



Still Falling Short

The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity

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July 2018

Having been founded in 1993, UKLGIG has been focused on ensuring dignity and equality in the asylum process for LGBTQI+ asylum seekers since 2003. We offer support services and legal advice to lesbian, gay, bisexual, trans, queer or intersex (LGBTQI+) people seeking asylum in the UK. UKLGIG conducts advocacy to influence primarily UK policymakers and offer in-depth briefings and training to lawyers, decision-makers and judges. We work internationally sharing our knowledge and promoting best standards in work with LGBTQI+ asylum seekers and in relation to sexual orientation and gender identity claims for international protection. UKLGIG draws on 15 years of specialist work directly with LGBTQI+ asylum seekers and expertise in examining practice and legal standards, documenting the experiences of LGBTQI+ asylum seekers in the UK and working with partners internationally.

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ABBREVIATIONS

- API** Asylum Policy Instruction – internal Home Office instruction to decision-makers. References in this report to the API are to the content of *The Asylum Policy Instruction: Sexual Orientation in Asylum Claims*. Two versions of this document are relevant to this study: version 5 of February 2015 and version 6 of August 2016. References to APIs are to both versions 5 and 6 of the API.
- HJ (Iran)** *HJ (Iran) SSHD and SSHD v HT (Cameroon)* [2010] UKSC 31 - Supreme Court case giving detailed guidance on how a decision-maker should decide whether a person is entitled to asylum on the basis of their sexual orientation.
- LGBTQI+** Lesbian, gay, bisexual, trans, queer, intersex and other persons of non-dominant sexual or gender identity. The abbreviations LGB, LGBT, LGBTI are used consistently with the documents in which they appear.
- SOGI** Sexual Orientation and Gender Identity



FOREWORD

BY LORD SCRIVEN

In 2016, I met Kareem from Syria. I was shocked to hear not only his story of the persecution he was fleeing, but also the many difficulties and challenges he was facing in trying to get asylum in the UK. He had fled in fear of being called up to the army on national service. He told me how gay men would be bullied and physically and mentally abused by others if they found out they were gay. He arrived in the UK first as a student and then applied for asylum, in his words ‘to be free and able to live my life without fear of violence, blackmail and rejection’. However, the welcome he has had from the UK Home Office puts us all to shame. Not believed, locked up in detention not knowing for how long, alongside people who were homophobic and threatened him with violence – the very things he was fleeing from back home. The way the Home Office handled his case was intrusive and, in his view, he was treated as a number – not as a vulnerable adult who was coming to terms with his sexual identity and the cultural and family-related issues this brings.

Sadly, Kareem’s case is not an isolated one. Around 2,000 people seek asylum in the UK each year on the basis of sexual orientation. Only about a quarter are granted asylum by the Home Office¹. Many trans and intersex people also seek sanctuary in the UK because of persecution in their countries of origin.

The UK Lesbian and Gay Immigration Group (UKLGIG) has been providing support to LGBTQI+ asylum seekers since 2003. They have helped countless people to secure refugee status. Their work has also helped overcome the marginalisation and isolation that sadly so many LGBTQI+ asylum seekers experience.

I have been working alongside UKLGIG to help improve how the government processes LGBTQI+ asylum claims. I am pleased that in my discussions with government ministers they have agreed to improve some of the policies and procedures used in dealing with LGBTQI+ asylum claims. Nevertheless, much more still needs to be done.

I am confident that by enacting the recommendations in this report the government can make the UK a safer and more welcoming place for LGBTQI+ asylum seekers and refugees, to help ensure that nobody else has to go through the same battles as Kareem.

A handwritten signature in black ink that reads 'Paul'.

¹ Home Office, *Asylum Claims on the Basis of Sexual Orientation: Experimental Statistics*, November 2017

EXECUTIVE SUMMARY

This report is a qualitative study of Home Office decision-making in asylum claims based on sexual orientation and gender identity. It examines Home Office decision-making against the applicable *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* (version 5 of February 2015 and version 6 of August 2016). A separate chapter is dedicated to asylum claims made on the basis of gender identity.

The study is based on a review of 48 substantive asylum interviews and Home Office refusal letters for claimants from 25 countries dating between March 2015 and December 2017. In addition, 32 decisions of the First-tier Tribunal made since March 2015 were made available for this project, which are used for illustrative purposes.

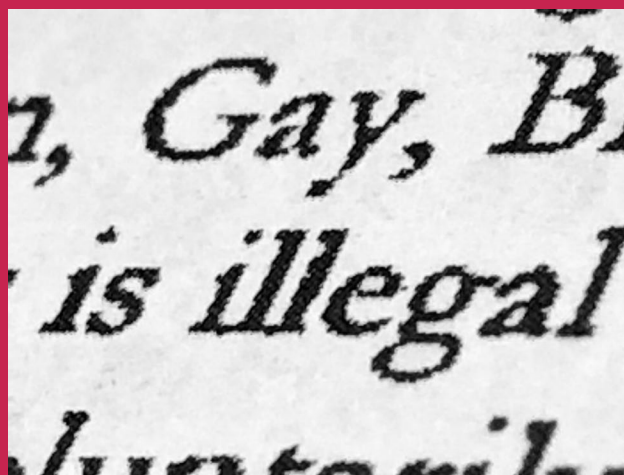
The report finds that in the materials examined:

- **ASYLUM INTERVIEWS.** Persistent questioning directed at sexual practices is not an issue and there is considerable evidence of good practice in relation to establishing parameters of interviews. However, there are still some concerning interview practices and failures to apply the asylum policy instruction (API) on sexual orientation rigorously, including instances in which claimants' preferred terminology for their identity wasn't used and the interviewer neglected to establish an open and reassuring environment in all cases.
- **DELAYED CLAIMS.** Decision-makers routinely rely on delay in claiming asylum as damaging to claimants' credibility, which fails to sufficiently recognise the lived experiences of LGBTQI+ asylum seekers. Additionally, delay is often the basis for devaluing individual items of supporting evidence.
- **NARRATIVES OF SELF-REALISATION:** Decision-makers often expect that claimants should be able to articulate sophisticated accounts of how their sexual orientation developed which is at odds with how claimants understand their own experience.
- **RELIGION:** The expectations of a sophisticated inner conflict with respect to condemnation of same-sex relationships in a person's religion is common and reflected both in questioning in interview and in reasons for refusal.
- **CORROBORATIVE EVIDENCE:** Decision-makers often place very limited or no weight on corroborative evidence of sexual orientation, such as evidence from friends, partners, participation in LGBTQI+ groups, attendance at events, social media exchanges. Such evidence is often labelled 'self-serving'. Failure to produce such evidence, however, is damaging to the claim.
- **RISK & CREDIBILITY:** Decision-makers sometimes consider claims not credible because people take risks to pursue relationships with their chosen partners.
- **DISCRETION:** The Home Office does not always apply the correct legal assessment of the reasons why someone would conceal their sexual orientation on return to their country of origin.
- **GENDER IDENTITY CASES:** There is some evidence of confusion by decision-makers in their manner of questioning and analysis in claims when gender identity arises.

We recommend that:

1. Home Office decision-makers should apply the guidance in the API rigorously so as to ensure consistent use of the claimant's chosen terminology regarding their identity, avoid potentially intrusive and irrelevant lines of questioning and ensure an open and reassuring atmosphere in all interviews which allows for full articulation of the claimant's narrative. There is scope for improving on the API to identify the need for clarity in relation to the use of terms referring to relationships.

2. Decisions-makers should recognise that the intimate nature of disclosure against the probable background of suppression of one's own sexual orientation and/or gender identity is likely to cause delay in claiming asylum and that delay cannot routinely operate to diminish the value of the account or the supporting evidence. The API should include a comprehensive recognition of the practical consequences of the common phenomenon of suppression of identity.
3. Decision-makers, when assessing claimants' sexuality, should not rely on a pre-determined notion of sexual self-realisation that relies on claimants having experienced or being able to articulate a particular type of emotional development or identifiable milestones in the recognition of their identity. The API should be clarified to better enable case-specific decision-making and include the experiences of women.
4. Interviewers and decision-makers should not expect or rely upon the disclosure of an inner conflict between a claimant's religious views and their sexual orientation, nor should they expect or rely upon the claimant to bring such inner conflict to a clear resolution. The API should be clarified to this effect.
5. Decision-makers should assess all items of evidence affording them appropriate weight, refrain from applying unreasonable expectations for corroboration and desist from labelling evidence as self-serving where there is no evidential basis for doing so.
6. Decision-makers should not find claims as lacking in credibility for the reason of unrealistic analysis of risk-taking.



7. Decision-makers must rigorously apply the analysis of what is a material reason for concealment of sexual identity and whether any concealment would remove the risk of persecution.
8. An updated API on gender identity is long overdue and its release is awaited. Further training on gender identity is likely to be beneficial.

We conclude that there has been a significant improvement in Home Office practice regarding sexually explicit evidence, but there are defective assessments of credibility and incorrect application of the legal test in *HJ (Iran)* when assessing future concealment. The overall observation from this study is that the Home Office application of the correct standard of proof is problematic. All a claimant must prove is that their account is 'reasonably likely' and too often this was not the standard applied.

INTRODUCTION



This report seeks to capture issues which arise in the determination of asylum claims based on sexual orientation and gender identity by the Home Office in the period since March 2015. This is the third report by the UK Lesbian and Gay Immigration Group which offers a qualitative analysis of Home Office decision-making in this area.

In recent years, the challenges facing the LGBTQI+ asylum seekers have increasingly become a part of the mainstream rights discourse both in the UK and internationally. In addition to the growing number of claims based on sexual orientation and gender identity (SOGI) globally, the work by many activists has brought into focus the difficulties faced by this group.

On the international level there has been recognition of the vulnerability of LGBTQI+ asylum seekers as well as solidification of a legal battery of international rights associated with SOGI based asylum claims. The first report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity to the Human Rights Council of the United Nations identified the intersectional vulnerability of LGBTI asylum seekers¹.

In the Council of Europe (CoE) context, the Recommendations of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5), which included both the right to seek asylum and the recognition of vulnerability of this cohort of asylum seekers, were incorporated into CoE standards on the issue in 2011. They are due for their second review in 2018. Most recently the European Court of Human Rights has recognised the importance of particular care assessing the vulnerability of LGBT asylum seekers when considering whether to place them in detention².

When the EU framed the minimum standards on qualification for international protection, sexual orientation was expressly recognised as a potential ground for persecution and there was a move in the direction of identifying the same potential in relation to gender identity.³ Against that background, fortified by two key cases in the Court of Justice of the European Union (see further below), the Fundamental Rights Agency of the EU (FRA EU) started monitoring the procedures and protection of LGBTI asylum seekers.

¹ 35th Session of the Human Rights Council; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity §§40, 41 A/HRC/35/36, 19 April 2017.

² *O.M. v Hungary*, Application no. 9912/15, 5 July 2016

³ This features in both the original and the recast Qualification Directive in the rubric considering what can constitute a particular social group (Article 10.1 (d) – Directives 2004/83/EC and 2011/95/EU). Gender identity also requires consideration for the purposes of determining a particular social group in the recast Qualification Directive, while the original merely refers to the possibility of considering gender related aspects in the same context.

Reviewing practises in several member states (not including the UK), FRA EU noted the continued reliance on stereotyped notions as well as unrealistic expectations of asylum seekers when assessing the credibility of their claims. This in some countries included expectations of detailed knowledge of LGBTI legislation or meeting places in the country of origin or ability to engage in detailed abstract discussion of their identity and innermost thoughts. In some countries late disclosure of sexual orientation was identified as having had a negative impact on credibility assessments. FRA EU also highlighted the problems arising with respect to safety of accommodation, vulnerability in detention and problems around adequate healthcare⁴.

The Yogyakarta Principles plus 10⁵, a distillation of current international law guarantees applicable to LGBTQI+ persons developed by a group of international human rights experts, identified the right to seek asylum as principle 23 and within it a set of 13 state obligations relevant to the process. The inclusion of principle 23 which addresses a wide range of issues, including the parameters for establishing a SOGI asylum claim, protection of privacy and dignity, appropriate healthcare as well as use of immigration detention as a last resort, demonstrate how far the international consensus has moved in this area.

This international awareness, however, as yet needs to translate into strong and uniform protection for all LGBTQI+ asylum seekers⁶. Nevertheless, from a niche interest of specialists, the advances in the visibility of SOGI international protection claims across the rights debates and in international legal standards⁷ are gradually changing the experience of LGBTQI+ people in the asylum process for the better, although work still needs to be done. The discord between the standards and practice and defects in the credibility assessments are common points in international and UK experience.

In the UK in recent years the issues around primarily asylum claims made on grounds of sexual orientation have been in the public eye as a result of vocal condemnation of some of the Home Office practices as well as, importantly, the resulting readiness of the government to investigate and look into improving the way the asylum process affects this group. UKLGIG identifies the main challenges for LGBTQI+ asylum seekers in the UK currently as being the problematic credibility assessments, the downplaying of risks for LGBTQI+ people from some asylum seeker producing countries, the continued use of immigration detention, and inadequate safeguards in accommodation provided by the Home Office. This report seeks to offer a snapshot of key issues in relation to the quality of decision-making against the legal and policy standards in the UK – those being embedded in the international legal framework.

UKLGIG has published two previous reports analysing the Home Office decision-making in SOGI claims. The UKLGIG report *Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum* of April 2010 was illustrative of the impact of the problems with assessments of sexual orientation and the Home Office expectation of ‘discretion’ which was the basis upon which almost all SOGI asylum claims were refused for many years. Even if the claimant was believed about who they were, they were expected to act ‘discreetly’ on return thereby avoiding persecution if this was found to be ‘reasonably tolerable’ to them – a matter found to be the case in almost all cases. This was the position of the Home Office and was reflected in binding decisions of the higher courts.

In this report the terms ‘discretion’ and ‘discreet’ are placed in inverted commas when referring to the term used in asylum case law or decisions. This is because in the context of an asylum claim, in order to be safe, people are not expected to be discreet in the sense of respecting an etiquette, but in most cases to actively dissemble – hiding a fundamental part of their identity and acting in a way designed to mislead others into believing that they are heterosexual.

The legal landscape in the UK changed as a result of the seminal judgment in *HJ (Iran)*⁸ where the Supreme Court ruled that the Refugee Convention prohibited the return of an asylum seeker if they would be discreet about their sexual orientation because their fear of persecution was one of the reasons for their ‘discretion’, ruling that a person cannot be required to be ‘discreet’ on return and relegating ‘reasonable tolerability’ test into regrettable legal history⁹.

The 2013 UKLGIG report *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*

4 Fundamental Rights Agency of the EU, *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*, March 2017.

5 *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, Geneva, 10 November 2017. These were adopted to supplement the original Yogyakarta Principles which outlined a set of international principles relating to sexual orientation and gender identity.

6 See FRA EU findings referred to above and fn 5. Also ILGA Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2017* identifies different issues in relation to in SOGI asylum provisions in European countries.

7 For a comprehensive, rigorous current review of international standards, see International Commission of Jurists (ICJ), *Refugee Status Claims Based on Sexual Orientation and Gender Identity – A Practitioners’ Guide*, February 2016

8 *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31, (7 July 2010)

9 See further chapter on Discretion below and UKLGIG, *Applying HJ Iran and HT Cameron to asylum claims based on sexual orientation*, June 2018.

looked into challenges faced by LGBT asylum seekers after *HJ (Iran)* and identified issues with Home Office decision-making including inappropriate questioning around sexual practices and use of stereotypes of what it meant to be LGB.

Much has changed since the time when virtually all claims made on the basis of sexual orientation were refused because of the impact of 'discretion'. According to experimental statistics released by the Home Office for the period between 1 July 2015 and 31 March 2017, 25% of asylum claims made on grounds of sexual orientation resulted in a positive determination by the Home Office¹. On the other hand, 35% of Home Office refusals in the same period were overturned on appeal².

While the statistics do not show the basis of refusals, the most important current challenge for people seeking international protection on grounds of sexual orientation in the UK, is proving their sexual identity.

In 2014, after a great deal of publicity about inappropriate questioning and flawed decision making in claims based on sexual orientation, the Home Office commissioned the Chief Inspector of Borders and Immigration, John Vine, to investigate the Home Office's handling of asylum claims made on the grounds of sexual orientation. The resulting report echoed the findings of UKLGIG's *Missing the Mark* report and raised concerns about interview questions and practices of the Home Office.

Following the Vine Report, the Home Office undertook a broad based consultation process before publishing the updated *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* Version 5.0 on 11 February 2015 (API v.5). That API reflected recommendations from civil society as well as the guidance handed down by the Court of Justice of the European Union (CJEU) in the case *Joined Cases C-148/13 to C-150/13, A, B, and C v. Staatssecretaris van Veiligheid en Justitie* (2 December 2014) and the findings in the case of *Joined cases C-199/12, C-200/12 and C-201/12, X, Y, and Z v Minister voor Immigratie en Asiel* (7 November 2013).

In *X, Y and Z*, the CJEU ruled that people claiming asylum on the basis of sexual orientation cannot be expected to exercise more restraint than heterosexual people and therefore cannot be expected to conceal their sexual orientation to avoid persecution. Although the criminalisation of consensual same-sex sexual conduct was found not to constitute persecution in itself, it was said that the member states must undertake an examination of all facts and circumstances relevant to the laws in issue, including their application, so as to establish whether there is persecution. In the UK, *X, Y and Z* has been interpreted as not being misaligned with *HJ (Iran)*³.

The case of *A, B and C* clarified key aspects of assessments of credibility of persons seeking asylum on sexual orientation grounds⁴. The CJEU ruled that the assessment of such claims should not be based only on stereotyped notions; it is unlawful to carry out detailed questioning as to sexual practices of the applicant⁵; it is unlawful to carry out 'medical tests' to establish homosexuality, as is production of evidence such as films of sexual acts⁶ and that decision-makers cannot find that the statement of the applicant lacks credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion they were given the opportunity to set out a ground for persecution.

In addition to incorporating key points of those cases, API v.5 also gave more detailed guidance on assessing credibility. The Home Office reviewed the instruction to caseworkers again in 2016 and issued *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* Version 6.0 dated 3 August 2016 (API v.6). This document gives more comprehensive and nuanced guidance relevant to credibility assessments and was welcomed as a positive framework by UKLGIG.

The Home Office APIs mirror much of the guidance given in the critical 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.

1 Home Office, *Asylum claims on the basis of sexual orientation: Experimental Statistics*, November 2017. The Home Office notes that there could be up to 12% inaccuracy in these statistics.

2 A full analysis of the figures is not within the scope of this work, but it is noted with concern that the breakdown of the figures shows that the rates for overturning Home Office decisions is very high in the case of countries such as Pakistan (39%), Iran (51%) and Uganda (54%), in which the treatment of LGB persons is appalling.

3 *LC (Albania) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 351 (09 May 2017)

4 Examining them in the context of Article 4 of the Qualification Directive 2004/83/EC which sets out the standards for the examination of international protection claims.

5 As contrary to the right to private life in Article 7 of Charter of Fundamental Rights of the EU and Article 4 of Directive 2004/83/EC.

6 As contrary to the right to dignity in Article 1 of Charter of Fundamental Rights of the EU and Article 4 of Directive 2004/83/EC.

This report makes only limited observations in relation to claims based on gender identity. The vast majority of the materials available to UKLGIG were from lesbian, gay and bisexual sexual orientation claims. Because of that, the focus of this introduction is on sexual orientation. Although UKLGIG has been the first organisation in Europe to offer a support group for trans asylum seekers as the number of such claimants coming into contact with UKLGIG increased, the number of claims made on the basis of gender identity that UKLGIG is aware of remains low in comparison to claims made on the basis of sexual orientation.

While an analysis of impact of detention on Home Office determination of asylum claims was not the subject of this study, in the experience of UKLGIG, LGBTQI+ asylum applicants also faced significant discrimination in detention. The now defunct Detained Fast Track (DFT) asylum process proved uniquely adverse for LGBTQI+ asylum applicants. The cross-parliamentary Detention Inquiry in March 2015 expressed concern about hidden abuse against LGBTI people in the detained asylum process as well as vulnerability to abuse whilst detained. The report *No Safe Refuge: Experiences of LGBT asylum seekers in detention* by UKLGIG and Stonewall of October 2016 documented the harm LGBTQI+ people experienced in detention. It is important to recognise that although DFT is no longer operating, detention itself continues to be a part of the experience of many LGBTQI+ asylum applicants. The Home Office still detains LGBTQI+ asylum seekers deciding their cases within the Detained Asylum Casework. Presenting an LGBTQI+ asylum claim while in immigration detention is inherently difficult due to claimants' fears of other detainees discovering their sexual orientation or gender identity, the psychological impact of being detained in such an environment, and the challenges in accessing supporting evidence when deprived of liberty. In the context where there is an increasing expectation of ability to produce corroborative evidence of one's sexual orientation, detention poses a formidable obstacle to obtaining such evidence.

This study finds that despite improvements in Home Office decision-making and updated guidance, asylum seekers making SOGI-based claims continue to face difficulties in the asylum process and some of the problematic aspects of consideration of credibility identified in *Missing the Mark* continue to occur.

It is a concern that in practice one frequently encounters Home Office credibility assessments where expectations of LGBTQI+ claimants seem to require demonstrating a higher standard of proof than reasonable degree of likelihood⁷ – this is reflected in the search for corroboration as well as in excessive reliance on delay. Further, the Home Office displays unrealistic expectations in relation to what a credible narrative of an LGBTQI+ asylum seeker should contain. Such expectations are of concern to UKLGIG particularly in view of UKLGIG's experience of many years of work supporting LGBTQI+ asylum seekers. There is no right or wrong narrative – people understand themselves in different ways and they have different experiences. It is important that the decision-makers recognise that diversity is a reflection of the human condition.

While an in-depth analysis of assessment of country conditions in refusals is beyond the scope of this study, in the materials available there is occurrence of poor risk assessments in relation to some countries of origin, including those where the Home Office published policy accepts that in general there is a risk to LGBTQI+ persons.

It is hoped that the findings in this report will contribute to the Home Office continuous review of its decision-making in SOGI claims. What is required is a sensitive approach to the assessment of credibility, a rigorous application of the API and the key case-law in this area, as well clarification of the API.

⁷ Asylum cases require that the claimant proves their account to a low standard of proof: 'a reasonable likelihood' or 'real risk' (*R v Secretary of State for the Home Department ex p Sivakumaran* [1988] AC 958)

THE STUDY

This report offers a qualitative study of Home Office decision-making in claims based on sexual orientation and gender identity since March 2015.

The asylum process in the UK ordinarily starts with a screening interview with the Home Office, which is primarily to establish the claimant's identity, method of entry and immigration history, as well as to identify the broad outline for the basis of the claim in briefest terms.

This is followed by a substantive asylum interview which can take several hours (or in some cases more than a day) where a person is questioned in detail with respect to the substance of the claim¹. Claimants can submit evidence in support of their claims in advance of the interview and usually up to five days following it².

The Home Office is required to decide the claims on the basis of all the evidence available to establish whether there are reasonable grounds to believe that a person is a refugee. Where refugee status is recognised by the Home Office, the claimant is informed of this by way of a *pro forma* letter which is followed by a grant of leave to remain. Should a claim be refused, detailed reasons are provided in refusal letters and these can be appealed as a matter of right to the First-tier Tribunal (Immigration and Asylum Chamber)³, and subsequent decisions can then be appealed to the Upper Tribunal if there has been a material error of law⁴.

The research is based on a review of 48 substantive asylum interviews carried out since March 2015⁵ and 45 Home Office refusal letters issued since March 2015, the last materials dating from December 2017⁶. Because it is not possible to establish the reasons for an asylum grant from positive decisions sent to applicants, the analysis of the decision-making is based on Home Office refusal letters, which provide reasoning for negative decisions⁷. In addition, the research materials for this project included 32 decisions of the First-tier Tribunal made from March 2015 onwards.

The vast majority of claims available for this study focused on sexual orientation as the primary basis for seeking asylum. A very limited range of the available material related to claims based on gender identity, and as a result the observations offered in relation to such claims are narrow in scope.

The interviews, refusal letters and Tribunal decisions used in this study relate to asylum seekers from a range of countries including Algeria, Bangladesh, Cameroon, DRC, Egypt, El Salvador, India, Iran, Iraq, Jamaica, Kuwait, Kyrgyzstan, Lebanon, Malawi, Morocco, Nepal, Nigeria, Pakistan, Sierra Leone, Sri Lanka, the Gambia, Guatemala, Uganda, Trinidad and Tobago, and Zimbabwe. All materials were provided on assurances of anonymity, as a result of which potentially identifying information has not been replicated in this report.

1 This process can differ somewhat where a person has previously made an asylum claim and is making a fresh claim either on a different and new ground and/or on the basis of further evidence. In those cases, further representations and evidence are submitted in writing and the person may or may not be interviewed before the fresh claim is decided.

2 This may include a witness statement, corroborative evidence of witnesses or medical or other experts and representations explaining why their case should succeed.

3 There are some exceptions to this in three categories of cases where the Home Office can make decisions which limit or exclude the right of appeal. The Home Office can consider a claim to be 'clearly unfounded' in which case the person can only appeal to the Tribunal after they had left the country. A claimant can be prevented from appealing to the Tribunal where Home Office considers that the grounds relied on should have been raised during a previous appeal or in response to a notice inviting the claimant to submit all grounds relied on. In cases where there has been a previous asylum claim a new claim could be found not to be sufficiently different from a previous one, or not to have sufficient prospects of success. Such decisions can be challenged by way of judicial review. A detailed exploration of this is beyond the scope of this study.

4 There is a possibility of appealing further to the Court of Appeal in limited circumstances.

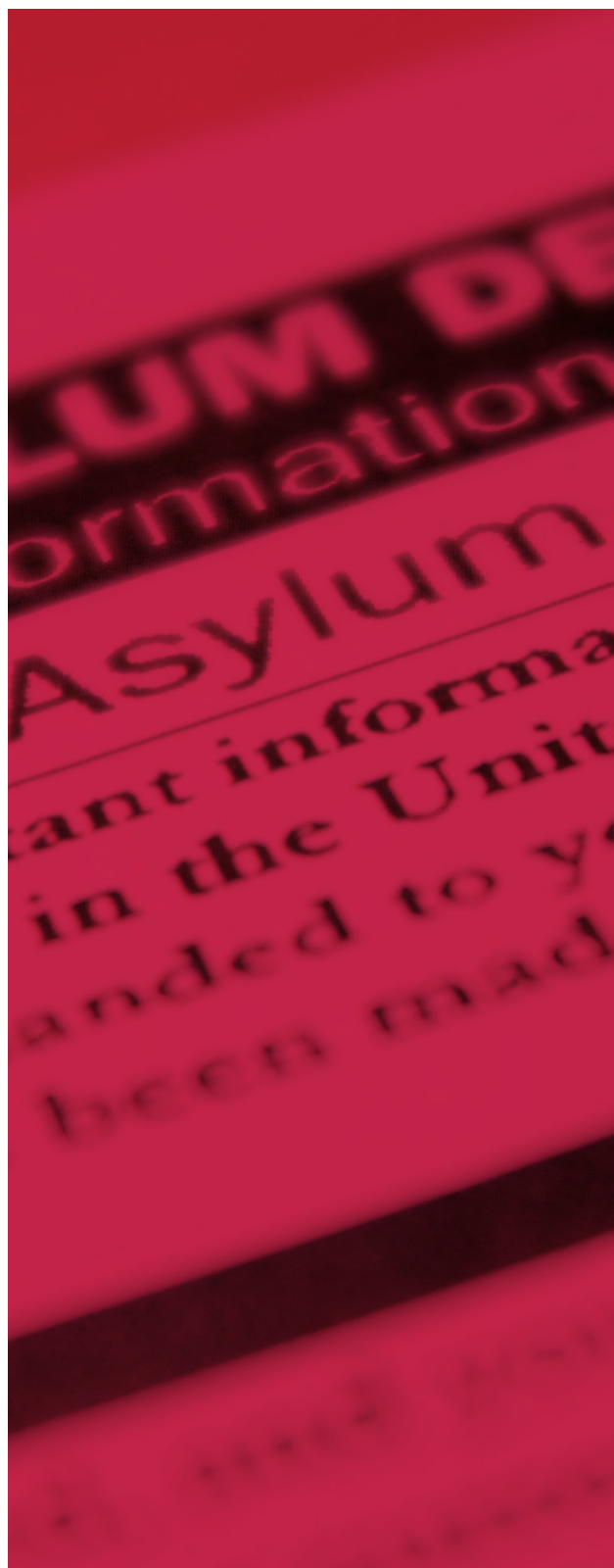
5 There are three exceptions to this, where refusal letters were issued since March 2015 but where the corresponding interviews took place prior to that. Those interviews are not substantively considered for the purposes of findings of the report.

6 The scope of the report is based on the documents made available to UKLIG. From a somewhat larger total pool of available material, a further selection was made to arrive at the numbers described here. This selection of material was to favour more complete sets of documents relating to the same claimant, although, in some cases, outcomes of cases are unknown or are under appeal.

7 While it is known that there are entries recording the reasons for the individual grant of asylum on internal Home Office files, it has not been operationally possible to obtain such entries. In addition, from experience of specialist practitioners, the internal file notes of reasons for grants rarely permit substantive analysis.

This report examines Home Office decision-making against the applicable *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* (version 5 of February 2015 and version 6 of August 2016), referring as necessary to the applicable legal context. The study sought to identify matters of specific relevance to SOGI claims against that background.

The focus of this report is on the Home Office decision-making and the references to Tribunal decisions are purely illustrative. Given its qualitative nature, this report does not aim to provide a statistical analysis of Home Office decision-making but rather to document issues currently arising in decision-making and interviewing in the sample available to this study.



KEY FINDINGS:

ASYLUM INTERVIEWS



The substantive asylum interview is for many LGBTQI+ claimants the first time they would present a detailed account of their identity – a matter which goes to the core of their claims for international protection. This involves reflection on many intensely personal experiences going to the most intimate aspect of one's life and sense of self. It is a prospect many claimants unsurprisingly find most unsettling. Particular sensitivity is required in questioning on sexual orientation and gender identity.

The Home Office provided guidance on conduct of interviews in sexual orientation claims in the APIs¹, requiring the interviewing officers to establish an 'open and reassuring' environment and to conduct 'a sensitive enquiry' into claimants' sexual orientation noting that the interview 'must not be adversarial'. The APIs warn explicitly that 'there are no circumstances in which it will be appropriate for the interviewer to instigate questions of a sexually explicit nature. This includes questions about explicit sexual activity or physical attraction. Caseworkers must not ask for or seek such information.'² Further, the APIs require that '[a]ssurances are given to the effect that information provided will be treated in confidence and in a non-judgemental manner'.

1 This refers to the content of both *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* versions 5 and 6.

2 Elsewhere, the API permits the Home Office to ask questions around management of risk in relation to sexual encounters, while prohibiting those seeking descriptions of nature or frequency of sexual encounters.

Sexually explicit questions and evidence

In *Missing the Mark* UKLGIG found that there were instances of inappropriate questioning eliciting evidence of sexual practices. This issue has been subject to enquiry within the Investigation into handling of Asylum Claims based on Sexual Orientation by the Independent Chief Inspector of Borders and Immigration published in October 2014 which found that 11% of interviews of LGB applicants contained one or more inappropriate questions. The Home Office revised its *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* and training in view of this as well as in view of the judgement in the case of *A, B and C*³ in the Court of Justice of the European Union which deemed such questioning unlawful and a breach of the claimant's right to respect for their private life.

UKLGIG wholeheartedly commends the fact that persistent questioning directed at sexual practices no longer seems to be an issue in the findings of this study. UKLGIG also finds considerable evidence of good practice in the conduct of interviews.

Nevertheless, there are instances in which questioning was not in line with the API standards.

In an interview in October 2016 a gay man was asked how he felt while being massaged in the context of foreplay by his partner, and later how he felt after having had oral sex for the second time. Although in that case it was not recorded that explicit sexual content was offered in response, this type of questioning is likely to result in just that. The questions were surprising, since the applicant was warned in a different part of the interview that a particular question was not intended to elicit sexually explicit evidence.

In an interview in December 2015 an applicant was asked about the frequency of sex with a person with whom he cheated on his partner in the UK⁴.

Interviewing a gay man in May 2016 a Home Office caseworker asked a number of successive questions about the claimant's first feelings for boys in early teens. Those were answered in terms of sexual attraction which the claimant neither understood nor acted upon. The questioning was pursued to include a question as to what would happen in dreams in which the applicant had described having sex with boys he liked.

It is difficult to understand what evidential value responses to questions such as those in the examples here would have had. To an outside observer and the claimant they may well appear to be a search for sexually explicit content and thus fraught with the danger of embarrassing the claimant during the most important opportunity to make their case to the Home Office.

In the materials available, all the decisions were dated after March 2015, however three decisions were based on interviews pre-dating March 2015. While those interviews were excluded from consideration of this report, one observation is made in relation to one of those cases. In spite of the fact that by 2016 it was clear that such questioning is an affront to the dignity of the claimant, an aggressive and intrusive interview seeking descriptions of sexual acts⁵ formed the basis of a refusal in March 2016, albeit not directly relying on the offending parts of the interview. UKLGIG considers that no part of such an interview should have been included in the consideration of the claim because the whole interview had been tainted by the inappropriate questioning.

It is observed that while the APIs state that they apply to 'all Home Office staff who interview and consider asylum claims brought on grounds of sexual orientation', it is not necessarily clear whether the intention of the API is that the standards in relation to the use of terminology and general conduct of questioning should apply not only to the interviewers and decision-makers but also to Home Office Presenting Officers in the course of conduct of appeals. In an Upper Tribunal determination of June 2016, where one of the grounds of appeal was based on inappropriate questioning in relation to sexual conduct, a submission by a Senior Presenting Officer was recorded as stating that the API was not binding on Home Office Presenting Officers (in addition to stating that the questioning was not inappropriate)⁶. It would be preferable for all representatives of the Home Office to be clearly instructed that the standards of the API apply to them.

³ Joined Cases C-148/13 to C-150/13, *A, B, and C v. Staatssecretaris van Veiligheid en Justitie* (2 December 2014)

⁴ APIs state: 'Questions about the nature of any sexual activity undertaken or how often undertaken are not however appropriate'.

⁵ This was a particularly regrettable interview. Not only were multiple questions asked in different parts of the interview, but when the claimant failed to provide a description of sexual acts he was repeatedly accused of being evasive and pressed to answer the questions asked.

⁶ Only incomplete papers were made available to UKLGIG and no observations are made here as to whether the questioning was in fact intrusive.

There were cases in which it was recorded that sexually explicit material was submitted and the decision-maker did not take it into account in accordance with the APIs, and reflecting the position of the Court of Justice of the European Union (CJEU) in *A, B and C*¹ which ruled that examination of such material is an affront to human dignity and contrary to the Charter of Fundamental rights. Ruling on the issue of lawfulness of admitting such material, the CJEU observed that such material 'does not necessarily have probative value' and also that 'authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence'. It is not possible from the materials available to ascertain whether in conventional evidential terms, the material which was excluded would have had potential impact on the assessment of the claim. In principle, sexually explicit material is not necessarily of no value and should be treated with caution². In line with the APIs and the ruling in *A, B and C*, there is no evidence of Home Office soliciting or encouraging the disclosure of such material.

The responses of interviewers to sexually explicit narrative freely offered by the claimants during the interviews did not accurately reflect the APIs. The APIs specify that the claimants 'must be allowed to make such disclosures as they wish'. The APIs recommend the wording of a warning. This states that while responses would be recorded, there would be no follow up on such narratives and that the Home Office does not consider descriptions of the detail of physical sexual activity as providing evidence of sexuality. The APIs recognise that there may be claims there is 'no other evidence available' or that a 'claim is defined by sexual activity only'. It is assumed that this partly reflects the fact that some people do perceive their sexual identity as strongly associated with their sexual conduct. This is perhaps unsurprising among people who risk criminal sanction or physical harm should their sexual activity be discovered by others. Similarly, a person completely precluded from offering any evidence of sexual activity might be unable to articulate their claim.

The guidance treads the line between not excluding potentially relevant evidence or discouraging free-flowing narratives and asserting the protective approach to the privacy and dignity of the claimant. The approach of the API is a positive one and needs to be applied with more rigour. This does not mean that the interviewing officers should be venturing into examination of sexual activity, but that great care is needed to take the evidence relevant to every claim.

The majority of interviewers interrupted the claimants if and when they made mention of circumstances involving sexual acts. The nature of interruptions as recorded in this study did not reflect the policy in the APIs – being in terms such as: 'Let me stop you there. You do not need to give me sexually explicit information, it will not affect the outcome of the claim' (November 2016); 'I do not need to know about functionality' (August 2016). There was no recorded instance of the full recommended warning being used, however there are instances of repeated interruptions. In this study, from the written record of interviews, the effect of interruptions in cases where sexually explicit content arose appears to be that the interviewee would simply stop giving their response to a question. Conversely, there were positive examples of interviewers qualifying questions around relationships or feelings by stating that no information about sexually explicit information was being sought reflecting the APIs recommendation that questions should make this clear. Communication of the policy in relation to sexually explicit narratives as they arise should not be confused with the excellent practice by some interviewing officers of offering a general explanation of the purpose and content of the interviews which sensitively conveyed to the claimant that they understood the intimate nature of sexual orientation and did not wish to embarrass the claimant by asking them to talk about their identity. Such practices contribute toward establishing an open atmosphere of the interview.

This study finds the Home Office approach in the difficult area of sexually explicit evidence considerably improved but some additional training would be useful.

1 Joined Cases C-148/13 to C-150/13, *A, B, and C v. Staatssecretaris van Veiligheid en Justitie* (2 December 2014)

2 Concerns around overly prescriptive guidance excluding all sexually explicit material is noted in the *Refugee Status Claims Based on Sexual Orientation and Gender Identity – A Practitioners' Guide*, February 2016; International Committee of Jurists, pp 41-42. For example, material already published would not necessarily suffer from the same defects as those that the CJEU contemplated in *A, B and C*. Sexually explicit material must not be confused with evidence which includes in part sexually explicit content (such as records of contact on dating sites or graphic exchanges with a sexual partner). Such evidence has evidential content which is not merely prurient but shows claimants seeking or finding partners. Such evidence remains relevant.

Using claimants' preferred terminology

The Home Office APIs on Sexual Orientation in Asylum Claims explain in detail the need to establish the claimant's preferred terminology to describe their identity. In many languages the only available terminology is derogatory and can demean the claimant, while the right to self-identify with a term of one's choice is a base measure of respect for identity. In addition, the use of wrong terminology will not promote an open and reassuring environment in interview, which the APIs require.

Most interviewers identified the terminology the claimants wished to use to describe their sexual orientation at the early stages of the interview. The standard interview structure means that often a part of the claim is elicited before such terminology is established³. It may be useful, where it is obvious to the interviewing officer that the claim is one based on SOGI because it would have been identified in the screening interview, that the preferred terminology is established at the outset.

There were some examples of the interviewers not using or inconsistently using the identifiers elected by the claimant. This must be avoided as it can distress or confuse the claimant. In an interview in July 2017 the claimant who self-described as bisexual, and said this in the opening of the interview, was referred to as gay in interview. When this was subject to a complaint, the Senior Caseworker replied that the interviewing officer had acted in accordance with the Home Office policy, using appropriate terminology, because in his witness statement submitted prior to interview, the claimant had referred to homosexuality in a specific context.

A number of Tribunal decisions did not match the predominantly good practice of the Home Office of referring to the sexual orientation of the claimant by their chosen terminology and instead use the term homosexual to relate to people who did not see themselves in those terms⁴.

Often in refusal letters and interviews, decision-makers used 'homosexuality' or 'homosexual' to denote more general propositions relating to, for example, 'attitudes to homosexuality', while using the claimants' preferred term to refer to the claimant. Use of homosexuality should be avoided as a neutral term because of its association with confusion of conduct and identity as well as uncertainty as to what in fact it means. Homosexuality could refer to same-sex attraction, or same-sex sexual relations or to more general non-dominant sexual identity.

Insufficient explanation or understanding of terminology used in interviews referring to relationships can have an impact on credibility assessments. The term 'relationship' can mean many different things, as can the terms 'boyfriend' or 'girlfriend'. These concepts go to the heart of the issues to be decided in SOGI claims and there is evidence of insufficient clarity of the intended meaning of questions, and assumed context to a given answer. There was evidence in this sample of assumptions about the nature of relationships causing confusion about the nature of given accounts. A different aspect of use of 'relationship' without defining what it is, is the possible and dangerous implication that a 'relationship' would have a complex emotional content and deep knowledge about one's partner. This can be particularly acute in sexual orientation cases because risk of persecution can result in people having experience of little more than secret sexual encounters with the same partner. While the APIs require that the interviewer 'to establish with an interpreter prior to the interview the terminology to be used in relation to identity and 'contact or encounters' so as not to cause offence; and also warn that relationships 'in some countries may bear little resemblance to relationships in the UK', they do not highlight the need to seek clarity of terminology relevant to relationships.

³ In practice, the opening questions of any interview will be around any evidence submitted in support of the claim followed by a number of questions in relation to personal and family background and the claimant's history in the UK. This will culminate in a single question asking why a person fears return. During this series of questions it is common for claimants to refer to their sexual orientation or gender identity. The caseworker would only then start the standard questioning around sexual orientation, of which the first one is establishing the preferred terminology.

⁴ This is not to discount the use of homosexual where it is a self-identifying term used by a claimant.

Facilitating an 'open and reassuring environment'

This study finds that some interviews were, from the context of the written record, unnecessarily confrontational and judgmental, thereby failing to establish an 'open and reassuring environment' so as 'to help build trust between the interviewer and the claimant' necessary for a claim of this nature, in line with the APIs.

In what was generally an aggressive interview in August 2016, after the preferred terminology had been established, an applicant was asked how he would describe his bisexuality in his language, to which he replied that he had never heard a word for it in his country of origin. The refusal letter found this response to be lacking in credibility, concluding that 'it is reasonable to expect you to have been able to identify and produce the correct terms for your own claimed orientation used in the country of your birth.' It is noted with concern that the decision-maker refusing the claim referred to the Home Office document Country Information and Guidance about the same country which in fact did not contain a word for bisexual orientation (as there is none) but instead referred to ostensibly derogatory terms for men in same-sex relationships. In that case, in spite of API warnings of only derogatory terms being in use in many languages and the country information notes clearly documenting this, the decision-maker asked questions with clear capacity to distress the claimant and which could be easily answered by persons who are not LGBTQI+ who come from the same country. In addition, the decision-maker in the refusal letter also misrepresented the information in the guidance they referred to. Such questioning was also present in an interview of another claimant who was asked for the terminology used in another country eliciting a response of three terms of which two had strongly negative connotations. Asking potentially upsetting questions apparently fishing for an adverse credibility point of no evidential value, goes against the intent of the APIs, even if not their express wording.

By way of an opening remark to the section of interview about the sexual orientation of the asylum claimant in May 2016, an interviewer told a claimant that they did not need to be in a relationship, or a member of any LGBT group, and was asked whether they had done 'anything to enhance [their] claim'. This was later followed up by asking whether they entered a relationship and became a member of an LGBT group because they thought that this would enhance their claim. There was no evidential basis to ask such questions and it is difficult to interpret the intention behind them in a positive way.

At the very outset of the same interview the claimant was asked why they had not brought all the documents to the interview, when the letter from the Home Office required them to do so. This claimant in fact had brought a number of documents to the interview and expected some to come later – presumably having been advised that they could submit further documents after the interview. Such a question implying fault at the first opportunity over a common occurrence is very unusual indeed and does nothing to establish a positive atmosphere.

There were a number of interviews in which the case-workers focused heavily on perceived inconsistencies with respect to events which took place in the claimant's early teens. This gave a distinct impression that the interviewer was not trying to establish an open and reassuring atmosphere. Inconsistencies which are significant to the claim must, for fairness, be put to the asylum seeker. These examples, however, were of minor events and minor inconsistencies being highlighted to the asylum seeker as significant issues. Asylum seekers will mostly know that inconsistencies are a reason for refusal, and illegitimate emphasis on minor detail has the potential to unnecessarily worry the interviewee.

Questions over-emphasising inconsistencies on descriptions of knowledge and feelings when an applicant was 10-11 years old were asked in September 2016. In an interview in August 2017 detailed questions were asked around a perceived inconsistency in relation to the precise timing of the first same-sex attraction that took place 20 years before when the claimant was age 12-15. Another example of questioning which is unnecessarily adversarial and evidentially irrelevant (as well as lacking perspective on the current discourse in the field) occurred in August 2016, when an interviewer asked: 'How is it you incorrectly refer to the T in LGBT as trans when it in fact means transgender?'

Similarly, a claimant who described how a schoolboy friendship grew into a same-sex sexual relationship when the boys were around 13 and 17 respectively was challenged for not having a date for the anniversary of the start of the relationship and being able to remember only a particular school trip as the time when the liaison started. Then, the interviewer asked whether the boys went out for a meal, or went out or to socialise, which would have been, under the circumstances, a culturally inappropriate expectation.

In an interview of a gay man in August 2016 exploring how he felt in the face of his mother's violence towards him caused by her rejection of his sexual orientation, the man reflected, 'you hate yourself, your personality and everything, and it is like a slow death.' He was asked why he hated himself, to which he replied that he did not hate himself, but the attitude of others made him hate himself. This response was then pursued by the interviewer with 'did you, or did you not hate yourself?' This lack of comprehension by the interviewer is disappointing and their approach could reasonably have been experienced by the claimant as insensitive and rigid – the opposite of 'open and reassuring'. It may have put them on the defensive and made them quite nervous. Importantly, the claimant's answer to this question would have had little evidential value.

In August 2016 a bisexual man explained that although he had told his family that he intended to remain in the UK and marry a male partner, they had told him that was a sin and wanted him back in his country of origin where they would marry him to a woman. He was then asked: 'So if your family want you back and they are welcoming – and there is no danger to your life there – why can't you go back to your country?' After a repeated explanation about his fear of being forced to marry, the interviewer asked: 'But as you've maintained today, you're bisexual. So what's the issue?' The tone of this questioning was in no way reassuring and invites questions as to the interviewer's understanding of risks to bisexuals.

In some interviews the claimants were asked why they were not attracted to the opposite sex or what made them more attracted to one as opposed to the other sex where there was no evidential basis for introducing such questioning. This type of questioning 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 the impossible task of explaining why they are not heterosexual. Such questions, where they have no evidential basis or are insisted on, may offend claimants and do not meet the standard of creating an open and reassuring atmosphere.

Following several questions and clear answers with respect to the time the claimant had realised he was gay in an interview in December 2015, the interviewer asked 'So nothing happened in your life which made you feel like you prefer men to girls?'

Such questioning can reflect the decision-maker's misunderstanding of what the claimant can be expected to prove. In a refusal letter of November 2015, a caseworker wrote, 'you have failed to explain why [X – male] touching you caused you to come to a conclusion that you are therefore only attracted to men and not to women'.

It must be noted that there were examples of interview records displaying excellent practice in opening the interview with detailed sensitive reassurances in relation to the nature of enquiry undertaken and which maintained a balanced approach to questioning.

Their interview is a daunting experience for any asylum claimant, and this may be especially sharply felt by people having to prove their sexual orientation or gender identity who are frequently unaccustomed to discussing those matters with anyone. It is essential that Home Office ensures that the API is applied in all cases by ensuring an open and reassuring environment is maintained.

Recommendation

Home Office decision-makers should apply the guidance in the API rigorously so as to ensure consistent use of the claimant's chosen terminology regarding their identity, avoid potentially intrusive and irrelevant lines of questioning and ensure an open and reassuring atmosphere in all interviews which allows for full articulation of the claimant's narrative. There is scope for improving on the API to identify the need for clarity in relation to the use of terms referring to relationships.

KEY FINDINGS:

DELAYED CLAIMS

Delay in making asylum claims frequently has adverse impact on the assessment of credibility. Delay in making asylum claims must be understood in context of the lived experiences of LGBTQI+ asylum seekers.

Most claimants UKLGIG works with have not claimed asylum on arrival. The most common situation is that a person would initially have had some form of leave to remain but claimed asylum on the basis of sexual orientation or gender identity at a later stage. Many would have made other applications to the Home Office on different basis¹ before making an asylum claim on the basis of sexual orientation or gender identity.

In addition, UKLGIG's experience is that a great many LGBTQI+ asylum seekers are unaware upon arrival in the UK that it is possible to claim asylum on the basis of sexual orientation or gender identity. For those who have heard of asylum, the perception is that asylum is 'political' asylum, designed for political opponents of a state. It is not unusual for the term refugee to be associated only with people coming from known conflict areas. It may be long after a person has arrived in the UK that they become aware of the possibility of obtaining protection on grounds of sexual orientation or gender identity.

LGBTQI+ asylum seekers come from societies where persecution, abuse and culturally embedded prejudice against them are prevalent. Many hid their identities in order to avoid persecution. LGBQ+ people may exhibit in some form (frequently not readily possible to articulate) shame or secrecy about who they are². Some may also be reluctant to discuss and therefore re-live traumatic experiences.

LGBTQI+ asylum seekers frequently cannot draw on support from their diaspora communities which often harbour the same prejudices against them as do the populations of the countries they come from. This results in people actively dissembling within their community. Some UKLGIG clients felt compelled to undergo 'conversion therapy' by their religious communities in the UK to ensure their continued support. In immigration detention LGB people often resort to self-enforced dissembling to ensure their own safety since they face abuse when their identity is

discovered by other detainees and even staff³. In many cases, a person would have hidden their identity from people in the country of origin, from their friends and acquaintances from the country of origin while in the UK, and from everyone in immigration detention. Against this history of dissembling, it is not surprising that people find it difficult to talk about their identity.

For many or most LGBTQI+ asylum seekers, approaching a state official and giving a detailed account of sexual or gender identity is an alarming prospect, and is likely to explain a delay in doing so. Where there is a possible alternative basis for obtaining leave to remain even temporarily, that is likely to be taken first.

On our sample, the Home Office routinely relied on delay in claiming asylum as damaging to the claimants' credibility applying section 8 of Asylum and Immigration (Treatment of Claimants) Act 2004. This requires the decision-maker to take account of certain categories of conduct, which can include delay, as damaging to a person's credibility. The interpretation of that requirement has been modified by case law. The Court of Appeal ruled in *JT (Cameroon) v SSHD* [2008] EWCA Civ 878 that the test for section 8 behaviour is that it is 'potentially damaging' to credibility while preserving the need for a global assessment of credibility in an asylum claim⁴. The Home Office may also take delay into account as an adverse consideration when considering whether to afford the benefit of the doubt to a person who has been deemed not to have sufficiently substantiated their claim⁵. This means that in some cases the delay can be taken into account twice, eroding the evidential value of the claimant's account.

The legal context for the delayed asylum claims based on sexual orientation was qualified by the Court of Justice of the European Union (CJEU) in the Joined Cases C-148/13 to C-150/13, *A, B, and C v. Staatssecretaris van*

1 These may be applications for leave in any non-protection immigration categories and/or unrelated asylum or human rights claims.

2 This might apply also to some trans and intersex people

3 *No Safe Refuge: Experiences of LGBT asylum seekers in detention* UKLGIG and Stonewall, October 2016

4 A global assessment of credibility is one which takes account of all the relevant evidence also often referred to as an assessment 'in the round'.

5 This is formally included in paragraph 339L of the Immigration Rules which seeks to implement Article 4(5) of the Qualification Directive 2004/83/EC. In practice, a coherent but externally unverifiable part of the claim may be left in the balance, subject to any adverse consideration such as delay. This can mean that relying on the claimant's account alone may be deemed insufficient to prove the claim as a result of adverse impact of delay.

Veiligheid en Justitie (2 December 2014), which ruled that, in view of the sensitive nature of questions relating to a person's personal identity and their sexuality, 'it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset'. *A, B and C* requires an overall assessment of the circumstances of the individual and a shared burden of proof between the decision-maker and the claimant. On the facts of the case of *C* (where the issue arose) significant delay in disclosure followed a previous unsuccessful asylum claim made on different basis; nevertheless, even in that context, the CJEU ruled that his claim could not be lacking in credibility solely on that basis.

UNHCR Guidelines⁶ identify the same phenomenon of inhibition in conveying the asylum claim based on SOGI grounds resulting from difficulty in coming to terms with one's sexuality as a result of oppressive surroundings and the intimate nature of the claim. The Home Office APIs include a review of these issues and also note the ruling in *A, B and C*.

Delay and credibility overall

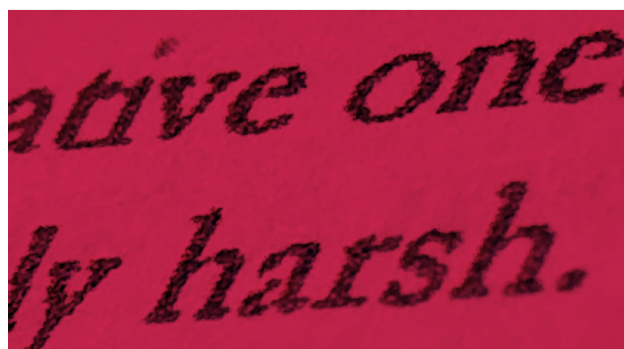
The context where the intimate nature of disclosure against the probable background of suppression of one's own sexual (and potentially gender) identity is likely to cause delay in claiming asylum, is insufficiently recognised in Home Office decision-making.

It is of concern that this study found that there were refusals in which there is very little reason to refuse the claim, other than delay. On the other hand, where delay arose, the disbelief of reasons for delay very often followed.

In a refusal from August 2016 the only reason for rejecting the account was delay: the claimant's lack of knowledge of sexual orientation as grounds for claiming asylum was rejected as a reasonable explanation for the delay. Since the claimant had stated that he used the internet to find partners and he was well educated, he was judged to have 'research skills'. In that case the refusal contained no challenge whatsoever with respect to the substance of the very detailed account provided in interview⁷.

⁶ 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, §3

⁷ In that case the remaining reasons for refusal considered three pieces of supporting evidence which were deemed ultimately not to have decisive weight in the round as they were, respectively, (1) not determinative of sexual orientation (letter from a sexual partner), (2) implicit rather than explicit (letter from a support worker for gay men) and (3) relevant but insufficient in the round (letter from a gay friend met on a dating site).



A refusal of a claim by a bisexual claimant in February 2017 had as the key reason for disbelieving the applicant the delay in claiming asylum in the light of previous applications for leave not related to asylum⁸. In that case the claimant explained in interview that he had attended a support group for gay and bisexual men and described gaining confidence over time to accept his sexual orientation. When allowing the appeal, the judge placed weight on his difficulties coming to terms with his sexuality as an explanation for the delay.

In some cases, the reason for delay recorded in interview was not considered at all in the refusal. The reasons so provided and ignored include difficulties disclosing sexual orientation (e.g. October 2016), having found out about the possibility of claiming asylum only from a specific support organisation (a different decision of October 2016) or from a person who corroborated conveying the information (May 2016).

In all analysed refusals where delay was relied on and where the person claimed no knowledge of the asylum process as an explanation for not having claimed previously, the Home Office did not accept that as an explanation.

Explanations of having no knowledge of the possibility of making a claim on grounds of sexual orientation were rejected on account of level of education (March 2017 and March 2015), previous ability to make immigration applications (May 2016 and November 2015), and having previously had legal representation (December 2016).

This kind of reasoning does not recognise the realities of life for many LGBTQI+ asylum seekers who may have a potential claim. The fact that a well-informed person knows that it is possible to make an asylum claim on the basis of sexual orientation or gender identity, does not mean that this is clear to people from countries where

⁸ There was also an allegation of deception used in relation to a previous application unrelated in nature to the international protection claim. The only other reason Home Office offered, SSHD having accepted that the claimant was able to explain his feelings when he recognised his sexual orientation, that 'no persuasive evidence' was submitted in support of his claim, noting that attendance at Pride does not prove sexual orientation.

they concealed their identity and who often have much of their social contact with deeply conservative diaspora communities of their countries of origin. Until a person chances upon someone to whom they have the confidence to disclose their identity and who also happens to know that this could be a basis for an asylum claim, they are unlikely to have any knowledge of this fact. In UKLGIG's experience, even people who are well educated are not necessarily aware of the fact that SOGI can be grounds for international protection and this flows directly from what is often a lifetime of self-denial.

Similarly, persons who are in contact with legal representatives in relation to non-asylum matters would not be advised with respect to the possibility of claiming asylum unless they knew to ask about that – lawyers do not speculatively search for alternative means to a resolution of a client's status, or ask people about their sexual orientation. In addition, prospective claimants would not routinely disclose their sexual orientation to their representatives. People who concealed their sexual identity for most or all of their lives do not suddenly start telling everyone about it, especially where there is no apparent need to do so. This in turn means they will not be advised that they can make an asylum claim.

In the many cases where delay in making the claim was raised as a reason for refusal, but appeals were allowed, the Tribunal judges did not place weight on delay as an overarching issue as a result of a global assessment of credibility, while in other cases judges accepted the explanations for delay.

This study found that the Home Office places excessive reliance on delay and insufficiently acknowledges in the practical impact of a lifetime of concealing one's identity.

Delay and supporting evidence

Delay is often the basis for devaluing individual items of supporting evidence as well as evidence of witnesses who provided letters or statements in support which post-date the claim. This additional function of delay has the capacity to render all supportive evidence meaningless, in spite of the fact that delay is a frequent feature of genuine SOGI claims.

The Home Office described supporting evidence showing membership of clubs and association with specialist LGBTQI+ support organisations as adding little weight to the claims because it post-dated the asylum claim (May 2016 and March 2016). Similarly, the 'delay in participating in such groups' was considered 'inconsistent' with another claimant's sexual orientation. In a refusal of October 2016 it was found 'despite attending [gay] clubs regularly, you did not decide to become a member and thereby obtain some evidence of your attendance at these clubs until your [previous] appeal for leave [on different basis] was dismissed'.

Attendance at a specialist support group for LGBTQI+ asylum seekers by a lesbian was found to have been an embellishment of the claim because 'it [was] not clear' why she had not attended over the previous 10 years before she had made a claim, even though she would not have been among the potential users of the group.

Civil partnerships and same-sex marriages entered into after the asylum claim had been made were often viewed with suspicion and little weight was placed on them: 'The timing of your marriage does not serve to support your claim that you have been in a same sex relationship since [four years prior to the marriage] and there is no reason to suggest that this marriage could not have taken place in an attempt to further support your asylum claim' (November 2015)¹. This is of particular concern given that the Secretary of State has powers to investigate parties to a proposed civil partnership or marriage before it takes place.

SOGI claims as a matter of principle are a particular species where delay frequently occurs for objectively or subjectively good reason. It is of concern that considerable weight is placed on delay as a matter of routine. Excessive reliance on delay can also undermine the application of the correct standard of proof and the need to assess the totality claim.

Recommendation

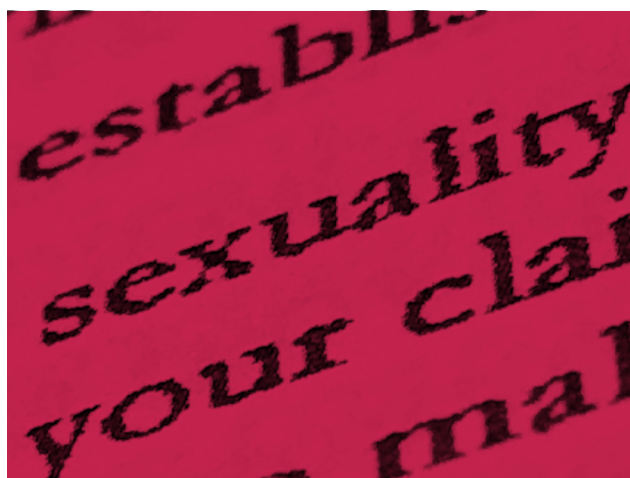
Decisions-makers should recognise that the intimate nature of disclosure against the probable background of suppression of one's own sexual orientation and/or gender identity is likely to cause delay in claiming asylum and that delay cannot routinely operate to diminish the value of the account and the supporting evidence. The API should include a comprehensive recognition of the practical consequences of the common phenomenon of suppression of identity.

¹ A similar approach was taken in another refusal of November 2015 relating to a different couple.

KEY FINDINGS:

NARRATIVE OF SELF-REALISATION

UKLGIG has welcomed the focus on sexual identity rather than sexual practices in Home Office credibility assessments. This has largely been facilitated by examining a



person's emotional development. With this important change, however, comes the need for critical reflection on a slightly different emerging issue. While apparently intended as non-prescriptive in the APIs, the Home Office use of this type of exploration has often resulted in swinging the pendulum away from sexual conduct to excessive focus on claimants being able to articulate sophisticated accounts of self-realisation (stories of recognising one's identity), searching for evidence of a particular account of development of identity.

In many cases this expectation of sophistication is erroneous as it relies on stereotypes of LGBTQI+ people, which in addition to being sexual stereotypes are culturally misaligned. Not everyone will have gone through introspective soul-searching and retrospective interpretation of their experiences, so as to be able to offer a narrative identifying their own emotions as central to their identity, or containing milestones which might be recognisable in some Western contexts.

In countries where there is repression and absence of recognition of non-dominant forms of expression of sexual orientation and/or gender identity, there are extremely limited opportunities to critically reflect on the social experience of one's identity. Further, personal

background, education, class and religion will all have an impact on whether there can be any '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 or communal duty as core founding features of identity), expectations of emotional journeys will often be culturally inappropriate. A market trader from Kampala is most unlikely to give an account of their sexual identity (be it heterosexual or any other) which could be in any way comparable to an account given by a Shoreditch blogger.

Many people would not have had an experience of their identity which includes an emotive narrative, or where emotions are central. Many people strongly associate their sexual orientation with sexual preference, while others associate it with feelings toward their partners, or with their social interactions.

Home Office policy

The APIs¹ are non-prescriptive in relation to accounts of emotional development and their evidential value: 'A detailed account of someone's experiences in relation to the development and realisation of their sexual identity *can help* to establish their credibility by establishing how and when they realised that they were of that identity' (own emphasis).

The APIs direct interviewers to consider all material facts of a claim including experiences and development of identity: 'questions asked should be open questions that allow claimants to describe their experiences and the development of their orientation (or the orientation imputed to them by their potential persecutor) and how this has affected their experiences both in their own country and in the UK'. There are expectations of ability to provide a reasonably detailed account of oneself (taking into account personal and country background) which includes, as an example, establishing 'what has motivated the individual into realising their sexual orientation' – an undeniably complex issue which not everyone can articulate.

¹ This refers to both versions 5 and 6 of the Asylum Policy Instruction: Sexual Orientation and Gender Identity

Fixed expectations about narratives

The decision-makers' focus on a narrative of development of sexual orientation resulted in a multitude of questions normally asked to establish how the claimant felt at almost every instance of their life where their sexual orientation might be of potential relevance.

The Home Office asked claimants how they realised they were gay, how they felt about it, what experiences they had that made them feel different, how they felt when they felt different¹. If, when questioned about first same-sex attraction, claimants responded simply by reference to sexual attraction at an early age, this was often pursued by asking about their feelings and emotions and seeking further or more detailed explanations about them. Similar questions were asked in relation to how people felt knowing the attitudes of their family, friends, religion and society at large, and often multiple questions were asked about the same events and the same people and what 'feelings' those resulted in.

Sometimes it is clear that such persistent questioning merely confused the claimants who are recorded as asking what is meant by such questions. In some interviews the questioning in relation to feelings is understood by the interviewee to be in relation to physical feelings as opposed to emotions or thoughts.

Interviews often reflected unreasonable expectations of claimants, even in the Western context, vigorously questioning applicants about emotions experienced at a very early age, a considerable period of time having passed since. A man in his mid-thirties was asked in depth about 'feelings' experienced when he was 15. A woman in her early fifties was questioned about what she felt as a teenager. One applicant was repeatedly asked to explain his emotions when first having a sexual experience age 13, while another was questioned in relation to his schoolboy friendship having grown into a sexual encounter age 12-13.

The Home Office often made conclusions such as 'it is considered that your inability to provide information about emotional development of your sexuality is inconsistent with your claim'. A First-tier Tribunal Judge similarly disbelieved that claimant because his account did not show 'any particular turmoil, angst or inner conflict between the way that he wished to and did behave compared with the expectations, religious obligations and potential consequences' in November 2016. The appeal was later allowed by another judge, who found the account of recognition of sexuality credible given the personal background and the country conditions

and pointed out that the 'UNHCR Guidelines and the Respondent's guidance explain that some people may find it difficult to talk about the development of their sexual identity and that some people may engage in sexual activity without attaching a clear label to their sexual orientation'.

The fixed expectations of a particular 'emotional journey' translate both into disregarding relevant evidence when not given in response to a question about 'feelings' and in imposing an unattainable standard of self-perception. While the APIs do not require the claimants to supply a narrative of a particular structure or content, conclusions reflecting assumptions about what someone's life-story should entail are a common feature of many refusals.

A claim of a gay man was refused in December 2016 mainly on his inability to articulate an emotional experience in a way expected by the decision-maker, and what was perceived as an inconsistency in his self-realisation. The inconsistency was around his first same-sex experience when he was 13 (with an older boy) and him realising that he was gay at age 17. It was concluded that he had not demonstrated 'any journey of thought or emotion regarding [his] sexuality'. The decision-maker appeared to have fixed expectations and repeatedly asked questions about the applicant's feelings while seemingly ignoring relevant answers such as 'It was the first time I had seen my mother cry in front of me. I was touched. I was sad, she said I had shamed the family so I felt guilty. But on the other hand I really enjoyed the fun I had with X' and in the context of concealing his relationship: 'It was so sad, you keep living in fear. You live a scared life, you can't be free or live a normal life.' Allowing the appeal in February 2017, a judge found that what was described as inconsistent as to the account of self-realisation was in fact 'not a mathematical analysis but rather more a journey of evolving sexual identity'.

Allowing an appeal of a lesbian whose account of recognising her sexuality was found inadequate, the decision-maker having cited significant parts of the section of API about difference, a judge found '...It is difficult to see quite what was meant when it was alleged that she had failed to provide an account of her "emotional journey of discovery". Within the decision letter the Respondent cited from her own *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* v. 6 and it seems to me ... [that] her interview demonstrated a number of the features referred to in the part the respondent quoted... the fact that she did not use any 'emotional' terms does not undermine the credibility of that account'.

¹ This is a real question asked in an interview. Most are not that clumsily phrased, but questions are asked in most cases around how people felt when they perceived themselves as different.

A claim which was refused because it was 'not considered reasonable' that the claimant 'would be unable to clearly describe [his] journey from [his] first realisation through to a full acceptance of [his] sexuality' was allowed in May 2017. The judge found that 'There can be no single correct way to respond to identifying sexuality. The appellant has given an account that displays both how he dealt with relationships with others and how he felt about his sexuality. That account accommodates his family's and societal views on the matter, and how the issues informed how he behaved and felt. No account can be right or wrong.'

There are examples in which the approach is contrary to the guidance in the API which advises that different people start thinking about their sexual orientation at different times. A refusal of November 2015 drew adverse conclusions because the claimant 'failed to [...] provide a reason for [his] lack of awareness [of sexuality] before this age [of 14]'.²

Expectations of an articulated account of 'difference' from society sometimes feature in the refusals of LGB asylum claims. One example is from a refusal in September 2016 where the account in interview was described as 'evasive of your thoughts and feelings as you resort to being perceived as behaving like a woman. This does not demonstrate how your feelings towards your sexual orientation developed, or how your sexual orientation meant you were different [from] others'. Those findings were made in spite of an account of same-sex attraction from the first arousal, detailed references to bullying at school and abuse at home as a result of being perceived as effeminate.

Absence of experiences of difference can be a result of personal experience of identity, but equally a result of the cultural context or self-denial. The APIs expressly instruct the decision-makers not to rely on absence of experience of difference as an adverse credibility consideration and states that there can be no expectation of identifiable milestones in a person's development. The APIs do not envisage difference being a key emotional milestone but a possible set of experiences which are indicators of difference.

The expectation of ability to retrospectively interpret and identify early experiences was explicit in the refusal decision of a claimant of November 2017: 'While it is accepted that a young adolescent may struggle to verbalise these feelings, it is not considered plausible with the benefit of age you were unable to identify any thoughts or feelings you experienced at this time' [this referred to emotional content of experiences at age 11-12].

Some claims by lesbians disclosed incorrect assumptions about how same-sex sexual orientation arises with women. In August 2017, reasons for refusing a claim by a

lesbian included the fact that she had not experienced any thoughts of being attracted to the same sex until she developed feelings for her first same-sex partner. A refusal of claim by a lesbian in February 2017 included a finding that it was not credible that she had 'not been able to evidence the growth of her realisation of her sexuality' during the period between the age of 18 (when she first had started to think that she was a lesbian) and the age of 30 (when she had her first same-sex relationship). The formation of same-sex sexual orientation in women in adulthood and/or as a result of an emotional connection with one woman, while well documented in academic literature², is not identified in the API.

Expectations of an emotive account

Questioning specifically searching for an emotive narrative of an internal conflict over one's sexuality was very common. A gay man was asked, 'Can you tell me about any internal struggles you had coming to terms with being gay in [your country of origin]?' This was after him having been asked some 11 questions exploring his feelings in the light of his environment. While a relatively sophisticated claimant who has reflected on their identity may be able to interpret their early experiences in terms of difference from the society and understand the emotive impact such matters may have had on them, many will struggle to do so, especially if they are exploring them in interview for the first time.

The APIs warn that '[w]here a narrative indicating difference is presented, caseworkers should never assume that it will or should be accompanied by evidence of discomfort'. When talking about experiences of society's condemnation of non-dominant sexual identity which may make people feel that their sexual orientation is somehow wrong, the API says that some people 'may' experience this. In spite of that some Home Office decision-makers expected expression of inner conflict and use of emotive language as a compulsory element of self-realisation:

- 'It is reasonable to expect... you would have had a lot of pressure and mental ordeals to overcome in realising your sexual identity' (May 2016).
- It is 'reasonable to expect' an account of 'emotional struggle and confusion' also finding that the 'account is wholly lacking in compelling detail or any emotive terminology' (October 2016).

² C Golden, 'What's in a Name? Sexual Self-Identification among Women' in RC Savin-Williams and KM Cohen (eds), *The Lives of Lesbians, Gays, and Bisexuals: Children to Adults*, Harcourt Brace College Publishers, 1996; C. Kitzinger and S. Wilkinson, 'Transitions from heterosexuality to lesbianism: The discursive production of lesbian identities'. *Developmental Psychology*, Vol 31, 1995 95-104

Feeling good after one's first same-sex experience or on recognising one's sexual orientation can be a cause for challenging and disbelieving a claimant: 'Despite knowing such relationships were not socially acceptable in [country X] you make no mention of having felt anything other than good' (refusal April 2016). In a refusal of December 2016 the fact that the claimant was scared to share information about his sexuality with others and the fact that they felt good about it were deemed to be inconsistent. Feeling good about one's experience or identity is neither impossible nor illogical. One can experience no guilt, shame or worry about their sexual orientation and rationally recognise that who they are puts them at risk. Alternatively, a person can be shamed by others or be unable to articulate exactly what they feel.

The expectation of a tormented experience of one's sexual orientation sometimes led to presumptions that same-sex relationships were wrought with difficulty. A lesbian was asked in April 2017: 'I am not sure you understand, what I want is your emotional journey from being just friends to in a relationship living together?'; 'How did you manage to maintain this relationship?' (a relationship with another woman with whom the claimant had lived for some years in the UK); 'Did you ever have any difficulties in maintaining this relationship or showing affection?'

On the other hand, where there was confusion, this was sometimes seen as an inconsistency:

- A lesbian was found 'inconsistent' in April 2016, having felt good about liking girls in general but also having felt embarrassed, upset and guilty when she fell in love for the first time.
- The fact that an applicant said that he liked boys and never had feelings for girls was found to be contradictory to his statement that he felt scared to express his sexuality in May 2016.

Fixed expectations of what a same-sex relationship involves, often arising from assumptions about the emotive content of relationships, can lead to logically unsustainable positions. In a refusal of October 2015, the Home Office made adverse credibility findings because of the way the claimant described his same-sex partner. The claimant described the same-sex partner as physically attractive, and described common pastimes as playing cricket, listening to music, eating together, going for walks and being intimate. The Home Office assessed the account as defective for inadequate level of knowledge about the partner because the claimant was unable to elaborate on hobbies, interests or principles important to his partner. On the other hand, the relationship with the heterosexual spouse was positively relied on by the Home Office, in spite of a simple description of having dinner and sleeping together and the wife being of 'a medium personality'. Both were reflective of the cultural context and the personal background of the claimant, but if elaboration or depth of relationship were the standard, the claimant's account of his relationship with his wife would also have failed the grade.

The APIs are not rigid but their focus is on exploration of the development of sexual orientation. The expectations of a 'journey' associated with a linear development of sexual identity and of presence of certain articulated features of narratives nevertheless occur in decision-making. The API could be further clarified to direct the decision-maker's enquiry at what harm is feared or experienced as a result of perceived divergence from the dominant conventions of gender identity and sexual orientation.

It would be beneficial if the APIs were made clearer with respect to the issues associated with fixed expectations documented here and further training were provided. The issues associated with claims brought by women are vitally important and need to be incorporated in the API.

Recommendation

Decision-makers, when assessing claimants' sexuality, should not rely on a pre-determined notion of sexual self-realisation that relies on claimants having experienced or being able to articulate a particular type of emotional development or identifiable milestones in the recognition of their identity. The API should be clarified to better enable case-specific decision-making and include the experiences of women.

KEY FINDINGS:

RELIGION

This study finds that many caseworkers had an expectation that asylum seekers who were genuinely LGBTQI+ would experience a sophisticated internal conflict with their religious beliefs. This is reflected both in the assumptions disclosed in questioning and in the adverse credibility findings.

The reason that such expectations are of limited value to assessing credibility of asylum claims based on sexual orientation or gender identity should be self-evident. If a person has not arrived at a refined reconciliation of their religious beliefs with their identity, that will most often shed no light on their identity, but instead on the nature of their religious beliefs. Religious beliefs, on the other hand, can be genuine but internally contradictory or highly debated. Indeed, a lack of willingness to face head-on the proscription of non-dominant gender norms or behaviours in one's religion may show the central place both religion and identity have in the life of a person. That is quite apart from the fact that the nature of education of a claimant is potentially material to their understanding of their religion.

The "Asylum Policy Instruction – Sexual Orientation Issues in Asylum Claims"¹ warns against refusals based on the claimants' religion. It is explained that a person can adhere to some and not all tenets of a religion (or a political group for that matter). Similarly the APIs instruct caseworkers to avoid questioning suggestive of claimants sinning or otherwise violating aspects of their religion. The only mention of religion in the APIs as possibly relevant to a claimant's account is in relation to possible experiences of stigma or shame in some cases – a matter which primarily registers the potential for a person feeling excluded from prevalent religious norms.

In view of the requirements in the API, it is disappointing to find a refusal letter including a reason such as that in August 2017 'You are aware that homosexuality is forbidden in traditional Islam as stated in the Qur'an, however you claim to have reconciled this by having your own relationship with God. However, it is considered that the Qur'an is the holy text of Islam and the word of God, this explanation is a contradiction and you have not provided a reasonable explanation as to why you have continued to practice Islam knowing full well that homosexuality is not permitted in the religion.'

Questions such as 'how do you feel about your religion given that it condemns your sexuality' (August 2015) occur regularly.

In our sample the interviewers almost always asked the claimants in some form how they reconciled their sexual orientation with their religion. This kind of questioning presumes a conflict and also implies an expectation of a complex theological narrative.

In one example the interviewer was searching for a theological underpinning of the reason for the claimant having maintained their religious belief in spite of their sexual orientation²:

Question

Answer

What does your religion say about gay relationships?

It is wrong in Islam and [in] the religion itself it is not allowed but we are created like that we can't help it. I hope God forgives it.

You just said to me you're following your religion then if it doesn't allow it, how are you following the religion?

It's not a big issue as such although we live together we are created like that because God created us this tendency then we hope he will forgive us...

My understanding of Islam is that it is not acceptable or forgiven so can I ask where your justifications are from?

I think apart from what is in the religion, one can think on his own and I think that because God has created us with this type of nature then there are other things in religion that are forbidden people still do them at least on personal level I am a good person and not harm anyone else.

³The decision-maker in this case found the answers wanting and made adverse credibility findings on that basis.

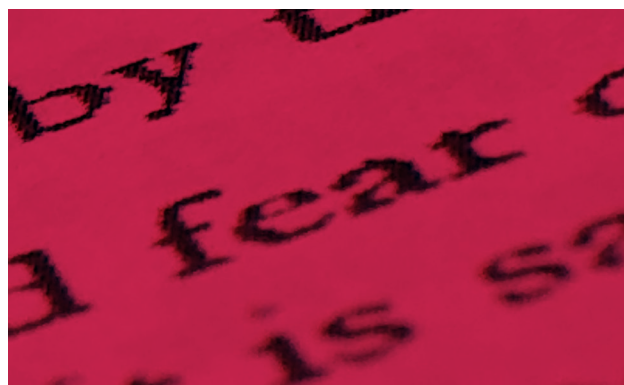
If the interviewer was looking for evidence of a lived experience in a religious context which has the capacity to exclude a person, an example of a useful question would have been 'What was it like growing up in a Muslim household' (interview of a gay man in November 2016). In one case that may produce a response considering one's beliefs, in another it may simply offer a description of living in fear of consequences, or not establish any more than a religious routine. None of those should result in rejection of a claim for lack of an imaginary standard of inner religious conflict or vagueness.

¹ This applies to both version 5 §35 and version 6 (p35).

There is another reason for desisting from questioning about one's religious views – people will often feel constrained in what they can say in response to such questions when they are speaking through an interpreter. This is because they may assume religious adherence by the interpreter and worry about their answers being perceived as critical of their religion.

Explanations such as 'God made me like this' or 'God will forgive me' were often rejected:

- 'It is considered inconsistent that having been raised as a devout Muslim... you did not experience some confusion or internal conflict on discovering your sexuality...' (July 2017 to a lesbian who had in any event stopped practising her religion before her same-sex experience)
- 'Your answer lacks detail and you have failed to demonstrate how you would have reconciled your sexuality with your religion...' (April 2017, a gay man had said: 'In this world human came first then religion came. I was like this naturally it wasn't my fault I'm happy with my Allah because I don't have any war with Allah. My problem is people of state and the system... the culture... law of the state')
- 'You claim not to have thought about the conflict between your religion and your sexuality' (March 2017 to a claimant who was not a practising Muslim)



A practical approach to resolving this issue in a Tribunal determination of June 2017 is of note:

'In a sense there are only three responses possible for a person who carries on doing something which is apparently prohibited by their religion, to be tortured and conflicted, or to spend a great deal of time in religious scholarship [to] try and find out whether there are alternative views within the religion... or to take the path which the appellant did, which may involve a degree of hypocrisy that enables a person to carry on living, i.e. to say God made me like this.'

The Home Office application of its own guidance as to relevance of religious beliefs needs to be addressed by way of further training. Given the frequent reliance on such matters, the API would also benefit from further elaboration.

Recommendation:

Interviewers and decision-makers should not expect or rely upon the disclosure of an inner conflict between a claimant's religious views and their sexual orientation, nor should they expect or rely upon the claimant to bring such inner conflict to a clear resolution. The API should be clarified to this effect.

KEY FINDINGS:

CORROBORATIVE EVIDENCE

In every asylum claim the decision-maker must assess all the evidence in order to arrive at a conclusion as to whether the asylum seeker's account of being at risk of persecution is 'reasonably likely'. This means that appropriate weight needs to be attached to all individual parts of the evidence and the claim assessed in its totality. Some individual pieces of evidence will carry more weight than others and credibility is generally assessed by taking into account all available evidence and applying anxious scrutiny¹.

In this study it is found that the decision-makers often place little or no weight on supporting evidence and rely on the absence of such evidence as damaging to the claim.

Discounting supporting evidence

Decision-makers often placed no or very limited weight on corroborative evidence of sexual identity which had been submitted, such as evidence from friends, partners, participation in LGBTQI+ groups, attendance at events, and social media exchanges. Simply labelling supporting evidence as 'self-serving' and therefore attributing no weight to it was common, despite the clear judicial guidance against doing so. On the other hand, the absence of such evidence was frequently seen to damage credibility in the eyes of the decision-maker.

UKLGIG is concerned to find many refusal letters which dismiss substantial corroborative evidence. The Home Office routinely addressed the documentary evidence as an afterthought, and dismissed it without engaging with it in substance or simply labelled it as self-serving. While the evidence could be self-serving, this characterisation was often used in refusals as a bare assertion. This label can only apply where there is clear evidential basis for doing so². Evidence labelled thus as self-serving and given no weight included letters from people who knew of the sexual orientation of a claimant³ and evidence from specialist LGBTQI+ support organisations⁴.



Photographs were routinely assessed as evidence which did not prove sexual orientation and were ignored or deemed 'self-serving' (for example, February 2017), instead of having a corroborative effect in the context of the totality of evidence and affording them some, even if not decisive weight.

In a decision refusing a claim by a bisexual man of April 2016 some 90 photographs of the claimant with his partner taken at different times were dismissed because they did not amount to 'conclusive proof' and were as a result 'self-serving'. In the same case, the witness statement by the same-sex partner was simply ignored while absence of joint utility bills was noted as damaging credibility. In the case described at footnote at footnote 7 on page 21 substantial corroborative evidence was dismissed (letter from a sexual partner, letter from a support worker for gay men and letter from a gay friend met on a dating site).

1 That means that they 'must show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account' *R (FM) v SSHD* [2015] EWHC 844 (Admin).

2 *R (on the application of SS) v Secretary of State for the Home Department ('self-serving' statements)* [2017] UKUT 00164 (IAC)

3 For example, March 2017; April 2016, November 2016.

4 For example, April 2016; March 2017, March 2016; February 2017.

In a refusal from February 2017, evidence of engagement with no less than six LGBTI organisations was dismissed in a single sentence as 'self-serving' with no reference whatsoever to its content in spite of the fact that the organisations appeared to provide specialist support to the claimant as a gay man.

Allowing the appeal by a gay man in November 2017, a judge criticised the Home Office for having found evidence in letters from seven friends 'self-serving' as a result of being written for the purposes of supporting the asylum claim and found that the Home Office 'did not adequately consider the volume of evidence provided in the round' referring to the corroborative evidence of letters, photographs, and text messages.

Medical reports showing conditions which were relevant to assessment of credibility were routinely only considered in the context of potentially founding an international protection claim on the basis of possibly inadequate medical treatment in the home country¹. This is in spite of such evidence having the capacity to corroborate an account of past persecution, have an effect on overall credibility by virtue of psychiatric credibility², or by evidencing a condition which affects a claimant's ability to present a coherent narrative and being relevant to the assessment of reasonableness of internal relocation.

In the refusal of a claim by a lesbian in November 2015 where inconsistencies were the basis for the refusal along with delay, the Home Office only considered the psychiatric evidence in the context of perceived inconsistencies between the account given to a psychiatrist and that given in interview, notwithstanding the fact that the matter in issue was a very complex account of events spanning over two decades. The Home Office did not consider in substance the effect that her psychiatric condition had on her ability to provide a wholly consistent account as a result of the abuse suffered, or the corroborative effect of her psychiatric credibility on the credibility of her account of her identity. When allowing the appeal in May 2016 the judge found 'that the Secretary of State had exaggerated the number and significance of the discrepancies and failed to look at the evidence in the round' and placed weight on the psychiatric evidence.

Absence of corroborative evidence

In law, adverse inferences may be drawn from the absence of supporting evidence where there should be readily available evidence in support of the claim³. In practice, the assessment of what evidence can be considered to be readily available and thus expected to be produced in support of a claim based on sexual orientation, is becoming more demanding and removed from a conventional assessment of refugee claim and application of a lower standard of proof.

The absence of joint utility bills which would tend to evidence cohabitation can be an adverse consideration as in the case described above. Yet most asylum seekers who have overstayed after expiry of their leave⁴ will be unable to provide utility bills because, for a start, they will be unable to rent property in their own name and with that will come difficulties with a name being placed on joint bills. As a result of recent legislative changes, people with no immigration status cannot have bank accounts.

The absence of photographs from past relationships was frequently taken against a claimant. In a decision of August 2016 it was said: 'You described in some detail your relationships with X and Y; although it is noted that you did not provide any evidence, such as photographs, of these relationships.' A similar approach was taken in a decision of November 2015.

In a decision refusing a claim by a lesbian in July 2015 the Home Office relied on the absence of corroborating evidence by way of letters, a tenancy agreement and photographs in relation to a partner with whom the applicant had lived in her particularly oppressive country of origin decades prior to the interview, and also on the absence of crime reports and a death certificate predating the interview by more than 30 years. In November 2015, the Home Office disbelieved a claimant's membership of a student LGBT group which had organised one public event before its members were arrested in 1998 in the absence of supporting evidence.

Refusing a claim of a lesbian in February 2017, the Home Office disbelieved the existence of a relationship in her country of origin in the absence of supporting evidence where the two women had never lived together, last saw each other more than 10 years before the interview, and the relationship was a secret.

1 (July 2016 [Article 3 medical claim only], October 2016 [not considered], May 2017 [Article 3 medical claim only])

2 If a person is psychiatrically credible having disclosed a comprehensive account of themselves to a medical professional, then that can have a positive corroborative effect on their account of their own identity where such identity is a part of relevant psychiatric history.

It is a fundamental proposition of asylum law that an

3 *TK (Burundi) v Secretary of State for the Home Department* [2009] EWCA Civ 40.

4 A common phenomenon among people claiming asylum on the basis of sexual orientation. See chapter on delay.

asylum claim needs not necessarily be corroborated. Where people come from countries where they had to conceal and disguise expression of sexual orientation, they cannot be expected to supply corroborative evidence of relationships they had there.

Relationships that LGBTQI asylum seekers have in the UK, if they do have such relationships, may well be unstable, wrought with suspicions, or simply a reflection of a transient nature of some encounters at the 'scene'. Some relationships will be exploitative and others will have a temporary nature because they involve other migrants. People with no income and no stable immigration status often find it hard to sustain any relationships. Yet the Home Office referred to the absence of possibility of verification with respect to such relationships and consequently afforded them little or no weight even where there was some supporting evidence of relationships. In decisions of September 2016 and April 2017 the Home office found that exchanges with former partners on social media could not be verified and therefore attracted no weight.

Assessments of corroborative evidence still showed reliance on petty and immaterial considerations, such as partly inaccurate naming of two similarly named LGBT groups considered inconsistent in spite of the presence of supporting evidence of attendance or confusion between names of gay clubs attended (for example refusals December 2016 and October 2015).

Contrary to policy, the Home Office took into account

failure to join LGBTI organisations in the UK as an adverse consideration, treating that as a defect in corroboration: 'You have not joined any LGBTI organisations in the UK, despite being free and able to do so' (October 2016). In August 2017 a decision-maker expected the claimant to be a member of LGBT groups in the UK and commented on the absence of evidence to show that the claimant had "an active role" such groups. Similarly, in a refusal in the case of a bisexual man the Home Office found it not credible that the applicant who had only met two people through use of dating websites 'had not made more use' of dating websites. These conclusions also can be seen as reliance on stereotypes as to how people ought to behave.

UKLGIG notes that in all the cases examined in this study where refugee status was granted by the Home Office, there was substantial corroborative evidence in support of the claim. Considering the number of cases available for this project it is not possible to draw conclusions from this observation. For completeness sake it must also be observed that many cases of refusal also involved significant supporting evidence.

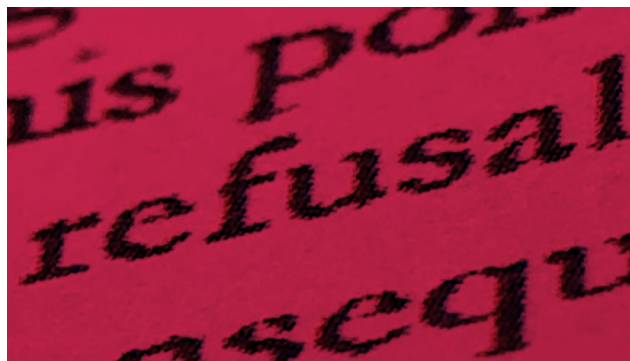
In this sample, there was not a single case which succeeded on appeal in the absence of significant corroborative evidence.

Recommendation

Decision-makers should assess all items of evidence affording them appropriate weight, refrain from applying unreasonable expectations for corroboration and desist from labelling evidence as self-serving where there is no evidential basis for doing so.

KEY FINDINGS:

RISK-TAKING



Our study finds that the Home Office often considered claims not credible because people had taken risks to pursue relationships with their chosen partners.

If high risk were determinative of human conduct, there would be no LGBTQI+ people who had ever experienced a relationship in much of the world. In straight relationships people take considerable risks – they commit adultery in countries where this is punishable by death, they have unsafe sex, they have sexual contact in public or at work risking criminal sanctions of varying degrees. Criminal offending takes place in the face of extreme punishments in many countries, often for reasons of much lesser importance to a person than that of expressing a fundamental aspect of their being – their sexual identity.

The APIs¹ permit questioning around risk-taking behaviour: 'Questions about where or how a claimant met or arranged to meet sexual partners (if cited as evidence) are appropriate as they link to questions considering the risks and consequences of being discovered, and the activities undertaken to prevent such discovery. Follow-up questions investigating how any same-sex friendships and relationships were maintained, developed and nurtured, while remaining discreet, or even secretive, are appropriate'.

On the other hand, the APIs note that risk-taking behaviour can be plausible: 'In instances in which the law provides for sanctions against homosexual acts, if a claimant indicates an awareness of the illegality of any of their actions, caseworkers must not assume that this should have prevented the claimant from engaging in those actions. Even if they know that they are against the law, it should not be an assumption that individuals do not carry out illegal acts in their country of origin'. Both

APIs observe, 'It is also reasonable to expect the claimant to explain what (if anything) they did or thought, in response to any actual or feared ill treatment, persecution or discrimination, while bearing in mind that people will often act impulsively when expressing their sexual orientation and may engage in actions even when they know that they are illegal'.

Home Office refusal letters featured the following examples of what was considered implausible or unreasonable risk taking behaviour:

- living with a same-sex partner (July 2015)
- having anonymous sex in a park (August 2017)
- having sex behind locked doors in a rented room (February 2017)
- having sex in the family house behind locked doors while others were elsewhere in the property (October 2016)
- protesting when a lesbian partner was harassed by men (February 2017)
- embarking on a sexual relationship prior to having discussed it (that relationship having built up on attraction over a period of two years) (January 2016)
- kissing the partner in the street at night during a blackout (March 2015)
- attempting to kiss a friend without knowing whether he was attracted to the claimant (where the two had been showing affection over a period of weeks and claimant's advances had not been rebuked) (November 2016)
- writing and sending love letters between women who lived in different cities and taking and sending photographs 'holding each other too much' (February 2017)

All the interviews in the sample asked questions around risk-taking behaviour and many refusal letters offered a forensic examination of sufficiency of security measures. Many decision-makers were neither observing the nuance of the API, nor apparently had awareness of the importance for everyone to seek affection and connect with another human being.

Recommendation

Decision-makers should not find claims as lacking in credibility for the reason of unrealistic analysis of risk-taking.

¹ Both version 5 and 6 of Asylum Policy Instruction: Sexual Orientation and Gender Identity have this content.

KEY FINDINGS:

DISCRETION

*HJ (Iran)*¹ had put an end to the possibility of returning LGBQ people to the countries where there is a real risk of persecution on account of them being able to reasonably tolerate concealing their sexual orientation, but opened a new area of complexity. This is because in some cases where people would hide who they are if returned to the country of origin, one must look into why they would do so and whether one of the reasons for that is that they fear persecution.

The Home Office approach to this part of enquiry is uneven and the test is not always applied with rigour.

HJ (Iran) in context

The ruling in *HJ (Iran)* contains a four-stage test.

First, one should establish whether it is reasonably likely that the claimant would be perceived as LGBQ.

Second, it should be ascertained whether the background evidence shows that there is a real risk of persecution to persons who are openly LGBQ in the relevant country. Living openly goes beyond merely attracting partners and maintaining relationships with them. Even if a LGBQ person who lived openly would not be at risk, the decision-maker must go on to consider whether the particular claimant would be at risk.

Third, it should be considered whether the claimant would live openly on return. Should that be found, the claimant is a refugee. This is so irrespective of whether they could avoid the risk by acting 'discreetly'. Nevertheless, even if a person will conceal some things about themselves one must ask whether what they do will be effective: if the risk remains they are a refugee. In addition, where there is real risk of persecution, concealment of sexual orientation may be unlikely to successfully and sufficiently remove the risk of persecution in the long term – it may be impossible or harmful for a particular claimant to hide.

Fourth, if the person would not live openly, and in fact by doing so be able to avoid persecution, the decision-maker must ask why. If a material reason for concealing their sexual orientation is fear of persecution, they would again be a refugee. This would be so even if the fear of persecution was one among many other reasons for concealment of one's sexual orientation (such as responding to social or family pressures). Only where the risk of persecution is immaterial to hiding who they are, a person will not

be a refugee.

'Discretion', in most cases where it could potentially obviate otherwise objective risk of persecution, involves active dissembling: it is not about simply being quiet about aspects of one's daily life, but involves concealing outwardly identifiable association with non-dominant expressions of sexual identity and misleading others into believing that a person is heterosexual. Where there is an objective risk of persecution to those open about their sexual orientation, caseworkers should address their minds to what would a person need to do in order to present themselves as a heterosexual.

A person's concealment of their identity can manifest in one of many different behaviours². It can involve forming relationships only within a trusted circle of people or pretending to be in a relationship with someone of the opposite sex – both are forms of concealment which if caused in part by fear of persecution, result in such a person being a refugee. The protected right to sexual orientation is to live freely and openly and it includes a wide spectrum of conduct beyond merely seeking a partner³.

In cases where the claimant has suffered persecution in the past, the exploration of reasons for concealment on return is likely to be of limited, if any, relevance. Where a person has previously been persecuted, this is a strong indication that they will be at risk of persecution, bar good reason that there has been a durable change in circumstances⁴. Further, they are likely to be known to the persecutor and any future concealment may well be irrelevant. In addition, logically, where there has been previous persecution, it would be most extraordinary that fear of repetition of such treatment would not be a material reason for concealment in the future.

The question whether the reasons for concealment of

² *HJ (Iran)*, Lord Rodger §63 'At the most extreme, the applicant might live a life of complete celibacy. Alternatively, he might form relationships only within a circle of acquaintances whom he could trust not to reveal to others that he had gay relationships. Or, he might have a gay partner, but never live with him or have him to stay overnight or indulge in any display of affection in public. Or the applicant might have only fleeting anonymous sexual contacts, as a safe opportunity presented itself. The gradations are infinite.'

³ *HJ (Iran)*, Lord Rodger §78

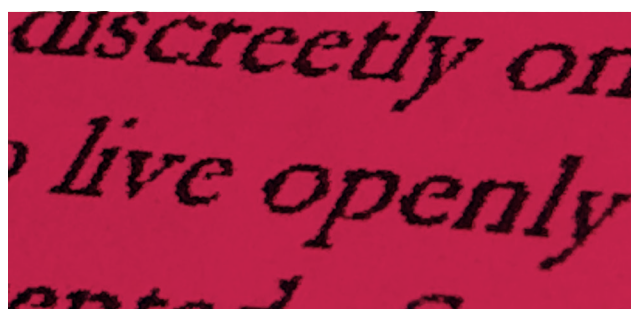
⁴ See for example Qualification Directive 2011/95/EU, Art 4(4); Paragraph 339K Immigration Rules; *Demirkaya v Secretary of State for the Home Department* [1999] INLR 441.

¹ *HJ (Iran) and HT (Cameroon) v SSHD vKSC* 31, (7 July 2010)

identity include fear of persecution is difficult to divorce from the human instinct for self-preservation – it means there is no real choice except to hide¹. It should follow from the recognition of this reality that where there is strong evidence of persecution of those open about their sexuality, this is material when assessing whether a person who will conceal their identity would do so for reasons which include fear of persecution². If risks are significant, the prospect of not being influenced by them may well be relevant only to persons who in truth have no desire to express any part of their identity.

The Home Office APIs instruct caseworkers not to rely on past reasons for concealment in the UK or in the country of origin when assessing current fears. This is no doubt because one's understanding of country conditions as well as expression of one's self may well change. Importantly, the reasons as to how a person behaves in the UK are likely to be different from how they would behave on return to their country of origin.

On a practical level, a person may not want their diaspora community in the UK to know about their sexual orientation because they fear withdrawal of support or exclusion or, importantly, that the news of their identity may spread in their country of origin increasing the risk to them should their asylum claim fail. Of course, in examining the reasons for not telling people around them in the UK one must not underestimate the impact of long-term concealment of one's identity in the context of repressive societies – people who have lived with the need to hide who they are will be unlikely to start telling everyone about their sexual orientation.



1 *HJ (Iran)* Lord Roger §78 'Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly'. Lord Dyson §123 'Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly.'

2 This proposition is not found expressly stated in caselaw, but in the view of UKLGIG, it is a necessary consequence of the ruling in *HJ (Iran)* and the need to assess all material facts and circumstances in an asylum claim. See UKLGIG (2018): *Applying HJ (Iran) and HT (Cameroon) to Asylum Claims based on Sexual Orientation*.

'Discretion' in this study

The approach of the Home Office to assessing whether a person is at risk included asking questions as to both conduct in the UK and conduct in the country of origin and reasons for such conduct.

In this study, both the Home Office and the Tribunal's assessment of evidence and reasons for 'discretion' on return sometimes did not reflect the legal position.

In a refusal of August 2017, the caseworker concluded that the claimant 'ha[d] not demonstrated that [his] fear [was] based on persecution as opposed to any other reason' clearly misunderstanding the test which requires the fear to be only a material reason. In that case the caseworker relied on the fact that the claimant had not told people in the mosque he went to in the UK (where he said he did not know anyone) that he was gay.

In a case where in the refusal letter no issues were raised with respect to a claimant's reasons for concealment, at the appeal hearing in September 2017 the Home Office relied on the proposition that not telling a particular person that the claimant had a one-night stand was evidence of likelihood of 'discretion' on return for reasons of the claimant's private personality rather than through fear. In this they lost sight of whether that type of 'discretion' would in fact reduce the risk and confused privacy with discretion.

In the case of joint appeals by two claimants who met and became a couple in the UK, the First-tier Tribunal concluded in December 2016 that they would be discreet on return because they did not want to upset their family members. The Tribunal ostensibly relied on their non-disclosure of their sexuality to some of their intolerant relatives in the UK on whom they were financially dependent. The Upper Tribunal overturned the decision and allowed their appeals, having found that much relevant evidence had been ignored. The evidence included the couple's own explanations in interviews about what they feared if returned, their histories of past persecution and the reasons for not having told their relatives in the UK, all of which were relevant to find the answer why they would conceal their identity on return.

In a decision of July 2017 the Home Office refused a claim by a lesbian for the sole reason that if she returned to her country of origin, she would not be open about her sexuality for reasons not related to any fear of persecution. This was on the basis that while living in the UK she was open about her sexuality to persons in a LGBT support group she attended, but not to friends from her country of origin who were in the UK. The interview in fact showed that she had not told her friends from her country of origin because she lived with friends from her country and feared losing her accommodation. The

claimant had also explained fearing being 'harmed or stoned' in her country of origin for what she is.

In arriving at this conclusion, the Home Office appeared not to have considered the background evidence in relation to her country of origin. If the Home Office case were right, and the applicant would have behaved the same way in her country of origin as she did in the UK (concealing a part of her identity), she would in fact have been at risk. In addition, the claimant's own evidence in relation to her motives was not a part of their consideration.

The First-tier Tribunal judge dismissing her appeal, asked themselves the practical factual question in relation to the reasons for discretion in binary terms: 'Would she [be discreet] because of fear of persecution or because of her private and reserved nature'. The judge seemed to think that their job was to decide between two mutually exclusive options as opposed to ask whether one of the reasons for future 'discretion' was fear of persecution, also not taking into account the fact that the claimant had been in a relationship in the UK and was open about it. The Upper Tribunal later overturned the decision allowing the appeal.

In July 2017 the First-tier Tribunal found that a claimant would be discreet because of the way he had always behaved, stating 'I do not find that he would discreetly practice homosexuality only to avoid persecution and ill-treatment'. The Upper Tribunal had no difficulty finding an error in that case given that the judge believed, contrary to *HJ (Iran)*, that to succeed in proving that a person was a refugee one needed to show fear of persecution being the only reason (as opposed to a material reason) for concealment. In that case, the Home Office refusal of May 2017 had raised the issue of concealment without engaging in a meaningful evidential analysis.

It is of concern that in relation to three out of the six claimants mentioned in this section, the Home Office did not raise the issue of possible discretion for reasons other than persecution in the refusal letters, but only during the appeal hearing itself. In these cases, the decision to change their case appeared not to be justifiable on the basis of further new evidence. All the cases mentioned here are from countries of origin where the Home Office policy accepts the general proposition that LGBQ people who are open are at risk.

Both the Home Office and the Courts sometimes fall into error when assessing matters relevant to 'discretion'. Further training in this area is needed.

Recommendation

Decision-makers must rigorously apply the analysis of what is a material reason for concealment of sexual identity and whether any concealment would remove the risk of persecution.

KEY FINDINGS:

GENDER IDENTITY CASES



The sample does not permit an in-depth analysis of approach to claims based on gender identity. As a result only limited observations can be made.

UKLGIG has been concerned as to the use and recording of the gender of trans people in the asylum process. As a rule, only the birth gender is used in all written communication and electronic records by the Home Office. This is reflected in the sample available for this study.

Claimants seeking international protection come from countries where their gender identity is the cause of persecution. A person whose gender does not coincide with dominant gender roles and behaviours – be they trans, intersex, gender non-binary or gender fluid – is likely to face abuse, humiliation and lack of legal recognition of their identity in their country of origin. In such countries access to gender recognition or gender-affirming surgery or hormones is limited or non-existent¹. Misgendering in the asylum process perpetuates the discrimination which gave cause to the persons to seek asylum. It also potentially leads to detention in the wrong detention population and provision of shared accommodation in the gender assigned at birth which may attract bullying, assault, and harassment. The mere fact of misgendering in official written communication is likely to upset asylum seekers. While the practice of using only the

gender assigned at birth is due for change, the situation for many claimants in the UK for a long time has been as that described here. This must not be confused with misgendering in interviews – in this small sample that did not arise.

There were examples of confusion by decision-makers in both the questioning and analysis of claims involving gender identity.

A trans man was asked in interview about the realisation of his 'sexual orientation' and 'sexuality', although the claim was clearly put on the basis of gender identity. While that claim was granted at first instance, it would have been at least confusing for the claimant to experience such questioning. A trans woman was asked whether certain treatment was caused by her 'sexuality' while elsewhere in interview she was correctly consistently described as being transgender.

It is of concern that the same trans woman was directly asked whether she had had gender affirmation surgery. This is an intensely private matter and even the most innocent enquiry is capable of both objectifying and humiliating trans persons. It is widely accepted that physical characteristics do not equate to someone's identified gender – for example issuing a Gender Recognition Certificate does not require gender affirming surgery; nor does the definition of transsexual which carries the protected characteristic of gender reassignment for the purposes of section 7 of the Equality Act 2010. Many trans people choose never to have gender confirmation surgery for a variety of reasons. Questioning about this matter might be interpreted by the claimant as implying an expectation of surgical intervention. While it would have been appropriate to ask general open questions around transitioning permitting the claimant to choose what to disclose, direct questions venturing into the most private realm should not be asked.

When a claim by a different trans woman was refused, the reasonableness of any internal relocation and her vulnerability, should she seek to continue with transition, was not considered in substance. In considering the background information, the Home Office applied the Country Guidance determination² relating to men. While the appeal against that refusal was eventually

¹ 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 in more than a hundred jurisdictions, see International Lesbian, Gay, Bisexual, Trans and Intersex Association: Chiam, Z., Duffy, S. and González Gil, M., *Trans Legal Mapping Report 2017: Recognition before the law*, Geneva, ILGA, November 2017.

² Country Guidance determinations are reported determinations of the Upper Tribunal which offer authoritative findings on risk factors for particular groups in a specified country.

dismissed on the grounds of absence of risk, the general concern over the approach originally taken by the Home Office remains.

In a claim by a man self-identifying as bisexual but whose claim partly overlapped with perceived gender (resulting from a medical condition), the complex and culturally specific background to the claim and the claimant's perception of themselves and their sexual orientation was poorly understood. The claim was refused by the Home Office in August 2016 on the basis of, among other matters, 'failure to provide a coherent' explanation of how he came to realise his 'sexuality'. The issue of perceived gender intersecting with sexual orientation was lost on the decision-maker when considering self-realisation,

and so was the cultural context in his country of origin of perception of same-sex relationships between men being based on femininity of one of the parties. On the other hand, in the same case, the decision-maker rightly did consider possible risk arising from being perceived as gay as a result of the medical condition but concluded, contrary to the Home Office policy and background evidence, that there was no risk to any LGBTI persons in that country of origin.

UKLGIG welcomes the work currently being done by the Home Office on the wholesale revision of the API on Gender Identity in Asylum Claims. This includes proposed inclusion of self-identified gender on Home Office systems and communications. The Home Office is also revising the instruction in the API with respect to the way claims based on gender identity are assessed which is also a very positive, if overdue, step.

Recommendation:

An updated API on gender identity is long overdue and its release is awaited. Further training on gender identity is likely to be beneficial in view of observations here.

CONCLUSION

The Home Office has in recent years shown willingness to review its policies and practice in the difficult area of international protection claims based on sexual orientation and gender identity. Much has changed and improved – claimants in sexual orientation cases are normally treated with respect, using terms they use to describe themselves and the Home Office caseworkers do not seek sexually explicit evidence. Nevertheless, the refusals of many claims still reveal defects in assessments of credibility and the Home Office in some cases incorrectly applies the legal test in *HJ (Iran)* when assessing the relevance of and reasons for concealment of sexual orientation.



The existing *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* is a good base from which to work towards better decision-making. What is needed primarily is a better application of standards in the API. In view of the issues identified in this study, some clarification of existing guidance would be useful in the areas of assessment of relevance of delay, religious beliefs, corroborative evidence, accounts of self-realisation and risk taking. To improve decision-making with respect to all issues identified in this report, including the quality of interviews and issues related to ‘discretion’, it seems apparent that further training and supervision are needed.

If this report were to make one overall observation, it would be that the Home Office application of the correct standard of proof is problematic. All a claimant must prove is that their account is ‘reasonably likely’ and too often this was not the standard applied. The search for corroborative evidence along with fixed expectations about claimants’ behaviour and experiences and routine reliance on delay are indicative of that.

Findings about defects in the Home Office approach to credibility assessments and problems around the application of standard of proof featured in the reports of the UNHCR Quality Initiative and Integration Projects¹ and Asylum Aid reports on Home Office decision-making².

Unrealistic expectations in relation to what should be proved should not arise in any asylum claim, let alone one involving a sensitive exploration of one’s identity. It is hoped that the Home Office will look to address the specific issues identified here. Addressing them will have an impact on credibility assessments and align them to the proper standard of proof – that of ‘real risk’.

1 The Quality Initiative Project operated between 2004 and 2009 during which time six reports were produced by UNHCR based on audits of various components of the Home Office asylum system. It was renamed Quality Integration Project in 2010 and its role expanded to include implementation of recommendations, its aim having been to improve the quality of asylum screening and decision-making through the development and implementation of a fairer and more efficient asylum system which again included publication of reports. The Quality Integration Project continues to operate.

2 *Asylum Aid, Right First Time: How UK Border Agency officials and legal representatives can work together to improve the asylum system*, February 2014; *Asylum Aid, Unsustainable: the quality of initial decision-making in women’s asylum claims*, January 2011

