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Many rivers to cross: the recognition of LGBTQI asylum in the UK¹

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Abstract

The Refugee Convention was not written with the persecution of lesbian, gay, bisexual, transgender, queer or questioning and intersex (LGBTQI) people in mind. This article shows the dilemmas this creates for LGBTQI asylum seekers and their advocates when establishing the case for protection. It uses the UK experience as an example and brings the literature on this topic up to date with reference to recent cases with implications for LGBTQI applicants. While there has been a welcome shift to recognising that LGBTQI persecution is a legitimate basis for asylum, contradictions and tensions between UNHCR, European and UK guidelines and instruments, as well as between UK policy and practice, have resulted in a lack of consistency and fairness in the treatment of LGBTQI asylum seekers. The article identifies three specific areas of concern and goes on to show what happens when they converge, using a case that exemplifies some of the problems – *AR (AP), against a decision of the Upper Tribunal (Immigration & Asylum Chamber)* [2017] CSIH 52. It concludes by suggesting a shift in the focus of questioning from the identity of the asylum seeker to the persecution in the country of origin as a possible basis for fairer treatment of LGBTQI asylum claims.

1. Introduction

It is recognised that the Refugee Convention of 1951 was not created with LGBTQI persecution in mind.² The archetypal refugee is a single young male political activist with no

¹ I am grateful to my colleagues at the University of Sussex, Nuno Ferreira, Darcy Leigh and Samantha Velluti for their valuable comments on a previous version of this article.

² 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* (2012) <<http://www.refworld.org/docid/50348afc2.html>> accessed 21 April 2017; S Jansen and T Spijkerboer (2011) *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Amsterdam: Vrije Universiteit Amsterdam 2011) 1.

defined sexual identity – which is to say implicitly heterosexual.³ However, along with growing recognition of LGBTQI rights, there has also been recognition that homophobia and transphobia are reasons why people have to flee their home countries. The challenge then is to recognise sexual minorities' narratives of persecution within a system that was designed for other kinds of abuse, but which is the best international protection mechanism that presently exists. This article considers how this has happened in the UK, where guidance and practice in this area has developed on an ad hoc basis and is often clumsy and inconsistent. This article identifies the implications of this for individuals fleeing persecution on the grounds of their sexual orientation and/or gender identity. It begins by contrasting the increasingly positive public discourse on LGBTQI rights with the increasingly negative public discourse on asylum and immigration to provide the context for the developments discussed subsequently. It goes on to identify three specific areas where LGBTQI claimants encounter difficulties: the 'discretion' test; contradictions and inconsistencies in the application of Country of Origin Information (COI); and finally in relation to membership of a 'particular social group' and credibility more broadly. While these problems have been identified and analysed in the literature,⁴ this article takes a new direction in considering

³ V Neilson, 'Homosexual or Female? Applying Gender-based Asylum Jurisprudence to Lesbian Asylum Claims' (2005) 16 Stanford Law & Policy Review, 419-420.

⁴ S K Arnold, 'Nexus with a Convention Ground: The Particular Social Group and Sexual Minority Refugees in Ireland and the United Kingdom' (2012) 1 Irish Law Journal 93; L Berg and J Millbank, 'Developing a jurisprudence of transgender particular social group' (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887> accessed 2 February 2017; A Briddock, 'The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure' (2016) 4(1) Birkbeck Law Review 123; C Costello, 'Safe Country? Says Who?' (2016) 28 (4) International Journal of Refugee Law 601; J Dawson and P Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) International Journal of Refugee Law 292; J L Gartner, '(In)credibly Queer: Sexuality-based Asylum in the European Union' (2016) <<http://www.humanityinaction.org/knowledgebase/578-in-credibly-queer-sexuality-based-asylum-in-the-european-union/print>> accessed 7 November 2016; J C Hathaway and J Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 315; N LaViolette, 'Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process' (2009) 13(2-3) The International Journal of Human Rights 437; R A Lewis, '"Gay? Prove it": The politics of queer anti-deportation activism' (2014) 17 (8) Sexualities 958; A Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17(2) Human Rights Quarterly 213; J

them in relation to the UK government's published materials on the treatment of LGBTQI asylum claims, interrogating these materials for flaws and inconsistencies. It shows how the concurrence of these three problems leads to systemic inconsistency and unfairness in the treatment of LGBTQI claimants. It concludes by advocating a shift in the focus of questioning from the identity of the asylum seeker to the persecution in the country of origin in order to create a fairer asylum system.

The article uses the acronym LGBTQI throughout, asking readers to understand it in its broadest and most inclusive sense. However, the author acknowledges that the LGBTQI acronym conflates many different kinds of identity and identity politics, while at the same time excluding others or imposing artificial categories. In relation to asylum there is a particular problem in that many case studies labelled LGBTQI focus on gay male asylum seekers and the experiences of lesbian, bisexual, trans, and intersex individuals are unheard. That problem is reflected in this article, where gay men are the claimants in many of the cases discussed.

In UK policy, sexual minority asylum seekers are generally homogenized under the acronym LGBTI, conflating what may be very different experiences, identities and grounds for claiming protection.⁵ It may be more difficult for lesbian claimants to convince decision makers that they are entitled to international protection, as many of the most concrete stereotypes relate to gay men. Indeed, 'lesbian sexuality is either invisible or it is treated in

Millbank, 'From discretion to disbelief: Recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 (2-3) *The International Journal of Human Rights* 391; J Millbank, 'The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21(1) *International Journal of Refugee Law* 1; Neilson (n 3); S Rehaag, 'Bisexuals need not apply: A comparative appraisal of refugee law and policy in Canada, the United States, and Australia' (2009) 13 (2-3) *The International Journal of Human Rights* 415; J Wessels, 'HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain' (2013) 24(4) *International Journal of Refugee Law* 815; J Wessels, 'Publicly Manifested—Fatefully Determined—Invariably “Discreet”: The Assessment of Sexuality-Based Asylum Claims in Germany and France' (2017) 29(2) *Canadian Journal of Women and the Law* 343.

⁵ Home Office, *Asylum Policy instruction: Sexual orientation in asylum claims*, Version 6.0 (Home Office, 2016), 36; UNHCR (n 3) 2.

a manner verging on the pornographic.’⁶ There is little Country of Origin Information about the treatment of lesbians and bisexual women,⁷ and bisexual asylum seekers have a low success rate and are often disbelieved, particularly if they have children, or have been married.⁸

It has been convincingly argued that:

The question of who counts as a ‘genuine lesbian’ becomes apparent most dramatically in the asylum process where women have to ‘prove’ that they are indeed lesbian if they claim asylum on grounds of sexuality. The country evidence that is used by Home Office officials and judges often draws on information that has been created for white middle-class gay travellers.⁹

There is even less information available about transgender asylum seekers and their experiences in the UK – and none to be found about intersex claims or the experiences of intersex asylum seekers.¹⁰ These problems are addressed in part 3.2 below.

2. Recognising LGBTQI asylum in the UK

⁶ Lewis (n 4). Lewis argues that ‘... heteronormative stereo-types about lesbian sexuality based on the assumption that lesbians are naturally more “discreet” about their sexual orientation than gay men become the basis for excluding queer female migrants from accessing refugee protection.’ 966.

⁷ Independent Chief Inspector 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’ (the Vine report, 2014), 31.

⁸ Lewis (n 4) 965; Rehaag (n 4).

⁹ N Held, ‘What does a ‘genuine lesbian’ look like? Intersections of sexuality and ‘race’ in Manchester’s Gay Village and in the UK asylum system’ in Francesca Stella, Yvette Taylor, Tracey Reynolds and Antoine Rogers, (eds.) *Sexuality, citizenship and belonging: Trans National and Intersectional Perspectives* (Routledge, London, 2016), 145.

¹⁰ The APPG Global LGBT Rights report stated that ‘[w]hile many of the issues facing intersex people intersect with the concerns addressed in this inquiry, we felt that due to their distinctiveness they require an approach that is beyond the scope of the group. We however remain open to investigating the issues facing intersex people in the future.’ All Party Parliamentary Group on Global LGBT Rights, *The UK’s Stance on International Breaches of LGBT Rights* (APPG on Global LGBT Rights, 2016) 13.

Policy, discourse and public opinion about, on the one hand, gay rights, and on the other hand, asylum, have taken different paths in the UK since the end of the 20th Century. While formal rights for LGBTQI people have increased alongside support for those rights,¹¹ the right to claim asylum and the entitlements of asylum seekers have both been increasingly restricted.¹² In 2016, the Council of Europe's Human Rights Commissioner expressed concern about the effect of negative public rhetoric towards migrants, particularly irregular migrants, citing the then Home Secretary Theresa May's comment in 2012 that the Government wished to 'create here in Britain a really hostile environment for illegal migration'.¹³ The Commissioner identified 'a dominant political debate in the UK characterised by alarmism'.¹⁴ The UK is in 17th place out of the 28 EU Member States in the number of asylum applications received and, in 2017, the UNHCR urged the UK to increase the number of refugees resettled annually to at least 10,000.¹⁵ Floating in-between and not fully recognised within either the LGBTQI or the asylum policy agenda, the rights of LGBTQI refugees have taken a distinct path – as this article demonstrates.

UK officials and leaders frequently emphasise the country's proud history of supporting refugees and its commitment to continuing to do so.¹⁶ In response to the crisis in Syria (but

¹¹ Since the New Labour Government of 1997, legislation has included the Employment Equality (Sexual Orientation) Regulations 2003, the Civil Partnership Act 2004, the Gender Recognition Act 2004, and the Marriage (Same Sex Couples) Act 2013.

¹² A Burrige and N Gill, 'Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals' (2017) 49 *Antipode*, 23; European Council on Refugees and Exiles and Refugee Council, 'Country Report: United Kingdom. 2016 Update' (ECRE, 2016).

¹³ Interview with Theresa May, *The Telegraph*, 25 May 2012.

<<http://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>> accessed 8 February 2017.

¹⁴ Commissioner for Human Rights, Council of Europe, Memorandum on the Human Rights of Asylum Seekers and Immigrants in the United Kingdom (2016). CommDH(2016)17; Criminal Justice, Borders and Citizenship Research Paper No. 2759269: <https://ssrn.com/abstract=2759269>.

¹⁵ Commissioner for Human Rights, Council of Europe (n 14); UNHCR, 'UNHCR's priorities for the UK Government' (UNHCR, 4 May 2017) <<http://www.unhcr.org/590b09ca4.html>> accessed 12 August 2017.

¹⁶ As Home Secretary, Theresa May said, '[w]e have a proud history of relieving the distressed and helping the vulnerable – whether it's through our military, our diplomacy, our humanitarian work or our support for

in place of participating in a common EU initiative to accept more refugees), the UK Government launched the Syrian Vulnerable Persons Resettlement Scheme to resettle 20,000 Syrians by 2020. The programme takes people identified as vulnerable by the UNHCR, including persons at risk due to their sexual orientation or gender identity (although figures for the number of LGBTQI people accepted on the scheme are unavailable).¹⁷ However, this initiative needs to be seen in the context of wider policy and the conflation of asylum and immigration to represent an on-going threat to UK border and population control.¹⁸

The precise degree to which this affects people fleeing homophobia and, in particular, transphobia, is unknown. As of 2011, staff were instructed to flag claims based on sexual orientation (though not gender identity) on the Home Office database, but the Vine report in 2014 found a 'woefully poor level of compliance' in this regard, with only 36% of the 116 sexual orientation asylum cases identified by John Vine, the Chief Inspector of Borders and Immigration, flagged as such.¹⁹ The Home Office first published 'experimental' statistics for

refugees, let us continue this tradition. Let Britain stand up for the displaced, the persecuted and the oppressed. For the people who need our help and protection the most, let Britain be a beacon of hope.' (Speech to Conservative Party Conference, 6 October 2015). As Prime Minister she has said 'Britain will continue to meet our promises to the poorest in the world, including through humanitarian efforts to support refugees, ...' Oral statement to Parliament, 7 September 2016, <<https://www.gov.uk/government/speeches/g20-summit-pm-commons-statement-7-september-2016>> accessed 23 July 2017. Home Office guidance on 'Refugee Leave' published in March 2017 states '[t]he UK has a proud record of providing protection for those who genuinely need it, in accordance with our obligations under the Refugee Convention': <<http://www.statewatch.org/news/2017/mar/uk-home-office-refugee-settlement-limits-policy-3-17.pdf>> accessed 23 July 2017.

¹⁷ LGBTQI people do not automatically qualify as vulnerable.

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/472020/Syrian_Resettlement_Fact_Sheet_gov_uk.pdf> accessed 23 July 2017.

¹⁸ UK legislation includes the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, and the Immigration Acts 2014 and 2016. The details of asylum policy are contained in section 11 of the Immigration Rules <<https://www.gov.uk/guidance/immigration-rules>> accessed 23 July 2017; C. Gabrielatos and P Baker, 'Fleeing, Sneaking, Flooding. A Corpus Analysis of Discursive Constructions of Refugees and Asylum Seekers in the UK Press, 1996-2005', (2008) 36, 1 Journal of English Linguistics 5-38.

¹⁹ Independent Chief Inspector of Borders and Immigration (2014) (n 7), 43.

asylum claims based on sexual orientation in November 2017, after pressure to do so dating back to at least 2009²⁰ and repeated questions in parliament.²¹ However, the data relates only to sexual orientation and not gender identity. It does not show whether sexual orientation was the sole basis of an application, nor does it indicate whether sexual orientation had any bearing on the final determination.

Nevertheless, the figures, which cover the period 1 July 2015 to 31 March 2017, show not only the countries with the highest number of applications where sexual orientation was raised as a factor – namely Pakistan, Nigeria and Bangladesh – but also disaggregate the number of appeals with a sexual orientation element that were allowed and dismissed by country. The figures show that most appeals by Ugandan and Iranian LGB applicants were allowed. Sexual orientation was raised as a basis of 6% of claims made during the period covered – very different from the figure of 1.4% suggested by the Home Office on the basis of cases flagged on the database cited in the Vine report in 2014.²² Despite their weaknesses, the ‘experimental’ statistics for the first time provide legal practitioners, advisors and academics with a baseline for assessing discrepancies in decision making in cases involving lesbian, gay and bisexual applicants.

3. Decision making in LGBTQI asylum claims

²⁰ ‘The Home office should collate and publish data on the number, chosen gender, age and country of origin of those claiming asylum on the basis of sexuality or gender identity’ (M Bell and C Hansen, ‘Over not Out. The housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers’, Metropolitan Support Trust, 2009, 64).

²¹ Home Office, ‘Asylum claims on the basis of sexual orientation. Experimental statistics’ (November 2017), Home Office; UKLGIG, ‘Submission to Women and Equalities Committee Inquiry into Trans Equality: Needs and Experiences of Trans Asylum Seekers’ (2015) 4; Asylum: LGBT People: Written question - HL1439, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-09-07/HL1439/>; questions by Lord Scriven on 2 December 2015 HL4122, Lord Storey on 6 June 2016 HL433, Lord Scriven on 17 November 2016 HL3335, Lord Scriven on 30 March 2017 HL6482, Lord Scriven on 7 September 2017 HL1439.

²² Independent Chief Inspector of Borders and Immigration (2014) (n 7) 43.

In the context of the above setting, this article now identifies three problematic aspects of LGBTQI asylum decision making in the UK, relating to 'discretion', country of origin information and credibility. It is argued that these three aspects may result in decisions that are inconsistent and unfair.

3.1 'Discretion'

The story of LGBTQI asylum recognition in the UK is to a large extent the story of Home Office and judicial interpretation of 'discretion' – a term that has taken on a life of its own and distinct meaning in this context.

Before 1999, LGBTQI applicants had difficulty meeting the criteria for Refugee Status following a High Court ruling stating that they did not constitute a particular social group because their only common characteristic of sexual orientation was normally concealed.²³ LGBTQI applicants are now generally recognised as a particular social group as a result of the House of Lords judgment in the case of *Shah and Islam* where it was found that women in Pakistan constituted a particular social group.²⁴ The same approach is applied by the UK government to gender identity and sexual orientation.²⁵ This is corroborated by the EU asylum Qualification Directive affirmation that '...depending on the circumstances of the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'.²⁶

In the period between 1999 and 2010, having been recognised as a particular social group, LGBTQI asylum seekers were likely to be refused not only on grounds of credibility, but also or in the first instance because they could return to their country of origin and live 'discreetly'. This was known as the 'reasonably tolerable' requirement, according to which the key question was whether the individual 'had adapted and would again adapt his

²³ *R v SSHD ex parte Binbasi* [1989] Imm AR 595 (QBD).

²⁴ *Shah and Islam* [1999] UKHL 20.

²⁵ UK Visas and Immigration, 'Guidance. Transgender identity issues in asylum claims' (UKVI, 2011), 11; The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 6 (e).

²⁶ Directive 2004/83/EC (Qualification Directive), art 10(1)(d).

behaviour so as to avoid persecution in circumstances wherein it amounted to his preferred way of dealing with the problem and a way which was reasonably tolerable to him'.²⁷

This thinking led to tautologies such as the 2005 case of an Algerian gay asylum seeker where it was stated that 'because in Algeria there are no gay rights, there are no opportunities for displaying homosexuality with those who are of a similar mind, and it will be impossible for him not to be discreet'.²⁸ Circular thinking appears in another case:

It is the respondent's position that self-restraint due to fear will be persecution only if it is such that a homosexual person cannot reasonably be expected to tolerate such self-restraint. Where a person does in fact live discreetly to avoid coming to the attention of the authorities he is reasonably tolerating the position.²⁹

Here, living a life of secrecy is taken as evidence that it is tolerable to do so.

In 2010, the UK Supreme Court rejected this kind of argument.³⁰ In the case of *HJ (Iran)* it was for the first time recognised that 'to require an applicant to engage in self-denial was to require him to live in a state of self-induced oppression.'³¹ Sexual identity was accepted as being 'a fundamental characteristic and an integral part of human freedom'.³² The effect of this significant attitudinal step forward was, however, undermined because 'discretion' thinking was reformulated in a new test asking: Is the applicant gay or likely to be perceived as gay? If so, are openly gay individuals persecuted in the individual's country of origin? If they are, what would the individual do if returned? If s/he would live openly and be exposed to persecution, then there is a well-founded fear of persecution even if the risk could be

²⁷ *J v SSHD* [2006] EWCA Civ 1238; para 13; Wessels (2013) (n 4) 822.

²⁸ *B v. Secretary of State for the Home Department* [2007] EWHC 2528, para 20 (although the case was remitted for redetermination).

²⁹ *HJ v. Secretary of State for the Home Department* [2008] UKAIT 00044 (18 April 2008), para 10.

³⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

³¹ *Ibid* para 32.

³² *Ibid* para 33.

avoided through 'discretion'. However, if the individual would live 'discreetly', the next question is why:

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them...

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution, which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted....³³

Even at the time, this tortuous test was criticised as both unreasonable and unworkable, with the Equality and Human Rights Commission, intervening in the case, pointing out that someone who has claimed asylum on the grounds of sexual orientation has effectively 'outed' themselves, precluding the option of returning to live 'discreetly'.³⁴ Moreover, in the years immediately following the 2010 ruling, 'discretion' thinking was rejected in UNHCR and EU guidance and judgments. The UNHCR Guidelines on International Protection No 1, published in 2012, state:

The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined

³³ Ibid para 82.

³⁴ Ibid para 60, 37. See also R Goodman, 'Asylum and the concealment of sexual orientation: where not to draw the line', (2012) 44 New York University Journal of International Law & Politics, 422.

to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion.³⁵

A year later, the Court of Justice of the European Union (CJEU) *X, Y and Z* ruling found not only that '... an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution'³⁶ but also:

As regards the restraint that a person should exercise, in the system provided for by the Directive, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution.³⁷

At no point does the CJEU advocate the *HJ (Iran)* approach in which the decision maker is required to imagine how a claimant *would* behave. Rather, the only question is whether someone might reasonably fear persecution – something that is certainly the case in a country where homosexuality is criminalised.

Following the CJEU *X, Y, and Z* judgment, the International Commission of Jurists (ICJ) argued that the 'ultimate question is whether the individuals concerned would face a real risk of persecution if they chose to live openly on return' and decision makers should not go beyond this issue. The ICJ pointed out that in *X, Y and Z*, which post-dated the Supreme

³⁵ UNHCR, 'Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees (HCR/GIP/02/01)' (2002), para 32, 9. See also *O.S. v. Switzerland* Application no. 43987/16 – Written Submissions on behalf of the Aire Centre (Advice on Individual Rights in Europe), the European Council on Refugees and Exiles (ECRE), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and the International Commission of Jurists (ICJ), 2017.

³⁶ Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, para 71.

³⁷ *Ibid*, para 72.

Court decision, there is no suggestion that adjudicators should ask the questions posed in the Supreme Court ruling.³⁸

Some scholars have also criticised the judgment in *HJ (Iran)*, and from opposing quarters: Hathaway and Pobjoy view the decision, and the earlier Australian ruling that informed it,³⁹ as excessively liberal:

Clearly, going to concerts, drinking cocktails, or engaging in “boy talk” with female friends should not attract persecution. But it does not *necessarily* follow that a grant of asylum is owed where risk follows only from a relatively trivial activity that could be avoided without significant human rights cost.⁴⁰

While applauding the rejection of a ‘discretion’ requirement, they argue that in both these cases, the courts misapplied the Refugee Convention to protect ‘a boundless range of activities’ in relation to claims based on sexual orientation, thus creating a schism with claims based on other grounds such as religion or political opinion.⁴¹

In contrast, Wessels finds the court’s decision flawed for different reasons: if openly gay people are persecuted in a country, then it is difficult to imagine that concealment would *not* be related to that fact and therefore, in her view, the test posited by the Supreme Court ‘risks coming down to a backward return to “discretion”’.⁴²

Despite international rulings and guidance, and international doctrinal debate, following the 2010 Supreme Court decision, the UK authorities have consistently adhered to ‘discretion’ thinking in all official statements and written guidance. After the ruling, the Home Secretary said that with immediate effect ‘... asylum decisions will be considered under the new rules

³⁸ International Commission of Jurists (ICJ), ‘Refugee Status Claims Based on Sexual Orientation and Gender Identity - A Practitioners’ Guide’ (ICJ, 2016) 95.

³⁹ *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473.

⁴⁰ Hathaway and Pobjoy (n 4) 335.

⁴¹ *ibid* 384.

⁴² Wessels (2013) (n 4) p838.

and the judgment gives an immediate legal basis for us to reframe our guidance for assessing claims based on sexuality, taking into account relevant country guidance and the merits of each individual case'.⁴³

As an example of the application of this reasoning, a decision letter from the Home Office regarding the case of a woman from Malawi sent shortly after the new test was introduced by the Supreme Court decision, said:

I am satisfied the appellant is at least bisexual... The country evidence shows Malawi to be a dangerous country for practising homosexuals. What would she do if removed there? Homosexuality is not a crime in the United Kingdom and there is no bar to anybody who is gay to be open about their sexual orientation. The appellant has chosen to hide it. That is her prerogative, her free choice. If she can hide it in the United Kingdom, where tolerance rules (very effectively it would seem), then she can hide it in Malawi.⁴⁴

The irrationalities of 'discretion' thinking in case law are mirrored in government policy and Home Office guidance for caseworkers. The 'discretion' test is enshrined in the Asylum Policy Instruction on 'Sexual orientation issues in the asylum claim' updated in 2016. The 'discretion' reasoning is replicated in most Home Office country guidance, including guidance on Afghanistan, published in February 2017, which states:

If it is found that the person will in fact conceal aspects of his or her sexual orientation/identity if returned, decision makers must consider why the person will do so. If this will simply be in response to social pressures or for cultural or religious

⁴³ Home Office, 'Sexuality judgement welcomed' (7 July 2010)

<<https://www.gov.uk/government/news/sexuality-judgement-welcomed>> accessed 23 July 2017.

⁴⁴ Refusal letter quoted in UK Lesbian and Gay Immigration Group (UKLGIG), 'Missing the Mark. Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (UKLGIG, 2013) 24.

reasons of their own choosing and not because of a fear of persecution, then they may not have a well-founded fear of persecution.⁴⁵

And in response to a parliamentary question on 15 March 2017, Home Office Minister Baroness Williams of Trafford said:

Our guidance fully complies with the Supreme Court judgement in *HJ (Iran)* which held that a person should not be required to 'modify their beliefs' or 'act discretely' in order to avoid persecution; if, on the other hand, they choose to do so for other – for example, private – reasons, then they may not be a refugee.⁴⁶

In 2017, this interpretation of *HJ (Iran)* was confirmed by the judgment in the case of *LC (Albania)*,⁴⁷ a judgment that was troubling in two ways. Firstly, the government acknowledged that it had been wrongly applying a previous case that had been set aside as the basis for refusing Albanian asylum claims between 2011 and 2016, meaning that an unknown number of Albanian people had been wrongly refused – and in some cases returned – on the basis that only those Albanians who go to a particular 'gay cruising' park in Tirana are at risk of persecution.⁴⁸

Secondly, the judge rejected the applicant's argument that, to be consistent with European Union law, only the first two questions from the 'discretion' test should apply. The applicant had argued that decision makers should stop at asking 1) Is the applicant gay or likely to be perceived as gay; and 2) If so, are openly gay individuals persecuted in the individual's country of origin? This assertion was rejected and Justice Hinkinbottom stated that the legal analysis in the *HJ (Iran)* was fully in line with European Union law, and that the Supreme Court distinction between concealment for fear of persecution and concealment for other

⁴⁵ Home Office, 'Country Policy and Information Note Afghanistan: Sexual orientation and gender identity' (Home Office, 2017).

⁴⁶ Asylum: Afghanistan: Written question - HL5742 <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-03-01/HL5742/>> accessed 23 July 2017.

⁴⁷ *LC (Albania) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 351.

⁴⁸ *MK (Lesbians) Albania CG* [2009] UKAIT 00036.

reasons is 'principled and clearly right'.⁴⁹ The judge emphasised the clear distinction between concealment 'in response to social pressures or for cultural or religious reasons of his own choosing', stating that the distinction must be right because 'such social pressures are present in all countries, including the United Kingdom'.⁵⁰ This could be read as an attempt to affirm a clear line between persecution in refugee-producing countries and lesser discrimination in refugee-receiving countries – such as the UK.

The case illustrates the difficulty facing decision makers, representatives and judges interpreting the 'discretion' test. The test states that if fear of persecution is a 'material' reason for an applicant living discreetly on their return, then their application should be accepted. However, it also says that if living discreetly is 'simply' because of social pressures then it should be rejected. A narrow reading of this wording assumes that individuals have single motives for their behaviour. They will conceal their sexuality *either* because they fear persecution *or* because they are responding to social pressures. Yet, in a country where sexual minorities are persecuted, it is more likely that the two motives will co-exist in the individual psyche. This is consistent with the requirement that fear of persecution merely be a 'material' reason for 'discretion'. Applying this approach, it becomes clear that 'simply' should be understood to mean 'only' in the relevant paragraph repeated here:

If the tribunal concludes that the applicant would choose to live discreetly *simply* because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. ... If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution [emphasis added].⁵¹

⁴⁹ *LC (Albania) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 351, para 53.

⁵⁰ *Ibid* para 52 (viii).

⁵¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, para 82.

On this reading, it is therefore clear that an individual can only be returned if fear of persecution is *not* one of the reasons why they would conceal their sexual orientation. It is difficult to imagine any circumstances where this would be the case for an individual coming from a country where homosexuals (the language of the court at the time) are persecuted and who has chosen to claim asylum on that basis. One must then consider that this is a hypothetical situation, based on an official imagining how someone with very different life experiences from his or her own would behave in an imaginary situation, and a judge's subsequent interpretation of that imagining. From this perspective, the entire process appears so subjective that using it as the basis for making a decision as critical as the granting of refugee status is difficult to justify.

The above discussion shows how with the evolution of 'discretion' thinking, critical asylum decisions now turn on the subtlest of interpretations of a single word. Described as a 'euphemistic misnomer' by international legal and NGO experts on LGBTQI asylum,⁵² the term 'discretion' is indicative of the confusion about LGBTQI identity in the context of asylum. This is discussed further in part 3.3 below.

3.2 Country of origin information (COI)

While the 'discretion' debate is important it is only one part of a larger picture. Equally critical for advocates and NGOs are the failings in country of origin information (COI).⁵³ All asylum applications should be assessed individually on their merits.⁵⁴ However, it is clear

⁵² *O.S. v. Switzerland* Application no. 43987/16 – Written Submissions on behalf of the Aire Centre (n 43) 1.

⁵³ Costello (n 4), 614; R Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20(4) *International Journal of Refugee Law*, 523; Asylum Aid, *Inspection of Asylum Casework of the Independent Chief Inspector of Borders and Immigration*, Asylum Aid response – 8th June 2017, 8 June 2017 <<http://www.refworld.org/docid/5948f32f4.html>> accessed 4 April 2018, 9; Independent Chief Inspector of Borders and Immigration (2018) *An inspection of the Home Office's production and use of Country of Origin Information. April – August 2017*. The findings of this last item were based on a methodology that included convening a meeting of NGO stakeholders, attending a meeting of the Immigration Law Practitioners' Association, and calling for written evidence from a variety of stakeholders (5-6).

⁵⁴ Home Office (n 5) 35.

from the Home Office statistics that LGBTQI asylum claims from some countries are more likely to be refused.⁵⁵

To aid UK caseworkers in their decisions, there is a Country Policy and Information Team which produces Country Policy and Information Notes – CPINs. There are criticisms of the structure of CPINs, which combine material labelled ‘policy’ with factual country information with the likely result that decision makers under pressure of time will be directed towards a ‘predetermined outcome’.⁵⁶ There are CPINs specifically on sexual orientation and gender identity-based claims for a number of countries of LGBTQI persecution, but not all. In addition to the gaps in countries covered, there have been concerns that the information is often out of date and sometimes internally inconsistent.⁵⁷ Decision makers have also been found to use the experiences of LGBTI foreign tourists inappropriately to determine whether a country persecutes its LGBTI nationals.⁵⁸ Moreover, much of the guidance confirms the approach to ‘discretion’ discussed above.⁵⁹

There is little correlation between countries where homosexuality is criminalised, countries on the Home Office list of ‘safe’ countries,⁶⁰ and the Home Office’s published country

⁵⁵ Home Office (n 21).

⁵⁶ Independent Chief Inspector of Borders and Immigration (2018) (n53) 3.

⁵⁷ Asylum Aid, ‘Inspection of Asylum Casework of the Independent Chief Inspector of Borders and Immigration Asylum Aid response – 8th June 2017’. A report by the Independent Chief Inspector of Borders and Immigration in 2018 found that ‘due to a combination of factors including the costs, [country officers] no longer had access to certain resources such as Reuters, Africa Confidential and (part of) allAfrica.com. CPIT has only one remaining subscription which it is considering renewing. Country Officers’ access to expert academic reports was also limited as these usually required a subscription: Independent Chief Inspector of Borders and Immigration (2018) (n53) 23.

⁵⁸ Independent Chief Inspector of Borders and Immigration (2018) 57.

⁵⁹ Home Office, ‘Country Policy and Information Note. Uganda: Sexual orientation and gender identity’ (Home Office, 2017), 9, 3.1.2.

⁶⁰ Claims of applicants from designated ‘safe’ countries where it is judged that there is ‘no serious risk of persecution’ will automatically be designated ‘clearly unfounded’ – meaning there is no right of appeal from within the UK – unless the caseworker finds reasons to designate the application otherwise (Home Office, ‘Certification of protection and human rights claims under section 94 of the Nationality, Immigration and

information and guidance. For example, despite the Government raising concerns about human rights and violence against LGBTQI people with the Bangladeshi High Commissioner in 2016 following the murder of a gay journalist,⁶¹ the updated Home Office guidance for Bangladesh, published in September 2017, states:

Evidence of violence by non-state actors against LGBTQI people is limited, with harassment and discrimination more likely experiences. In general the treatment of LGBTQI persons in Bangladesh does not amount to serious harm or persecution, even when taken cumulatively. Each case must however be considered on its facts.⁶²

Even within a single document there are inconsistencies. In one of the most recent country policy and information notes on sexual orientation on Afghanistan, statements by the Foreign and Commonwealth Office (FCO) in the annex depict Afghanistan as a country where homosexuality is 'wholly taboo' and where there is 'very little space... in any location, to be an individual that openly identifies as LGB&T'.⁶³ Despite this, the revised Home Office guidance, dated only four days after the FCO correspondence, claims that 'in the absence of other risk factors, it may be a safe and viable option for a gay man to relocate to Kabul, though individual factors will have to be taken into account'.⁶⁴ The FCO letter also expresses deep concerns at the implication that sexual abuse of boys implied acceptance of some homosexual conduct. Yet the main body of the guidance refers to evidence that 'many Afghan men may have had some homosexual experience without having a homosexual

Asylum Act 2002 (clearly unfounded claims)', (Home Office, 2017); European Council on Refugees and Exiles and Refugee Council (n 12) 51.

⁶¹ 'Bangladesh LGBT editor hacked to death', BBC news 25 April 2016 <<http://www.bbc.co.uk/news/world-asia-36128729>> accessed 23 July 2017; HC debate 24 May 2016 Vol 611, Col 382 <<https://hansard.parliament.uk/commons/2016-05-24/debates/16052423000012/Bangladesh>> accessed 23 July 2017.

⁶² Home Office, 'Country Policy and Information Note Bangladesh: Sexual orientation and gender identity Version 2.0' (2017), 10, 3.1.12.

⁶³ Home Office, 'Country Policy and Information Note on Afghanistan: Sexual Orientation and Gender Identity' (Home Office January 2017), 22.

⁶⁴ Ibid 9.

preference. A careful assessment of the credibility of a claim to be a practising homosexual is particularly important'.⁶⁵ The 'homosexual experience' referred to here is evidently 'bacha bazi – sexual relationships between men in power and adolescent boys', which is mentioned earlier in the guidance.⁶⁶ This suggests that an asylum seeker claiming to be gay may in fact be the victim of child sexual abuse. The guidance does not make this explicit, or say that, in such a situation, the boy or man might still be eligible for protection on different asylum or humanitarian grounds. It exemplifies the problems identified by the Chief Inspector of Borders and Immigration in conflating 'policy' with country information.⁶⁷

There are also contradictions between Home Office instructions and widely reported events. South Africa is on the list of countries from which claims are presumed to be unfounded despite reports of lesbian women undergoing 'corrective rape'.⁶⁸ There are also internal contradictions between different Home Office publications: claims by Gambian men are presumed to be unfounded according to one document,⁶⁹ yet more recent country-specific guidance states:

Where a claim is based on a person's sexual orientation or gender identify [sic], it is not likely to be certifiable as 'clearly unfounded' under section 94 of the Nationality, Immigration and Asylum Act 2002.⁷⁰

This is presumably because – as the guidance states – 'consensual same-sex sexual activity is illegal in the Gambia and carries a sentence of between 5 and 14 years in prison'; a new

⁶⁵ Ibid 8; Asylum Aid (n 57) 9.

⁶⁶ Home Office (n 63), 5.

⁶⁷ Independent Chief Inspector of Borders and Immigration (2018) (n 53) 43.

⁶⁸ Patrick Strudwick, 'Crisis in South Africa: The shocking practice of "corrective rape" - aimed at "curing" lesbians', *The Independent*, 4 January 2014. <<http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html>> accessed 23 July 2017.

⁶⁹ Home Office (2017) (n 60) 26.

⁷⁰ Home Office, 'Country Information and Guidance. The Gambia: Sexual orientation and gender identity Version 1.0' (Home Office, 2016) 7.

offence of ‘aggravated homosexuality’ punishable by life imprisonment was created in 2014;⁷¹ inflammatory homophobic government rhetoric is frequently reported; and internal relocation is not a reasonable option.⁷²

Picking up the earlier question of ‘discretion’, the guidance on Iran shows the illogical thinking in relation to internal relocation. It points out that ‘[t]he Islamic Penal Code (IPC) criminalizes same-sex sexual relations. Punishments range from lashes to the death penalty’.⁷³ Yet individuals are said to be able to relocate and move freely if they do not reveal their sexual orientation and keep a low profile.⁷⁴ The response of most individuals will be that any rational person would fear persecution in a country where open expression of their identity is a capital crime. Whether or not they would choose to be discreet for any number of other reasons is a separate issue to the question of a well-founded fear of persecution.

Similarly, the guidance for Jamaica – until recently on the list of ‘safe’ countries despite a UK Court of Appeal ruling in 2015 that Jamaica could not be considered a ‘safe country’⁷⁵ – notes that Jamaica’s Offences Against the Person Act of 1864 states: ‘Whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.’⁷⁶ The guidance goes on to recognise that lesbians risk violence ‘up to and including “corrective” rape and murder’ with insufficient State protection.⁷⁷ Despite this, it quotes a Tribunal ruling saying ‘Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual

⁷¹ Ibid, 5.

⁷² Ibid.

⁷³ Home Office, ‘Country Information and Guidance Iran: Sexual orientation and gender identity Version 2.0’ (Home Office, 2016).

⁷⁴ Ibid.

⁷⁵ *R (on the application of Brown) Jamaica* UKSC [2015].

⁷⁶ Home Office, ‘Country Policy and Information Note Jamaica: Sexual orientation and gender identity Version 2.0’, (Home Office, 2017) 10.

⁷⁷ Ibid.

narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear'.⁷⁸ Again, the obvious question is whether anyone at risk of corrective rape or murder would *not* hide their sexuality through fear.⁷⁹

With the publication of the first statistics on sexual orientation-grounded asylum claims, it became possible to see that there were successful applications and in many cases a significant number of successful appeals made by individuals from all of the countries discussed in this part – Bangladesh, Afghanistan, South Africa, Gambia, Iran and Jamaica.⁸⁰ While this is by no means an exhaustive list of countries where LGBTQI individuals face persecution, it is nevertheless sufficient indication that accurate and up-to-date country information is imperative for fair and consistent decision making.

Furthermore, the discussion here shows how 'discretion' thinking overlaps with inaccurate or out-of-date country information to compound the risk of people being returned to situations where they are in danger or their safety is contingent on NGO protection. India, for example, is on the 'safe' list and Home Office guidance states that 'India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities, from which a person can seek support and assistance.'⁸¹ Yet, as the International Commission of Jurists points out, '[t]his approach is legally unsustainable. The responsibility to provide effective protection and ensure access to rights without discrimination rests on the relevant State and not on NGOs or ad hoc group of individuals who may themselves be under threat.'⁸²

Lastly, picking up a point made in the introduction to this article, country of origin information may be inadequate in different ways for different sexual minorities. Relocation

⁷⁸ *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC).

⁷⁹ J Wessels (2013) (n 4) 821.

⁸⁰ Home Office (n 21).

⁸¹ Home Office, 'Country Policy and Information Note India: Sexual orientation and gender identity' (Home Office, 2017).

⁸² International Commission of Jurists (n 38) 245-246.

is likely to be more difficult for lesbians and women in general and this is recognised in Home Office guidance.⁸³ At the same time, Home Office staff themselves have complained that Country of Origin Information fails to provide 'comprehensive coverage of sexual orientation issues and, in particular, issues relating to the treatment of lesbians and bisexual women.'⁸⁴ Research has identified country guidance cases relating to sexual minority women as a priority.⁸⁵ As previously stated, there is no evidence about intersex people's experiences, and a particular lack of country of origin information in relation to transgender persecution with the danger that absence of evidence is taken as absence of persecution.⁸⁶ Transgender asylum seekers may find it expedient to make a claim on the basis of sexual orientation, serving to disguise the level and nature of transgender persecution and creating a vicious circle in which evidence of transgender persecution continues to be non-existent and trans experiences are erased.⁸⁷ This is likely to continue until there is a better understanding of the diversity *within* LGBTQI claims and also of the intersectional nature of identity, both of which are critical to the development of an asylum system that is responsive to applicants' experiences, rather than one that imposes a single (gay, male) model of sexual minority identity based on Western stereotypes.⁸⁸

This part has identified four ways in which country of origin information is problematic: there are contradictions between different official documents; in at least one case there are contradictions within a single official document; country guidance is structurally flawed and sometimes out of date or at odds with widely reported facts; and guidance has been

⁸³ Home Office (n 5) 36.

⁸⁴ Independent Chief Inspector of Borders and Immigration (2014) (n 7) 31.

⁸⁵ TY Khan, 'Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum-Seekers: Theoretical and Empirical Perspectives on Fairness' (PhD, University of Liverpool 2016), 151; Independent Chief Inspector of Borders and Immigration (2018) (n 7) 31.

⁸⁶ J Bachs, 'Assessing transgender asylum claims', (2013) 42 Forced Migration Review 34.

⁸⁷ Berg and Millbank (n 4).

⁸⁸ P Sussner, 'Invisible Intersections: Queer Interventions and Same Sex Family Reunification under the Rule of Asylum Law' (2013) in T Spijkerboer (ed.) *Fleeing Homophobia; Sexual orientation, gender identity and asylum*, (2011) 176; A N Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28, Harvard Human Rights Journal 205; K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43, 6 Stanford Law Review 1241.

identified as inadequate for different sexual minority applicants – specifically lesbian women and transgender people. As part of the process of asylum policy harmonization, the EU is developing a common ‘safe’ countries list in an initiative that will include a responsive approach to any ‘sudden deterioration of the situation in a country designated as a safe country of origin’.⁸⁹ It is difficult to know whether this harmonized approach will lead to better decisions. However, given the UK’s impending withdrawal from the EU and the fact that it has already opted out of the recast Qualification Directive, it seems unlikely that the UK Government will choose to be part of this initiative.⁹⁰ This means that one potential lever for greater consistency, if not greater fairness, is unlikely to be introduced in the UK, and evidence and lobbying by lawyers and NGOs will remain critical to improving country of origin information.⁹¹

3.3. The burden of proof: membership of a ‘particular social group’ and credibility

Credibility is the ultimate hurdle for all asylum seekers.⁹² But where most applicants have the single challenge of proving they are at risk of persecution, LGBTQI claimants also have to prove their sexuality or gender identity in a legal structure that is based on fixed categories

⁸⁹ European Parliament, ‘Asylum: EU list of safe countries of origin to replace national lists in 3 years’ (European Parliament, 7 July 2016) <<http://www.europarl.europa.eu/news/en/news-room/20160707IPR36205/asylum-eu-list-of-safe-countries-of-origin-to-replace-national-lists-in-3-years>> accessed 23 July 2017.

⁹⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9. The UK is bound by the previous directive, Directive 2004/83/EC (Qualification Directive), Article 10 (1)(d)). (European Database of Asylum Law, 2013, European Parliament and the Council: Qualification Directive (recast) transposition deadline 21 December 2013).

⁹¹ For example, through processes such as engagement with inspections by the Independent Chief Inspector of Borders and Immigration.

⁹² H Baillot, S. Cowan, and V E Munro, ‘Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK’, (2014) 10 (1) International Journal of Law in Context, 105; Jansen and Spijkerboer (n 2); I Mighetto, ‘The Contingency of Credibility: Gender-Related Persecution, Traumatic Memory and Home Office Interviews’, (2016) 3 SOAS Law Journal, 1; Millbank (2009) (n 4), 391.

and has only recently begun to recognise LGBTQI identities in a positive way.⁹³ As with ‘discretion’, this is often presented in the form of a test. In this case, the test applied in UK law is proving membership of a particular social group. As with the ‘discretion’ test, there are inconsistencies between UNHCR, EU and domestic guidance that make it difficult for claimants to meet the test’s requirements.

Recognition as a member of a particular social group is the default basis for most LGBTQI asylum claims, rather than via any of the other Convention grounds of race, religion, nationality or political opinion.⁹⁴ Membership has two dimensions – an internal and external one but it is unclear whether these are alternative or cumulative requirements.⁹⁵ According to the UNHCR, a particular social group is ‘a group of persons who share a common characteristic other than their risk of being persecuted [internal or fundamental characteristic test], *or* who are perceived as a group by society [external or social perception test]’.⁹⁶ Only one of the two is required, meaning that, in theory, an individual persecuted because she was rightly or wrongly labelled as a lesbian would be entitled to asylum without needing to verify her sexual identity.

However, the Qualification Directive 2004 substitutes ‘or’ with ‘and’:

a group shall be considered to form a particular social group where in particular:
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

⁹³ The first positive LGBT rights in the UK came with the Adoption and Children Act 2002, giving adoption rights to same-sex couples, and the Employment Equality (Sexual Orientation) Regulations 2003. Legislation prior to this took the form of criminalisation and decriminalisation.

⁹⁴ ‘The five Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap’ (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’, UNHCR, 2012, 11; Arnold (n 4) 113-114.

⁹⁵ Arnold (n 4) 118.

⁹⁶ UNHCR (n 2) 12.

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.⁹⁷

Despite concerns by the international legal community, this definition was entrenched in the *X, Y and Z* judgment in 2013.⁹⁸ The implication of this is that claimants need to show both that they are members of a sexual minority (fundamental characteristic test) and also that they are or would be visible as such in their country of origin (social perception test). A literal application of article 10(1)(d) legitimates refusals of claims on the basis that, while the applicant is believed to belong to a sexual minority, they are not perceived, and would not be perceived, as such, and therefore could safely relocate to a different part of the country of origin.

The International Commission of Jurists believes this is not a hypothetical concern:

The application of the cumulative two-limb test to establish the existence of a PSG [particular social group] has given rise to a further disturbing development in the context of SOGI [Sexual Orientation and Gender Identity] -based asylum claims. Namely, some refugee-status decisionmakers have found that, while certain applicants' claims satisfied the protected characteristics limb, they did not meet the social perception limb, either because the group of LGBTI persons are not visible

⁹⁷ Directive 2004/83/EC (Qualification Directive), Article 10 (1)(d)) (emphasis added).

⁹⁸ "The Court frames its answer to the question as to "whether foreign nationals with a homosexual orientation form a particular social group" with reference to the 2004 [Qualification Directive's] cumulative, two-limbed test: do the members of the group share an innate characteristic, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce? *And* (instead of or), does the group have a distinct identity in the relevant country, because it is perceived as different by the surrounding society? In ruling on this question, the CJEU adopted the cumulative application of the "protected characteristics" and the "social perception" approaches to the definition of membership of a particular social group, despite the fact that the UNHCR's authoritative interpretation of the Refugee Convention does not support such a reading.' (International Commission of Jurists, 'X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*' (3 June 2014) 11 (footnotes omitted).

within a given society or because the individuals themselves are not 'out' enough to be perceived as part of that group by society.⁹⁹

Unfortunately, Home Office guidance follows the EU rather than the UNHCR definition.¹⁰⁰ However, in 2006, the House of Lords gave the view that Article 10 of the Qualification Directive 'propounds a test more stringent than is warranted by international authority'.¹⁰¹ How this has played out in the UK is unclear and merits further research, but at the very least it creates the potential for confusion on the part of UK decision makers that is not resolved by the official guidance on sexual orientation-based claims.¹⁰² And if claimants must demonstrate that they both have an immutable characteristic and are also seen as different, it is unsurprising that one leading practitioner said he encourages clients presenting to a judge 'to bring friends from the gay community and referred to it as a "pink parade"'.¹⁰³

The requirement to prove that one belongs to a sexual minority *and* that one is visible as such is at odds with the theoretically low burden of proof for all asylum claims.¹⁰⁴

⁹⁹ International Commission of Jurists (n 38) 201.

¹⁰⁰ 'In deciding whether a person is a refugee: ... (d) 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. (The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 6 (1)).

¹⁰¹ *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, United Kingdom: House of Lords (Judicial Committee), 18 October 2006, para 16.

¹⁰² Article 10(1)(d) of the 2004 Qualification Directive is cited in the Home Office, 'Asylum Policy Instruction - Sexual orientation in asylum claims Version 6.0' (Home Office, 2016), 11.

¹⁰³ Arnold (n 4) 106. Arnold states that in the UK decision makers have required applicants to show 'a degree of social visibility in addition to establishing membership to a particular social group' (105).

¹⁰⁴ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para 196.

Recognising what is at stake in claims for protection, Home Office guidance on assessing credibility in all asylum claims makes this very clear:

The level of proof needed to establish the material facts is a relatively low one – a reasonable degree of likelihood – and must be borne in mind throughout the process. It is low because of what is potentially at stake – the individual’s life or liberty – and because asylum seekers are unlikely to be able to compile and carry dossiers of evidence out of the country of persecution.

and

‘Reasonable degree of likelihood’ is a long way below the criminal standard of ‘beyond reasonable doubt’, and it is less than the civil standard of ‘the balance of probabilities’ (i.e. ‘more likely than not’). Other terms may be used: ‘a reasonable likelihood’ or, ‘a real possibility’, or ‘real risk’; they all mean the same.¹⁰⁵

Home Office guidance tells caseworkers they ‘must not stereotype the behaviour or characteristics of lesbian, gay or bisexual persons’.¹⁰⁶ But if one accepts that sexual and gender identity are not simply the sum of activities and preferences – clubbing, musical tastes and what kinds of sex one has – then how does one provide evidence to meet either arm of the test? Explicit details of sexual activity, whether verbal accounts or in the form of videos and photos have rightly been ruled out by European Union law,¹⁰⁷ and Home Office guidance now goes so far as to provide a script for caseworkers in situations where they are presented with sexually explicit material, a script beginning ‘Stop please. I am not going to ask you any detailed questions about sex.’¹⁰⁸

A sensitive alternative approach to establishing credibility is the DSSH model developed by S Chelvan, based on exploring applicants’ experiences of difference, stigma, shame and

¹⁰⁵ Home Office, ‘Asylum Policy Instruction Assessing credibility and refugee status Version 9.0’ (Home Office, 2015), 11.

¹⁰⁶ Home Office (n 5) 7.

¹⁰⁷ Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.

¹⁰⁸ Home Office (n 5) 29.

harm.¹⁰⁹ An individual narrative of persecution grouped around these four themes would be likely to shed light on the individual's identity and how the surrounding community perceives this without a rigid requirement for these elements. While the DSSH model has been criticised by some for reinforcing rigid or linear notions of non-heterosexual identity, others recognise it as a welcome improvement on models which focus on sexual behaviour and activity.¹¹⁰ While this model is not explicitly mentioned in Home Office guidance, its four elements are all highlighted throughout the main guidance on sexual orientation and gender identity-based claims.¹¹¹

However, it is difficult to reconcile the Home Office guidance with the high level of first-decision refusals of asylum claims set against reversals of refusals: between July 2015 and March 2017, approximately one-third of appeals involving sexual orientation were allowed.¹¹² This shows that erroneous initial decisions were made in a significant proportion of cases, suggesting a discrepancy between the Home Office guidance on assessing credibility and its application by caseworkers, as well as the discrepancy identified above between the instructions of the UK Government, EU law and case law, and the UNHCR about the definition of a particular social group for LGBTQI asylum seekers. It is not surprising if the application and appeals process is therefore somewhat of a lottery for individuals.

4. Flaws in the asylum process

This article has identified inconsistencies between the UNHCR, EU and domestic materials that together provide UK decision makers in both the Home Office and the courts with the necessary guidance for assessing LGBTQI asylum applications. In conclusion, it will examine the impact this has by looking at a specific case, that of *AR*.¹¹³ In fairness, this is an unusual

¹⁰⁹ Hungarian Helsinki Committee, 'Credibility Assessment in Asylum Procedures – A Multidisciplinary Training Manual', Volume 2, 2015.

¹¹⁰ Dawson and Gerber (n 4).

¹¹¹ Home Office (n 5) and UK Visas and Immigration (n 25).

¹¹² Home Office (n 21).

¹¹³ *AR (AP), against a decision of the Upper Tribunal (Immigration & Asylum Chamber)* [2017] CSIH 52. AR's future was undecided at the time of writing, with the case in remission.

case in the number of appeals that the claimant has had to go through – six decisions over four years with successive orders that the judges in each hearing should not be involved in subsequent stages. One of the judges involved said ‘[w]e can only hope that the long and unfortunate history recounted above is not typical of immigration proceedings in the tribunal system’.¹¹⁴ However, delays are not uncommon according to the NGO Asylum Aid:

We regularly receive letters six months after interview stating that a claim is complex in nature and as such falls outside the normal service standards. Since 2016, our experience has been that fewer cases are decided within 6 months, and cases not decided within the 6-month standard regularly wait over a year or more for a decision. Our lawyers describe this part of the process as a ‘black hole’.¹¹⁵

AR’s story involved the sale of a kidney and accusations of sodomy, as well as the usual disputed evidence about how often the gay asylum applicant had attended gay clubs. The case demonstrates many of the problems identified in this article.

In 2013, the appellant, a gay man from Pakistan seeking asylum in the UK, appealed against the decision to remove him to Pakistan. The judge in the First-tier Tribunal, Judge Quigley, initially allowed his appeal, accepting that he was homosexual based on the evidence, which included an official police First Information Report (FIR) of his detention following an allegation of sodomy and a Pakistani newspaper article reporting this. Here, *AR* met both arms of the particular social group test in proving that he was both gay and visibly gay in his country of origin. Country of origin information provided evidence of the Pakistani authorities’ failure to protect gay men. Moreover, internal relocation would not be an option as it would depend on *AR* concealing his sexual identity through fear of persecution.

One statement by Judge Quigley brings together the three issues highlighted in this article – at this stage, to the benefit of the applicant:

¹¹⁴ Ibid 29.

¹¹⁵ Asylum Aid (n 57) 3-4.

I find that this appellant has been the subject of adverse attention in the past by reason of his sexual orientation [fundamental characteristic and social perception]. I find that were he to be removed to Pakistan, he would resort to concealment of sexual orientation as a result of a genuine fear that otherwise he will be persecuted [‘discretion’ test]. Accordingly, on the basis of the objective information considered above, that fear is well-founded [country of origin information submitted]. Accordingly, I find that this appellant is entitled to a grant of asylum.¹¹⁶ [author’s additions]

If the case had ended there, one might argue that guidance and case law were being applied effectively to facilitate fair decision making, but it did not: the Secretary of State successfully appealed, the matter was remitted from the Upper Tribunal back to the First-tier Tribunal (with the order that Judge Quigley not be involved). The appeal was refused and there were further decisions and reversals until the decision of the Upper Tribunal to remit the case to the First-Tier Tribunal once more in January 2016.¹¹⁷

In these subsequent decisions and the discussions that informed them, some of the difficulties in establishing sexual identity and verifying reports from the country of origin are apparent. The appellant did not claim asylum on the basis of sexual orientation when he first arrived in the UK, and the unfavourable decision of the First-tier Tribunal Judge in October 2013 was based on the belief that the appellant was asserting that he was gay only

¹¹⁶ Cited in *AR (AP)* (n 113) para 4.

¹¹⁷ Decision of First-tier Tribunal 30 August 2013 that the appellant is entitled to be granted asylum, decision of Upper Tribunal 16 December 2013 setting the August 2013 decision aside and remitting the case to a First-tier tribunal, decision of rehearing before First-tier Tribunal 30 July 2014 refusing *AR*’s appeal, overturn on appeal to the Upper Tribunal of the dismissal of the appellant’s asylum claim on 20 March 2015, dismissal of the appeal against the Secretary of State’s removal directions by the First-tier Tribunal on 13 October 2015, decision of Upper Tribunal 13 January 2016 that the First-tier Tribunal decision of 13 October 2015 should stand, opinion of the Court of Session delivered by Lord Malcolm on 4 August 2017 to quash the decision of the Upper Tribunal of 13 January 2016 and remit the case to the First-tier Tribunal for determination of the appeal against removal ‘and this by a judge who has had no previous involvement in the case’.

to support his asylum claim.¹¹⁸ In the First-tier Tribunal, Judge Farrelly also found the account of selling a kidney to come to the UK lacking in credibility, while adding '[t]here is no doubt he only has one kidney'.¹¹⁹

However, the most striking aspect of the case is what happens when the tests for 'discretion' and for proving membership of a particular social group converge. Here it results in this combination of statements: on the one hand, Judge Farrelly 'did not believe the appellant was homosexual', but, at the same time:

If he was a homosexual, and with regard to the second stage of the test set out by Lord Hope in *HJ (Iran)* at paragraph 35, the judge accepted that Pakistan is intolerant of homosexuality and that the state would not provide protection. The view was taken that, if returned to Pakistan, he would not behave in a manner likely to bring adverse attention upon himself. He would "conduct himself consistent with his upbringing, nature and the social *mores* in place" (paragraph 40). This was supported by the low level of homosexual activity reported in the UK. The judge saw no real risk of persecution in Pakistan. The appeal against the removal directions was refused.¹²⁰

In other words: 'We don't believe you're gay, but if you were, it would be safe to return you'.

At the time of writing, the most recent tribunal decision in this case had been quashed and the case remitted to the First-tier Tribunal for appeal against removal, 'and this by a judge who has had no previous involvement in the case'.¹²¹

The UK government's own figures suggest that the areas of inconsistency identified here detrimentally affect individuals, judging by the high and varying refusal rates for applicants

¹¹⁸ Judge Farrelly found that the appellant's sexuality '... almost impossible to determine' *AR (AP)* (n 113).

¹¹⁹ *Ibid* para 17.

¹²⁰ *Ibid* paras 18–19.

¹²¹ *Ibid* para 38.

from countries that criminalise same-sex activity,¹²² and also by the high level of initial decisions that are overturned on appeal. A superficial sweep of key LGBTQI asylum cases and media stories from 2010 to 2016 finds worryingly little change over more than half a decade: sexual minority asylum seekers from the same countries – Nigeria, Uganda, Iran and Cameroon are prominent – are having their claims refused because decision makers at both Home Office and appeal stages find their narrative implausible, with the high proportion of first decision refusals winnowed down somewhat on appeal. There are still reports of last minute reprieves from deportation on a charter flight, apparently as a result only of online petitions, grass-roots campaigning and investigative reporting.¹²³ This is suggestive of flaws throughout the process.

5. Conclusion

This article has highlighted three critical points of inconsistency and unfairness in the UK relating to the ‘discretion’ requirement, country of origin information, and the fundamental problem of proving one’s sexual identity in the context of contradictory guidance by international bodies and domestic authorities. Together they are the explanation for many failed applications by LGBTQI asylum seekers where the view of the Secretary of State or the judge is either that the individual is not genuinely LGBTQI; or that they may be, but it would be safe for them to relocate to a different part of the country of persecution; or that it would be safe to return them because they would choose to live ‘discreetly’.

Setting aside problems with the quality of individual casework and political and media hostility to asylum seekers at a national level, and even if one assumes that at the level of Home Office policy there is the intention to create a system that is at least consistent on a case-by-case basis, the unfair treatment of LGBTQI asylum seekers is unlikely to be eliminated while the problems identified here remain unaddressed.

¹²² Home Office (n 21).

¹²³ See for example Benjamin Butterworth, ‘Just in: Gay man’s deportation to homophobic Uganda postponed’, *Pink News* 5 December 2016) <<http://www.pinknews.co.uk/2016/12/05/friends-terrified-for-safety-of-gay-man-set-to-be-deported-to-uganda/>> accessed 23 July 2017 or Joe Morgan, ‘Uganda lesbian, a victim of ‘corrective rape’ and forced marriage, granted asylum in the UK’, *Gay Star News*, 23 May 2016 <<http://www.gaystarnews.com/article/uganda-lesbian-granted-asylum-uk/#gs.5E4dLI>> accessed 23 July 2017.

To end on a constructive note, how might LGBTQI asylum decision making be improved? There is an inherent tension between refugee law and decision making – both of which are about establishing facts and definitive accounts – and sexual and gender identities, which are increasingly understood as fluid both over time and at any one moment.¹²⁴ If the two arms of the particular social group test are retained, one way would be to adjust the balance between them. At present, the emphasis is on the individual's sexual identity, which, as suggested above, is very difficult to verify without resorting to debates about how regularly one has to frequent a gay club to qualify as homosexual, or whether someone is bisexual or 'just experimenting'.¹²⁵ The more important question concerns perception in the context of accurate and up-to-date information about country of origin conditions. Using this approach, instead of the question: 'Are you a lesbian, gay, bisexual or transgender? If so, prove it', decision makers would first ask 'Are you from a country where LGBTQI people are persecuted?' and secondly, 'Would you be viewed as LGBTQI if you went back there?' While this proposal clearly needs further exploration and would not resolve all the existing complexities and contradictions in the asylum process as it applies to sexual minorities, it provides a starting point that is more likely to lead to consistent decisions and a fair outcome for individuals than is currently the case.

¹²⁴ Berg and Millbank (n 4) 122.

¹²⁵ Orashia Edwards, a bisexual Jamaican man, spent three and a half years battling attempts to deport him to Jamaica and was detained a number of times, after authorities claimed he was heterosexual and had just been 'experimenting' with men. Nick Duffy, 'Bisexual Jamaican man wins right to stay in the UK after deportation battle', *Pink News* 18 January 2016 <<http://www.pinknews.co.uk/2016/01/18/bisexual-jamaican-man-wins-right-to-stay-in-the-uk-after-deportation-battle/>> accessed 23 July 2017.