



**UKLGIG submission to the
Independent Chief Inspector of Borders and Immigration
inspection of asylum casework
September 2020**

1. The UK Lesbian and Gay Immigration Group (UKLGIG) supports lesbian, gay, bisexual, trans, queer and intersex+ (LGBTQI+) people through the asylum and immigration system.
2. This submission is focused on casework of LGBTQI+ asylum claims. For further information on the issues raised in this submission, we recommend reading UKLGIG's research report *Still Falling Short*, based on more than 40 interview transcripts and reasons for refusal letters, and UKLGIG's briefing paper *Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation*.

1) Accessibility, clarity and adequacy of Home Office policies and guidance in relation to the asylum process, including country of origin information

A. Asylum policy instruction (API) on sexual orientation

3. The *Asylum Policy Instruction: Sexual Orientation in Asylum Claims* is a good base from which to work towards better decision-making. The primary change needed to improve casework in LGB asylum claims is better application of this API – see part (3) of this submission. Nevertheless, there are areas in which the API should be improved.
4. Persecution, abuse and culturally embedded prejudice means that many LGBTQI+ people have spent much of their lives hiding their sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC). LGBTQI+ people may exhibit in some form shame or secrecy about who they are, making it extremely hard for them to talk about their SOGIESC. This is one – but not the only – reason why LGBTQI+ people 'delay' claiming asylum, i.e. they often do not claim asylum immediately upon arrival in the UK. Delay should not routinely operate to diminish the value of the account and the supporting evidence.
5. The API states there should be 'very good reasons' for a claimant not to have mentioned their sexual orientation at substantive interview so as not to attract adverse inferences to be drawn in relation to credibility (pp 34-35). However, there is no

requirement in law for 'very good reasons' for failing to express the ground of sexual orientation or gender identity as the reason for seeking international protection during the substantive asylum interview.

6. The term 'relationship' has many meanings, as do the terms 'girlfriend', 'boyfriend' or 'partner'. This can sometimes cause confusion in interviews and thus have an impact on credibility assessment.
7. The API gives some gendered analysis of the experiences of LGB people claiming asylum but needs to give more recognition to how the experiences of men and women differ. For example, the API does not sufficiently recognise that women sometimes develop a same-sex attraction for the first time in adulthood.
8. The API mentions the lower standard of proof in a few places, but in other parts neglects to emphasise this. For example, it states one of the policy objectives for asylum interviews is 'to establish whether a claimant is in fact LGB'. This could be interpreted to mean that an interviewer or decision-makers must be *convinced* of the claimant's sexual orientation, which could set the standard of proof too high. Statements such as this should be accompanied by a reminder of the correct standard of proof.
9. The API does not recognise the significant challenges faced by LGBTQI+ people if they have to make an asylum claim within detention. In order to convince the Home Office that they are LGBTQI+ as claimed, the claimant must be in a situation of trust and security in which to consider and discuss their sexual orientation or gender identity. This is extremely difficult if you come from a country where persecution has meant you have never spoken about your sexual orientation or gender identity, or you have experienced trauma. It can be an impossible task to do so whilst in detention, where fear of discrimination or harassment requires you to conceal your SOGIESC as much as possible. Added to that is the difficulty of amassing the kind of corroborating evidence often expected by the Home Office, especially if the person is trying to avoid being outed to staff and other detainees, and without access to social media or smartphones.
10. The API is generally not prescriptive about the role of religion in asylum claims based on sexual orientation. However, as explained in paragraphs 48 and 61 below, questioning about religion and reasons for refusing LGB asylum claims sometimes include expectations around claimants' religious beliefs. Statements in the API such as, *'a recognition that the claimant's sexual orientation or conduct is disapproved of, either by their family or because of legal, cultural or religious mores, may lead some LGB claimants to have developed beliefs that their sexual orientation is in fact 'wrong' and which needs to be either changed and more probably, hidden'* could be leading to such assumptions.
11. We are pleased that the API on sexual orientation warns explicitly that *'there are no circumstances in which it will be appropriate for the interviewer to instigate questions of a sexually explicit nature'*. Our research in *Still Falling Short* found that sexually explicit questioning has reduced and we commend the Home Office for this improvement.

RECOMMENDATIONS

- 12. The API on sexual orientation should include a comprehensive recognition of the practical consequences of the common phenomenon of suppression of one's SOGIESC.**
- 13. The guidance in the API on considering late disclosure of sexual orientation should be updated.**
- 14. The API on sexual orientation should be improved to identify the need for clarity in relation to the use of terms referring to relationships.**
- 15. The API should give more information on the experiences of women.**
- 16. All APIs should reiterate the correct standard of proof throughout.**
- 17. The API should provide guidance on asylum claims from LGBTQI+ people who are held in detention.**
- 18. The API on sexual orientation should clarify that there should be no expectation or reliance upon the disclosure of an inner conflict between a claimant's religious views and their sexual orientation, nor for a claimant to bring such inner conflicts to a clear resolution.**

B. Asylum policy instructions (API) on gender identity, gender expression and sex characteristics

19. The *Asylum Policy Guidance: Gender Identity Issues in the Asylum Claim* is now outdated and despite a consultation in 2017, the Home Office has yet to publish a new version.
20. The Home Office does not have published guidance for intersex asylum claims / asylum claims based on sex characteristics, although it included intersex asylum claims in the draft update of the API on gender identity on which it consulted in 2017.

RECOMMENDATIONS:

- 21. The Home Office should update its guidance on asylum claims based on gender identity so that it is based on self-identification as a starting point. This would provide for all documentation addressed to or referring to the individual to refer to them in their self-identified gender.**
- 22. The Home Office should publish guidance on asylum claims based on sex characteristics.**

C. Country policy information notes

23. A number of Country Policy Information Notes ('CPINs'), which are heavily relied on by Home Office decision-makers, state legal principles and caselaw incorrectly. If the CPINs do not state the law accurately, decision-makers are more likely to misapply the law and fail to ask the right questions when considering a claimant's case.

24. CPINs should in a simple and correct way state the four questions from *HJ (Iran)*¹. This is important because the caseworkers should be firmly focused on the assessment of risk on return to the country of origin to people who are completely *open* about their sexual orientation². This is distinct from questions about whether a particular individual claimant would be open on return and what reasons they may have for concealing any part of their sexual orientation.
25. CPINs vary in the way *HJ (Iran)* is addressed. For example in *Ghana: Sexual orientation and gender identity or expression Version 2.0* there is no summary of the four questions, but a rather generalised and potentially tendentious direction to the enquiry about the reasons for concealment at §2.4.2. The CPIN *Sri Lanka: Sexual orientation and gender identity and expression, October 2018 (Version 3.0)* mixes together and fails to follow the order of the questions of *HJ (Iran) [2010] UKSC 31*³ at para 2.4.1-2.4.5 and its analysis is likely to lead to asking the wrong question - what would be reasonably likely to happen if a claimant decided *not to be completely open* about their sexual orientation or gender identity. UKLGIG is aware of cases in which the analysis of risk is incorrectly based on risk to those who conceal in part rather than to people who are completely open.
26. A number of CPINs use of the word ‘generally’ when articulating the risk on return for LGBT claimants. However, this distracts from *HJ (Iran)* where the Supreme Court reiterated that a ‘real risk’ may exist even where something does not ‘generally’ happen (para 91), and may lead decision-makers to raise the standard of proof instead of applying the correct standard of reasonable degree of likelihood.
27. CPINs also fail to effectively refer to §78 and §82 of the decision of the Supreme Court in *HJ (Iran)*, which established that claimants have only two mutually exclusive options, i.e. complete openness or effective concealment, as opposed to partial openness.
28. Home Office decision-makers often fail to undertake an analysis of the CPINs and country background evidence when deciding whether LGBT claimants would be at risk on return to their countries of origin. Even though some CPINs may indicate that LGB persons who live openly would not generally be at risk, decision-makers do not always consider whether there are reasons why the particular individual claimant would be at risk. In doing so, they also rely heavily on the existence of anti-discrimination laws as an indication of sufficiency of protection in the claimant’s country of origin. However, page 19 of the API on sexual orientation confirms that the existence of certain elements, including the presence of LGB organisations and events, may not be sufficient to undermine a claimant’s well-founded fear due to entrenched societal attitudes that may give rise to a continued risk where authorities fail to enforce protective laws.
29. CPINs and decision-makers often treat lack of evidence of persecution as indicative that no such risk exists. An example of this is *Ghana: Sexual orientation and gender identity or expression, May 2020 (Version 2.0)* which states at para 2.4.14 that ‘In general, the available evidence *does not establish* that LGB persons who are open about their sexual orientation *are likely* to be subject to treatment from the state that by

¹ See UKLGIG’s briefing paper *Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation* <https://uklgig.org.uk/wp-content/uploads/2018/06/UKLGIG-on-HJ-Iran.pdf>

² This much is clear from the alternatives of openness and effective concealment at §82 and observations at §78

³ For more information, see UKLGIG’s briefing paper *Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation* <https://uklgig.org.uk/wp-content/uploads/2018/06/UKLGIG-on-HJ-Iran.pdf>

its nature and frequency amounts to persecution' [emphasis added]. This ignores the fact that there will be instances of underreporting of persecutory acts in the country of origin and suggests the wrong standard of proof.

RECOMMENDATIONS:

30. The Home Office should ensure that all CPINs on sexual orientation, gender identity or gender expression set out accurately and in the correct order the questions in *HJ (Iran)*: (1) Is it reasonably likely that X is gay [or LGBQ] or will be perceived to be gay [or LGBQ]? (2) Is there a real risk that gay men [or LGBQ people] would face persecution if they lived openly in X's country of origin? (3) Would X in fact live 'openly' (or would X conceal X's sexual orientation) if returned to the country of origin? If the answer to question (3) is that X would conceal X's sexual orientation, (4) why would X do so?

31. The Home Office should ensure that appropriate and consistent terminology is used in all CPINs that will not have the effect of altering the meaning or purpose of established legal principles and caselaw.

32. The Home Office should ensure that CPINs remind decision-makers to ask Question 2 of *HJ (Iran)* about what would be reasonably likely to happen if a claimant was *completely* open about their sexual orientation or gender identity in their country of origin, as required by the test established by the Supreme Court.

33. The Home Office should ensure that decision-makers receive appropriate training to make effective and consistent use of CPINs in conjunction with the API.

2) Availability, costs and quality of advice and support for asylum seekers

34. LGBTQI+ people who have a well-founded fear of being persecuted in their countries of origin are very often not aware upon arrival in the UK that they can claim asylum on the basis of their SOGIESC. They are also frequently unaware that they might be eligible for legal aid for their asylum claims. Both of these factors prevent them from claiming asylum and obtaining vital assistance as early as possible. When they realise the available services to them, they may still face further difficulties in terms of accessing legal advice and representation.

35. LGBTQI+ asylum claims require in-depth preparation and considerable client contact in order to establish and maintain trust with representatives as well as explore intimate experiences of one's SOGIESC. Very often, claimants realise that they can claim asylum on the basis of their SOGIESC a long time after arriving in the UK, which in itself presents its own legal challenges and requires further in-depth engagement with their representatives in order to overcome them by way of evidence. Furthermore, the Home Office usually expects corroboration of the claimant's account and therefore preparation will often include search for corroborative evidence by way of witness statements and other documents.

36. As explained by Wilding (2019) in *Droughts and Deserts: A report on the immigration legal aid market*, the current legal aid structure means that providers often have to choose between financial viability and carrying out quality casework. Furthermore, legal aid representatives are unlikely to take on cases whose prospects of success are not immediately apparent. Legal aid lawyers have been forced to become more selective of the cases that they are willing to take on. LGBTQI+ asylum claims are likely to be acutely affected because their prospects of success are not always immediately apparent and they require significant preparation by representatives. As a result, LGBTQI+ people frequently struggle to access a legal aid lawyer who will carry out the necessary work on their asylum claims and many are left unrepresented, particularly if they want to make a fresh claim based on new evidence. Those who are successful in finding a lawyer may still be poorly represented because of the legal aid fee structure and because many representatives have limited knowledge or expertise in SOGIESC claims.
37. There is a considerable variety between firms offering privately funded legal representation and very often quality legal representation comes at a significant price that few can afford without getting into debt. In an attempt to cover the fees of private legal representation, LGBTQI+ people may be subjected to exploitation⁴. While in a handful of cases pro bono representation is obtained by claimants, often this will not cover the cost of expert reports or other evidence which is often necessary.
38. There is continuing limitation on obtaining advice in detention. The 30-minute slots per client in legal surgery rotas do not lend themselves to fully and correctly assessing the prospects and issues arising in LGBTQI+ asylum claims. The quality of representation in detention can vary. LGBTQI+ people in detention face additional difficulties accessing confidential and adequate legal advice because of fears of being 'outed' in detention and because of limited availability of legal advice in detention. Those in prisons have extremely limited access to legal advice and yet they may have well-founded international protection claims. In the detention context, it is of utmost importance to secure prompt quality advice from a representative with whom the claimant can establish trust.

RECOMMENDATIONS:

- 39. The Home Office should inform claimants at the time of screening of the existence of legal aid and that it is possible to seek legal advice and representation in the context of their asylum claims.**
- 40. The Home Office and other public bodies should implement in full the recommendations made by Dr Jo Wilding (2019) in *Droughts and Deserts: A report on the immigration legal aid market* in order to ensure every person seeking asylum can access good quality legal representation.**
- 41. The Home Office should consider the availability of legal aid when making decisions on dispersal areas.**
- 42. The Home Office should not detain LGBTQI+ people.**

⁴ See for example *Unreported! Sexual Abuse & Exploitation of LGBTIQs Seeking Asylum, 23 December 2018* by African Rainbow Family

3) Quality of screening interviews, substantive interviews and asylum decisions, including for asylum seekers who have protected characteristics

43. For further information on the issues raised below, we recommend reading UKLGIG's research report *Still Falling Short*, based on more than 40 interview transcripts and reasons for refusal letters.

A. Substantive interviews

44. As mentioned above, UKLGIG wholeheartedly commends the fact that persistent questioning directed at sexual practices no longer seems to be an issue compared to previous practice and there are many cases of good practice, for example of interviewers giving sensitive reassurance.

45. **Terminology:** Many interviewers are also sensitive to the need to use the claimant's preferred terminology in relation to their sexual orientation, gender identity, gender expression or sex characteristics, as required by the API on sexual orientation. However, this is not always the case, with examples of poor practice including referring to bisexual people as gay.

46. **Environment:** The asylum policy instruction on sexual orientation requires interviewers to establish an 'open and reassuring' environment. However, there are many instances of unnecessarily confrontational questioning, potentially upsetting questions, excessive focus on perceived inconsistencies, questions seeking out adverse credibility points of no evidential value and expecting claimants to explain why they are LGBTQI+ and not straight or heterosexual.

47. **Questioning:** The fact-finding purpose of the substantive interviews is sometimes hindered by ineffective questioning. Claimants are sometimes refused because several aspects of their accounts are deemed 'unclear' by the decision-maker. While it is accepted that claimants are responsible for putting their account forward, interviewing officers fail to ask questions that claimants would easily answer if they were given an opportunity to do so.

48. **Religion:** Questions asking claimants how they feel about their religion and how they reconcile their sexual orientation with their religion occur too frequently. This kind of questioning presumes a conflict and also implies an expectation of a complex theological narrative. See paragraphs 10 above and 61 below for more information on religious stereotyping of LGBTQI+ asylum claimants.

B. Asylum decisions

49. UKLGIG welcomes recent changes in Asylum Operations for decisions on asylum claims to be made more often by the person conducting the substantive interview.

50. **Standard of proof:** UKLGIG's prime concern with decision-making in LGBTQI+ asylum claims is that the Home Office application of the correct standard of proof is not always correct. All a claimant must prove is that their account is 'reasonably likely' and too often this is not the standard applied.

51. **Corroboration:** Home Office decision-makers often place little or no weight on supporting evidence. The Home Office routinely addresses documentary evidence as an afterthought, dismisses it without engaging with it in substance or simply labels it as ‘self-serving’ without any evidential basis for doing so, whereas in fact, such evidence can have a corroborative effect in the context of the totality of evidence and should be afforded some, or even decisive, weight. This is the case even when the decision-maker is presented with substantial evidence, such as multiple letters from different witnesses attesting to a claimant’s sexual orientation.
52. On the other hand, the Home Office also uses the absence of such evidence as damaging. 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 claims and application of a lower standard of proof. Asylum claims from LGBTQI+ people have been refused because the claimant did not supply: joint utility bills (even in cases when the individual could not rent property in their own name or open a bank account because of their immigration status); photographs of previous partners from decades previously and/or where the relationships were secret; photographs of short-term partners; or joint tenancy agreements from other countries. Similarly, the Home Office sometimes takes it into account if an LGBTQI+ individual *hasn’t* joined LGBTQI+ groups, clubs or organisations – which is based on a stereotype that all LGBTQI+ people are members of LGBTQI+ groups, clubs or organisations.
53. Sometimes, supporting evidence is dismissed and the absence of other evidence is noted as part and parcel of the same claim. For example, in one case the witness statement by the claimant’s same-sex partner was ignored while the absence of joint utility bills was noted as damaging credibility.
54. In addition, supporting letters or statements from friends or same-sex partners of the claimant are often dismissed because the author is not considered ‘impartial’. This is not a requirement of witnesses – they are expected to be *truthful* (rather than impartial). It is decision-makers that must be impartial.
55. In a demonstration of the misapplication of the standard of proof, one reason for refusal letter stated that the documentary evidence supplied to corroborate the claimant’s account of his relationship did not amount to ‘conclusive proof’.
56. **Delay:** A great many LGBTQI+ people who claim asylum do not do so immediately on arrival in the UK. Too often, the Home Office assesses this as damaging to their credibility, sometimes refusing asylum claims almost entirely on this basis. Similarly, the Home Office frequently ignores or disbelieves the reasons given by LGBTQI+ to explain why they did not claim asylum earlier, disregarding the lived experience of LGBTQI+ people seeking asylum (see paragraph 4 above).
57. The Home Office also dismisses evidence from LGBTQI+ people if it post-dates the asylum claim, which ignores the fact that many LGBTQI+ people will be able to access support services only after they enter the asylum process. On the other hand, lack of such evidence is deemed as damaging the claimant’s credibility.
58. **Stereotypes:** The Home Office also displays unrealistic or stereotypical expectations in relation to what a credible narrative of an LGBTQI+ person should contain. However, there is no right or wrong narrative. People understand themselves in different ways

and have different experiences⁵. This diversity needs to be better recognised in decision-making.

59. **Self-realisation:** The Home Office continues to have an expectation that LGBTQI+ people make reference to key milestones or ‘trigger points’ in respect of their self-realisation. More recently, the Home Office has been finding claimants not credible because they failed to provide an account of an individual ‘emotional journey of self-realisation’. The expectation that LGBTQI+ people seeking asylum have undergone such journeys or gone through milestones is problematic as it is based on stereotypes.
60. **Feelings of difference, unease or shame:** Claims from LGBTQI+ people are often dismissed because they did not express feelings of difference, unease or shame. One example of this is a reasons for refusal letter which stated that the claimant’s assertion that she ‘felt good’ and ‘normal’ about her sexual orientation was not credible given the lack of ‘feelings of conflict or foreboding’ regarding the ability to express herself within a homophobic society. While some people may experience these feelings, it is incorrect to assume that all LGBTQI+ individuals feel the same way.
61. **Religion:** The Home Office sometimes has an expectation that LGBTQI+ people feel conflicted about their religious beliefs and that they can reconcile this ‘inner’ or ‘internal’ conflict, and uses this as a reason for refusing their claims. However, this goes against the API on sexual orientation, which warns against refusals based on claimants’ religion.
62. **Risk-taking:** Contrary to the API on sexual orientation, the Home Office continues to consider risk-taking behaviour as damaging a claimant’s credibility. Claimants are therefore routinely refused because they did not take precautions to avoid putting themselves at risk in their countries of origin.
63. **Gender identity or expression:** Decision-makers may sometimes conflate sexual orientation with gender identity or gender expression. An example of this is a refusal letter which stated that the claimant’s ‘transgender sexuality’ was rejected.
64. **Discretion:** In some cases, the Home Office incorrectly applies the legal test in *HJ (Iran)* when assessing the relevance of and reasons for concealment of sexual orientation⁶.

RECOMMENDATIONS:

- 65. The Home Office should apply the guidance in the API on sexual orientation rigorously so as to ensure consistent use of the claimant’s chosen terminology regarding their sexual orientation, gender identity, gender expression or sex characteristics, effective questioning that avoids potentially intrusive and irrelevant avenues, and an open and reassuring atmosphere.**

⁵ For examples, see §11 UKLGIG’s briefing paper *Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation*. <https://uklgig.org.uk/wp-content/uploads/2018/06/UKLGIG-on-HJ-Iran.pdf> and page 23 of *Still Falling Short* <https://uklgig.org.uk/wp-content/uploads/2018/07/Still-Falling-Short.pdf>

⁶ For more information on how the test should be applied, see UKLGIG’s briefing paper *Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation*. <https://uklgig.org.uk/wp-content/uploads/2018/06/UKLGIG-on-HJ-Iran.pdf>

- 66. The Home Office should ensure the correct standard of proof is applied to all decisions on asylum claims.**
- 67. 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.**
- 68. Home Office decision-makers should recognise the many reasons why LGBTQI+ people frequently delay claiming asylum. Delay should not routinely operate to diminish the value of the individual's account and their supporting evidence.**
- 69. In order to avoid stereotypes, the Home Office should recognise the diversity of LGBTQI+ lives and experiences and that SOGIESC is conceptualised or understood differently according to individual experiences and/or cultural contexts.**
- 70. Interviewers and decision-makers should not expect or rely upon the disclosure of an inner conflict between a claimant's sexual orientation and their religious views or upbringing in oppressive societies, nor should they expect or rely upon the claimant to bring such inner conflict to a clear resolution.**
- 71. Home Office decision-makers should ensure that claimants are not refused on the basis that they took risks, in contravention of the API on sexual orientation.**
- 72. The Home Office should improve its training and supervision of LGBTQI+ asylum claims. We recommend regular refresher training for all interviewers and decision-makers on LGBTQI+ asylum claims. We also recommend the Home Office consults on the content of its training materials.**