGBTI persons themselves<sup>7</sup>. Further, personal background, education, class and religion will all have an impact as to whether there can be - in cultural terms or in any individual case - any scope for recognition of an "emotional journey" to self-realisation. In many societies, sexuality in itself is taboo, amplifying the misplacement of such expectations. Where a person is not imbued in the Western context of self-focus (as opposed to focus on family, tribe and duty as core founding features of identity) — expectations of emotional journeys will often be culturally inappropriate. A shopkeeper from Pakistan is most unlikely to give an account of his/her sexual identity (be it heterosexual or any other) which could be in any way comparable to an account given by a North London blogger. Related to

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<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf)

<sup>7</sup> This difficulty is recognised in UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees and the Asylum Policy Instruction on Sexual Identity. Home Office own COI recognises absence of information and understanding of sexual identity issues as well as existence of persecution and repression in many countries, yet unreasonable expectations of self-identification persist.

this problem are decision-makers' expectations of inner struggles to reconcile sexual or gender identity with tenets of one's religion. UKLGIG is aware of cases in which decision-makers have unreasonably rejected a person's explanation of the way in which they have personally resolved that tension; and of others in which decision-makers have expected a further, more complex articulation of inner struggle than that offered; or where they decision-makers have relied upon the absence of a description of religion-related inner struggles, where the LGBTI person is not religiously committed in any event. Each of these is an example of the inappropriate reliance by decision-makers upon generalising assumptions about the way in which LGBTI asylum-seekers will have experienced, and will articulate, their sexual and gender identity.

- 2) Expectations of sophisticated accounts of difference sometimes feature in the refusals of LGB asylum claims. The expectation that a person will feel different from others is not a requirement for self-realisation. Furthermore, it requires a recognition of individuality and importance of sexual identity absent in countries where non-conformity in sexual identity is repressed and/or persecuted, or where indeed sexuality in principle is a taboo. Absence of experiences of difference can be a result of personal experiences in their environment but also a result of the cultural context or self-denial. The ability of a person to articulate a sense of difference (even where it exists) cannot be a measure of their sexual or gender identity. It is also contrary to the API to rely on such matters - see p 27.
- 3) There is often an absence of appropriate consideration of perceived/imputed sexual orientation or gender identity. This is particularly important in cases where the result of social responses to a claimant's chosen partner (who may be transgender or not conform to the heterosexual normative expectations) or the claimant's previous experiences or presentation warrant considerations of perception and resulting risk.
- 4) Decision-makers often place no weight on corroborative evidence of sexual identity which has been submitted, such as evidence from friends, partners, participation in LGBTI groups, attendance at events and similar. Simply labelling supporting evidence as "self-serving" and therefore attributing no weight to it, is common, despite the clear judicial guidance against doing so<sup>8</sup>. On the other hand, the absence of such evidence is frequently seen to damage credibility in the eyes of the decision-maker.
- 5) There is often excessive reliance on delay in claiming asylum on the basis of sexual orientation, contrary to Cases C-148/13, C-149/13 and C-150/13 *A, B, and C v Staatssecretaris van Veiligheid en Justitie* and the recognised complex difficulty with disclosure of sexuality<sup>9</sup>. It is plain that for many or most LGBTI asylum-seekers, the prospect of approaching a state official and giving a detailed account of sexual or gender identity will be an alarming prospect, and is likely to explain a delay in doing so. In addition, UKLGIG's experience is that very many LGBTI asylum seekers are unaware upon arrival in the UK that it is possible to claim asylum on the basis of sexual or gender identity. For those who are aware of asylum at all, the prevalent image is often that asylum is 'political' asylum, designed for political opponents of a state. It may only be long after a person has arrived in the UK that they become aware of the wider range of cases in which a person may secure protection. The case of *A, B and C*

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<sup>8</sup> See, most recently, *R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements)* [2017] UKUT 00164 (IAC) and the cases referred to there.

<sup>9</sup> Acknowledged in the Home Office API and UNHCR Guidelines.

clearly requires an overall assessment of the case and a shared burden between the decision-maker and the claimant. On the facts of those cases delay in disclosure amounted to years; but UK decision-makers routinely attach significant weight to the failure to disclose earlier.

- 6) There are frequent accusations of vagueness (and or inconsistency) which are not made out, showing failures in anxious scrutiny of claims. Vagueness can be a feature related to issues under 1 and 2 above, or can feature separately. It is of note that UNHCR has in the past noted inappropriate use of such terms in Home Office decision-making<sup>10</sup>.
- 7) There are instances in cases of claimed risk from the family where the Home Office concludes that there is no overall risk of persecution from state agents or failure of state protection, and finds that this in itself means that internal relocation alternative is viable, without examining whether it is in fact unduly harsh.
- 8) Occasionally a more general issue arises over application of the assessment as to whether there is a well founded fear of persecution in the context of HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31. That judgment requires that once sexual identity and existence of persecution on account of sexual orientation are established, in certain cases there should be an enquiry into possible reasons for concealment of sexual identity on return. The substance to this test cannot be separated from the reality that where there is persecution, concealment of sexual orientation will not remove the risk of persecution and most people will conceal sexual orientation because of fear of persecution. This has recently been clarified in where Hickinbottom LJ in LC (Albania) v The Secretary of State for the Home Department & Anor [2017] EWCA Civ 351 (09 May 2017) who stated at §32 that only where a person “does not satisfy the decision-maker that he would in fact be at risk of harm from direct persecutory conduct on return because he would live discreetly, then a further inquiry has to be made as to *why* he would live discreetly”. Where there is sufficient evidence of persecution in the country of origin, there is no scope for examination of the prospect of concealment of sexual orientation. Similarly, where there is past experience of persecution, the search for alternative reasons for discretion which are divorced from fear of persecution is unsustainable.

We make the following observations in relation to asylum interviews

- 9) There are still some instances of inappropriate questioning related to sexual conduct. In addition there are questions as to why a person is not attracted to the opposite sex or what makes them more attracted to one as opposed to the other sex. While such questioning will elicit little by way of evidentially significant material, it has the capacity to render the interview a search for justification for sexual orientation. Even where this may not be intended, the interviewee may well have the experience of having to explain why they are not heterosexual.
- 10) It has long been our position that all asylum interviews should be tape recorded. This is a simple method which enables both quality control and accuracy of written record of

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<sup>10</sup> *Quality Initiative Project - Third Report to the Minister*, March 2006, available at:

<http://www.refworld.org/docid/56a9c8c34.html>

interview. Home Office has over the years raised issues of resources as a response to these requests which were raised by a number of organisations. We are aware that on some individual occasions even where recording of interviews is requested (in line with the policy), this does not take place due to operational difficulties which would be likely to occur more rarely if recording were a matter of routine.

In asylum process there are occasions where there are disputes over the written record of interview. The interviewees normally have a few days to draw to the attention of the caseworkers any inaccuracies or disputed content of the interview record. While those who are represented may have assistance with this (often limited through pressures on solicitors), those who are not represented are disadvantaged making sense of at times handwritten records.

In case of LGBTI asylum seekers nuances are often lost as the caseworker is trying to record by hand sometimes complex narratives. This is of particular significance where an asylum seeker is trying to explain their emotional development; where for linguistic particularities in relation to words used to express emotions can be interpreted in different ways or where tensions or misunderstandings arise as a result of use of particular words with a derogatory connotation as a result of lack of availability of alternative terminology in the original language.

Should all interviews be recorded doubts as to content of the interview and the accuracy of the written record would be removed. We would also note in passing that we maintain that asylum seekers should, if they wish, be represented in interviews, and that funding should be provided for that where the asylum seeker is in receipt of legal aid. The presence of a legal representative is an additional factor in relation to perceived power relationship in interview where in particular a LGBTI claimant is likely to feel more at ease with their interpreter present when disclosing intimate issues.

We have raised concerns in relation to appropriate safeguards to be used when interpreters are used in asylum interviews in claims based on sexual orientation or gender identity. In the context of sensitivity of the issues involved and difficulty of disclosure in many cases, we are of the view that Home Office accredited interpreters should have training and sensitization, as explained above.

#### **4) The role of the Home Office in support provision (e.g. financial, integration services) once an initial asylum decision has been taken**

LGBTI asylum seekers are recognised as a vulnerable population who suffer from isolation. Integration services overall are limited and do not recognise their particular vulnerability and isolation.

#### **5) The impact of the gender of the applicant in all of the above**

In the LGBTI population, gender in general only emphasises the vulnerability of asylum seekers.

#### **For further information, please contact:**

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