

## LGBT refugee protection in the UK: from discretion to belief?

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**The UK government used to have no specific guidance or training for decision-makers for claims brought on the grounds of sexual orientation. It was only in 2010 following a combination of judicial, civil society and political pressures that specific policy guidance was speedily issued and significant progress was seen.**

Until July 2010, individuals who claimed asylum in the UK on account of their sexual orientation or gender identity (SOGI) were considered not to be in need of international protection if it would be “reasonable” for them to be “discreet” on return to their home country. This ‘reasonable discretion’ test had been elaborated in earlier case law and adopted in 2009 by the UK Court of Appeal in the case of *HJ (Iran) and HT (Cameroon)*.<sup>1</sup> Consequently, UK asylum decision-making authorities focused on whether an individual seeking asylum could be discreet about their sexuality if returned. This test required testimony by the applicant as well as country-of-origin evidence as to whether they could reasonably be expected to tolerate a life lived in secret if returned there.

The test ran contrary, however, to UNHCR’s 2008 Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity which states that “a person cannot be expected or required by the state to change or conceal his or her [sexual] identity in order to avoid persecution. Nor is there a duty to be ‘discreet’ or take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships.”<sup>2</sup> The Guidance Note makes it clear that requiring lesbians and gay men to remain ‘in the closet’ in this way is discriminatory and can amount to persecution in itself.

While a significant problem, the reasonable discretion test was not the only one relating to the quality of decision-making in sexual orientation claims. Research published in April 2010 by two UK NGOs<sup>3</sup> identified other systematic issues with the quality of decision-

making. The report by one of the NGOs, Stonewall, was deeply critical, finding that UK authorities and the judiciary displayed evidence of “systematic discrimination” against those claiming asylum on the basis of sexual persecution. Their research found that 98% of gay or lesbian claims were refused, based on arguments such as:

- the **potential for the applicant to relocate** to another part of their country of origin to avoid persecution.
- **non-enforcement of laws** criminalising same-sex relationships leading to the finding that an applicant did not have a well-founded fear of persecution. This fails to adequately reflect the reality that a well-founded fear of persecution can exist even if laws criminalising same-sex consensual acts are not enforced, that is, when “the existence of that law has the effect of creating an intolerable predicament for him or her” or when such laws are “enforced in an unofficial manner”.<sup>4</sup>
- **problematic credibility assessments**, which resulted at times in outright disbelief that the asylum claimant was lesbian or gay. This included rejection of claims due to pre-conceived notions about how lesbians and gay men behave, both when forced to conceal their sexual identity in their country of origin (for example, by being in a heterosexual relationship) and how they express their sexual identity when they are in the UK (for example, not having been to gay clubs or formed gay relationships). Stonewall’s report quoted a caseworker saying: “I would look at how they’ve explored their sexuality

in a cultural context, reading [famously homosexual British author] Oscar Wilde perhaps, films and music.”

Meanwhile, in May 2010 the UK’s government committed publicly to ensure that no gay or lesbian asylum seeker would be returned to persecution: “We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution”.<sup>5</sup> It was nonetheless, the Supreme Court’s decision in July 2010 in the case of *HJ (Iran) and HT (Cameroon)* which gave the much needed policy change real urgency and direction, ensuring a radical overhaul in how such decisions were approached by refugee status decision-makers at the first instance (i.e. at the first legal decision). This case concerned the extent to which two gay refugees from Iran and Cameroon might conceal, or be expected to conceal, the behaviour or characteristic giving rise to his or her fear of persecution, in this case their sexual orientation. The Supreme Court considered whether they would be considered a refugee when they were hiding their own sexual orientation – in other words, living a lie – in order to avoid persecution. They found that such a person **would** be a refugee, and so overturned the Court of Appeal’s 2009 decision which had answered the same question with “only if the concealment cannot reasonably be tolerated”. Several points were made:

- The rationale of the Refugee Convention is that people should be allowed to live their lives free from the **fear** of serious harm coming to them as a result of one of the protected grounds (of which sexual orientation is one). If an individual would have to conceal his/her sexual identity because of a well-founded fear of persecution, that person does not cease to have that well-founded fear, even if such concealment is successful.
- No-one would consider it acceptable for a straight man or woman to have to conceal his or her sexual identity indefinitely.

- The ‘reasonable tolerability’ test was difficult to apply in practice.

The judgment was unanimous, finding that gay and lesbian asylum seekers should be granted refugee status if going home would result in them being forced to conceal their sexuality. The UK authorities reacted quickly to the judgment. Specific guidance and training for decision-makers on how to approach asylum claims based on sexual orientation and sexual identity were rolled out by the UK Border Agency by the end of 2010.

### Policy and training

By the end of 2010 all decision-makers at the UK Border Agency, along with their managers and senior managers, had been trained and a specific Asylum Policy Instruction was in place and public. Findings from the NGO research referred to above and the Supreme Court judgment provided a framework of the key areas where the UK authorities should focus. Some of the key policy changes and guidance that were introduced are outlined below.

A strong and welcome focus on **interviewing skills** highlighted the need to ask open and sensitive questions around sexual identity as opposed to the former practice of asking questions on conduct. The training explores interviewing technique and describes why asking about sexual conduct is inappropriate.

Research by NGOs had revealed how a failure by applicants to disclose their sexual orientation early in the asylum process was used to discredit their story without any consideration of mitigating circumstances. The new policy and training both deal with the issue of **late disclosure**. Recognition by the UK authorities that the asylum process can silence narratives of sexual orientation due to environmental factors and lack of privacy as well as harsh and insensitive questioning is particularly welcome.

On the issue of **self-identification**, the Policy Instruction comes close to adopting the UNHCR Guidance, when it states that “generally speaking self-identification as a

lesbian, gay or bisexual will be the normal starting point as an indication of a person's sexual orientation". Guidance is provided for decision-makers in terms of **credibility assessment** in this caseload. This includes the need to apply the 'benefit of the doubt' more often due to the fact that in lesbian, gay, bisexual and transgender (LGBT) cases it is more likely that external, documentary evidence and country of origin evidence may

not be available. Decision-makers are trained that it is far better and more determinative to investigate at interview the applicant's personal journey ('narrative of difference') – that is, how they know they are gay, lesbian or bisexual.

**Monitoring** the quality of decisions is a vital safeguard in this complex arena. Since 2004 UNHCR has been working with the UKBA to develop a Quality Audit System and to achieve an improvement in the quality of first instance decision-making. Following the introduction of this new policy and training, in 2011 the UK Border Agency's Quality Audit Team conducted a thematic audit of decision-making in SOGI claims, in order to identify strengths and weaknesses of implementation.

The authorities also moved quickly to collect better **data**. Such data will include statistics on the number of sexual orientation cases overturned at appeal and can help identify the particular areas that require further attention, through training or guidance on particular factors that have an impact on decisions.

Statistics can also help dispel myths about the numbers of individuals claiming asylum on a certain ground, addressing the misconceived notion expressed in the press that floodgates will open if grounds for claiming asylum are liberalised for gay claimants.



Protest outside the UK Supreme Court, led by Movement for Justice, prior to the Court's judgment in July 2010 against the 'discretion test'.

### Continuing challenges

A major area of continuing concern in LGBT decision-making is the quality of credibility assessment. The emphasis on 'self-identification' as evidence of sexual orientation has led to accusations that these claims are easy to make and hard to disprove, and research indicates that decision-makers in Australia and the UK "have been slow to fully absorb and apply the insight that gay people are secretive about their sexuality and relationships as a result of oppressive social forces rather than by choice".<sup>6</sup> Even if there is self-identification by the applicant as an LGBT person, he or she may still not be believed.

Such inherent difficulties are in part due to the fact that credibility assessment is conducted by human beings who bring an element of subjectivity into the decision-making process. While the training developed in the UK allowed considerable time in the training session to look at individual attitudes to gay and lesbian applicants, it is important that authorities have a heightened awareness of the other subtle pressures that face decision-makers. For example, post-traumatic stress disorder can transfer to the decision-maker over time as a result of hearing such difficult and traumatic personal testimonies; this, combined with defensive

coping mechanisms, can negatively affect the starting point of belief, disbelief or neutrality.

The progress made in the UK on refugee protection for LGBT people is vital, progressive and life-saving. It is for this reason that there must be utmost concern to ensure that one problem is not replaced with another – by moving from discretion to disbelief.

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1. UK Court of Appeal in HJ (Iran) and HT (Cameroon) and SSHD, (2009) EWCA Civ. 172, 10/03/09 para 96

2. UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008 para 26. Guidance Note superseded in 2012 by new Guidelines: see article by Volker Turk pp5-8.

3. UK Lesbian and Gay Immigration Group, *Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum*, April 2010 <http://tinyurl.com/UKLGIG-Failing-the-Grade-2010>  
Stonewall, *Immigration and Asylum*, [www.stonewall.org.uk/what\\_we\\_do/research\\_and\\_policy/2874.asp](http://www.stonewall.org.uk/what_we_do/research_and_policy/2874.asp)

4. UNHCR Guidance Note 2008

5. <http://tinyurl.com/Coalition-programme-2010> (p18)

6. Millbank J 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom', *International Journal of Human Rights*, 2009, Vol. 13, 391–414 See footnote 1, at p. 392  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1330175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330175)