



Home Office

# Asylum Policy Instruction

## SEXUAL IDENTITY ISSUES IN THE ASYLUM CLAIM

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# Section 1: Introduction

## 1.1 Purpose of instruction

This instruction explains how caseworkers should conduct asylum interviews in claims made on the basis of sexual identity. This is to ensure that the relevant information is obtained in order to make a balanced decision as to whether or not the claimant meets the threshold for an asylum or human rights claim. The interview should be a sensitive enquiry into the development and exploration of the claimant's sexual identity and the extent to which it is relevant to the assessment of the need for protection. It should not be an enquiry into any explicit sexual activity.

It provides specific guidance on:

- ▶ how to approach consideration of asylum claims made on the basis of sexual identity;
- ▶ the additional considerations decision-makers should have in mind when assessing claims for asylum that could include issues to do with sexual identity;
- ▶ how to take sexual identity issues into account when looking at the persecution experienced and whether there has been a failure of state protection;
- ▶ how to objectively consider future fear within the legal, political and social context of the country of origin.

In all interviews caseworkers, as representatives of the Home Office, are expected to maintain high professional standards and treat claimants with respect and sensitivity throughout.

This instruction replaces the previous guidance entitled 'Sexual Orientation Issues in the Asylum Claim of June 2011. It must be read in conjunction with the main asylum policy instructions, in particular:

[Assessing Credibility and Refugee Status](#);  
[Conducting the Asylum Interview](#);  
[Gender Issues in the Asylum Claim](#); and  
[Gender Identity Issues in the Asylum Claim](#)

This instruction applies to all parts of the Home Office (including the Asylum Intake Unit) which consider asylum claims brought on the basis or part-basis of sexual identity.

## 1.2 Background

Some asylum claims are based on a fear of persecution due to sexual identity. It is important to note that some lesbian, gay or bisexual (LGB) people may originate from countries in which they are made to feel ashamed, humiliated and/or stigmatised by their sexual identification. Discussing matters such as sexual identity may be unfamiliar to them. Having to do so in an official context, such as in an asylum interview, may prove additionally daunting.

The asylum interview is a key part of the asylum process because it is the main opportunity for the claimant to provide relevant evidence about why they need international protection and for caseworkers to test that evidence. It is important that claimants disclose all relevant information at this stage and that caseworkers fully investigate the key issues through a focused, professional and sensitive approach to questioning, particularly as some evidence may relate to instances of persecution or serious harm, including sexual violence. Such evidence is crucial in ensuring that: asylum claims are properly considered; no illogical conclusions are reached; decisions are sound; when protection is granted, it is granted to those who genuinely need it; and protection is refused to those who do not need it.

### 1.3 Policy objectives

The policy objectives when conducting an asylum interview are:

- ▶ to provide an opportunity for the claimant to put forward sufficient evidence to establish their case;
- ▶ to encourage full disclosure of all relevant facts, allowing the caseworker to investigate and consider the evidence about a particularly sensitive topic in order to identify and protect those who would face persecution if returned to their country of origin; and
- ▶ in the case of claims based on a risk of persecution for being LGB, to establish whether an applicant is in fact LGB and the relevance of that to the asylum claim.

### 1.4 The best interests of the child

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK.

Officers must comply with the section 55 duty when carrying out the actions set out in this instruction, in respect of children and those with children. The statutory guidance under section 55, [Every Child Matters - Change for Children](#), sets out the key principles to take into account in all activities.

The statutory duty in respect of children includes the need to demonstrate:

- ▶ fair treatment which meets the same standard a British child would receive;
- ▶ the child's best interests being made a primary, although not the only, consideration;
- ▶ no discrimination of any kind;
- ▶ that asylum applications are dealt with in a timely fashion; and
- ▶ identification of those who might be at risk from harm.

This duty must be borne in mind throughout the process.

### 1.5 Language and Terminology

LGB is an acronym used in many Western cultures for 'lesbian, gay or bisexual'. Specifically, it comprises individuals who are lesbians, or gay men, or bisexuals. It is often used to encompass a person's social identity and community. Although LGB is used as a collective phrase, this does not suggest that LGB people are a homogeneous group with a shared or

collective identity, representation or experience of linked issues. The issues faced by each distinct group of individuals can vary considerably by country and or region. In other cultures, this term (or even the term homosexual) is not used as a form of self-identification by people with a same-gender attraction or who engage in same-gender sexual behaviour. The term may exist but have very different connotations, and may not emphasise or imply any shared social identity or particular community affiliation based on sexual identification. In some countries, there are no (non-derogatory) terms used to refer to lesbian, gay or bisexual individuals. In others, no distinction is made between non-conforming sexual orientation and non-conforming gender identity.

In some countries, in particular in the context of work on HIV/AIDS, the term 'men who have sex with men' (MSM) is used as a descriptor for heterosexual men who have sex with men because this is the sexual activity available to them, and also to men who simply do not see themselves as gay although their sexual conduct coincides with what others see as gay. Nevertheless, as a result of 'globalisation' (in particular via the use of the internet and via activism), self-identification as LGB is spreading across countries.

### Key considerations

- ▶ Caseworkers must not stereotype the behaviour or characteristics of lesbian, gay or bisexual persons.
- ▶ It is important to recognise that some individuals may hold a completely different perception of their own sexual identity from those implied by the term LGB, or may be unaware of labels used in Western cultures. They may be unwilling to use the labels used in their language.
- ▶ It will be necessary to establish how the claimant perceives him or herself and how his or her behaviour or characteristics are perceived by the society which he or she is from.

Caseworkers should be aware that interpreters may be using labels in the claimant's original language which are derogatory because no adequate translation exists, and that this may impact on the conduct of the claimant in interview. See section 4.1 of this instruction ([Interpreter arrangements](#)) for further guidance.

## 1.6 Handling claims from transgendered individuals

This instruction does not deal with the handling of claims from transgendered individuals. It should, however, be borne in mind that, whilst the experiences of discrimination and persecution for transgender people are often distinct, they may, in addition, experience discrimination and persecution due to other characteristics. For example, a person may have had gender re-assignment or dress in the manner of the opposite sex. A transgender man may be perceived to be lesbian even after gender reassignment if his 'new' gender is not acknowledged. A transgender woman may be vulnerable as a woman and as a transgender person.

Separate instructions exist to consider the handling of claims from transgendered individuals. They can be accessed at the following link:

[Gender Identity Issues in the Asylum Claim](#)

# Section 2: Legislation and legal framework

## 2.1 The 1951 Refugee Convention

Claims relating to sexual identity are primarily recognised under the 1951 Convention ground of membership of a particular social group, but may also be linked to other grounds, such as political opinion and religion, depending on the circumstances.

## 2.2 Caselaw

**2.2.1** The Court of Justice of the European Union ruled, in December 2014, in the cases of C-148/13, C-149/13 and C-150/13. This ruling has important implications for the relationship between the Qualification Directive and the EU Charter of Fundamental Rights and addresses the issue of what evidence can be used to assess asylum claims brought on the basis of sexual identity. The court has ruled that:

- ▶ questions based solely on stereotypical behaviour cannot be relied on in order to assess evidence put forward by a claimant;
- ▶ detailed questioning in regard to sexual practices must not be asked;
- ▶ sexually explicit evidence, even if it is provided voluntarily by the claimant, must not in any circumstances be accepted; and
- ▶ an adverse credibility finding cannot be made merely because a claimant did not raise issues of sexual identity on the first occasion in which they claimed asylum.

The CJEU also made it clear at the outset that it did not accept the claimant's assertion that sexual identity should be accepted as an established fact on the basis solely of the declarations of the claimant. It held that such declarations merely constituted the starting point in the process and were subject to proper assessment of the facts and circumstances.

**2.2.2** The Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 sets out the approach to take when considering applications for asylum on the grounds of a well founded fear of persecution because of the claimant's sexual identity. This judgment supersedes [2009] EWCA Civ 172 HJ (Iran) & HT (Cameroon) v SSHD. The previous test, based on the concept of "reasonable tolerability", no longer applies and should not be used as it is contrary to the 1951 Convention.

The European Council Directive (2004/83/EC) of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection provides a framework for determining whether a person is a refugee. The Directive was transposed into UK law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and through changes to the immigration rules, and has applied to all protection-based claims since 9 October 2006.

Article 2(c) defines a refugee as a third country national who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.”

## Applying the legal framework

### 2.3 Considering the convention

#### ► Race

Whilst actual or attributed racial identity is not specific to LGB cases, sexual identity may affect the form that persecution takes in race-related cases. For instance, a particular racial group may target LGB persons not conforming to moral codes within their group in order to assert the group’s racial ‘superiority’ or ‘purity’ i.e. by ‘purging’ the group of perceived ‘impure’ elements.

#### ► Religion

Religion may be a relevant factor in sexual identity asylum claims, such as where the attitude of religious authorities towards LGB people is hostile, or where being LGB is seen as an affront to religious beliefs in society.

#### ► Nationality

The concept of nationality is not confined just to citizenship but can include, for example, membership of a group as determined by cultural, ethnic or linguistic identity, common geographical or political origins, or relationship with the population of another state. As a result the term ‘nationality’ may occasionally overlap with the term ‘race’. Whilst actual or attributed national identity is not specific to LGB persons, it may operate in tandem with sexual identification to explain why an individual fears persecution. For instance an LGB individual from a particular ethnic group may have a fear of persecution that does not exist for other LGB individuals in the country of origin.

#### ► Political opinion

The concept of political opinion includes the holding of an opinion, thought or belief on matters related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the claimant. Holding political opinions different from those of the government is not in itself a ground for refugee status. However, in countries where LGB practices are viewed as contrary to the country’s policy, a claimant may apply for asylum based on a fear of persecution for acting in opposition to the political opinion.

For further details on convention reasons, see section seven – ‘Assessing Convention Reasons’ in the [Assessing Credibility and Refugee Status](#) Asylum Instruction.



As with all other applications, someone who may not qualify for international protection under the 1951 Convention could nevertheless qualify for Humanitarian Protection (Subsidiary Protection). See the Asylum Instruction on [Humanitarian Protection](#).

### Key considerations

- ▶ An application does not have to be on one Convention ground only; and
- ▶ Whilst the claimant is required to establish that he or she has a well-founded fear, he or she is not required to identify accurately the Convention reason for it.

## 2.4 Determining membership of a Particular Social Group (PSG)

In order to consider whether an individual can be recognised as a member of a particular social group, it is important to have reason to conclude whether or not they are LGB, or would be treated as such, and whether LGB people are perceived to have a distinct identity in their country of origin

Regulation 6(1) (d) of the Qualification Regulations states that:

*“A group shall be considered to form a particular social group where, for example:*

- ▶ *members of that group share an innate characteristic, or a common background that cannot be changed,*
- ▶ *or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
- ▶ *that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society”*

LGB people in most countries will meet this definition and will thus form members of a PSG. If decision-makers are in doubt as to whether a person may be part of a PSG, they should refer to Section 7 of the [Assessing Credibility and Refugee Status](#) Asylum Instruction and / or discuss the case with a Senior Caseworker (SCW).

Caseworkers should also take note of the European Court of Justice ruling in the cases of Joined Cases C-199/12 to C-201/12 ([2013] WLR(D) 427, [2013] EUECJ C-199/12). The Court ruled that the existence of criminal laws which specifically target homosexuals supports the finding that those persons must be regarded as forming a particular social group as they are identified through their ‘difference’.



## Section 3: Preparing for Interview: LGB specific issues to consider

### 3.1 Consideration of sexual identity

A claimant may qualify for asylum when they fear persecution on account of their actual or perceived sexual identity that does not, or is deemed not, to conform to prevailing political, social or cultural norms in their country of origin. It should be remembered that an asylum claim may also be founded on the basis that the claimant will be perceived to be LGB regardless of their actual sexual identification. In such a claim, the emphasis is likely to be on factors that are likely to be perceived as indicating that someone is LGB in their country of origin.

Caseworkers are reminded that an LGB person's sexual identity is not solely, or even necessarily partly, defined by their participation in sexual behaviour and, in any case, this aspect of their behaviour may, in some claims, be irrelevant due to factors such as religious beliefs or cultural restrictions.

Some LGB people may originate from countries in which they are made to feel ashamed, humiliated and/or stigmatised by their sexual identification. In response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions, many LGB claimants will have kept aspects of and, sometimes, large parts of, their lives secret. Some will have, in addition to hiding their identity, evaded detection by engaging in a lifestyle which conforms to normative cultural heterosexual stereotypes.

Caseworkers must note the important distinction between someone hiding their sexual identity due to societal pressure and someone hiding it for persecution reasons. If someone has hidden their sexual identity because, for example, their family would disapprove of it and cut them out of an inheritance, then that is not persecution. However, if someone has hidden their sexuality because their family would disapprove and would kill them as a result, that would be persecution. The distinction is important.

A recognition that the claimant's identity or conduct is disapproved of, either by their family or because of legal, cultural or religious mores, laws and customs, may lead some LGB claimants to develop feelings of shame and stigma about their sexual identification. This can be compounded by their potential experiences of difference, separation and secrecy and they may feel that any persecution experienced has been caused by this identity. They may also come from cultures where they have never openly discussed their sexual identity.

Discussing matters such as sexual identity may be unfamiliar to some people and, in an official context such as an asylum interview, may prove additionally daunting. Some LGB asylum seekers may struggle to talk openly about their sexual identification due to feelings of shame, painful memories or cultural implications, and may find it difficult to establish trust with an interviewing officer - this may help to explain why they may appear to be evasive.

Caseworkers should note that, when the claimant is in the process of coming to terms with his or her identity, or when they fear openly expressing their sexual identity, they may be reluctant to identify the true extent of the persecution suffered or feared. Discrimination and oppressive environments in their country of origin often lead to lack of information about the actual treatment of LGB persons within their own country. Caseworkers should be aware that some claimants may find it difficult to substantiate their claim or provide full disclosure of sensitive and personal information.

### Key considerations

Caseworkers and interviewers should therefore ensure that:

- ▶ The human dignity of the claimant is respected;
- ▶ An open and reassuring environment is established to help build trust between the interviewer and the claimant; and
- ▶ Assurances are given to the effect that information provided will be treated in confidence and in a non-judgemental manner.

Caseworkers must be sensitive to the fact that the asylum interview may well be the first occasion on which some individuals have needed to speak openly about their sexual identity and that they may feel reluctant to speak openly about these issues when being questioned by figures of authority. They may not have felt either willing or able to disclose this information at for example, screening, which is a more open and public place, and this will need to be explored in greater depth at interview.

Caseworkers need, however, to be able to explain to asylum claimants that they have to relate their reasons for having made a claim.

- ▶ Caseworkers must not make an adverse credibility finding solely on the grounds that a claimant did not raise issues of sexual identity on the first occasion that they claimed asylum – that is at screening. See further information at [section 5: Establishing credibility during the interview](#)

## 3.2 Treatment that could amount to persecution

In the Court of Justice of the European Union ruling, in the cases of Joined Cases C-199/12 to C-201/12 ([European Court of Justice ruling: EUECJ/2013/ Joined Cases C-199/12 to C-201/12](#)), the court ruled that the criminalisation of homosexual acts does not in itself, constitute an act of persecution. However, a term of imprisonment which is a sanction against homosexual acts and which is actually applied in the country of origin which has adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

The point at issue for caseworkers in considering whether legal provisions will amount to persecution (i.e if there is a real risk of serious harm) is whether these legal provisions are applied in practice. In order for the presence of criminal sanctions against homosexual acts to amount to persecution (or to a threat of persecution), the sanctions must be at a certain level of severity – namely imprisonment rather than simply a fine – and these sanctions must be applied in practice. If there are criminal sanctions that are never, or even hardly ever, imposed

in practice then a claimant cannot demonstrate real risk on this basis. However, caseworkers must be aware that the severity of societal discrimination could in itself meet the required threshold - so this must be considered as well. If the legal provisions are not applied in practice, then someone cannot rely on criminalisation to demonstrate real risk – the risk must be considered in light of the practical application of the rule of law in the country to which the claimant is returned.

Claims made by people on the basis of their sexual identification can reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and so-called 'honour killing'. However, hostility or the threat of violence towards LGB individuals need not necessarily be the defining feature of persecution. Other forms of physical and psychological harm that may constitute persecution can include harassment, discrimination and threats of harm, vilification, intimidation and psychological violence.

Discrimination in itself does not establish a claim to persecution. To establish a claim under the Refugee Convention the treatment feared must amount to persecution. Someone could face societal discrimination but this will not amount to persecution, nor establish a claim, unless it is of the level of severity that makes it persecutory in nature.

A discriminatory measure, in itself or cumulatively with others, may amount to persecution if it led to consequences which were of a substantially prejudicial nature for the person concerned. For example, it may, depending on the facts of the case, amount to persecution if the discrimination has resulted in sufficiently serious consequences for the person concerned such as:

- ▶ serious legal, cultural or social restrictions on rights to, or ability to earn, a livelihood;
- ▶ serious legal, cultural or social restrictions on rights to, or ability to enjoy, private and family life;
- ▶ serious legal, cultural or social restrictions on rights to, or ability to enjoy, freedom of opinion, expression, association or assembly;
- ▶ restrictions on political enfranchisement;
- ▶ restrictions on the choice to practise or not practise a religion;
- ▶ restrictions on access to public places; and
- ▶ restrictions on access to normally available educational, legal (including law enforcement), welfare and health provision.

Lesbian women and gay men may feel obliged to conform outwardly to family and social expectations by, for example, marrying and having children. This issue may be most acute for lesbian claimants due to the fact that women often occupy a comparatively weaker position in society. This would not of itself amount to persecution. The appropriate test to apply when considering a claimant's concealment of their sexual identity is to be found in paragraph 35 of [the Supreme Court in HJ \(\*Iran\*\) and HT \(\*Cameroon\*\) v Secretary of State for the Home Department \[2010\] UKSC 31](#). The test is at section (d) which states:

*'The next stage, if it is found that the Applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not*

*because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.'*

### 3.3 Country information and guidance reports

Before interviewing a claimant, assessing credibility, considering internal relocation or deciding whether there is a need for protection, decision-makers should be aware of the status and treatment of LGB individuals in the claimant's country of origin. This should be by reference to the specific sections on handling claims made by LGB persons in COI and country-specific guidance products provided by the Country Policy and Information Team (CPIT) and other relevant background material.

This awareness includes, but is not limited to:

- ▶ the social cultural and religious norms of the country and how these affect the general response to LGB individuals;
- ▶ the level of 'visibility' of LGB communities, including the presence of specific social, campaigning or support groups;
- ▶ the efficacy of specific protection against violence available to 'identifiable at-risk groups' within the country, including LGB persons; and
- ▶ the legal status of LGB persons, including: criminalisation of same-sex sexual conduct (including whether implemented or not); recognition of same-sex relationships; any discriminatory measures.

If information about LGB persons in a particular country is not available within an existing country information and guidance product and it is essential to the case, a case specific research request should be made using the online [Country of Origin Information Request Form](#).

The relevant sections of the Asylum Instruction [Assessing Credibility and Refugee Status](#) instruction should also be taken into account regarding actors of persecution and the sufficiency of state protection. See also section 6.1 of this instruction – [Considering the Option of Internal Relocation](#).

LGB groups represent a particular claim group on whom it may sometimes be difficult to obtain relevant, current and accurate information. This may be because such groups may opt to live discreetly and/or because there is a lack of reporting on their treatment in the country of origin.

The discriminatory behaviours experienced may vary between the sexes. For lesbian claims, given the social pressure, discrimination faced by women and lack of reporting generally, the issue of limited Country Information may reflect under-reporting rather than suggest that there is no persecution. Persecution may not be recorded because so few women are prepared to break the mould - that doesn't mean they may not be persecuted. The onus is on the applicant to substantiate their claim and caseworkers need to look at all available information

about the position of sexual minorities. Where required, in considering the credibility of the applicant's account, CPIT should be approached for information.

If gay travel guides are referenced as a source of country evidence, it must be noted that the perspectives provided may not be applicable to locals. Such guides, if required, must be used critically and their content will require context and corroboration.

### 3.4 Non-state agents of persecution and state protection

#### 3.4.1 Protection

For reasons of sexual identity, whether actual or perceived, individuals may be subject to abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts.

Such failure of state protection may include, but is not limited to:

- ▶ lack of police response to pleas for assistance;
- ▶ reluctance, refusal or failure to investigate, prosecute or punish individuals; and
- ▶ encouragement or toleration of particular social, religious or customary laws, practices and behavioural norms or an unwillingness or inability to take action against them (for instance, a state may not necessarily have laws criminalising same-sex relations but may continue to condone or tolerate societal or familial violence against gay, lesbian or bisexual people).

Persecution can be perpetrated by the state in a number of ways. This may be through laws and the implementation of those laws which implicitly discriminate against LGB persons. It could involve prosecution, punishment, or the denial of judicial redress which is disproportionate or discriminatory. It can also be because certain elements of the state target, discriminate against, or treat differently, LGB persons through legal, administrative, police, or judicial measures – for example prosecution for petty crimes by police or restrictions on access to healthcare.

Acts of violence, persecution and serious discrimination can also be committed against LGB persons by non-state agents, such as mob or family violence, or violence perpetrated by other members of the public.

#### Key considerations

- ▶ Where there is evidence of societal persecution, caseworkers will need to consider the extent to which a sufficiency of protection exists, whether such acts of societal persecution are knowingly tolerated by the authorities, and whether the authorities refuse, or prove unable, to offer sufficient protection.

#### 3.4.2 Effective Protection

Protection is generally considered effective when the state takes reasonable steps to prevent the persecution or suffering of serious harm, and where the claimant has access to such protection.

Sufficiency of protection must be considered within the context of available country of origin information. It may not always be possible to access levels of protection from the state because of the general hostility that exists toward people who are LGB. This area must be fully explored and due consideration given to the fact that a claimant's fear of the authorities might prevent them from approaching those authorities for protection. General homophobia and intolerance of the LGB community may contribute to the lack of state protection, regardless of whether same sex relationships are criminalised. It is reasonable to ask whether redress was sought and/or to explore any reason for not seeking protection.

### Key reading

- ▶ See section to 8 'Sufficiency of Protection' in the [Assessing Credibility and Refugee Status Instruction](#)

### 3.4.3 Reasonableness of seeking protection

In many cases it will not have been reasonable or possible for an LGB claimant to alert the authorities to his or her need for protection. This may be because protection may not be forthcoming or because where there are criminal sanctions against LGB practices, the claimant is regarded as an offender rather than a victim. It may also be the case that the police force tolerates attacks on LGB persons because of discrimination within the police force itself. A victim of an attack who approaches the police will in some countries be at risk of attracting additional persecution, either from members of the police force or by others who are passed information by members of the police force. Reporting an attack very often requires a declaration of sexual identity and it may not be realistic to expect a person to officially 'out' him or herself to State authorities. However each case must be assessed on its individual merits in the light of country of origin information and guidance.

### 3.4.4 Failure of Protection

The ways in which particular laws, social policies or practices (including traditions and cultural practices) are implemented may constitute or involve a failure of protection. For example:

- ▶ a law, policy or practice may have a "legitimate" goal, e.g. the maintenance of law and order out of respect for genuine religious or social sensitivities, but be administered through persecutory means;
- ▶ the penalty for non-compliance with the law or policy may be disproportionately severe against the LGB community;
- ▶ a law, policy or practice may not be enforced in practice and therefore may fail to deter or prevent the banned behaviour;
- ▶ it may be difficult to report abuse to the police because of a culture of discrimination against LGB people within the police force;
- ▶ there may be police tolerance of, or collusion in, discrimination and / or violence against LGB people; and
- ▶ a law, policy or practice which is not enforced, such as an unenforced law criminalising same sex relations, may result in lack of protection for LGB individuals and impunity for non-state actors, or may enable extortion and harassment by the police;



## Section 4: Conducting the interview

### 4.1 Interpreter arrangements

Claimants are asked at the screening interview if they would like a male or female interviewer. A request, made in advance, by the claimant for an interviewer of a particular gender should normally be met and, if that request cannot be met on the scheduled day, the interview should normally be re-arranged. This applies to the interpreter also, as far as practically is possible.

Where it is known that the asylum claim includes sexual identity issues, it will be useful in advance of the interview to establish with the interpreter the available words in the language of origin and whether they have derogatory connotations. This is because the terms “homosexual” / “sexual identity” and “sexual orientation” may not be used as forms of self-identification by all people (or in particular cultures) and, while the terms may exist in certain cultures, they may have very different and possibly derogatory connotations. The interviewer should establish what words are to be used in both English and in the individuals native language of origin to reference, as appropriate, i) the concepts of hetero and homosexuality; ii) the way in which the interpreter will explain any contact or encounters; and iii) to ensure they do not cause offence or imply a derogatory connotation.

### 4.2 Language issues

Caseworkers should also be aware that the concept of ‘sexual identification’ is not represented in all languages, and that certain words in such languages can imply that the behaviour to which they refer is inappropriate or “sinful”. As a result, claimants may use unfamiliar words and phrases. Some people may not identify with the labels ‘LGB’. Language used to discuss sexual identity should be that which the claimant uses to perceives him or her self.

### 4.3 Discharging the burden of proof

The asylum interview must be one of cooperation as it requires the discharge of a shared burden. It is the responsibility of the claimant to establish their case that they have a well-founded fear of persecution on the basis of his or her sexual identity. The required threshold is to a “reasonable degree of likelihood”.

Whilst a claimant must substantiate their claim, caseworkers should assist the claimant by:

- ▶ ascertaining the relevant aspects of the claim;
- ▶ encouraging disclosure of all relevant information; and
- ▶ obtaining all the available information relevant to the claimant’s case.

To achieve this, the focus of the interview must be on allowing the claimant to provide a narrative which provides evidence in support of their claimed sexual identity, the threshold of which is also to a “reasonable degree of likelihood”. Whilst claimants are expected to put forward their reasons for claiming asylum so that all relevant information can be considered to reach an informed decision, putting a claimant at ease and approaching the interview with sensitivity can help them to disclose, potentially, what is sensitive information early in the



process. In order to enable a claimant to present their case, it may be necessary to ask questions about where claimants have socialised or whether, for example, they have been members of clubs, groups or organisations, including through social media. Claimants must be allowed to make the disclosures they wish to make in order to substantiate their case and, while the interview is the primary opportunity for claimants to do this, caseworkers must be able to guide and control the interview to ensure compliance with the ruling from the Court of Justice of the European Union, in the cases of [C-148/13](#), [C-149/13](#) and [C-150/13](#) in regard to sexually explicit narratives. Further advice on how to do this can be found at Sections 4.8 – 4.10 of this guidance (Handling sexually explicit material).

#### 4.4 Imputed sexuality

There may be some cases in which a claimant asserts that they would be persecuted in their home country on the basis that they are considered to be gay, even though they are not. In such cases, the issues must be fully investigated and questioning must facilitate as detailed an account of someone's experiences as is possible, in order to establish all material facts.

The consideration which must be made is to be found in para 82 of the test which was established by the Supreme Court in *HJ (Iran)*. It requires that, when a claimant applies for asylum on the ground of a well-founded fear of persecution because they are LBG, the test to be satisfied includes consideration of the evidence of whether they would also be treated as LGB by potential persecutors in their country of nationality.

Caseworkers must note that an individual should not and cannot be required to hide their sexual identity in order to avoid persecution. The principle that an individual should not and cannot be required to hide their sexual identity in order to avoid persecution was applied to the topic of hiding an individual's political opinion or affiliation in [RT \(Zimbabwe\) v SSHD \[2012\] UKSC 38](#). The Supreme Court found that, in cases in which an individual had no political opinion but in which a political view would be imputed to them and they would be persecuted as a result, they would still fall to be allowed asylum. This principle must be applied to a heterosexual claimant who would be imputed to be homosexual in his home country and would be persecuted as a result.

#### 4.5 Considering self identification as lesbian, gay or bisexual

Interviewing officers should be aware that lesbian and gay relationships in some countries may bear little resemblance to relationships in the UK. The Court of Appeal in [NR \(Jamaica\) v SSHD \[2009\] EWCA Civ 856](#) has made it clear that what is relevant is "current" identity.

A claimant's self-identification as lesbian, gay or bisexual should not however be accepted as an established fact on the basis solely of the declarations of the claimant. For the purposes of the interview, any such declaration merely constitutes the starting point in the process and the point from which assessment of the facts and circumstances will be made.

Many claims, especially those from countries in which criminal sanctions for homosexuality are applied, will stand on whether or not the claimant actually is LGB.

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. It is therefore important to establish the range of life experiences that may have informed or affected an individual's sexual identity or how they are perceived. Caseworkers must, however, test the evidence submitted and explore assertions made at interview. The standard of proof required of a claimant is to the level of "reasonable degree of likelihood". Any differences between statements made at screening, in any written statements and at interview should be put to the claimant, as should any conduct prior to the claim which may have a bearing on the claimant's general credibility.

If there is insufficient evidence to establish that the claimant is reasonably likely to be LGB then, having taken account of all the evidence in the round, claims can be refused.

It is not necessary for a claimant to be in a same-sex relationship or to have had experience of one. Although these factors can be significant, they are not conclusive as to an individual's sexual identity. It is however acceptable to investigate the existence of current or previous friendships and relationships with other LGB persons, either in this country or in the claimant's country of origin and to enquire about the nature of the relationships in question. The focus of any such enquiry must not be on any sexual activity. For guidance on handling sexually explicit narratives, see Section 4.8 of this guidance 'Responding to a claimant's narrative: issues around sexually explicit narratives.'

Evidence of existing or former heterosexual relationships or parenthood (both of which may need to be explored at interview) must not be automatically taken as evidence of a lack of credibility.

### **Key considerations**

- ▶ Caseworkers need to establish material facts which are at the core of the claim.
- ▶ The interview should sensitively explore what the claimant is claiming as their current sexual identification.
- ▶ Interviewing officers should ask open questions that allow claimants to describe their experiences and the development of their identity (or the identity imputed to them by their potential persecutor) and how this has affected their experiences both in their own country and in the UK.
- ▶ While the interview must not be adversarial, the interviewer is expected to explore and test any inconsistencies or gaps within the account.

## **4.6 Responding to a claimants narrative: issues around 'difference'**

In some cases, an LGB person's first indications of their non-heterosexual identity may be a self-perception of 'difference', i.e of being different from other members of the community, of perceiving that they are either living a life which does not conform to a heterosexual narrative, or are perceived to be doing so by others. From the perspective of the persecutor, the issue can be the fact that the individual is not conforming to common prevailing heterosexual stereotypes. In effect, the behaviour which may give rise to harm, harassment or persecution

may not be LGB behaviour (or perceived LGB behaviour), but behaviour or lifestyles which are deemed not to be heterosexual enough.

Not every LGB person will have experience of, or be able to communicate a sense of, being different. However that does not mean in itself that they are not being truthful in presenting their claim. It should be borne in mind that the way in which an individual develops will be different for each person and that any feelings of being 'different' will vary from person to person. It should also be noted that any self-recognition of being different may have occurred some time, perhaps years, before any sexual attraction or sexual conduct was realised or engaged in.

Where feelings of 'difference' are volunteered, such as feelings of being different from mainstream society, feelings of attraction, feelings of isolation or self-doubt or feelings of not wanting to be exposed to others, this can be a valuable method in considering the credibility of the claim. If someone can provide a detailed account of how their life was 'different', including detailed information on specific events, this may add to their credibility.

### Key considerations

- ▶ LGB claimants should be encouraged to provide a narrative identifying key experiences important to their sexual identity and to describe how it developed in their life.
- ▶ Any such exploration needs to be sensitive and considered in the round, taking into consideration factors such as education, communication skills and cultural background.
- ▶ The interview should explore issues around the concept of 'difference'.
- ▶ Enabling the claimant to express their self realisation of their sexual identity (and subsequently exploring this) will give rise to a better indication of how a claimant may have experienced 'differences' in relation to the development of their sexual identity.

## 4.7 Establishing the source and nature of threats made

A climate of hostility to LGB persons can still exist in a particular country even when homosexual activity is not specifically laid down as criminal in a penal code or legal statutes or where laws do exist but are not enforced. There may be instances in which, even though LGB people are not referred to specifically in the legislation, a society remains intolerant of LGB people. The absence of specific legislation on lesbians in particular may be an extension of the general marginalisation of women.

Societal disapproval may not in itself amount to persecution but, if expressed in an extreme way and without effective protection from the State, then outright hostility, general discriminatory measures and the cumulative effects of harassment, threats and restrictions can constitute persecution.

### Key considerations

- ▶ The interview should establish, where possible, whether the actual past or feared future threats came from state agents enforcing legislation or whether the persecution was a

result of societal discrimination and general homophobia. Either may be a basis for establishing a claim.

- ▶ To establish a claim of persecution, the treatment feared must be of a level of severity that makes it persecutory in nature. Discrimination in itself does not necessarily establish a claim of persecution.

## 4.8 Responding to issues around sexually explicit narratives

The interview is the primary opportunity for claimants to present their case for fearing persecution on the basis of their sexual identity. There may however be occasions during interview when they voluntarily provide narratives regarding the development of their sexual identity which may focus on issues of sexual activity, or physical or sexual attraction.

The claimant must be allowed to make such disclosures as they wish – however caseworkers must not pursue any such narratives with further lines of questioning which may invite sexually explicit disclosure. Home Office policy is clear – **detailed questioning about claimants' sexual practices must not be asked and 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. It is sufficient only to record such narratives. However, where such narratives present credibility concerns with earlier disclosures, caseworkers should explore these to seek clarity. This applies only to the events around the reported sexual activity, not the activity itself. When sexually explicit disclosures are made, caseworkers must follow the guidance below, at section 4.9.

### Key considerations

- ▶ The focus of the interview should be on the claimant's sexual identity and not on their sexual activity.
- ▶ Questions about claimant's sexual practices must not be asked.
- ▶ 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.
- ▶ Questions posed by the interviewer must be clear so that the claimant understands that the information requested does not relate to sexual activity.

## 4.9 Communicating sexually explicit policy to claimants

There can be several reasons why claimants may offer a narrative to substantiate their claim which predominately focuses on sexual activity. This could be when they have been inappropriately encouraged to do so by other claimants or their advisers. There may be some LGB cases in which a claimant may indicate that they have been a victim of a sexual attack or rape, either from state authorities or from within their communities. The investigation of the detail of such an incident should be dealt with in accordance with the existing Home Office guidance on Victims of torture or other trauma. See Section 5.7 of the Conducting the Asylum Interview instruction.

It may, however, be genuinely the case that there is no other evidence available, or that their claim is defined by sexual activity only. Such narratives could also have a bearing when the nature of the claim is a *sur place* one.

When such narratives are offered (excepting allegations of sexual attack or rape), the interviewer should make the following declaration:

*'Stop please. I am not going to ask you any detailed questions about sex. I do not want to stop you from giving us your story but, if you talk about your sex life, I will not be following up your statements with questions which ask you for further sexual detail. You need to know that we do not consider descriptions of the detail of physical sexual activity as providing evidence of your sexuality'.*

There may however be circumstances, such as when the claimant has independently cited sexual activity as evidence in support of their claim, in which it is reasonable to ask questions relating to the circumstances surrounding the sexual activity of a claimant.

If, for example, the claimant volunteers information to the effect that their sexuality had been discovered, perhaps by a family member, or that it had come to the notice of others, it is likely to be necessary, and therefore reasonable, in order to test the credibility of any events described, to ask such questions as whether the activity took place in a public environment or if it was likely to have come to the notice of others, how it came to be known, or by whom. Questions addressing what happened as a result, including the immediate behaviours, events, implications or consequences following an incident of detection (a sexual relationship or otherwise) from family, community or state authorities are appropriate. The purpose of the questioning must be purely to test the consistency of the account provided in order to assess credibility. There should be no exploration of the detail of the claimed sexual activity itself. It is important that these areas are covered in some detail since, in many cases, this will be the information on which the credibility of the claim is likely to turn.

It is perfectly acceptable for a claimant to acknowledge that they have engaged in sexual activity. However, if it is apparent that a claimant is about to provide further detail or if a claimant actually makes reference to physical sexual activities such as penetration, kissing or oral sex, caseworkers should intervene and make the declaration above.

It is permissible to ask whether a claimant has had previous same-sex friendships or relationships (akin to a partner) in either this country or in their home country. 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. Equally, where claimants are vague or reluctant to elaborate further about any previous partners they have cited, it is appropriate to enquire about the nature of the relationship cited. Caseworkers



should not necessarily expect claimants to recall all minutiae of previous relationships or even, in some circumstances, the names of previous partners.

Questions about the nature of any sexual activity undertaken or how often undertaken are not however appropriate.

### Key considerations

- ▶ When sexually explicit narratives are offered in interview (excepting allegations of sexual attack or rape), the interviewer should inform the applicant that any detail of physical sexual activity will not be considered as providing evidence of sexuality
- ▶ Questions relating to the circumstances surrounding any sexual activity cited are permissible in order to test credibility.
- ▶ Questions investigating the nature of any relationships cited in interview are permissible.
- ▶ Questions about the nature of any sexual activity undertaken are not permissible.

### 4.10 Submission of sexually explicit audio visual material

In C-148/13, C-149/13 and C-150/13 the European Court ruled that Member States must not accept sexually explicit material. In cases in which a claimant or their legal representative seeks to submit such material, it must be refused and returned to them. Any visual material depicting sexual acts must not be accepted.

In establishing the range of life experiences that may have informed an individual's sexual identity claimants may offer, by way of example, evidence of membership of social media, smart phone apps or other internet platforms designed specifically to enable LGB individuals to connect and network with other members. Evidence of membership of such sites should not be refused as it may have a bearing on the credibility of the claimant's case – for example, evidence of a prolonged membership may count as credible evidence in establishing, as a material fact, if the individual's sexual identity is as claimed. Features of such platforms may however include 'profile account' pictures and/or descriptive biographical text. Chat history with other individuals may also be clearly apparent. Such chat history may include sexually explicit content in pictorial form.

Caseworkers must make it clear to the claimant that any sexually explicit element is not regarded as evidence in support of the claim and is not required. Key to accepting such evidence (if offered) is whether the evidence pertains to the duration of membership, which might be available from the account details page of the app, or the evidence relating to the date of the earliest online chat with other members. A screen shot provided of such pages may not necessarily indicate that the evidence provided relates to the account held by the claimant. To establish that the evidence provided relates to the claimant, it may be necessary to view the claimant's telephone as any such platforms are log-in activated and individual-account specific. In such circumstances in which a claimant wishes to offer such evidence, the claimant should be advised of the Home Office policy outlined above in Section 4.9 and asked to resize the phone screen or to scroll away from any sexually explicit photographic material which may contravene Home Office policy.

Similarly, if written evidence is submitted which contains elements which are sexually explicit - such as explicit love letters, online diaries or extracts from a personal blog, claimants must be required to redact such elements prior to submission.

### Key considerations

- ▶ Asylum claims based on sexual identity should be considered with reference to evidence (including oral testimony at interview) that is not sexually explicit.
- ▶ A claimant must never be asked to supply video or photographic evidence of sexually intimate acts. Any such evidence of a person engaging in sexual activity is not in and of itself evidence of sexual identity and has no evidential value.
- ▶ Any 'evidence' purporting to portray the claimant having performed sexual acts must not be accepted.
- ▶ If a claimant inquires at interview about the submission of audio-visual material or recordings, the interviewer must tell the claimant that any evidence must not contain sexually explicit material.
- ▶ Caseworkers must (in line with section 5.14 the [Conducting the Asylum Interview](#) instruction) explain that any submission of audio-visual material recordings or photographic images that are not of a sexually explicit nature, must be accompanied with an explanation of: precisely where, when, and by whom the material was recorded; who and what is being depicted, how it is relevant to the asylum claim and confirmation that it does not contain sexually explicit material;
- ▶ If it is apparent that the material contains images of a sexually explicit nature, it should be handed back to the claimant or their legal representative and must not be viewed.

### 4.11 Resources to assist in the preparation for interview

- ▶ UNHCR. See para. 63 (i)- 63 (ix) Credibility and Establishing the Claimant's Sexual Orientation and/or Gender Identity at <http://www.refworld.org/docid/50348afc2.html>



# Section 5: Considering credibility

## 5.1 Credibility - consideration of the claim

This section is to be read in conjunction with the Asylum Instruction '[Assessing Credibility and Refugee Status](#)'.

The interview may be the primary, or even the only, source of evidence, especially if the case is one of non-state persecution. In the absence of external or objective evidence, the interview is particularly important in ensuring that sufficient evidence is gathered to inform a decision.

While there is an emphasis on establishing the individual's sexual identity in determining whether protection is needed, caseworkers are reminded that the asylum claim needs to be considered in the round and that all aspects of the claim need to be addressed.

It is reasonable to expect that the level and nature of the information provided by the claimant should demonstrate personal experience and knowledge, allowing for any underlying factors. Vague and limited statements will not generally meet reasonable expectations of sufficiency of detail or personal experience.

Consideration of the claim should first focus upon whether the account itself is credible. This means considering whether the account is sufficiently detailed. Levels of detail and specificity are not only about requiring the claimant to provide objectively known facts and minutiae. They are also about establishing, for example, what has motivated the individual into realising their sexual identity which they may not previously or openly have been able to acknowledge in their country of origin.

The absence of objective information to corroborate a claimant's account may be a relevant factor, but should not necessarily be taken to mean that any claimed fact did not occur. Caseworkers must be mindful that some LGB claimants may have been able to avoid specific incidents of persecution by remaining discreet. The fact that there have been no historic incidents of violence must not, therefore in itself, be regarded as evidence of an absence of a genuine fear of future persecution. 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.

Where persecution has been claimed it is reasonable, subject to any underlying issues, to expect a detailed and consistent account of any incidents of persecution and/or ill treatment a claimant (or others they know) has experienced even if they are not aware of the exact legal or social position of LGB persons in their country of origin. 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 identity and may engage in actions even when they know that they are illegal.

Caseworkers must consider whether the material facts relating to the person's account of their actual or perceived sexual identity and of their experiences is reasonably detailed, internally consistent (e.g. oral testimony, written statements) as well as being externally credible (i.e. consistent with generally known facts and the country information). Case workers should take into account all mitigating reasons why a person may be inconsistent or unable to provide details of material facts such as age; gender; mental or emotional trauma; fear and/or mistrust of authorities; education, feelings of shame; painful memories, particularly those of a sexual nature, and cultural implications.

When the facts being established in a case are internally consistent and coherent, consistent with other evidence including COI, and plausible, this will go towards establishing that they can be accepted. Where there is a strong correlation between aspects of the claimant's account and external evidence, the greater the weight caseworkers should attribute to those aspects.

In considering material facts, caseworkers are reminded that these must always be assessed in the context of the evidence as a whole and not in isolation. An assessment of their credibility must be made against the correct standard of proof. All factors must be considered in the round, and appropriate weight attributed to them in order to properly assess the key issues in context.

Where there is a lack of evidence, or where it has not been possible to establish material facts to the required standard, it may be necessary to consider whether to apply the benefit of the doubt under the terms of Rule 339L and to consider the claimant's personal credibility in the light of any behaviour which may call that credibility into question. If evidence exists, for example of deception in one or more other material facts and/or poor general credibility concerns, in respect of the behaviours applicable to S.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, an assessment must be made of the damage done to the person's 'general credibility'.

Where a material fact falls to be rejected, it is likely that other material facts linked to it will be rejected too. So, even if a claimant's assertion to be LGB has been determined as a material fact, the consideration of all material facts in the round may lead to the sexual identification material fact being called into question.

Caseworkers will need to be able to make a well reasoned decision on whether or not the claimant is LGB. If the decision is that a claimant is not LGB as claimed, then the caseworker must show their rationale for reaching that conclusion.

## 5.2 Credibility - considering late disclosure of sexual identity

Consideration must be given to any possible reasons for not disclosing the issue of sexuality at the first available opportunity during screening. Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may have led some claimants to feel reluctant about speaking openly about such issues. Any late disclosure must be fully

investigated and the overall credibility of a claim considered 'in the round'. Caseworkers must not make an adverse credibility finding **merely** because the claimant did not rely on LGB grounds on the first occasion on which they claimed persecution – there must be more weighing against the claim. While adverse inference should not necessarily be drawn from someone not having immediately declared their sexual identity at the screening stage, failure to mention it at the main asylum interview, when there is every opportunity to do so, may call into question the credibility of the claim, unless there are very good reasons for not having mentioned it at that point. Each claim must be considered on its individual merits and all factors considered in the round.

### 5.3 Religious and /or political affiliations

A claimant's religion is not a basis for rejecting his or her claim. LGB individuals may be adherents of religions which disapprove of homosexuality, preach against it, or indeed forbid it. Similarly, a person may have a political affiliation to a political grouping which is not pro-LGB. A person does not have to subscribe to every belief of a religion or views of a political group in order to be a member of it. Decision-makers should take care to avoid judgemental questioning that suggests that a person is rejected by his or her religion or that their behaviour would be seen as 'sinful'.

### 5.4 Resources to assist

Further guidance can be found at

- ▶ Asylum Instruction: [Assessing Credibility and Refugee Status](#);
- ▶ [Gender Issues in the Asylum Claim](#) and [Gender Identity Issues in the Asylum Claim](#) Asylum Instructions;
- ▶ UNHCR. See para. 63 (i)- 63 (ix) Credibility and Establishing the Claimant's Sexual Orientation and/or Gender Identity at <http://www.refworld.org/docid/50348afc2.html>

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## Section 6: Considering issues in the claim

### 6.1 Considering the option of Internal Relocation

In accordance with Paragraph 339O of the Immigration Rules, if there is a part of the country of origin to which the claimant can relocate where they would not have a well-founded fear of persecution or real risk of suffering serious harm, and where it is reasonable to expect them to relocate, then the application for asylum should be rejected. Where internal relocation is an issue, decision makers must make an assessment of whether the claimant would be at risk of persecution or serious harm in the place of relocation. Caseworkers must explore whether the option of internal relocation is feasible or reasonable by putting this to the claimant.

Caseworkers should refer to Country Information and Guidance products provided by the Country Policy and Information Team. There may be certain areas or cities in the country of origin in which COI evidence indicates that treatment is better and would not amount to persecution. Further background reading on considering internal relocation can be found in Section 5 of the Asylum Instruction on [Gender Identity Issues in the Asylum Claim](#).

It should be noted that, in certain countries, financial, employment, housing, logistical, social, cultural and other factors may mean that an LGB person may face particular difficulties. This may be particularly the case for lesbians who are unmarried, or single/lone parents (who could be perceived to be lesbians), especially in countries in which women are expected to have male protection. Women may also face a particular form of discrimination in the place of relocation and thus be unable to work and, therefore, survive in the place of relocation. Men who are identified as gay or bi-sexual may face discrimination when attempting to secure work.

### 6.2 Considering Discretion

The UNHCR guidance note '[The Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity](#)' of 23 October 2012, relating to refugee claims relating to sexual orientation and gender identity, states:

*“That an applicant may be able to avoid persecution by concealing or by being “discreet” about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others”.*

This is to be understood in the following terms:

- ▶ people cannot be required to behave discreetly; and
- ▶ internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location.

These principals are underpinned in [the Supreme Court in HJ \(Iran\) and HT \(Cameroon\) v Secretary of State for the Home Department \[2010\] UKSC 31](#) :

*“There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.” (Paragraph 21)*

The Supreme Court sets out the approach to take when considering applications for asylum on the grounds of a well founded fear of persecution because of the claimant's sexual identity. Paragraph 82 of the judgment states:

*“When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.*

*If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.*

*If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.*

*If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".*

*If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.”*

The Supreme Court established the test that should be applied when assessing a claim based on fear of persecution because of the claimant's sexual identity. The following steps need to be considered:

- I. Is the applicant gay or someone who would be treated as gay by potential persecutors in the country of origin?
- II. If yes, would gay people who live openly be liable to persecution in that country of origin?
- III. How would the applicant behave on return? If the applicant would live openly and be exposed to a real risk of persecution, he has a well-founded fear of persecution even if he could avoid the risk by living discreetly.
- IV. If the applicant would live discreetly, why would he live discreetly? If the applicant would live discreetly because he wanted to do so, or because of social pressures (e.g. not wanting to distress his parents or embarrass his friends) then he is not a refugee.

But if a material reason for living discreetly would be the fear of persecution that would follow if he lived openly, then he is a refugee.

The judgment made it very clear that the point of analysis is how the individual would act on return, *not how* the LGB claimant has acted in the UK. Furthermore, the Supreme Court found that the protection of Refugee Convention extends to people who are discreet but a material reason for them concealing their sexual orientation is fear of persecution. If an individual chooses to live discreetly because he or she fears persecution if he or she were to live as openly gay, lesbian or bisexual, (even if this is not the only or the primary reason for his/her discretion), then he or she will have a well-founded fear of persecution.

If an individual chooses to live discreetly merely because he or she wants to avoid embarrassment or distress to his or her family and friends, he or she will not be deemed to have a well founded fear of persecution and will not qualify for asylum. This is because he or she will have adopted a lifestyle to cope with social pressures and not because he or she fears for his or her safety.

On the other hand if there is evidence of persecution throughout the country of origin, and living an open lifestyle would be likely to trigger persecution, they would also be refugees. Assessment of future conduct is relevant to this test.

### Key considerations

- ▶ Applications should not be approached from the assumption that individuals could exercise discretion in order to avoid persecution.
- ▶ Any relocation has to be considered in terms of how the individual may choose to live on return to their country of origin.
- ▶ How they will behave on return is a question of fact to be investigated at the interview. The primary basis for assessing this is the evidence of the individual.
- ▶ Investigation needs to be made of the risk the individual might be exposed to if they chose to live openly as is their right. That a person did not live openly, before they fled, whether out of fear or otherwise, is not determinative of whether they would do so on return.

## 6.3 Bad faith claims

Internal relocation is an option which can be considered in certain situations, such as in cases in which the LGB issue has been rejected, when a claimant then engineers the creation of risk by self-advertisement, by intentionally putting their claim into local media to create the perception that they are LGB. Such cases need to be considered on their merits and on a case by case basis. Assessment must be given to the likely impact of such actions. If it would result in serious harm by perception, irrespective of their lifestyle, this could justify protection.

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## Section 7: Change record

Version	Author(s)	Date	Change References
3.0	Kaunain Nurani		Separation from Gender AI.
4.0	Jennifer Segal	05/10/10	Expanded document.
4.1	Sandra Wray	08/06/11	Extraction of gender identity issues to its own AI.
5	Paul Pedlow	11/02/2015	<u>Review</u> Reviewed by Emma Haddad, Graham Ralph  Approved for Publication by Rob Jones (SCS) IBPD, Family and Asylum Policy

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