

The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure

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The article deals with people claiming asylum in the UK on the basis of a well-founded fear of persecution due to their sexual orientation or gender identity (SOGI). Although the UK is a country that respects and actively promotes SOGI rights, the UK does not always provide adequate protection to those who come to the UK in need of refuge. For many years, people persecuted because of their SOGI were not considered a member of a particular social group and were therefore not afforded international protection pursuant to the 1951 Refugee Convention. This began to change in 1999 in the House of Lords decision of *Islam and Shah* and in 2010 the Supreme Court in *HJ (Iran)* confirmed the right to refugee status even if the person could avoid persecution by concealing their sexual orientation. However, despite the Supreme Court judgment, considerable obstacles remain. This article discusses these obstacles—namely, the continued and often unlawful use of the discretion test; that bringing criminal charges due to an individual’s SOGI does not constitute persecution; and elements of the asylum process that frustrate legitimate claims for asylum.

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Introduction

People continue to be persecuted in many parts of the world due to their sexual orientation or gender identity (SOGI). Although sexual orientation and gender identity includes persons who identify as heterosexual or cisgender, SOGI is used globally to describe persons who identify as lesbian, gay, transgender, intersex or non-binary, all of whom may be described as ‘queer’.¹

In many parts of the world, those who identify as lesbian, gay, bisexual, trans and/or intersex, plus other differing identities (LGBTI+), may be subjected to death, violent persecution or be prevented from expressing their sexuality or gender identity in any meaningful way. The purpose of this article is to give an overview of the law and procedure for SOGI applicants in the UK for lawyers, academics and students who may not have in-depth understanding of SOGI refugee claims. Refugee law is complex and the discrete issues relating to SOGI refugees are numerous. Readers who require assistance with specific aspects of SOGI refugee law and procedure should refer to the International Commission of Jurists, *Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioner’s Guide*, by Louise Hooper and Lavinia Zilli, and other relevant practitioners’ texts.

This article will proceed by examining SOGI asylum rights from the perspective of those seeking protection in the UK. While the UK is a country with generally a legal and social culture of non-discrimination and one where SOGI rights are actively protected and promoted, it remains the case that many people seeking protection in the UK due to a well-founded fear of persecution because of their SOGI face significant obstacles from the authorities. This article will explore the legal matrix defining SOGI refugees and the history of claiming asylum in the UK on the basis of SOGI. This article will also explore the way in which SOGI-based asylum claims have been processed by the UK authorities since 2010.

¹ For a more detailed definition of terms see UNHCR, ‘Guidelines On International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (23 October 2012) <<http://www.unhcr.org/509136ca9.pdf>> accessed 3 October 2016.

A Brief History of Persecution due to SOGI

Persecution of people due to their SOGI is not a new phenomenon. It is well documented that LGBTI+ persons were persecuted by the Nazi regime alongside Jews, Roma, Polish, Communists and other ‘undesirable’ groups. It is estimated that between 10,000 and 15,000 LGBTI+ persons (mainly gay men) were sent to concentration camps in the Holocaust, where they were tortured and castrated and of which approximately 60% were murdered. Most died in the camps.² In addition, an estimated 100,000 men were arrested as homosexuals, and of these, some 50,000 officially defined homosexuals were given prison sentences.³

Following the devastation of the Holocaust, the 1951 Refugee Convention was drafted, whereby the international community recognised the need for a legal mechanism requiring states to provide protection to individuals outside their country of nationality who have a well-founded fear of persecution in their home state.

However, the Refugee Convention 1951 was written at a time when LGBTI+ persons were virtually invisible. SOGI ‘rights’ were not conceived as a popular movement until the Stonewall riots in New York decades later. It is no surprise then that persecution on grounds of SOGI was not included in the Refugee Convention, despite the fact LGBTI+ persons were targeted and murdered by the Nazis, and that they continue to be persecuted in many parts of the world today.

For many decades following the signing of the Refugee Convention, the fact that LGBTI+ persons were part of ‘The Final Solution’ even if in small numbers compared to Jews, Poles, Roma and the disabled—was not recognised. It was not until the 1980s that the former West German government, and other nations, finally recognised LGBTI+ persons as Holocaust victims. It was not until

² Holocaust Memorial Day Trust, ‘Gay People’ <<http://hmd.org.uk/genocides/gay-people>> accessed 3 October 2016.

³ United States Holocaust Memorial Museum, ‘Persecution of Homosexuals’ <<https://www.ushmm.org/learn/students/learning-materials-and-resources/homosexuals-victims-of-the-nazi-era/persecution-of-homosexuals>> accessed 3 October 2016.

2002 that the German government officially apologised to these victims.

It is unsurprising then that in the UK SOGI refugees remained outside of the scope of the Refugee Convention completely until 1999⁴ and in any meaningful way until 2010.⁵

The Right to Claim Asylum due to SOGI persecution

It is long-established internationally that a person who fears persecution in their country of origin is entitled to seek safe haven in another country. Provided an objective fear of persecution is shown by the applicant, they are able to claim asylum on the grounds of political opinion, religious belief, race, etc. One of the most important aspects in the definition of a refugee is that the person must share an ‘immutable characteristic’ with others. What is ‘immutable’ has been the subject of much debate and decisions of courts around the world.⁶ ‘Immutable’ essentially means that the characteristic is a part of the person’s identity that cannot be changed. It is now accepted that sexuality and gender identity are immutable characteristics.⁷

Unfortunately, millions of people around the world are forced to suppress their sexuality or gender identity. People living in societies where they are persecuted due to their SOGI are unable to express their sexuality or gender identity, enter into relationships, be

⁴ *Islam v Secretary of State for the Home Department and R v Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] UKHL 20, [1999] 2 AC 629, [1999] 2 All ER 545. Note that gender identity was not considered in *Islam and Shah* but it has been recognised since internationally as a particular social group. Gender identity is recognised by the UNHCR as forming a particular social group in the UNHCR SOGI Guidelines (n 1).

⁵ *HJ (Iran) v Secretary of State for the Home Department (Rev 1)*, [2010] UKSC.

⁶ See for example *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985; *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

⁷ Although bisexuality is clearly immutable, bisexual refugee claimants have faced ongoing issues with decision makers grappling to understand this sexual orientation.

married, present in a way which is natural to them, or generally to live openly as the person they are, without the fear of very often violent and state-sanctioned persecution. The right to refugee status due to SOGI persecution may be the difference between living their lives as a lie, and/or in fear of persecution, and living openly. It allows them to express who they really are, be that their sexuality or gender identity, and to live without fear of persecution.

As stated, the Refugee Convention was certainly not written with SOGI refugees in mind. A refugee is defined in Article 1(a)(2) of the Refugee Convention, as amended by the 1967 Protocol, as someone who:

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.

There are therefore five ‘Convention reasons’—race, religion, nationality, political opinion and ‘membership of a particular social group’.

The latter of those categories has been the most controversial over the years and is now the category under which SOGI refugees have been recognised as falling within the Refugee Convention—a principle recognised by a growing number of countries and by the EU.

In the UK, SOGI refugees were recognised as belonging to a particular social group and, therefore, falling within the Refugee Convention in the 1999 House of Lords decision⁸ of *Islam and Shah*, whereby it was accepted that ‘homosexuals’ are capable of forming a particular social group. Lord Steyn found:

In some countries homosexuals are subjected to severe punishments including the death sentence. In *Re G.J.*

⁸ Then the UK’s highest court, which was replaced with the Supreme Court in 2009.

[1998] 1 N.L.R. 387 the New Zealand Refugee Status Authority faced this question. Drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the U.S.A., the Refugee Status Authority concluded in an impressive judgment that depending on the evidence homosexuals are capable of constituting a particular social group with the meaning of article 1A(2): see pp. 412-422. This view is consistent with the language and purpose of article 1A(2). Subject to the qualification that everything depends on the state of the evidence in regard to the position of homosexuals in a particular country I would in principle accept the reasoning in *Re G.J.* as correct.⁹

Despite the significant advancement in *Islam and Shah*, the decision of the House of Lords made no real difference to the vast majority of persons living in, or afraid to return to, countries where they are persecuted due to their SOGI. In the UK, as in other countries, significant barriers prevented LGBTI+ persons from making successful asylum claims. As will be elaborated upon in the next section, evolving domestic and international case law held that if a person fearing persecution due to their SOGI could avoid being targeted by being ‘discreet’, then they were not a refugee. Furthermore, procedural and evidential barriers, such as requiring the applicant to prove their SOGI status, and the questioning of the risk of persecution in applicants’ home states, prevented many people from successfully seeking international protection in the UK. For example, in 2009, 98–99% of all SOGI asylum claims were refused.¹⁰

‘Discretion’ and ‘Reasonably Tolerable’

A common reason for the UK to refuse asylum to a person fearing persecution in their home country due to their SOGI is that the person in question could be discreet—that is, not behave in a way

⁹ (n 4).

¹⁰ ‘Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum’; May 2010 – UKLGIG.

that would alert others of their sexual orientation, such as not having a relationship with someone of the same sex or lying about their sexuality. For example, in the 2008 country guidance decision *JM (homosexuality: risk) Uganda CG* (no longer followed),¹¹ the court had to decide if it was safe to return the applicant, a homosexual man, to Uganda. While there is legislation in Uganda which criminalises homosexual behaviour (an issue dealt with later in this article) the court reasoned that if the applicant was a ‘discreet homosexual’ he would not be at risk.¹²

Being ‘discreet’ essentially means hiding sexuality or gender identity. No other category of persons protected by the Refugee Convention was subject to such a requirement. For example, a person of a particular religious faith is not expected to conceal their faith to avoid persecution. Indeed, if that religious faith requires its followers to proselytise, then unless they are able to do so in their country of origin, they would be a refugee.¹³

The idea therefore that people should hide their sexuality or gender identity is rebarbative and, as we will see, a misinterpretation of the Refugee Convention. However, judges who allowed otherwise valid claims to be refused based on the notion that the applicant would be discreet was representative of the fact that judges are, of course, human and judgments are products of their era. For example, in a judgment of the European Court of Human Rights (ECtHR), in which the continued criminalisation of male homosexuality in Northern Ireland was challenged, the Court said:¹⁴

The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices.

It is difficult to imagine that as late as 1981 the ECtHR regarded gay men as predatory and found that legislation

¹¹ *JM (homosexuality: risk) Uganda CG*, [2008] UKAIT 00065.

¹² *ibid.*

¹³ For example, see *Ahmed (Ifthikhar) v Secretary of State for the Home Department*, [2000] INLR 1.

¹⁴ *Dudgeon v UK*, [1981] ECHR 5 [47].

‘protecting’ young people from gay men was legitimate. Indeed, the age of consent in the UK was maintained for gay men at 21 (16 for heterosexual men and women) until 1994 on the grounds that young people needed to be protected from gay men. Even then it was only reduced to 18, and it was not until 2001 that an equal age of consent was introduced.

In this regard, it is worth therefore to give a brief, if not comprehensive, overview of the case law on the issue of discretion.

In *J v Secretary of State for the Home Department*, [2006] EWCA Civ 1238, Kay LJ found:

[16] ... [The Tribunal] will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for ‘discretion’ before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether ‘discretion’ is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to ‘matters following from, and relevant to, sexual identity’ in the wider sense recognised by the High Court of Australia (see the judgment of Gummner and Hayne JJ at paragraph 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the ‘discretion’ which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that ‘related to or informed by their sexuality’ (ibid, paragraph 81). This is not simply generalisation; it is dealt with in the appellant’s evidence.

It is extraordinary that the Court suggested in *J* that LGBTI+ persons might avoid ‘condign punishment’ rather than classify such punishment as persecutory. It is difficult to imagine that any other protected group would be subject to such a caveat. It is hard to imagine the suggestion that the persecution of people of a particular religion or race, for example, would be categorised as ‘condign punishment’.

The effect of the case law was that people persecuted due to their SOGI were essentially precluded from protection of the Refugee Convention. Even if an applicant was from a country where the persecution of LGBTI+ persons was not in doubt, such as Uganda or Iran, they would not be recognised as a refugee if by lying about their SOGI they could avoid harm.

In *HJ (Iran) & Anor v Secretary of State for the Home Department*, [2009] EWCA Civ 172, the Court of Appeal found:

In my judgment the test stated in paragraph 16 of the judgment of Maurice Kay LJ in *J ...* complies with the standard required by the Refugee Convention. We are, in any event, bound by it. It is an appropriate and workable test. It was sufficiently stated by the Tribunal at paragraph 39, recited at paragraph 17 above. In reaching their conclusions, the Tribunal in *HJ* plainly understood the test. They considered the evidence with great care and in detail. They applied the test to the evidence and the facts as they found them to be. I cannot accept the submission that the findings at paragraph 42 were perverse. They were findings the Tribunal were entitled to make on the evidence. Their conclusion that *HJ* could reasonably be expected to tolerate conditions in Iran was firmly based on the evidence in the case, considered in the context of the in-country evidence.

I would dismiss the appeal of *HJ* on that ground but add comment on the relevance in cases such as this of the views about homosexuality and its practice held and emerging from the in-country evidence in a particular state. The need to protect fundamental human rights transcends national boundaries but, in assessing whether there has been a breach of such rights, a degree of respect for social norms and religious beliefs in other states is in my view appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable in a particular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there. A judgment as to what is reasonably tolerable is

made in the context of the particular society. Analysis of in-country evidence is necessary in deciding what an applicant can expect on return and cannot, in my view, be ignored when considering that issue.¹⁵

In other words, people persecuted due to their SOGI were not entitled, according to the Court of Appeal, to the basic right of being open about their sexuality and gender identity, and everything that goes with such identities such as having relationships or choice of dress and appearance.

As argued by the International Commission of Jurists,¹⁶ ‘discretion’ is better described as ‘concealment’. They say:

In the context of SOGI claims, some courts, refugee-status determination authorities and academics have referred to concealment of one’s sexual orientation or gender identity as ‘discretion’ or ‘restraint’. As the reality is that people will be required to ‘hide’, ‘deny’ or ‘restrain’ their identity in the course of being ‘discreet’, ‘discretion’ is a euphemistic misnomer to signify what is in fact ‘concealment’, which is therefore the term the International Commission of Jurists prefers to use in this context.

Whatever the term employed, the nub of the issue is that concealing requires the suppression of a fundamental aspect of one’s identity, such as one’s sexual orientation and/or gender identity and its expression or aspects thereof. In these circumstances, the self-enforced suppression of one’s SOGI, or aspects thereof, is not a course of action undertaken voluntarily, resulting from full, free and informed consent. Rather, concealment typically results from a fear of adverse consequences, such as physical or psychological harm or both, whether at the hands of State (e.g. by way of prosecution and imprisonment for engagement in consensual same-sex acts)

¹⁵ Pill LJ in *ibid* [31], [32].

¹⁶ Louise Hooper and Lavio Zilli, *Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioner’s Guide* (ICJ 2016).

or non-State actors that may amount to persecution. Thus, concealing is coerced. In fact, concealment is a typical response, consistent with the existence of a well founded fear of persecution and, indeed, itself constitutes evidence that an applicant's fear is well-founded.¹⁷

The contrast to what was happening in the western world at that time was remarkable. At a time when civil unions and same-sex marriage were being introduced throughout Europe and beyond, when the right to gender identity was being recognised and transgender persons started being protected from discrimination,¹⁸ and when LGBTI+ persons were becoming more and more visible and accepted, those same European countries, including the UK, were telling people persecuted due to their SOGI from other countries that they should conceal their SOGI to avoid persecution, and the courts were hiding behind being sensitive to cultural norms.

The End of Discretion?

In its judgment in *HJ (Iran) v Secretary of State for the Home Department (Rev 1)*, [2010] UKSC, the Supreme Court overturned the Court of Appeal's decision (above) and dismissed the very notion that people persecuted due to their SOGI should be 'discreet to avoid persecution'.

Lord Rodger found:

At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved

¹⁷ *ibid* 84.

¹⁸ For example the Equality Act 2010.

and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. *Mutatis mutandis*—and in many cases the adaptations would obviously be great—the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.¹⁹

Lord Rodger recognised that these were 'trivial stereotypical examples' but he nevertheless made a powerful point that sexual orientation is far more than what, in that case, a gay man does, in the bedroom.

¹⁹ *HJ (Iran)* (n 5) [77], [78].

Furthermore, the position put forward by the UK Supreme Court is identically expressed in community law emanating from the European Union.

In *XYZ*²⁰ the Court of Justice of the European Union (CJEU) found that homosexuality falls within the definition of ‘particular social group’ under the Qualification Directive, which effects the Refugee Convention into binding EU law. Although the UK and other European countries had found that well over a decade earlier, the CJEU’s ruling meant that all 28 EU Member States had to accept that people persecuted due to their SOGI fall within the definition of a refugee.

The Court found:

68 Thus, Article 10(1)(d) of the Directive does not lay down limits on the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation for the purposes of that provision.

69 The very fact that Article 10(1)(b) of the Directive expressly states that the concept of religion also covers participation in formal worship in public or in private does not allow the conclusion that the concept of sexual orientation, to which Article 10(1)(d) of that Directive refers, must only apply to acts in the private life of the person concerned and not to acts in his public life.

70 In that connection, it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it.

²⁰ Cases C-199/12 to C-201/12 *XYZ v Minister voor Immigration en Asiel*, [2013] ECR I-0000.

71 Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

Therefore, some 60 years after the Refugee Convention, SOGI refugees in Europe properly fell under its protection.

Ongoing Issues in SOGI Refugee Claims

Although the Supreme Court's judgment in *HJ (Iran)* was seminal and entirely changed the landscape for SOGI refugees in the UK, problems remain. These can broadly be categorised into three categories:

- (a) the continuing issue of discretion;
- (b) recognising claimants as refugees where homosexuality is still criminalised in their country of origin;
- (c) stereotyping of SOGI claimants, homophobia and transphobia.

The Continuing Issue of Discretion

Following *HJ (Iran)* there were a large number of SOGI asylum claims and the UK authorities looked for ways to refuse them. The most common approach was to not accept that the claimant was LGBTI+ at all. The second approach was to find that the claimant would be 'discreet for their own reasons' and therefore not within the Convention.²¹

Although the Supreme Court in *HJ (Iran)* clearly found that LGBTI+ persons did not have to conceal their SOGI to come under the Convention; the Court did introduce a caveat which has been used by the UK authorities and judiciary to refuse refugee status to SOGI refugees on the grounds of 'discretion'.

²¹ The reasons outlined here are formed from my experiences in practice, representing SOGI applicants.

For reasons I will explain, in my opinion the Supreme Court did not intend for the caveat to be used as a way of refusing refugee claims in the manner in which they have and the courts have incorrectly interpreted the judgment.

In *HJ (Iran)* Lord Hope laid down a five-stage test for the authorities when considering a SOGI refugee claim. It includes:

35(d) 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.

In my opinion, Lord Hope was considering a very small class of persons in his judgment, comparable to, for example, a person in the UK, where there is no fear of persecution, concealing their SOGI for their own reasons. However it is hard, if not impossible, to separate such concealment when the person lives in a deeply homophobic or transphobic society. If there is an objective fear of persecution, it is hard to understand how an LGBTI+ person would only conceal their SOGI only for personal reasons.

Lord Rodger found:

61 A fear of persecution is by no means the only reason why an applicant might behave discreetly if he were returned to his country of nationality. For example, he might not wish to upset his parents or his straight friends and colleagues by revealing that he is gay; in particular, he might worry that, if the fact that he was gay were known, he would become isolated from his friends and relatives, be the butt of jokes or unkind comments from colleagues or suffer other discrimination. Indeed, in a society where gay men are persecuted, it is quite likely that the prevailing culture will be such that some of an applicant's friends, relatives and colleagues would react negatively if they

discovered that he was gay. In these circumstances it is at least possible that the only real reason for an applicant behaving discreetly would be his perfectly natural wish to avoid harming his relationships with his family, friends and colleagues. The Convention does not afford protection against these social pressures, however, and so an applicant cannot claim asylum in order to avoid them. So if, having considered the facts of any individual case, the Secretary of State or a tribunal concluded that the applicant would choose to behave discreetly on his return simply to avoid these social pressures, his application for asylum would fall to be rejected. He would not be a refugee within the terms of article 1A(2) of the Convention because, by choosing to behave discreetly in order to avoid these social pressures, the applicant would simultaneously choose to live a life in which he would have no well-founded fear of being persecuted for reasons of his homosexuality.

He continued:

62 Having examined the relevant evidence, the Secretary of State or the tribunal may conclude, however, that the applicant would act discreetly partly to avoid upsetting his parents, partly to avoid trouble with his friends and colleagues, and partly due to a well-founded fear of being persecuted by the state authorities. In other words the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of

nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?

In my opinion therefore the ‘caveat’ was intended by the Supreme Court to affect only a small minority of claimants and the caveat cannot be viewed without reference to the type of society that the applicant has come from. However, it has been used, and continues to be used, as a basis for refusing to recognise refugee status.

This has manifested in the Home Office asking questions about applicants’ lives in the UK, such as whether people here know about their SOGI, whether they go to LGBTI+ bars and clubs, whether they have a partner, or even if they like Oscar Wilde, and if the person did not indicate that they were completely out in the UK, or didn’t go to LGBTI+ bars or clubs, then a common finding was and is that the person is ‘discreet’ for his or her own reasons and refugee status was refused. I discuss this issue below, but of course it is nonsense to suggest that a person who has fled persecution, who may not have fully accepted their SOGI, and who just might not like bars and clubs would be discreet in their own country for their ‘own reasons’.

Unfortunately, however, the Immigration Tribunal has followed this reasoning in post-*HJ (Iran)* cases.

The Upper Tribunal found, in a case concerning lesbians in Jamaica:

Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear.²²

In a case concerning gay men in Algeria, the Upper Tribunal found:

²² *SW (lesbians—HJ and HT applied) Jamaica CG v Secretary of State for the Home Department*, [2011] UKUT 251 (IAC).

It is plain that for gay Algerian men who have moved to France there appears to be no obstacle preventing them from living openly if that is what they choose to do. The fact that the evidence before us indicates that they generally do not choose to live openly as gay men indicates that it is not a fear of persecution that leads them to live discreetly but other reasons to do with self-perception and how they wish to be perceived by others.²³

The Tribunal seems to find it important that Algerian gay men who were living in France, ‘do not choose to live openly as gay men’ in its consideration of whether there is a general well-founded fear of persecution for gay men living in Algeria. The observation completely ignores the fact that those same gay men fled persecution and many would be living in Algerian communities in France. The Tribunal appears to have an expectation that once an LGBTI+ person finds their way to a country where there is no SOGI persecution, the person should immediately be out and proud and marching around with a rainbow flag. The authorities and the courts appear to be divorced from reality and indeed misinterpreting *HJ (Iran)* and *XYZ*.

Furthermore, not only did the Tribunal in *OO (Algeria)* make that giant and unsustainable leap, but in fact the evidence presented to the Tribunal suggested otherwise.

The appellant was an Algerian bisexual man who had fled Algeria in 2008 to France. In 2010 he came to the UK. Expert evidence given to the Tribunal included:

This is, to my mind, an important point on which it may be worth elaborating. It could be argued that in a culture which severely represses what it regards as sexual deviation and impropriety, including extra-marital heterosexual relations, but particularly regards same sex relations as anathema, even the concept of homosexuality as a distinctive and easily recognisable sexual orientation (and even more so the concept of ‘gay’ or the term ‘gay’) is

²³ *OO (Gay Men) Algeria CG v Secretary of State for the Home Department*, [2016] UKUT 65 (IAC).

difficult to grasp, even by those who have homosexual feelings or inclinations.

Furthermore, even those who are homosexually inclined may feel guilt or doubts about their own sexuality when virtually the whole of society is so hostile towards homosexuality; the same may be the case with those who are bisexually inclined. The widespread and almost universal condemnation and hostility means not just that being 'openly gay' is virtually impossible (and at the very least dangerous) but also that admitting to being homosexual or bisexual becomes difficult, even to oneself.²⁴

Despite this and other detailed expert evidence that was, in my opinion, unequivocal that gay and bisexual men cannot live openly in Algeria, the Tribunal found:

The absence of reliable evidence of adverse reactions to gay men living away from their families of a type sufficiently serious to constitute persecutory ill-treatment demonstrates that the choice to live discreetly as a gay man is not generally driven by a need to avoid persecution. In living in a manner that does not require others to be confronted with open displays of the affection a gay couple have for each other such a couple are doing no more than what is demanded of a heterosexual couple. That two gay men do not volunteer the information that they are living together not simply sharing accommodation as friends but living together as sexual partners, gay men are acting discreetly to avoid social pressures of the type contemplated in *HJ (Iran) v SSHD* that does not give rise to a sustainable claim for asylum. Put another way, a gay man who did live openly as such in Algeria may well attract upsetting comments; find his relationships with friends or work colleagues damaged; or suffer other discriminatory repercussions such as experiencing

²⁴ *ibid* [55].

difficulty in dealing with some suppliers or services. But none of that amounts to persecution.

It is clear therefore that the Refugee Convention is being misinterpreted in the UK despite the judgments of *HJ (Iran)* and *XYZ*. The Supreme Court in *HJ (Iran)* was unequivocal that gay men, and thus LGBTI+ persons, are not expected to be discreet. However, the Tribunal's decisions, as set out above, and countless more Home Office decisions and First-tier Tribunal decisions, misinterpret *HJ (Iran)* and indeed the Convention by applying a different form of discretion test.

In *OO (Algeria)* the Tribunal is suggesting that discretion should be judged against some form of examination of cultural norms and it appears that, according to the Tribunal, discretion will always apply in conservative societies such as Algeria. In my opinion that would nearly always defeat a refugee claim unless the application is from one of the countries in which there is active state persecution of people due to their SOGI, such as Iran, Uganda or Cameroon. That is an incorrect interpretation of the law.

As Lord Rodger said in *HJ (Iran)*:

Although counsel for the Secretary of State was at pains to draw this distinction between assuming that the applicant would act discreetly to avoid persecution and finding that this is what he would in fact do, the distinction is pretty unrealistic. Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution.²⁵

He added:

²⁵ (n 5) [59].

A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?²⁶

In my opinion the Supreme Court was very clearly stating that the issue is whether an LGBTI+ person would, in fact, face persecution if they openly expressed their SOGI, even if their subjective reasons were personal.

Lord Rodger gave further guidance when he said:

It is convenient to use a phrase such as ‘acting’ or ‘behaving’ ‘discreetly’ to describe what the applicant would do to avoid persecution. But in truth he could do various things. To take a few examples. At the most extreme, the applicant might live a life of complete celibacy. Alternatively, he might form relationships only within a circle of acquaintances whom he could trust not to reveal to others that he had gay relationships. Or, he might have a gay partner, but never live with him or have him to stay overnight or indulge in any display of affection in public. Or the applicant might have only fleeting anonymous sexual contacts, as a safe opportunity presented itself. The gradations are infinite.²⁷

If the applicant did ‘choose’ to live in the manner described in Lord Rodger’s examples, in no way could they be said to be living openly regarding their SOGI. It is in the light of Lord Rodger’s

²⁶ *ibid* [62].

²⁷ *ibid* [63].

findings and examples in *HJ (Iran)* that the ‘discreet for own reasons’ part of Lord Hope’s test needs to be viewed. Therefore the Supreme Court’s judgment has been, and continues to be, fundamentally misinterpreted by the Home Office and the judiciary in the UK, and many SOGI claimants are being denied recognition of refugee status unlawfully.

One example is a case in which I represented before the First-tier Tribunal, then the Upper Tribunal and eventually the Court of Appeal. My client was one partner in a same-sex male Sri Lankan couple.²⁸ The couple had been together since their late teens in Sri Lanka. Their relationship, and thus their sexuality, was discovered by their families and it was not in dispute that my client (and his partner) had been persecuted in his local area. However, the Home Office refused to recognise him as a refugee on the grounds that he could relocate within Sri Lanka and part of that conclusion was that he would be ‘discreet for his own reasons’. The conclusion was based on four questions in his asylum interview in which he said that ‘some’ of his friends in the UK were not aware of his relationship and sexuality and that he and his partner did not go to gay clubs or bars. The finding that he would be ‘discreet for his own reasons’ was made despite that fact that he and his partner had expressed that they would like to live together, wherever they lived, and wished to spend their lives together in a relationship.

The finding that the applicant would be discreet for his own reasons, and therefore outside of the scope of the Refugee Convention, was sustainable on neither the facts nor the law.

As stated, the decision was based on the fact that not all his friends and the people he went to college with in the UK knew he is gay or in a relationship and that he didn’t go to gay clubs or bars.²⁹

²⁸ The partner’s application for refugee status was considered separately.

²⁹ In any event, the Vine Report found that such questions were stereotyping SOGI applicants. The report stated [4.43]:

In our sample, we found that 24 interviews (21%) contained a perceptible amount of stereotyping. This was mostly shown in questions formulated as presumptions that someone claiming to be LGB would have attended gay bars or rallies, or would automatically want to ‘reach out’ to others in the ‘gay community’ in some way. In one

There is no way those facts could lead to a lawful finding that he would be discreet for his own reasons in Sri Lanka. The finding meant, if he and his partner were required to return to Sri Lanka, they would have to lie to avoid persecution. What would they tell a landlord? Would they need to have two bedrooms to avoid the landlord or anyone who came into contact with them spreading gossip and letting the local community know they are gay and in a relationship? Should they lie to new friends and work colleagues, etc.

Unfortunately the First-tier Tribunal, in a decision upheld by the Upper Tribunal, agreed with the Home Office and found that he would be discreet for his own reasons and outside the scope of the Convention, again a finding which in my opinion is impossible on the facts. Thankfully the Court of Appeal agreed that the Tribunals were in error and the matter is back for a first-stage decision by the Home Office.

That case is one example of many (including *OO (Algeria)*) in which the discretion test is alive and well and in which the Home Office and the courts are applying the Refugee Convention, and *HJ (Iran)*, incorrectly.

Recognising Claimants as Refugees When Homosexuality is Criminalised in their Country of Origin

The other big legal issue to be won is the issue of criminality of homosexuality and gender identification in refugees' countries of origin. The current legal situation is that criminality in itself does not amount to persecution.³⁰

interview, for example, the applicant was asked 'Which annual gay events have you taken part in?' While interviews are expected to cover life in both the home country and the UK, lack of such contact is not a prime reason for refusal.

John Vine, Independent Investigator of Borders and Immigration, 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation' (March-June 2014) <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/10/Investigation-into-the-Handling-of-Asylum-Claims-Final-Web.pdf>> accessed 3 October 2016.

³⁰ XYZ (n 20).

There are currently 74 countries worldwide that criminalise homosexuality.³¹

In *XYZ* the Court of Justice of the European Union found:

50... criminalisation of an activity does not per se constitute an act of persecution for the purposes of Article 9(1) of the Directive. Rather, it is for the competent national authorities to assess, in the light of the circumstances pertaining in the applicant's country of origin, in particular, to (i) the risk and frequency of prosecution, (ii) in the event of successful prosecution, the severity of the sanction normally imposed, and (iii) any other measures and social practices to which the applicant may reasonably fear to be subjected, whether a particular applicant is likely to be subject either to acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant.

It is an interesting side-note that in some of the countries in which homosexuality is criminalised, the law stems from the Offences Against the Person Act 1861 in which criminality was first introduced in the UK. This was repealed (in part) in England and Wales in the Sexual Offences Act 1967³² and not in Scotland until 1980³³ and Northern Ireland in 1982,³⁴ following the European Court of Human Rights judgment in *Dudgeon v UK*.³⁵ Unfortunately

³¹ Siobhan Fenton, 'LGBT relationships are illegal in 74 countries, research finds' <<http://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html>> accessed 20 October 2016.

³² The decriminalisation of homosexual acts in the Sexual Offences Act 1967 did not extend to the armed forces or the merchant navy.

³³ See the Criminal Justice (Scotland) Act 1980.

³⁴ See the Homosexual Offences (Northern Ireland) Order 1982, No. 1536 (NI 19).

³⁵ *Dudgeon* (n 14), a case decided against the UK (England and Wales, Scotland and Northern Ireland) finding that the criminalisation of homosexual acts between consenting adults was a violation of Article 8 of the European Convention on Human Rights.

the 19th century legal export continues to apply in most of the Commonwealth countries on which it was imposed.

In cases involving criminalisation of homosexuality in Malaysia, Sri Lanka and Algeria,³⁶ the UK and European judiciary have consistently found that criminality in itself does not amount to persecution. In all cases the courts found that actual prosecution of gay men or women in those countries is rare. What the courts have failed to understand, or perhaps in some cases refused to understand, such as in *OO (Algeria)*, is that the issue of criminalisation of LGBTI persons does not begin and end with prosecutions.

There is significant evidence from most countries where LGBTI+ persons are criminalised, but not routinely prosecuted, that such people are subjected to harassment, blackmail and arrest by local police and that members of the public can attack and intimidate LGBTI+ persons with impunity due to the lack of protection from the law and the authorities. LGBTI+ persons are susceptible to prosecution under other charges due to their SOGI and the examination of prosecutions due to SOGI is, in fact, a red herring.

For example, Human Rights Watch reports:

Sri Lanka criminalizes ‘unnatural’ sex, acts of ‘gross indecency,’ and ‘cheating the public by impersonation.’ Police have used these and other laws, such as a vaguely defined ‘vagrancy’ prohibition, to target [LGBTI+] people. In 2014, government officials told the United Nations Human Rights Committee that the Sri Lankan Constitution’s equal protection clause ‘protects persons from stigmatization and discrimination on the basis of sexual orientation and gender identities,’ but neither the constitution nor any other law expressly prohibits discrimination on such grounds.³⁷

The International Commission of Jurists note:

³⁶ *LH and IP (Gay Men: Risk) Sri Lanka CG v Secretary of State for the Home Department*, [2015] UKUT 00073 (IAC); *OO (Algeria)* (n 23).

³⁷ ‘World Report 2016: Sri Lanka’ <<https://www.hrw.org/world-report/2016/country-chapters/sri-lanka>> accessed 3 October 2016.

This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors' abuses, against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment, instead of, or at times in addition to, prosecution. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions.³⁸

In *OO (Algeria)* the Tribunal found:

Although the Algerian Criminal Code makes homosexual behaviour unlawful, the authorities do not seek to prosecute gay men and there is no real risk of prosecution, even when the authorities become aware of such behaviour. In the very few cases where there has been a prosecution for homosexual behaviour, there has been some other feature that has given rise to the prosecution. The state does not actively seek out gay men in order to take any form of action against them, either by means of prosecution or by subjecting gay men to other forms of persecutory ill-treatment.³⁹

Likewise in *LH and IP (Sri Lanka)* the Tribunal found:

The evidence of general persecution of gay men thus amounted to a low number of serious incidents. Equal Ground is the immediate or underlying source for almost all of that information. While we have accepted that there is under-reporting, we are unable to agree that the incidents involving gay men are of a scale, frequency or

³⁸ Hooper and Zilli (n 16) 147. See examples at page 141.

³⁹ (n 23) [172].

pattern to constitute a general risk of persecution. Although there is a lack of state protection, there is no evidence of serious harm except in those isolated instances. There may be a few members of the wider LGBTI community who suffer difficulties at the level of persecution, but the evidence is not there to indicate that it is only because they are gay men.⁴⁰

The Tribunal seems to find that it is acceptable to persecute a gay man if there is some other reason to prosecute him. An analogy is a person arrested for, say, theft, and then they are also persecuted for their religion. It is impossible not to see that as persecution, even if the person was validly arrested for the criminal offence. To suggest that such persecution is acceptable prosecution is extraordinary and, in my opinion, simply not in accordance with long-established refugee law; and is it a misinterpretation of the Refugee Convention. Further, the Tribunal's finding that 'There may be a few members of the wider LGBTI+ community who suffer difficulties at the level of persecution, but the evidence is not there to indicate that it is only because they are gay men' artificially separates out the reasons for the persecution. Even if there are other reasons why they are persecuted, or why they have come to the attention of the authorities, that does not put them outside the scope of the Convention. On the contrary, it clearly means they are being persecuted as gay men, and entitled to international protection, even if there are other reasons for the adverse interest in them.

We are perhaps a long way off from a finding that the mere fact of criminalisation of SOGI automatically renders a LGBTI+ person from that country as at risk of persecution, if we ever arrive at that point at all. Certainly the judiciary at domestic and European levels do not seem near to such a conclusion. The European Court of Human Rights has found on numerous occasions that the mere fact of criminalisation, even without enforcement, is a breach of Article 8 on the right to private life.⁴¹ If that is right for European nationals, how can it not be right for non-European ones?

⁴⁰ (n 36) [118].

⁴¹ *Dudgeon* (n 14); *Norris v Ireland*, [1988] ECHR 22; *Modinos v Cyprus*, [1993] ECHR 19.

Internal Relocation

Criminalisation of homosexuality also needs to be looked at in the context of ‘internal relocation’. Under established refugee law, a person who is at risk of persecution in his home area will nevertheless not be a refugee if he can find safe refuge in his home country. This is known as ‘internal relocation’. The applicant does not need to show there is a risk of persecution throughout the country of origin. However he must show that it would be ‘unduly harsh’⁴² or in UK domestic law that he cannot ‘reasonably be expected to stay’⁴³ in another ‘safe’ part of their country.

There are many first instance and Tribunal decisions in which internal relocation has been found not to be unduly harsh, or reasonable, in countries where homosexuality is criminalised. I have seen many examples of first-instance and Tribunal SOGI decisions where internal relocation was found to be an option on the grounds that there is no risk of persecution in another part of the country.

However, such a finding is a clear and unequivocal (and trite) misinterpretation of the Refugee Convention, as the applicant does not need to show that he has a well-founded fear of persecution in another part of the country; rather they have to show that it would be unduly harsh or unreasonable for them to relocate there.

Could it ever be reasonable to expect someone who has been persecuted in one part of their country due to their SOGI to move to another part, in a country that criminalises them? In my opinion that can never be reasonable.

As stated, we may never get to the point where criminalisation in itself gives rise to a well-founded fear of persecution. However, we do have a significant way to go on this issue. The issue of criminalisation of SOGI is one which has yet to be properly grappled with by the UK authorities and courts. We need, at least, to arrive at a point where the effects of criminalisation are given due weight,

⁴² *R v Secretary of State for the Home Department, ex p Robinson*, [1998] QB 929, [1997] INLR 182, [1997] Imm AR 568.

⁴³ Home Office, ‘Immigration Rules’ <<https://www.gov.uk/guidance/immigration-rules>> accessed 3 October 2016, para 339O(i).

rather than the sterile and misleading examination of actual prosecutions.

The Asylum Process

Following *HJ (Iran)*, SOGI refugees could be recognised as such without the need to show they could not avoid persecution by concealment. In practice the concealment requirement barred the majority of SOGI refugees from obtaining refugee status.

Consequently there was a large increase in the number of SOGI based applications for refugee status and the Home Office started to refuse applications on the grounds that the person is not LGBTI+ at all. SOGI applicants therefore had to prove they are LGBTI+.

In an article relating to SOGI refugees it was stated:

So how do you prove you are gay? No one arrives in the UK with a certificate stating their sexuality, just as no one in the UK has such a certificate. Instead applicants have to rely on the believability of their oral testimony at their Home Office interview. At which stage your own feelings about your sexuality, your reluctance for it to be known publicly, your lack of words related to sexual issues (in English or your own language) all come into play. Plus having to relive the trauma of how you were persecuted.⁴⁴

Unfortunately there was (and still is) a general culture of disbelief and the applicant's own testimony was and is often not enough.

In addition, Home Office officials were indulging in stereotypes and decisions made on the basis that the person did 'not look' LGBTI+ were not uncommon. As I mention above one Home Office decision-maker proudly announced that one of the questions

⁴⁴ Deborah Singer, 'How do you prove you are gay? A culture of disbelief is traumatising asylum seekers' (*The Guardian*, 24 November 2015) <<https://www.theguardian.com/commentisfree/2015/nov/24/gay-asylum-seekers-sexuality-home-office>> accessed 3 October 2016.

he would ask SOGI applicants was whether they liked Oscar Wilde. If the issue were not so serious it would be laughable that a government official would base a decision on whether someone from the far corners of the world knew a 19th century Irish poet. More extreme examples were also common, such as a lesbian being asked by a Home Office official whether she is prepared to take a DNA test to prove she is a lesbian or the frequent suggestion that applicants could not be LGBTI+ because they had children.⁴⁵ Trans applicants were, and still are, frequently not accepted as trans due to the medicalisation of gender and expectations that a trans person would have undergone surgery or be taking hormones.

A significant problem arising from the culture of disbelief was the growing trend of applicants to produce sexually explicit material of themselves to 'prove' they are lesbian, gay or bisexual. Although this was never requested by the Home Office, officials would accept, and view, such material, as did the judiciary in appeals. It is deeply degrading for any person, let alone someone who has fled persecution, to feel the need to produce evidence showing themselves in sexual activity in an attempt to 'prove' their SOGI.⁴⁶ Home Office officials indulged in asking deeply personal and sexually explicit questions in order to 'establish' whether a person is LGBTI+. The officials seemed unaware that sexuality is far more complicated and sophisticated than sexual activity.

⁴⁵ Emily Dugan, 'Home Office says Nigerian asylum-seeker can't be a lesbian as she's got children' (*The Independent*, 3 March 2015) <<http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylum-seeker-can-t-be-a-lesbian-as-she-s-got-children-10083385.html>> accessed 13 October 2016.

⁴⁶ The Vine Report stated:

We understood from staff that explicit material (photographs or video clips), if submitted before the decision, would be returned by the outcome of any appeal. However, during file sampling we found two files with sexually explicit material which had neither been returned nor stored securely.

(n 38) [4.50].

In September 2013, the UK Lesbian and Gay Immigration Group (UKLGIG)⁴⁷ published its report ‘Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims’. The report concluded:

It is acknowledged that it is difficult to make broad conclusions about sexual identity asylum claims based solely on the materials analysed. A particular restraint has been the inability to analyse the exact figures for sexual identity claims and further the reasons for which refugee status is granted by case workers. However, encouraged by the improvements since the last report, this report aims to highlight some of the persisting problems with decision making by Home Office case workers and also with immigration judges who did not form part of the last report. An analysis of both refusal letters and Tribunal decisions reveals that many of the same problems are common to both stages of the decision making process.

With this in mind, this report has aimed to highlight both the improvements and the persisting problems unique to sexual identity asylum claims. Whilst the quality of decisions greatly improved following HJ and HT, case worker training and the issuing of Policy Instructions, the analysis of recent material shows that old problems are creeping back in, with some case workers focusing on sexual practice during the substantive interviews and considering inappropriate material. The consideration of ‘risky’ behaviour and out of date country of origin information is a persisting problem which must be addressed.⁴⁸

In February 2014 *The Guardian* published its article ‘Gay asylum seekers face “humiliation”’ in which it was reported:

⁴⁷ UK Lesbian and Gay Immigration Group (UKLGIG) is the only national organisation dedicated to supporting and advocating for the rights of LGBTI+ persons seeking asylum in the UK.

⁴⁸ (2013) <<http://www.uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 29 October 2016.

A confidential Home Office document leaked to the Observer reveals how one bisexual asylum seeker was asked a series of lurid questions by a Home Office official, including: ‘Did you put your penis into x’s backside?’ and ‘When x was penetrating you, did you have an erection? Did x ejaculate inside you? Why did you use a condom?’⁴⁹

The document reveals that during five hours of questioning in a UK detention centre, the male asylum seeker was also asked: ‘What is it about men’s backsides that attracts you?’ and ‘What is it about the way men walk that turns you on?’

Immigration barrister Colin Yeo also voiced concern: ‘This is the worst I have seen, but these sorts of intrusive, abusive questions are features of Home Office interview practice, particularly in cases involving sexuality. The underlying problem is that officials believe everyone is a liar. It leads to a fundamental lack of respect for the people they are dealing with.’

The Guardian article led to an investigation by John Vine, then the Independent Chief Inspector of Borders and Immigration.⁵⁰ The report, known as the Vine Report, stated:

I found inconsistent application of guidance and training. I was particularly concerned to find that the approach towards sexually explicit material submitted by claimants differed between the DFT [Detained Fast Track] and teams dealing with non-detained cases. While neither area requested explicit material, DFT senior caseworkers advised their own staff to receive it and view it. The Home Office should not be sending mixed signals to claimants, and claimants should not feel that they need to submit such material to ‘prove’ that they qualify for asylum. The

⁴⁹ <<https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>> accessed 29 October 2016.

⁵⁰ John Vine, Independent Investigator of Borders and Immigration, ‘An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation’ (March-June 2014) <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/10/Investigation-into-the-Handling-of-Asylum-Claims-Final-Web.pdf>> accessed 3 October 2016.

Home Office must adopt a consistent approach to this situation.⁵¹

Worryingly, I found some stereotyping of applicants in about a fifth of substantive interviews. Caseworkers must avoid stereotypical expectations in questioning and decision documents.

Although the Home Office would not request sexually explicit material the Vine Report found it was inadvertently encouraged:

We also found inadvertent soliciting of explicit material for the appeal stage in a decision document—‘despite your claim to have been intimate with [name], the pictures you have provided show no more than two males sitting together’. Most refused applicants would understand this to mean that they must submit material at appeal showing more intimacy.⁵²

There have been significant improvements since the Vine Report and the Home Office and the judiciary will no longer accept sexually explicit material as evidence of sexuality. However problems persist. In a recent case which I represented before the Tribunal, the Home Office representative suggested, as the main part of his case, that none of the applicant’s witnesses, who all gave evidence that in their opinion the applicant is a lesbian, could actually say she is a lesbian as none of them had been with the applicant sexually. Not only is the idea abhorrent, but the cross-examination of the witnesses included questions about whether they had ‘been intimate’ with the applicant. This line of questioning was intrusive and in any event missed the point.

In the same case the Home Office representative asked the applicant if she was ‘ashamed and embarrassed’ that she is a lesbian. The representative submitted it was an appropriate question as it is part of the *HJ (Iran)* test (as described above). However, the applicant had never concealed her sexuality, either in her home country or in the UK, and the ‘discretion for own reasons’ was totally irrelevant and not even raised in the refusal letter. It is

⁵¹ *ibid* 2.

⁵² *ibid* [51].

entirely inappropriate therefore to ask a SOGI applicant whether she is ashamed and embarrassed of her sexuality. The example illustrates the ongoing battle that SOGI applicants have in the asylum system.

Nevertheless, the processing of SOGI refugees is undoubtedly far better now, but there remains a long way to go.

Conclusion

The ability for SOGI refugees to be recognised as such has improved dramatically since the Supreme Court's judgment of *HJ (Iran)* in 2010.

The fact that SOGI is recognised as immutable characteristics and that SOGI applicants are not obliged to conceal their SOGI has been seminal in ensuring that persons persecuted due to their SOGI are not sent back to persecution or a life of concealment in their countries of origin.

SOGI refugees are now able to remain in the UK and the EU to live their lives openly and without fear of persecution.

As explained in this article, problems in the recognition of SOGI refugees still exist but the law and procedure are improving all the time. Despite the problems I have identified in this article, as a trustee of UKLGIG, as a barrister and as a person with an LGBTI+ identity, I am satisfied that the vast majority of SOGI refugees from countries where there is unequivocal persecution will be recognised as refugees. I am confident too that the majority of refugees from countries where persecution is not so equivocal, will also be recognised as refugees, but I would like there to come a time when such recognition is guaranteed and when the Home Office and the Tribunal cannot hide behind such red herrings as lack of prosecutions or 'cultural norms'.

In all however we have come a very long way since 1999 when SOGI refugees were first recognised in the UK as coming under the protection of the Refugee Convention. Despite the advances in the UK, Europe and other countries around the world, such as South Africa and Brazil, homophobia and particularly transphobia, remain significant problems and the UK is certainly not immune. Although

LGBTI+ persons may still face discrimination in the UK, we are not persecuted, and we owe it to our LGBTI+ brothers and sisters, and all those in-between or beyond, to ensure that they can live their lives without the fear of being persecuted for who they are.

Indeed, the Refugee Convention says we have to.