

SEXUAL ORIENTATION ISSUES IN THE ASYLUM CLAIM

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Introduction

This instruction, with due regard to the Supreme Court Judgment in the case of HJ (Iran) & HT (Cameroon) v SSHD [2010] UKSC 31, gives guidance on:

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

Application of this Instruction in Respect of Children and those with Children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Every Child Matters; Change for Children' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

This instruction should be read in conjunction with the Asylum Instructions (AI) on [Considering the Protection \(asylum\) Claim and Assessing Credibility](#) ; [Considering Human Rights Claims](#), [Conducting the Asylum Interview](#), [Gender Issues in Asylum Claims](#) and [Internal Relocation](#).

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Glossary

Below is a brief glossary setting out some of the terms used in this instruction. It is important to recognise that some individuals may hold a completely different perception of their own sexual orientation from those set out below, and decision makers should not label or stereotype lesbian, gay or bi-sexual persons. It will be necessary to establish how the applicant perceives him or her self and how his or her behaviour or characteristics are perceived by the society which s/he is from.

LGB is an acronym for 'lesbian, gay or bisexual'. This term is often used to refer to LGB persons as a diverse group or community, and is used throughout this document.

Sexual behaviour may relate to activities to find or attract partners for physical or emotional intimacy, and/or it may relate sexual contact (the latter is usually referred to as '**sexual conduct**'). Sexual behaviour is not always in line with sexual orientation, for example, a lesbian woman or gay man may engage in heterosexual relations, or a person with a heterosexual orientation might in certain circumstances have sexual contact with a person of the same sex (e.g. lack of access to people of the opposite sex or male rape used as an exertion of power).

Sexual orientation is understood to refer to a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. It does not necessarily mean that the individual is engaged in sexual behaviour.

Sexual Orientation and Persecution

An applicant may claim asylum when he or she fears persecution on account of his or her actual or perceived sexual orientation which does not, or is deemed not to, conform to prevailing political, social or cultural norms in their country of origin.

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

The European Council Directive (2004/83/EC) of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (the Qualification Directive) contains definitions of certain terms within the 1951 Convention, including the forms persecution may take. The Directive was transposed into UK law through the Refugee or Person in need of International Protection (Qualification) Regulations 2006 and changes to the immigration rules, and has applied to all protection based claims since 9 October 2006.

Claims made by people on the basis of their sexual orientation can reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and so-called 'honour killing'. Lesser forms of physical and psychological harm that may constitute persecution include harassment, threats of harm, vilification, intimidation and psychological violence.

Amongst the persecution experienced by LGB individuals, there are certain types of harm more commonly experienced by particular groups; for instance:

- In some countries some lesbians may experience persecution due to their sexual orientation and gender. They may be at a higher risk of harm at the hands of non-State actors and may have less access to informal protection systems. Lesbian women and gay men may feel obliged to conform outwardly to family and social expectations by, for example, marrying and having children. This issue may affect all LGB people but due to women's weaker position in society, this issue may be even more acute for lesbians.

The fact that hostility towards LGB persons is common, widespread and culturally accepted in a particular society does not render the harm caused any less serious. While such a fact is not relevant to an assessment of whether any harms reaches the threshold of persecution each case should be considered on its own merits in the light of country of origin information and guidance.

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Discrimination

Hostility or the threat of violence towards LGB individuals need not necessarily be the defining feature of persecution. A discriminatory measure, in itself or cumulatively with others, may amount to persecution (see [Considering the Protection \(asylum\) claim and assessing credibility AI](#)). For example, it may, depending on the facts of the case, amount to persecution if the discrimination has sufficiently serious consequences for the person concerned such as:

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

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Non-state Agents of Persecution and the Failure of State Protection

Persecution can be perpetrated by the state. However, acts of violence and serious discrimination committed by the local populace, within a specific community, within the family, or by individuals, are also persecutory if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer sufficient protection.

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

Decision makers should: refer to objective country of origin information provided by the Country of Origin Service (COIS), in particular the sections on LGB; make (where necessary) a case specific research request to COIS; refer to Country Guidance cases (principally found in the country Operational Guidance Notes); and take into account the relevant sections on actors of persecution and the sufficiency of state protection in the AI [Considering the protection \(asylum\) claim and assessing credibility](#).

For reasons of sexual orientation individuals may be subject to abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts. Such failure of state protection may include, but is not limited to:

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

It is not always reasonable or possible for an LGB claimant to alert the authorities to his or her need for protection. This may be because protection may not be forthcoming or, where there are criminal sanctions for LGB practices, because the claimant is regarded as an offender rather than a victim.

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

- (i) a law, policy or practice may have a "legitimate" goal, e.g. the maintenance of law and order out of respect for genuine religious or social sensitivities, but be administered through persecutory means;
- (ii) the penalty for non-compliance with the law or policy may be disproportionately severe against certain persons/groups;
- (iii) a law, policy or practice may not be enforced in practice and therefore fail to deter or prevent the banned behaviour.

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Internal Relocation

In accordance with Paragraph 339O of the Immigration Rules, if there is a part of the country of origin to which the applicant can relocate where they would not have a well-founded fear of persecution or real risk of suffering serious harm, **and where it is reasonable to expect them to stay**, then the application for asylum should be rejected.

The Supreme Court in HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location:

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

In the event that internal relocation may be a possibility then the question to be asked is whether the applicant would face a well-founded fear of persecution in the place of relocation; whether there is a reasonable level of protection by the authorities, and if so, whether it is reasonable, i.e. not unduly harsh, to expect the individual to travel to and stay in that place. The practicalities **for the individual concerned** of moving to and settling in a different part of a country must be assessed in the light of the available information about the country concerned, such as the means of travel and communication, cultural traditions, religious beliefs and customs, ethnic or linguistic differences, health facilities, employment opportunities, supporting family or other ties, and the presence and ability of civil society (e.g. non-governmental organizations) to provide practical support.

In certain countries, financial, logistical, social, cultural and other factors may mean that a LGB person may face particular difficulties. This may be particularly the case for lesbians who are unmarried, or single/lone parents, especially in countries where women are expected to have male protection. Women may also face a particular form of discrimination in the place of relocation and thus be unable to work so that they cannot survive in the place of relocation.

Decision makers should consider whether the applicant, if unaccompanied, would be able to safely access the proposed relocation area.

Decision makers should: refer to objective country of origin information provided by the Country of Origin Service (COIS), in particular the sections on LGBT; make (where necessary) a case specific research request to COIS; and refer to the Asylum Instruction on [Internal Relocation](#) . But even where country information and guidance suggest that relocation is possible, the personal circumstances of the individual should be explored at interview for a sound decision to be reached on the reasonableness of internal relocation. The onus is on the decision maker to demonstrate that internal relocation is not unduly harsh, having regard to the individual circumstances and country of origin information.

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Convention Grounds

LGB issues may inform an assessment of whether one of the five convention grounds applies. Decision-makers are reminded that an application does not have to be on one Convention ground only and that while the claimant is required to establish that s/he has a well-founded fear, s/he is not required to identify accurately the Convention reason for it. As with all other applications, someone who may not qualify for international protection under the 1951 Convention could nevertheless qualify for Humanitarian Protection (Subsidiary Protection) (see the AI on Humanitarian Protection).

Membership of a Particular Social Group (PSG)

Most claims relating to sexual orientation will fall under 'Particular Social Group'. A definition of what constitutes a particular social group is provided in Regulation 6 (i) (d) of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006.

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

- i) 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
- ii) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

The Regulation sets out an approach to identifying the existence of a social group which is similar to the one taken by the UK courts, most significantly in the House of Lords judgement in the case of **Shah and Islam [1999] UKHL 20**. In Shah and Islam it was found that women in Pakistan constituted a particular social group. When discussing this case, Lord Steyn drew an analogy with homosexuals by saying: "I regard it as established that depending on the evidence, homosexuals may in some countries qualify as members of a particular social group."

Where LGB issues are a significant feature of claims made by particular nationalities, guidance will be provided in the relevant **Operational Guidance Note**. However, an absence of information on LGB issues in an OGN or COI should not necessarily be taken to mean that there are no issues for the LGB people in that country. If decision-makers are in doubt as to whether a person may be part of a PSG they should refer to the section on membership of a particular social group in the [Considering the protection \(asylum\) claim and assessing credibility AI](#) or discuss the case with a Senior Caseworker (SCW). If it is considered that the person is not within a PSG, the decision maker will explain why not.

Race

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

Religion

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

Nationality

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

“The concept of nationality shall not be confined to citizenship but shall include, for example, membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins, or its relationship with the population of another state.”

As a result the term ‘nationality’ may occasionally overlap with the term ‘race’. Whilst actual or attributed national identity is not specific to LGB persons, it may operate in tandem with sexual orientation to explain why an individual fears persecution. For instance an LGB individual from a particular ethnic group may have a fear of persecution that does not exist for other LGB individuals in the country of origin..

Political Opinion

Regulation 6(1)(f) of the Qualification Regulations 2006 states that:

“The concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon [by the applicant]”.

Holding political opinions different from those of the government is not in itself a ground for refugee status. However, in countries where LGB practices are viewed as contrary to the country’s policy, an applicant may apply for asylum based on a fear of persecution for acting in opposition to the political opinion. For full details see section on political opinion in the [Considering the protection \(asylum\) claim and assessing credibility AI](#)

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Interviewing and Assessment of Credibility

When interviewing an applicant, before assessing the credibility of an account and before deciding whether there is a need for protection, decision-makers should have an awareness of the status and treatment of LGB individuals in the applicant's country of origin. This should be by reference to the specific sections on LGB persons in **Country of Origin reports** and other approved objective sources of information. This awareness includes, but is not limited to:

- The social and cultural norms of the country and how these affect the general response to lesbian and gay people.
- The level of 'visibility' of LGB communities, including the presence of specific social, campaigning or support groups.
- The efficacy of protection against violence available to all citizens of the country of origin, including LGB persons.
- The legal status of LGB persons, including: criminalisation of same-gender sexual conduct (including whether implemented or not); recognition of same-gender relationships; any discriminatory measures.

Establishing the material facts and assessing the credibility of the claim are essential and it is therefore important that an effective interview is conducted and relevant issues clarified with the applicant. (For further guidance see the [Considering the protection \(asylum\) claim and assessing credibility and Conducting the asylum interview](#) AIs).

Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter that is made in advance of an interview. Requests made on the day of an interview for a male or female interviewer or interpreter should be met as far as is operationally possible.

The credibility of an individual's claim and the degree of risk on return should primarily be tested by a **sensitive** enquiry into the applicant's realisation and experience of sexual orientation, both in the country of origin and in the UK. Interviewing officers should ask open questions that allow applicants to describe the development of their identity and how this has affected their experiences both in their own country and in the UK.

A common element in the experience of many LGB applicants is having to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions.

Lesbian and gay applicants may feel a strong sense of shame and stigma about their sexual orientation and may feel that persecution they have experienced was caused by this identity. They may also come from cultures where they have never openly discussed their sexual orientation.

For these reasons lesbian and gay asylum seekers may struggle to talk openly about their sexual orientation. An open and reassuring environment will help to establish trust between the interviewer and the claimant, and should help the full disclosure of sensitive and personal information.

Although an individual's appearance or demeanour may have a bearing on the persecution suffered in the country of origin, stereotypical ideas of people – such as an 'effeminate' demeanour in gay men or a masculine appearance in lesbians (or the absence of such features)

should not influence the assessment of credibility. Nor should an adverse judgement be drawn from someone not having declared their sexual orientation at the screening phase.

Generally speaking, self-identification as lesbian, gay or bisexual will be the normal starting point as an indication of a person's sexual orientation. However applicants may not always feel able to disclose this straight away and it will need to be explored in greater depth at interview.

The fact that an applicant has not had any same-sex relationship(s) in the country of origin or in the country of asylum does not necessarily mean that s/he is not lesbian, gay or bisexual - it may be that the individual was fearful of the implications of acting on his or her sexual orientation, and wary of doing so in the UK. Neither should (heterosexual) relationships or parenthood (both of which may need to be explored at interview) be automatically taken as evidence of a lack of credibility. Interviewing officers should be aware that lesbian and gay relationships in some countries may bear little resemblance to relationships in the UK. The Court of Appeal in **NR (Jamaica) v SSHD [2009] EWCA Civ 856** has made it clear that what is relevant is "current" identity. Decision makers should encourage individuals to explain their previous actions in order to ensure that all evidence can be considered appropriately.

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Deciding the Claim

Having established facts of the claim and come to a conclusion on which aspects are accepted, rejected or where it is appropriate to apply the benefit of the doubt, in accordance with paragraph 339L of the Rules, decision makers will then need to consider if there is a future risk of persecution, and if the criteria for Refugee Status, Humanitarian Protection or Discretionary Leave apply. (See [Considering the protection \(asylum\) claim and assessing credibility AI](#) for detailed guidance).

The decision-maker needs to assess objectively whether there are reasonable grounds for believing that the applicant, in his or her particular circumstances, would face persecution if returned to the country from which they seek refuge. It is important to consider fully any other relevant material such as medical or psychological reports as well as objective country information provided by the **Country of Origin Information Service**. The absence of objective information to corroborate a claimant's account will be an important factor, but should not necessarily be taken to mean that the claimed fact did not occur. Each case must be decided on its own merits.

It is important, however, to note that there may be very little evidence on the ill-treatment of lesbians in the country of origin. It may be the case that if gay men are found to face persecution, then lesbians, as a corresponding group which does not conform to an established gender role may also be at risk.

Discretion

Great care should be taken in assessing the risk to an individual and the issue of 'discretion'. As noted by the UNHCR in its Guidance Note Relating to Refugee Claims Relating to Sexual Orientation and Gender Identity (21 November 2008):

"A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds."

This is to be understood in the following terms: people cannot be **required** to behave discreetly. However, how they will behave on return is a question of fact to be investigated at the interview. Applications should therefore not be approached from the assumption that individuals could exercise discretion in order to avoid persecution.

The Supreme Court has found in the case of HJ (Iran) & HT (Cameroon) v SSHD [2010] UKSC 31 that the 'reasonable tolerability' test applied by the Court of Appeal is contrary to the 1951 Convention and should not be followed in the future. The Supreme Court has provided detailed guidance. Paragraph 82 of its judgement sets out the approach to take when considering applications for asylum on the grounds of a well founded fear of persecution because of the applicant's sexual orientation. This case supersedes [2009] EWCA Civ 172 HJ (Iran) & HT (Cameroon) v SSHD.

Paragraph 82 of the judgement states:

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

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

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

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

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

The Supreme Court has now established the test which should be applied when assessing a claim based on fear of persecution because of the applicant's sexual orientation. As such, the following steps need to be considered:

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

With due regard to gender equality, the decision maker is now required to look at the risk a lesbian, gay or bisexual person might be exposed to if they chose to live openly on return to their country of origin. The previous test, based on the concept of “reasonable tolerability”, **no longer applies**.

If an individual chooses to live discreetly because s/he wants to avoid embarrassment or distress to his or her family and friends s/he will not be deemed to have a well founded fear of persecution and will not qualify for asylum. This is because s/he has adopted a lifestyle to cope with social pressures and not because s/he fears persecution due to his or her sexual orientation. If an individual chooses to live discreetly because s/he fears persecution if s/he were to live as openly gay, lesbian or bisexual then s/he will have a well founded fear and should be granted asylum.

Each case must be determined in the light of its own facts and country of origin information. It is the task of the decision-maker to assess objectively whether there are reasonable grounds for believing that there would be a real risk of serious harm to the applicant, in his or her particular circumstances, if returned to the country from which s/he is seeking refuge.

Persecution

General hostility and homophobia may not amount to persecution but general discriminatory measures and the cumulative effects of harassment, threats and restrictions can constitute persecution. The interview should establish if it was a single event or a number of incidents that led to the applicant's fear of persecution.

It is reasonable to expect the individual to give a detailed account of any incidents of persecution and/or ill treatment they or others they know have experienced even if they are not aware of the exact legal or social position of LGB persons in their country of origin.

It is neither reasonable nor logical to argue that an awareness of the illegality of their actions should prevent the applicant from engaging in those actions. However, it is reasonable to expect the applicant to explain what they did in response to any ill treatment, persecution or discrimination.

Country of Origin Information

A climate of hostility to LGB persons can still exist in a particular country even where those acts are not specifically laid down as criminal in a penal code or legal statutes or where laws do exist but are not enforced. There may be instances where, even though LGB people are not referred to specifically in the legislation, a society remains intolerant of LGB people. The absence of specific legislation on lesbians in particular may be an extension of the general marginalisation of women. The interview should establish if the threats came from state agents enforcing legislation or whether the persecution is a result of societal discrimination and general homophobia.

Sufficiency of Protection

This must be considered within the context of available objective country information. It may not always be possible to access protection from the state because of the general hostility that exists toward people who are LGB.

This area must be explored and due consideration given to the reasons as to why an applicant's fear of the authorities might prevent them approaching those authorities for protection. General homophobia and intolerance of LGB may contribute to the lack of state protection regardless of whether same sex relationships are criminalised. It is reasonable to ask whether redress was sought and/or to explore any reason for not seeking protection.

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