

## **Sexual Borders**

### ***Does the UK Adequately Protect People Seeking Asylum based on Risk of Persecution relating to Sexual or Gender Identity or Expression?***

This policy briefing addresses issues relating to asylum applications in the UK by persons who fear persecution relating to their sexual or gender identity or expression. We make the following key recommendations:

1. The Home Office should consult with stakeholders and revise the Asylum Policy Instruction relating to sexual identity.
2. The Home Office should examine the reasons for high success rates on appeal for applicants claiming asylum based on sexual identity from some countries and use this analysis to improve initial decision-making.
3. The Home Office should improve and expand the Second Pair of Eyes monitoring process and invite external monitoring to reduce errors in initial decision-making in cases involving sexual or gender identity or expression.

## **Introduction**

People who do not comply with sexual or gender identity or expression (SOGIE) norms continue to face persecution in many parts of the world:

It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world. Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty.<sup>1</sup>

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR). (2012). 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. HCR/GIP/12/01, para 2 ('UNHCR SOGI Guidelines').

Approximately 6% of persons who seek international protection in the UK do so for reasons relating to their sexual identity.<sup>2</sup> Data regarding the number of people seeking protection for reasons relating to their gender identity or expression is not available.<sup>3</sup>

The Home Office has made some progress in its approach to asylum claims based on sexual and gender identity and expression in recent years. In response to the 2014 report of the Independent Chief Inspector of Borders and Immigration, John Vine, 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation' ('Vine report'),<sup>4</sup> the Home Office stated its commitment to ensuring that asylum applications based on sexual identity 'are handled with sensitivity'. Compared to a decade ago, there is now greater recognition of the importance of these issues at the policy level, increased monitoring of sexual identity cases, higher success rates in asylum applications, and there are ongoing developments in guidance and training for Home Office staff.<sup>5</sup>

However, set against the progress that has occurred is Asylum Aid's experience and other evidence that indicates that problems persist in the Home Office's approach to SOGIE asylum applications. The UK Lesbian and Gay Immigration Group (UKLGIG) reported in June 2017, for example, that 'instances of inappropriate questioning related to sexual conduct' and questions that oblige the applicant to 'explain why they are not heterosexual' continue to occur.<sup>6</sup>

This briefing discusses three key aspects of refugee status determination in cases relating to sexual or gender identity or expression: 1) current Home Office guidelines; 2) the accuracy of Home Office decision-making; and 3) the effectiveness of Home Office monitoring mechanisms.<sup>7</sup>

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<sup>2</sup> Home Office. (November 2017). [Asylum Claims on the Basis of Sexual Orientation](#). In this briefing, unless quoting from another source, we use the acronym 'LGBTQIA+' to refer to lesbian, gay, bisexual, trans, queer, intersex, and asexual people and others who do not fit within heteronormative or cisnormative expectations. In line with developing norms, we prefer the term 'sexual identity' to 'sexual orientation' (when discussing issues relating to, primarily, lesbian, gay, and bisexual people) but use 'sexual orientation' in this briefing in some instances, primarily when referring to documents using that terminology.

<sup>3</sup> Gender identity or expression refers, broadly, to how people relate to or express their experience of identifying as male, female, both, neither, third-gender, or being somewhere on a non-binary or gender-fluid spectrum. People who seek asylum in relation to their gender identity or expression *may* identify as trans, non-binary, queer, third gender, or gender-fluid, but may not self-identify with any of these, as these terms may not correlate to concepts used in their culture or language. At present, the Home Office does not have sufficient data to publish statistics relating to asylum claims based on gender identity or expression.

<sup>4</sup> <http://icinspector.independent.gov.uk/wp-content/uploads/2014/10/Investigation-into-the-Handling-of-Asylum-Claims-Final-Web.pdf>.

<sup>5</sup> See, for example: Home Office. (3 August 2016). [Asylum Policy Instruction, Sexual Orientation in Asylum Claims](#). ('Sexual Orientation Policy Instruction'). The Home Office published its guidance on [Gender Identity Issues in the Asylum Claim](#) in June 2011 and has committed to publishing a revised version of this guidance in early 2018. A draft of the revised guidance was circulated for consultation by stakeholders in October 2017. See also a list of Home Office country policy and information notes on sexual orientation and gender identity compiled by Moira Dustin, SOGICA researcher, available at <http://www.sogica.org/en/database/uk-visas-and-immigration-country-policy-and-information-notes-on-sexual-orientation-and-gender-identity/>.

<sup>6</sup> UK Lesbian and Gay Immigration Group. (June 2017). [UKLGIG Submission in Response to the Invitation of the Independent Chief Inspector with Respect to the Inspection of Asylum Casework](#), 5.

<sup>7</sup> This briefing does not attempt to address all aspects of the Home Office's approach to the treatment of persons fleeing persecution related to their SOGIE, such as accommodation, detention, support, and integration. However, we observe, as a matter of principle, that persons seeking asylum have a right to liberty and generally should not be detained, and particularly not those who are LGBTQIA+, as

## Current Home Office Guidelines

The Home Office has adopted in its written guidance some of the principles set out by UNHCR and other organisations on the correct approach to refugee status determination in SOGIE asylum applications.<sup>8</sup> As other applicants, persons seeking protection from persecution related to their sexual or gender identity or expression should be given the benefit of the doubt with respect to their statements, where they have provided a reasonable explanation and as much evidence as can be reasonably be expected in their circumstances (which the Home Office has acknowledged may be *no evidence* other than the applicant's testimony<sup>9</sup>). In addition, factors specific to LGBTQIA+ applicants must be taken into account, for example the need to have concealed their SOGIE in their country of origin, and trauma, shame, or self-denial of sexual or gender identity which may have affected their asylum application.

The Home Office Asylum Policy Instruction 'Sexual Orientation in Asylum Claims' states that persons applying for asylum on the basis of fear of persecution relating to their sexual orientation must establish 'to a reasonable degree of likelihood that they are or are perceived to be of the sexual orientation in question'.<sup>10</sup> The guidance goes on to state that Home Office decision-makers should assist applicants to substantiate their claims; should put claimants at ease; and should approach asylum interviews sensitively. The guidance further confirms, for example, that some applicants may not use labels such as 'LGB'; that some applicants may not have spoken to anyone previously about their sexual orientation; and that some applicants may be associated with a religious or political group that condemns 'homosexuality'.<sup>11</sup>

Despite many positive aspects, this Policy Instruction is flawed in some respects. For example:

- 1) The Policy Instruction refers to UNHCR guidance and *HJ (Iran) v Secretary of State for the Home Department*<sup>12</sup> in relation to assessing risk of persecution, correctly affirming that claimants cannot be expected to avoid persecution by concealing their sexual identity<sup>13</sup>. The Policy Instruction refers to the *HJ (Iran)* test, stating that 'if **a** material reason for living discreetly would be the fear of persecution that would follow if they lived openly, then they are a refugee'.<sup>14</sup> However, on the next page, the Policy Instruction incorrectly re-states this test: '[i]f **the** reason why the person will resort to concealment is that they genuinely fear that otherwise they will be persecuted, it will be

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they often face discrimination and/or abuse in immigration detention. Similarly, LGBTQIA+ persons seeking protection in the UK should be provided appropriate accommodation and support to enable them to rebuild their lives free from discrimination, harassment and abuse. See also Bachmann, C. (Stonewall and UK Lesbian and Gay Immigration Group, 2016) *No Safe Refuge.*; and see UNHCR. (2012). *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.*

<sup>8</sup> See UNHCR. (May 2013). *Beyond Proof, Credibility Assessment in EU Asylum Systems*, especially S. 2.7 'Sexual Orientation and/or Gender Identity'; see also International Commission of Jurists. (2016). *Refugee Status Claims Based on Sexual Orientation and Gender Identity, A Practitioners' Guide*, no. 11 ('Practitioner's Guide'); and see Chelvan, S. (2015) 'Asylum Claims based on Sexual Orientation or Gender Identity' in *Credibility Assessment in Asylum Procedures*, Vol 2.

<sup>9</sup> See *Sexual Orientation Policy Instruction*, 22-23.

<sup>10</sup> *Sexual Orientation Policy Instruction*, 22.

<sup>11</sup> *Sexual Orientation Policy Instruction*, 7-8, 14, 22-23, 35.

<sup>12</sup> [2010] UKSC 31. For additional jurisprudence on sexual and gender identity, see SOGICA. (updated December 2017). *Table of UK SOGI asylum case law.*

<sup>13</sup> See *UNHCR SOGI Guidelines*, in particular para 12.

<sup>14</sup> P 37 (emphasis added).

necessary to consider whether that fear is well-founded'.<sup>15</sup> In some cases, this small wording change could make a huge difference.<sup>16</sup>

- 2) The Policy Instruction guides decision-makers to include in their assessment whether applicants who would conceal their sexual identity would do so for 'cultural or religious reasons', referring to Lord Hope's opinion in *HJ (Iran)*<sup>17</sup>; however, it is Lord Rodgers' opinion in *HJ (Iran)* which is binding, and this does not include 'cultural or religious reasons', but only 'social or personal' reasons, which in some cases, may be distinct.<sup>18</sup>
- 3) The Policy Instruction seems inconsistent with 2012 jurisprudence of the Court of Justice of the European Union on the point of concealment. In *X, Y, and Z*, the CJEU held that '[t]he fact that [a gay applicant for asylum] could avoid the risk [of persecution] by exercising greater restraint than a heterosexual in expressing his sexual orientation is **not to be taken into account**', which indicates that consideration of reasons for potential concealment is unlawful.<sup>19</sup> However, in 2017, the Court of Appeal in *LC (Albania)*<sup>20</sup> found no inconsistency on the point of concealment between the CJEU decision in *X, Y, and Z* and the Supreme Court's 4-part test in *HJ (Iran)*.<sup>21</sup> The Appellant in *LC (Albania)* is seeking to appeal to the Supreme Court; thus, there may be further developments on this point.

#### Recommendations:

- The Home Office should consult with stakeholders and revise the Policy Instruction relating to sexual identity.

## The Accuracy of Home Office Decision-making

On 30 November 2017, for the first time, and after significant pressure, the Home Office published long-awaited statistics on 'Asylum Claims on the Basis of Sexual Orientation'. The 'experimental' data, which the Home Office emphasise must be interpreted with caution, are simultaneously an indication of progress and of ongoing cause for concern. The data indicate that asylum is granted to **25%** of applicants applying based on sexual identity, compared with **31%** of all asylum applicants being granted protection at first instance. For a historical comparison, in 2010, the UK Lesbian and Gay Immigration Group reported that the Home Office granted asylum in only **1-2%** of gay and lesbian asylum applications sampled.<sup>22</sup>

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<sup>15</sup> P 38 (emphasis added).

<sup>16</sup> For further a critique of this Asylum Policy Instruction, see Chelvan, S. (freemovement, 8 August 2016). [New Home Office API on Gay Asylum Claims: Not Fit for Purpose.](#)

<sup>17</sup> [Sexual Orientation Policy Instruction, 37-38; HJ \(Iran\)](#), para 35.

<sup>18</sup> *HJ (Iran)*, paras 82-83, under the heading: 'The approach to be followed by Tribunals'. Further, Lord Dyson explicitly rejects any cultural relativism in analysing reasons for concealment of sexual identity. *HJ (Iran)*, para 128-29.

<sup>19</sup> [X, Y, and Z v Minister voor Immigratie en Asiel \(C-201/12\)](#), para 75 (emphasis added).

<sup>20</sup> [2017] EWCA Civ 351.

<sup>21</sup> See also discussion of related UK jurisprudence in Chelvan, S. (freemovement, 8 August 2016). [New Home Office API on Gay Asylum Claims: Not Fit for Purpose](#); and see [UNHCR's intervention in LC \(Albania\)](#).

<sup>22</sup> UKLGIG. (2010). [Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum.](#); see also UKLGIG (2013) [Missing the Mark: Decision Making on Lesbian, Gay \(Bisexual, Trans and Intersex\) Asylum Claims](#). Subsequently, the 2014 Vine report found that of the sexual identity cases sampled, **39%** were granted asylum. Whether there has been a decline since 2014 is an open question – the difference between the current statistics and the Vine report results may be based on a difference in the cohorts sampled or the way the data were collected and interpreted.

The following table shows a snapshot of the data for the ten countries with the highest number of asylum cases based on sexual identity.

**Ten countries with the highest number of asylum cases  
'where sexual orientation has been raised as a basis of claim'<sup>23</sup>**

<b>Country</b>	<b>% sexual orientation cases granted asylum (first instance)</b>	<b>% total decided cases granted asylum (first instance)</b>	<b>% sexual orientation cases granted on appeal</b>
Pakistan	25%	14%	39%
Bangladesh	14%	4%	32%
Nigeria	19%	7%	24%
Uganda	55%	48%	54%
Iran	52%	37%	51%
Ghana	12%	4%	12%
Cameroon	29%	19%	34%
Albania	0%	1%	41%
India	0%	0%	22%
Iraq	28%	8%	30%

The data also show variations on **appeal**, demonstrating an overall success rate on appeal in sexual identity cases of **35%**, compared to 40% for asylum cases generally.<sup>24</sup> The high success rates on appeal for some countries suggests a need for further information – is the Home Office country information for those countries inaccurate? Is the Home Office prone to bias in respect of some countries? Are there problems in credibility assessment? Are there other explanations?

Going forward, statistics should also indicate the basis for refusal (for example, whether the decision-maker did not accept that the applicant was LGBTQIA+ or they thought that there was no risk of persecution). Statistics should also include timeframes for decision-making in SOGIE asylum cases, as there are concerns that such cases may be subject to delays beyond the average if they are considered 'non-straightforward'.<sup>25</sup>

The Home Office does not currently flag *gender identity* cases on their database. Such cases should be monitored, as are sexual identity cases, to ensure that they are dealt with appropriately. Gender identity cases are relatively few in number, and it would not pose an undue burden on the Home Office to record them and publish data related to them.

**Recommendations:**

- The Home Office should examine the reasons for high success rates on appeal in SOGIE asylum cases from some countries and how to improve initial decision-making.

<sup>23</sup> See full table: 'SOC\_02. Initial decisions made on asylum claims raised between 1 July 2015 and 31 March 2017 where sexual orientation has been raised as a basis of claim'. Home Office. (November 2017). Asylum Claims on the Basis of Sexual Orientation.

<sup>24</sup> See full table: 'SOC\_03. Appeal outcomes on asylum claims raised between 1<sup>st</sup> July 2015 to 31<sup>st</sup> March 2017 where sexual orientation has been raised as a basis of claim'. Home Office. (November 2017). Asylum Claims on the Basis of Sexual Orientation.

<sup>25</sup> For an analysis of Home Office treatment of 'non-straightforward' cases (but not specifically LGBTQIA+ cases), see Independent Chief Inspector of Borders and Immigration. (28 November 2017). An Inspection of asylum intake and casework.

- The Home Office should publish further, more detailed statistics relating to asylum applications based on sexual identity.
- The Home Office should also flag and monitor gender identity cases and publish related statistics.

## **Home Office monitoring: the ‘second pair of eyes’ approach**

In response to the 2014 Vine report, the Home Office implemented a system for monitoring decisions based on sexual identity (but not gender identity or expression), which the Home Office calls the ‘second pair of eyes’ (SPOE) approach – this means that all decisions on sexual identity asylum cases are reviewed by someone other than the initial decision-maker (a Senior Caseworker or ‘technical specialist’).<sup>26</sup>

However, our experience in representing LGBTQIA+ asylum applicants at Asylum Aid is that despite some improvements, Home Office decision-makers still do not consistently correctly assess credibility in SOGIE asylum cases. LGBTQIA+ applicants for asylum continue to face the difficult task of proving their sexual identity to often sceptical Home Office interviewers.<sup>27</sup> Other organisations and legal advisors also continue to report flawed credibility assessment, including applicants being disbelieved about their sexual identity:

- ‘because they said they liked same-sex classmates in primary school’ (which the Home Office decision-maker decided was too young);
- ‘because they said they were attracted to boys at age 10 but later said they knew they were gay at age 14’ (which the Home Office decision-maker considered inconsistent);
- ‘because he mixed up where he hugged a man’ (inside his room or outside in the corridor) (which the Home Office decision-maker considered relevant);
- because he ‘forgot when his same-sex partner last went to the dentist’ (which the Home Office decision-maker considered central to whether the applicant was gay)<sup>28</sup>; and
- because a ‘strong attachment’ to Islam was considered inconsistent with the use of lesbian dating sites.<sup>29</sup>

Additional examples of flawed credibility assessment include:

- unrealistic expectations of ‘sophisticated accounts of self-realisation’ and of feeling ‘different from others’;
- inadequate consideration of imputed sexual identity;
- placing ‘no weight on corroborative evidence’ where it exists or treating the absence of corroborative evidence as damaging to credibility; and

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<sup>26</sup> See [Vine report](#), Part 6.

<sup>27</sup> See Singer, D. (*The Guardian*, 24 November 2015). [How Do You Prove You Are Gay? A Culture of Disbelief Is Traumatizing Asylum Seekers](#).

<sup>28</sup> McClellan, M (at Danielle Cohen Immigration Law Solicitors at the time the article was written), (9 June 2017) [Why Gay Asylum Seekers Aren’t Believed](#). The author of this article has confirmed the cited examples are from 2016-17 decisions.

<sup>29</sup> Posted by Paul Dillane, then-Executive Director of the UK Lesbian and Gay Immigration Group, on Twitter on 10 August 2016. Comments on the post indicated that this was not an isolated incident. For further examples of related issues, see Houghton, N. (Citizens Advice Liverpool, 2018). [‘You feel like a nobody’: An investigation into the support and advice needs of LGBT+ Asylum Seekers in Merseyside](#), noting that all those interviewed for the study ‘commented on the frequently intrusive and degrading approach of asylum adjudicators’.

- inappropriately treating delay in claiming asylum on SOGIE grounds as damaging to credibility.<sup>30</sup>

The evidence cited above indicates that the Second Pair of Eyes monitoring approach is not functioning properly – if it was, these errors would have been identified and corrected internally. Instead, sexual identity cases in which the Home Office has made an incorrect assessment must be appealed, which carries a high cost, for applicants in terms of mental distress and delays; and for the Home Office, Tribunal, and legal advisors, all of whom must spend time and resources dealing with challenges to flawed decisions.

#### Recommendations:

- The Home Office should improve monitoring by requiring that ‘second pair of eyes’ staff have had advanced specialist SOGIE training and have sufficient expertise to properly assess SOGIE asylum cases.
- The Home Office should ensure adequate feedback is provided to decision-makers and other measures are taken to ensure mistakes in assessing credibility in SOGIE cases are not repeated.
- The Home Office should take steps to improve monitoring in SOGIE cases, for example by inviting audits by the Independent Chief Inspector of Borders and Immigration<sup>31</sup> and/or UNHCR’s Quality Integration team.
- As well as sexual identity cases, the Home Office should flag, monitor, and subject gender identity cases to increased scrutiny to ensure that they are assessed fairly and consistently.

## Conclusion

The UK does not yet offer adequate protection to refugees who are at risk of persecution relating to sexual or gender identity or expression. Although the Government has made progress in the way it addresses SOGIE-related asylum applications and continues to engage with stakeholders on these issues, much more progress is needed to achieve

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<sup>30</sup> UK Lesbian and Gay Immigration Group. (June 2017). [UKLGIG Submission in Response to the Invitation of the Independent Chief Inspector with Respect to the Inspection of Asylum Casework](#), 3-5. Wesley Gryk Solicitors also have had cases refused on the basis that the applicant did not provide a detailed enough account about the emotional realisation of their sexual identity or how their sexual identity related to their religion. Email from Nath Gbikpi, Solicitor, Wesley Gryk Solicitors, to Cynthia Orchard, 12 December 2017, referring to a recent case overturned on appeal.

For a proper approach to *late disclosure*, see International Commission of Jurists, [Practitioner’s Guide](#), 40, referring to the CJEU *ABC* judgment at para 69.

<sup>31</sup> In June 2017, Asylum Aid and other organisations responded to a consultation relating to a planned ICIBI inspection of asylum casework, encouraging the ICIBI to consider SOGIE issues in the planned inspection, including the SPOE approach. Unfortunately, that Inspection did not consider LGBTQIA+ issues in any detail. See also: Asylum Aid. (December 2017). *Response to Inspection of asylum intake and casework April – August 2017 by the Independent Chief Inspector of Borders and Immigration*. <https://www.asylumaid.org.uk/wp-content/uploads/2017/12/ICIB-inspn-of-asylum-intake-casework-AA-response-FINAL.pdf>; Asylum Aid. (June 2017). *Submission to Inspection of Asylum Casework of the Independent Chief Inspector of Borders and Immigration*. <https://www.asylumaid.org.uk/wp-content/uploads/2017/06/2017-ICIBI-AA-Consultation-Response-8-June.pdf>; and UK Lesbian and Gay Immigration Group. (June 2017). *UKLGIG Submission in Response to the Invitation of the Independent Chief Inspector with Respect to the Inspection of Asylum Casework*. <http://uklgig.org.uk/wp-content/uploads/2017/06/Inspection-of-Asylum-Casework-UKLGIG-response.pdf>.

fairness and justice for LGBTQIA+ people seeking protection in the UK. This policy briefing makes recommendations as to how improvement might be achieved.

## **Notes**

For further resources on SOGIE asylum claims and organisations providing support to LGBTQIA+ refugees, see <https://www.asylumaid.org.uk/lgbti-resources/>.

Asylum Aid collaborates with various organisations and individuals working on SOGIE asylum issues, including the SOGICA project at the University of Sussex, which is funded by the European Research Council to explore the social and legal experiences of asylum seekers in Europe claiming international protection on the basis of their sexual orientation or gender identity. The SOGICA team is inviting people to take part in the project, including by contributing materials to the project database – a free resource for anyone working on these issues.

## **Contact Information**

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### **About Migrants Resource Centre**

Migrants Resource Centre (MRC) has a vision of a British society that is inclusive and free of prejudice; that celebrates the diversity of its population; and that supports the rights of all people to enjoy freedom from persecution, danger and oppression. For over thirty years we have worked to remove the barriers that prevent migrants, refugees and asylum seekers from participating fully in society. We have helped tens of thousands of people secure protection in the UK, regularise their immigration status, learn English, and find work. Asylum Aid, our programme supporting refugees, asylum seekers, and stateless people provides free legal advice to the most vulnerable and excluded asylum seekers, and lobbies and campaigns for a fair asylum system that upholds respect for their dignity and human rights.

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