

# Failing The Grade

Home Office initial decisions on  
lesbian and gay claims for asylum

April 2010



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 organisation dedicated to tackling the multifaceted problems faced by these 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 LGBT asylum seekers.

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## Contents

Foreword	1
I Introduction	2
II Summary	3
III Analysis	4
A. The "Discretion" Requirement	4
B. Internal Relocation	5
C. Inter-relational Discrimination and Invisibility Issues for Lesbians	6
D. Laws Criminalising Consensual Sexual Relations	7
E. Credibility Issues	8
F. Misuse of Operational Guidance Notes	9
IV Conclusion	10
V Recommendations	11

## Foreword



The aims of this report are very straightforward and achievable.

The report argues simply that decisions on lesbians and gay men seeking refugee status in this country are being made by Home Office case owners who lack essential training and access to appropriate guidance on dealing with such claims.

This is evidenced in the higher refusal rates for lesbians and gay men – 98-99% compared to 73% for other claims. It is also evident from the nature of the individual decision making. The report rightly questions refusals requiring asylum seekers to be “discreet” about their sexual identity or to “relocate” in countries where homophobia is prevalent.

It seems clear that case owners making decisions about lesbian and gay asylum claims do not have training on the particular issues arising from persecution based on sexual orientation or identity. They are also relying on out of date information on countries of origin and too often ignoring the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.

The result is that lesbian and gay asylum seekers who are already experiencing persecution may also face discrimination in our own country.

This is something that should not and need not happen. I hope that government departments will engage in constructive dialogue with the UK Lesbian and Gay Immigration Group (UKLGIG) to improve the process of initial decision making for lesbian and gay asylum seekers.

More widely UKLGIG deserves all our support for the excellent work they do to help those lesbians and gay men, from across the world, whose lives are still blighted by prejudice and persecution.

**Angela Mason CBE**

# I Introduction

Asylum claims based on sexual orientation and gender identity have been recognised in the United Kingdom since 1999. Having the right to seek refugee status, and actually gaining asylum on this basis, have proved to be two very different things, particularly at the Home Office initial decision making stage.

UK Lesbian & Gay Immigration Group (UKLGIG)<sup>1</sup> conducted a review of 50 Home Office Reason for Refusal letters (refusal letters) issued from 2005 to 2009 to claimants from 19 different countries<sup>2</sup> who claimed asylum on the basis of their sexual identity.

In 2009, 73% of all asylum claims made in the UK were denied at the initial decision making stage.<sup>3</sup> However, in claims made by lesbians and gay men brought to UKLGIG's attention, a staggering 98-99% were rejected at this initial stage.<sup>4</sup> The poor quality of initial decision making has been a long-standing concern of groups monitoring refugee claims in the UK.<sup>5</sup> The number of lesbian and gay claims being rejected suggests that this lack of quality is even more pronounced in decisions on cases relating to sexual identity.

UKLGIG undertook this qualitative study to examine why the denial rate for lesbians and gay men is so high and to identify areas where decision makers are not following existing law, policies or guidelines or are misapprehending the nature of these claims.<sup>6</sup> A number of trends emerged that are noted and discussed in this report.

The report concludes with recommendations to improve the process so that claims based on sexual identity are better understood and better addressed from the beginning.

This project was self-funded by UKLGIG and therefore its scope has been limited. The report does not purport to be a definitive piece of research but rather a study that indicates trends emerging from the Home Office's consideration of LGBT asylum claims.



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1 UK Lesbian & Gay Immigration Group is a registered charity committed to assisting those seeking asylum on the basis of sexual identity.

2 Refusal letters reviewed relate to asylum seekers from Belarus, Cameroon, Dominica, Democratic Republic of Congo, Gambia, Ghana, Iran, Jamaica, Kenya, Libya, Morocco, Nigeria, Pakistan, Sri Lanka, Syria, Tanzania, Uganda, Yemen and Zimbabwe.

3 UK Home Office, Control of Immigration: 2009 Quarterly Statistical Summary, United Kingdom, February 25, 2010.

4 This information is based on asylum claims brought to the attention of UKLGIG since 2005.

5 Amnesty International, "Getting it Right: How Home Office Decision Making Fails Refugees", p. 4 (2004).

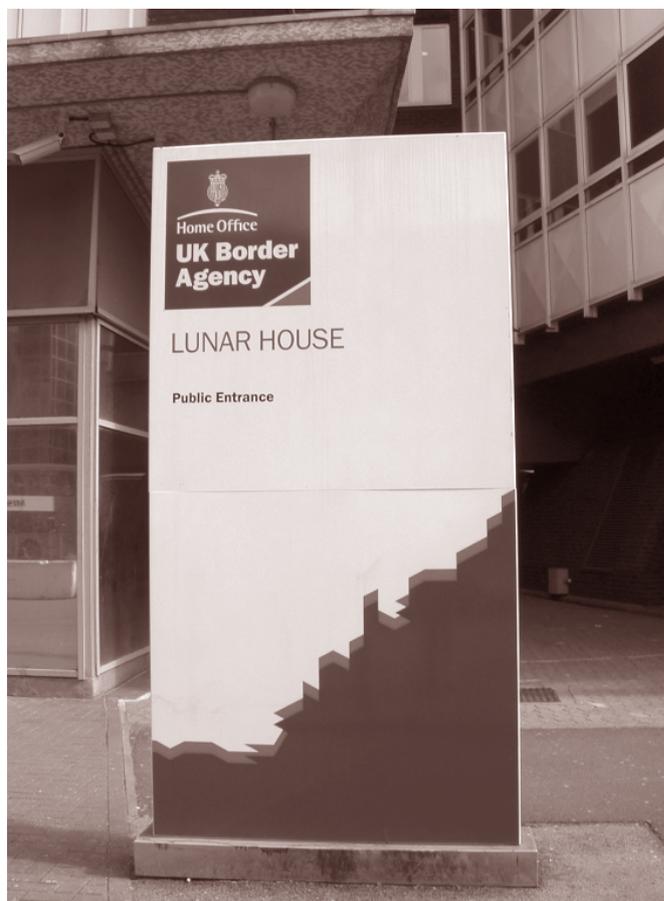
6 This report concentrates on claims made by lesbians and gay men based on their sexual identity. None of the claims reviewed in the sample focused directly on transgender, intersex or bisexual persecution, which limits UKLGIG's ability to comment on Home Office trends concerning gender identity claims at the time of the report's release.

## II Summary

A review of 50 refusal letters reveals several troubling reasons why sexual identity claims are denied on a regular basis. These include:

- A lack of understanding of what sexual identity actually is which leads to decisions requiring asylum seekers to conceal their sexual identity and live a clandestine life in order to avoid persecution – referred to as being “discreet”;
- Falsely assuming that internal relocation is a viable option for lesbians and gay men in countries where homophobia is prevalent;
- Failing to appreciate the ways in which multiple discrimination and persecution impact on lesbian asylum seekers and inaccurately equating the lack of Home Office country of origin information about human rights abuses of lesbians with an absence of such persecution;
- A false belief amongst case owners that a lack of documented evidence on the application of existing laws criminalising same-sex sexual behaviour, equates to a lack of persecution;
- Disbelieving a person is lesbian or gay due to the decision maker’s misconceptions about sexual identity;
- An unrealistic and speculative belief that asylum seekers are lying because they recount having engaged in so-called “risky” sexual or nonconforming social behaviours that then lead to their persecution; and
- Reliance on Operational Guidance Notes in refusal letters in general and specifically reliance on Operational Guidance Notes that conflict with the Country of Origin Report for a specific country.

While not intended to be an exhaustive discussion of these complicated issues, this report attempts to raise awareness and suggest ways in which these claims can be better understood, particularly at the initial decision making level. Specific suggestions for improvement are contained in the recommendations.



## III Analysis

### A. The “Discretion” Requirement

Under the Refugee Convention<sup>7</sup>, an asylum seeker must show a well-founded fear of persecution if returned to their country of origin. Serious harm can be inflicted by the state or by non-state agents (such as family or members of the public). If a person claiming asylum in the UK will not be provided with effective state protection, then he or she is entitled to refugee status.<sup>8</sup> In many lesbian and gay cases, analysis focuses on whether the asylum seeker could return to the country of origin and hide their sexual identity. Sexual identity is thereby reduced to physical sexual behaviour. Thus, if a lesbian or gay man previously lived a clandestine life in their home country, due to their fear of persecution, then they can be returned to that country and be “discreet” again, supposedly without fear of persecution.

UK jurisprudence concerning the “discretion” requirement is convoluted and complicated. Presently, an asylum claim can be denied if there is evidence that the applicant could reasonably be expected to behave “discreetly” in expressing their sexual identity if returned to their country.<sup>9</sup> This requires testimony as to whether, given the extent of “discretion” required in their country, they can reasonably be expected to tolerate a life lived in secret if returned there.<sup>10</sup>

In 56% of the cases reviewed, case owners 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 in countries such as Iran and Jamaica with appalling track records of persecuting lesbians and gay men. These decisions ignored the fact that lesbians and gay men often live secret lives due to societal repression and fear of being found out, not out of any voluntary desire to hide their sexual identity.

The United Nations High Commission for Refugees recently stated that “a person cannot be expected or required by the state to change or conceal his or her [sexual] identity in order to avoid persecution. Nor is

there a duty to be “discreet” or take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships.”<sup>11</sup> Further, requiring lesbians and gay men to remain closeted is discriminatory and can amount to persecution in itself.<sup>12</sup> No “discretion” requirement is imposed on other asylum seekers, for instance, those claiming religious or political persecution. Why is it being required of only one group of people?

*“Legislation which renders homosexuality illegal in Iran may cause you to be secretive in the conduct of your homosexual relationships there, however, this does not engage the UK’s obligations under Article 8 [of the European Convention on Human Rights]. This is because it is clear from your own evidence that you have demonstrated neither past nor future intention of publicly engaging in any homosexual conduct which...would expose you to any real risk on return to Iran. ...[w]hen an individual’s right to pursue his sexuality is placed within the context of a civilised society, the need for discretion in relation to sexual practices is the accepted norm...”<sup>13</sup>*

As this extract reveals, part of the problem is that case owners focus on “homosexual acts” only and not on sexual identity. For many case owners, being “discreet” simply means avoiding having sex in public or in a place where one could be discovered. This, case owners say, in the “cut and paste” language used in many refusal letters, is a part of living in a “civilised society” and is “the accepted norm, regardless of sexual orientation.” This analysis ignores the reality that being lesbian or gay in the home countries of asylum seekers is in itself not conforming to the “accepted norm”. Sexual identity encompasses much more than having sex with a partner. It includes the ability to meet a potential partner, to live with a partner, to socialise and to express one’s sexuality without fear of grave harm. As the Administrative Court held in February

<sup>7</sup> United Nations Convention Relating to the Status of Refugees, 1951.

<sup>8</sup> See *Jain v SSHD* [2000] Imm A R 76 for a reference to the continuum to enable assessment of whether a gay man or lesbian is a refugee.

<sup>9</sup> See *HJ (Iran) and HT (Cameroon) and Secretary of State for the Home Department*, [2009] EWCA Civ. 172, 10/03/09.

<sup>10</sup> *Ibid* at paras. 14, 17.

<sup>11</sup> UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, (hereafter “UNHCR Guidance Note”) para. 26.

<sup>12</sup> *Ibid* at para. 12. See also Dauvergne, Catherine and Millbank, Jenni “Before the High Court, Applicants S396/2002 and S395/2002, a Gay Refugee Couple From Bangladesh”, 25 *Sydney L. Rev.* 97, (2003), p. 122.

<sup>13</sup> *Secretary of State for the Home Department in a refusal letter to an Iranian asylum seeker.*

2010 in SB (Uganda)<sup>14</sup>, “Homosexuality is about sexual orientation or identity rather than behaviour.”

UKLGIG is hopeful that UK law will eventually conform to UN norms. In the meantime case owners must allow, and indeed elicit, testimony as to whether “discretion” is something that the asylum seeker can reasonably be expected to tolerate, not only in relation to sexual activity but also in regard to the broader concept of sexual identity – the daily experience of being lesbian or gay. Case owner inquiry is crucial since most asylum seekers do not have legal representation prior to or during the initial asylum interview.

Case owners should be asking whether being “discreet” in their home country forces a person to live a continuous lie – not to mention any relationship they are in, not to associate with other lesbians or gay men, to pretend their partner is only a friend, to be extremely careful about showing affection, to withhold vital personal information from family, friends and colleagues and in some countries, to marry a member of the opposite sex, – in order to avoid serious harm.<sup>15</sup> If the answer to many of these questions is “yes”, then the person is being asked to suppress too many aspects of their sexual identity and requiring them to be “discreet” is intolerable.

## B. Internal Relocation

Once a case owner has determined that an asylum seeker can be “discreet”, it is common that internal relocation within the home country will also be cited as a reason to deny the claim. Of the cases reviewed, 68% cited the ability to relocate as a reason for denial. In 38% the claim was denied due to a perceived ability of the claimant to both relocate and be “discreet”.

Internal relocation is especially difficult for lesbians and gay men. Homophobia normally permeates all levels of society and all regions of a country.<sup>16</sup> For instance, the small island nation of Jamaica has a culture of virulent homophobia that exists everywhere, with violence committed frequently against lesbians and gay men

without state protection.<sup>17</sup> Yet, in nine out of the ten refusal letters of Jamaican cases reviewed, case owners determined that relocation somewhere else on the island was a viable option. In Iran, which also has a strong record of persecution of lesbians and gay men, including execution, the possibility of relocation was cited as at least one reason for denial in four out of seven cases.

As long as a lesbian or gay man closely hid her or his sexual identity and was careful not to get “caught” having sex, internal relocation was considered acceptable by the case owner. Given the fact that all of the claimants in the 50 refusal letters in the sample were persecuted precisely because they were “caught” with a partner or were already perceived to be lesbian or gay, this is an impossible no-win situation.

Relocation is especially untenable in countries with laws, enforced or not, that criminalise homosexual conduct. Such laws demonstrate a widely held hostility towards lesbians and gay men and single them out for persecutory treatment without hope of state protection.

Persecution by non-state actors, particularly family, is common. Many incidents of honour crimes committed by families were cited by asylum seekers and subsequently dismissed by case owners. In one case involving a Pakistani lesbian fleeing her father who was threatening to kill her, the case owner speculated that since her father had “never travelled to other parts of Pakistan” previously, he would not travel to find and kill her if she relocated to another area. Case owners must appreciate the power of the culture-based concept of family honour, the gravity of these threats and the reality that families can and will find the ‘offending’ person within the home country.

In a combination of the “discretion” and relocation rationales, case owners assume lesbians and gay men can relocate and live “discreetly” as unmarried persons in other areas of their countries. In reality, being unmarried and residing alone or with a person of the same gender is frequently interpreted as evidence of a person’s homosexuality. Even the most secretive and

<sup>14</sup> See R (on the application of SB (Uganda)) v SSHD [2010] EWHC 338 (Admin) [paragraph 2].

<sup>15</sup> This is sometimes referred to as living a fake “heterosexual narrative”.

<sup>16</sup> UNHCR Guidance Note, para. 33.

<sup>17</sup> See UK Border Agency Country of Origin Information Report, Jamaica, December 2009, paras. 19.01-19.31. The continuing high level of violence and discrimination against LGBT people in Jamaica is reflected in a Human Rights Watch letter sent to the Jamaican Prime Minister. Human Rights Watch, “Jamaica: Condemn Homophobic Remarks”, February 2009.

private people will attract attention over time if they are not conforming to social strictures such as marriage.<sup>18</sup> There is much force in the fact that “perception is all”.<sup>19</sup> Being placed in a situation where a lesbian or gay man has to live a heterosexual life in order to survive is not reasonably tolerable.

Case owners must understand that in countries with significant country of origin evidence of widespread homophobia, relocation is seldom a viable option. Finding that claimants can internally relocate as long as they stay in hiding is cruel and discriminatory.

### C. Inter-relational Discrimination and Invisibility Issues for Lesbians

Violence and human rights abuses are experienced differently by lesbians compared with gay men. Two major trends emerged from the review of 15 refusal letters of lesbians. Firstly, case owners discounted the fact that lesbians often encounter harm due to the inter-relation of their gender and sexuality, ignoring elements of gender discrimination altogether. Secondly, there is a dearth of information concerning abuse and harm perpetrated against lesbians in many countries, which case owners incorrectly assume means that no such persecution exists.<sup>20</sup>

#### Inter-relational Discrimination

Lesbians face discrimination based on both their gender and their sexual identity. Women often occupy an inferior social and economic position in refugee producing societies. Women experience persecution in ways that are distinctive or which affect them disproportionately, including rape and sexual violence, trafficking, honour crimes, domestic violence, forced sterilisation and genital mutilation.<sup>21</sup> When these factors are coupled with discrimination based on sexual identity, persecution is likely and state protection unlikely.

Relocation, for example, is extremely difficult for unmarried or divorced women in general, because they are viewed with suspicion and are at a distinct social and economic disadvantage that leaves them highly vulnerable to abuse and harm.<sup>22</sup> The plight of lesbians is even worse since they are subject to an additional threat of harm based on their sexual identity.

*“It is considered inconsistent that you would remain married for a long time in a marriage which you did not consent to. You claim to have tried to leave your husband several times but you were always taken back. It is not clear from your account who took you back however, it is considered that as you claim to have reported the abuse to police [sic]. It is inconsistent with the objective evidence which states that although marital rape is not effectively enforced because it is not being reported, rape and assault are enforced [sic] and therefore, if it were to be accepted that you reported the abuse by your husband, it is considered that he would have been prosecuted for rape or assault.”<sup>23</sup>*

As evidenced by this quote, case owners often ignore or play down abuse related to gender suffered by lesbians, particularly where the persecutory acts are carried out by family or other non-state actors. Four of the 15 lesbian cases reviewed involved forced marriages. In eight cases, the woman experienced domestic violence and/or rape, and women endured or were threatened with honour crimes in a further four cases. Despite the extreme difficulty of relocating, case owners found it a viable option in ten out of the 15 cases.

Case owners seem to be trying to separate out harm suffered solely due to sexual identity while ignoring the connection between this and gender. The same failures to appreciate gender-based persecution outlined in recent reports by Asylum Aid<sup>24</sup> were present and amplified in the case of lesbians. Family or other non-state actors, often perpetrate harm against lesbians, as against women generally. Given women’s often inferior position in society, expecting authorities to protect lesbians against violence by men is unrealistic. Better knowledge and understanding of these complex issues is necessary in the decision making process.

18 See Dauvergne and Millbank, footnote 12 above, p. 122. See also Bennett, Claire “Relocation, Relocation: The impact of Internal Relocation on Women Asylum Seekers”, Asylum Aid, November 2008, p.76, discussing the particular difficulty of relocation for lesbians.

19 See DW (Homosexual men – Persecution – Sufficiency of Protection ) Jamaica CG [2005] UKAIT 00168 [para 71].

20 See MK (Lesbians) Albania CG [2009] UKAIT 00036.

21 See Collier, Bethany “Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims”, Asylum Aid, 2007, p. 10.

22 See Asylum Aid, “Relocation, Relocation”, footnote 18 above.

23 Refusal letter to Gambian woman.

24 See footnotes 18, 21 and 22

## Invisibility

*"It is illegal in Uganda to be homosexual and penalties can be severe. It is also clear that gay women are not mentioned in the penal code and prosecutions are rare. It is therefore not accepted that homosexual women in Uganda are systematically and persistently persecuted as you claim."*<sup>25</sup>

*"There is some evidence of discrimination against homosexuality, however it is noted that lesbians are not specifically mentioned."*<sup>26</sup>

These refusal letters highlight a recurring theme – the assumption that laws criminalising homosexual sexual acts do not apply to lesbians, or if there is no evidence in Home Office Country of Origin Reports about abuse of lesbians, a claim cannot be believed or does not reach the level of persecution necessary to grant asylum.

Some countries such as Jamaica, Kenya and Pakistan have laws that only criminalise sexual acts between men. However, women are often not included in laws criminalising homosexual acts because of their marginalized position in society and because existing laws already proscribe women's sexual behaviours. It defies reason to believe that if laws criminalise homosexual relations between men, such behaviour would somehow be tolerated in women, particularly given that women commonly hold a subordinate social position.

In seven of the 15 lesbian cases in the sample, case owners used the lack of criminal law targeting lesbians as a reason to disbelieve the asylum seeker's account or to find that the persecution was not severe or widespread. In a further five cases, the lack of sufficient country of origin information about the plight of lesbians was taken as proof that such abuse does not exist. Clearly, a lack of evidence does not mean abuses do not occur, particularly when evidence of persecution of gay men in the same country is clear. It merely confirms the invisibility of lesbians and the need for far

<sup>25</sup> Refusal letter to Ugandan woman. Although Uganda recently changed its law to criminalise lesbian behaviour, this quote still shows case owners' misunderstanding of the issue that is applied to other countries.

<sup>26</sup> Refusal letter to Belarusian woman.

more inclusion of their issues in Country of Origin Information Reports.<sup>27</sup>

Case owners cannot use the absence of country of origin evidence of persecution, or lack of criminal laws addressing sexual acts between women, as a reason for dismissing asylum claims. Case owners must investigate further and stop requiring lesbian asylum seekers to corroborate their claims with unavailable information. Additionally, country of origin information must be improved so that lesbians and the persecution they suffer in many countries is rigorously investigated alongside consideration of the position of women in general in that society.

## D. Laws Criminalising Consensual Sexual Relations

*"Homosexuality is illegal according to Nigerian common law in the south but few cases have been tried in the courts and there is usually very little attention in the press and among the public regarding these cases."*<sup>28</sup>

This refusal letter went on to mention, and dismiss as irrelevant, objective evidence that penalties for homosexuality ranged from a "few years up to 14 years" imprisonment and under Shari'a code applicable in some parts of Nigeria, the "sentence could be death".

Eighty countries still have laws criminalising same-sex consensual sexual conduct.<sup>29</sup> Additionally many states use "public decency laws" to criminalise same-sex sexual acts. In 23 of the 50 refusal letters, including the Nigerian case cited above, case owners used the supposed lack of regular enforcement of such laws to support a determination that an applicant did not have a well-founded fear of persecution or to disbelieve their account.

<sup>27</sup> See O'Leary, Barry "We Cannot Claim any Particular Knowledge of Homosexuals, Still Less of Iranian Homosexuals...the Particular Problems Facing Those Who Seek Asylum on the Basis of Sexual Identity", *Feminist Legal Studies*. 16:87-95 (2008), p. 92.

<sup>28</sup> Refusal letter to Nigerian man.

<sup>29</sup> See International Lesbian and Gay Association, *State Sponsored Homophobia Report*, May 2009, at [www.ilga.org](http://www.ilga.org), and information provided by the International Gay and Lesbian Human Rights Commission at [www.iglhrc.org](http://www.iglhrc.org).

A well-founded fear of persecution can exist even if laws criminalising same-sex consensual acts are not enforced. Such laws show a general climate of homophobia and often lead to unlawful detentions, extortion and violence by police. Lesbians and gay men suffer grave harm as a result of the mere existence of these laws, which indicate institutionalised homophobia.<sup>30</sup> Additionally, lesbians and gay men are inhibited from reporting abuse to the authorities because they fear arrest or mistreatment by these authorities. This reluctance to seek help can be evidence of a State's failure to protect lesbians and gay men.

Case owners must stop using the alleged non enforcement of criminal laws as a reason to reject a claim. Instead, emphasis should be placed on whether country of origin information shows a generalised or persistent climate of homophobia. Testimony that an asylum seeker did not report homophobic persecution due to fear of the authorities, or that they were detained by police but not charged with any crime, is common and cannot be disregarded.<sup>31</sup> Case owners must take such claims into consideration when determining whether the claimant has shown a well-founded fear of persecution.

## E. Credibility Issues

Home office case owners have been criticized in the past for making unreasonable assumptions that cast doubt on a person's credibility.<sup>32</sup> This trend persists in claims made by lesbians and gay men.<sup>33</sup> Many claims were denied because the person was not believed to be lesbian or gay, and others were rejected due to serious misconceptions about how lesbians and gay men behave when forced to conceal their sexual identity. In 24% of the cases, the applicant's version of events was dismissed because the case owner did not believe the person would engage in "risky" behaviour that was likely to lead to exposure or harm.

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<sup>30</sup> UNHCR Guidance Note, paras 20-22.

<sup>31</sup> The legal test under the Refugee Convention includes the fact that an individual is "unwilling" and not only "unable" to be afforded state protection" Article 1 A of the 1951 Refugee Convention and 1967 Protocol.

<sup>32</sup> Amnesty International, "Getting it Right", above at footnote 5, p. 19.

<sup>33</sup> See O'Leary, Barry, above at footnote 27, p. 89.

## Evidence that a Person is a Lesbian or Gay Man

*"There is no real way to ascertain your sexuality"*<sup>34</sup>

In the sample, 48% of cases were denied because the person was not believed to be lesbian or gay. Normally, no documentary evidence exists to "prove" sexual identity. Applicants often have deep feelings of shame, self-loathing or internalized homophobia, and answering questions about their sexuality is very difficult, especially when speaking to an authority figure.<sup>35</sup>

Case owners need to be especially sensitive to the lack of objective evidence of a person's sexuality and focus on narratives that help flesh out a person's self-knowledge of their sexual identity. It is especially important that case owners receive specific training in this area since credibility assessment is such a critical part of the refugee determination process.<sup>36</sup> Additionally, case owners must avoid relying on stereotypical concepts of what it means to be lesbian or gay, such as that all gay men are flamboyant and all lesbians are masculine in appearance.<sup>37</sup>

In three of the sample cases, the person's previous marriage or heterosexual relationship was taken as proof that they were lying. However, many lesbians and gay men have been married or involved in heterosexual relationships in the past. Sometimes these relationships are the result of forced marriages, as was the case of one lesbian asylum seeker with a child from Gambia. In others, including the case of a Jamaican gay man, people have opposite sex partners as "cover" in an attempt to conform to social pressure and avoid detection. Some people are bisexual, and others enter a heterosexual marriage and discover that they are lesbian or gay after some time. The fact that a previous heterosexual relationship existed cannot be used to dismiss the claim without a more detailed investigation into the circumstances surrounding the relationship. Decisions on sexual identity need to relate to current sexual identity and not be determined solely by conduct in the past.<sup>38</sup>

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<sup>34</sup> Refusal letter to Cameroonian man.

<sup>35</sup> See Millbank, Jenni "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003", (2005) 14 Social and Legal Studies, p. 115.

<sup>36</sup> Ibid.

<sup>37</sup> UNHCR Guidance Note, para. 36.

<sup>38</sup> See NR (Jamaica) v SSHD [2009] EWCA Civ 856.

## Disbelief that a Person Would Engage in “Risky” Behaviour

*“It is not considered credible that you would then invite known homosexuals and “camp” men to your house and so readily place yourself in danger from reprisals or any other form of abuse.”*<sup>39</sup>

*“It is not accepted that you were observed kissing a[nother] pupil nor that you would risk doing so at school where this could be observed, as you were fully aware that homosexuality is not accepted in Uganda and the consequences.”*<sup>40</sup>

*“You assert that although you were too scared to tell anybody about your sexual orientation you dressed like a man...if as you claim you have lived in fear for an approximate period of 20 years it is not believed that you would openly have dressed in men’s clothes thereby leaving yourself and your son open to verbal and physical abuse.”*<sup>41</sup>

In 10 cases, including the examples above, the case owner disbelieved the person’s account due to their engagement in perceived “risky” sexual behaviour, association with other lesbians or gay men, “coming out” to a family member, or nonconforming dress or actions that could subject the person to risk of detection or harm. Case owners regularly speculated that no rational person would take such a risk, so the applicant must be lying.

This flawed reasoning places an irrational and unrealistic burden on lesbians and gay men to avoid the very behaviours that are subjecting them to persecution. Humans in general have engaged in “risky” sexual behaviours since the dawn of history. When denied a normal outlet for having intimate relationships, lesbians and gay men will naturally try to do so furtively, despite the risk. In fact, many people in the cases reviewed were “caught” trying to have “discreet” sex with partners, or even simply associating with other lesbians or gay men in places they thought would be safe from detection.

Disbelieving that a person would dress in a nonconforming manner knowing that it would attract negative attention ignores the reality that people will go

to great lengths to express their sexual identity. Like gender identity based claims, lesbian and gay persecution has roots in nonconformance with gender norms. Case owners must understand that practically any behaviour by lesbians and gay men that manifests their sexual identity is, by its nature, nonconforming and therefore “risky” in homophobic societies. Case owners must expect such behaviours and understand that they support, rather than undermine the asylum seeker’s account.

## F. Misuse of Operational Guidance Notes

*“There is no evidence to corroborate that lesbians generally face serious ill-treatment in Jamaica.”*<sup>42</sup>

Operational Guidance Notes are policy documents. According to the Home Office’s own guidance, Operational Guidance Notes are not meant to be a source of country of origin information in refusal letters. Concern about this practice has been raised before by the Immigration Advisory Service.<sup>43</sup>

In three of the sample cases, case owners cited Operational Guidance Notes to provide supposedly objective country of origin information. The Operational Guidance Note cited above was relied upon in two cases involving lesbian applicants from Jamaica and was incorrect and at odds with (the admittedly sparse) country of origin information. Improving country of origin information in relation to lesbians and gay men would lead to less reliance on policy led Operational Guidance Notes. Additionally, case owners must ensure that the country information relied upon, even if contained in an Operational Guidance Note, is accurate and not contradicted by other sources.

<sup>42</sup> Refusal letter to Jamaican woman, citing 2006 Jamaican Operational Guidance Note.

<sup>43</sup> See Pettitt, Jo “The Use of Country of Origin Information in Reasons for Refusal Letters”, in Immigration Advisory Service (IAS), *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives* (May 2009), p.9, stating that case owners continue to use OGN’s as COI and recommending that they be explicitly instructed to refrain from doing so.

<sup>39</sup> Refusal letter to Jamaican man.

<sup>40</sup> Refusal letter to Ugandan man.

<sup>41</sup> Refusal letter to Jamaican woman.

## IV Conclusion

Human rights violations based on actual or perceived sexual identity are frequent and often include extra-judicial killings and detention, mob attacks, honour crimes, rape and sexual assault as well as societal hatred and discrimination. Asylum claims based on sexual identity pose a unique set of issues that need to be better understood by case owners.

Case owners misunderstand the notion of “discretion”. Too often, they perceive sexual identity narrowly as a person’s desire to engage in same-sex sexual acts, sometimes in inappropriate settings. In reality, people are being persecuted for far more than sexual behaviour. Simply being unmarried, living with a same-sex “flat mate”, being seen showing affection to a partner, or presenting nonconforming dress or mannerisms can have severe consequences in many societies.

Case owners should focus on whether being “discreet” requires a person to lie and suppress their sexual identity, in effect denying who they are and living in constant fear of detection, in order to be free from significant harm. If so, their situation is intolerable, they do have a reasonable fear of persecution and should be granted asylum.

In countries where there is evidence of widespread homophobia, case owners must understand that for lesbians and gay men, internal relocation is rarely a viable option.

The violence and human rights abuses experienced by lesbians need to be seen in conjunction with gender abuse. Case owners do not acknowledge the fact that lesbians often encounter harm due to the inter-relation of their gender and sexuality, ignoring elements of gender discrimination altogether. The lack of country of origin information concerning abuse and harm perpetrated against lesbians cannot lead to the assumption that no such persecution exists.

Case owners must stop using the alleged non-enforcement of criminal laws as a reason to reject a claim. Emphasis should be placed on whether country of origin information shows a generalised or persistent climate of homophobia, whether involving the authorities or non-state actors. Accounts of non-reporting of homophobic persecution or detention by police without charge, must be taken into consideration when determining whether there is a well-founded fear of persecution.

When credibility issues arise in claims based on sexual identity, case owners often apply speculative and inappropriate reasoning based on stereotypes to disbelieve that a person is lesbian or gay and reject claims. Case owners must be sensitive to the difficulty that claimants have discussing their sexuality in the context of an asylum interview.

Evidence that a person was married or had a child cannot be used to discount a claim without further inquiry. Also, case owners should not disbelieve claims solely because a person has engaged in “risky” behaviour, since such behaviour is frequent and predictable despite the risks.

A serious lack of country of origin information exists for sexual identity persecution. The study found that Operational Guidance Notes were relied upon even where country of origin information was available. In some cases, the Operational Guidance Notes contained inaccurate information on human rights violations. In this relatively new area of refugee law, country of origin information relating to lesbians and gay men needs to be improved to enable better understanding of the difficulties they face.

The poor quality of initial decision making in asylum claims generally has been a long-standing concern. Like other interested groups who have addressed this issue, UKLGIG believes that making good quality initial decisions conserves resources and fulfils the Home Office mandate to address claims in a fair and timely manner.<sup>44</sup>

Only since *Shah and Islam*<sup>45</sup> in 1999, have the asylum claims of LGBT people been formally recognised. The inordinately high rate of initial refusal of these claims is based on a lack of understanding of the issues involved. Fortunately, education can address this deficiency. UKLGIG hopes that this report, along with Home Office adoption of its recommendations, will vastly improve the initial decision making process in sexual identity asylum claims.

<sup>44</sup> Amnesty International, “Getting it Right: How Home Office Decision Making Fails Refugees”, p. 4 (2004).

<sup>45</sup> See *Islam v SSHD* [1999] 2 AC 629 (House of Lords).

## V Recommendations

### Case Owner Training

All case owners should receive training that specifically addresses the unique issues arising in sexual identity based asylum claims to ensure that good quality decisions are made in the first instance.

### Country Information

Country of Origin Information Reports and other sources of country of origin information should include accurate and up-to-date information on the situation of LGBT people. Emphasis should be placed on providing and improving information on lesbians, who remain particularly invisible. Training for Country of Origin Information Service researchers should include LGBT issues.

### Following the UNHCR Guidance Note on Sexual Orientation and Gender Identity

In November 2008 the UNHCR issued comprehensive guidelines for addressing LGBT asylum claims. Case owners should follow these guidelines and they should be incorporated into training of both case owners and Country of Origin Information Service researchers.

### End Reliance on Operational Guidance Notes for Country of Origin Information

Case owners should not rely on Operational Guidance Notes, which are policy documents, as a source of country of origin information. Doing so violates the Home Office's own guidance and leads to the use of potentially inaccurate and outdated information.

LGBT asylum claimants experience persecution in unique and complex ways that are generally not understood by the public or case owners. UKLGIG understands that the Home Office will soon issue an Asylum Instruction for claims based on sexual and gender identity. We welcome this development and hope that its use by case owners will help address problems created by a lack of understanding of LGBT claims.







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Failing the Grade  
Home Office Initial Decisions on  
Lesbian and Gay Claims for Asylum

A report from UK Lesbian & Gay  
Immigration Group

This report was written for  
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