

# Fear and prejudice here and abroad: Claiming asylum on the basis of sexual orientation

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## I. Introduction

The process of asylum in the UK is an often harrowing process, especially for those sent through the immigration detention system. LGB (lesbian, gay and bisexual)<sup>1</sup> individuals in this position find their situation is exacerbated by discrimination throughout their experience. This article will examine the development of asylum claims based on sexual orientation and, in light of the recent Parliamentary Inquiry into Immigration Detention,<sup>2</sup> will review the problems of proving claims of persecution based on sexual orientation and the fear and prejudice faced by LGBT people in immigration detention. Finally, the article will suggest solutions to the problems posed, concluding that the Home Office must be constantly vigilant against insensitive and ineffective methods of questioning, and that the particular problems faced by LGBT detainees could be wholly remedied by a radical rethink of the UK's heavy reliance on detention.

## II. Legal Developments

The UK has accepted claims based on sexual orientation since the case of *Shah and Islam* in 1999.<sup>3</sup> The case was centrally concerned with the status of women as an oppressed social group, but established the possibility of homosexuals claiming asylum on the same grounds.<sup>4</sup> Asylum claims based on sexual orientation are based on the Convention Relating to the Status of Refugees, which states that individuals can seek asylum if they are part of an oppressed 'social group'. Before 2010, the test was formulated on the concept of 'reasonable tolerability' and stated that gay men who were able to hide their identity in reasonably tolerable conditions were not

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<sup>1</sup> This article will refer to claims made on the basis of sexual orientation rather than gender identity. Although there is some overlap in the difficulties faced by transgender asylum seekers, it would be disingenuous to refer to LGBT asylum seekers without addressing the unique issues faced by transgender asylum seekers.

<sup>2</sup> APPG on Refugees and the APPG Group on Migration, Parliament of UK, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom* (2015).

<sup>3</sup> *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] All ER 545.

<sup>4</sup> *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] All ER 545, 26.

eligible for asylum. This was reversed in the 2010 case of *HJ (Iran) v Secretary of State for the Home Office*.<sup>5</sup> Counsel in this case convincingly argued against the previous formulation on account of the 'Anne Frank principle'. This principle states that the conditions that Anne Frank had to endure, confined to an attic away from everyday pleasures and in constant fear of discovery, were surely grounds for her to be considered persecuted. Counsel successfully drew a correlation to this and the lives of forcibly closeted homosexuals.<sup>6</sup> No other social group were placed under the same expectation to hide themselves. The case of *HJ (Iran)* demonstrated a great leap forward for LGB rights in the context of asylum.

Since that decision in 2010, there have been further legal developments relating to the status of LGB asylum seekers. The case of *Minister voor Immigratie en Asiel v Hoog Commissariaat* found that the existence of criminal laws that punish same-sex sexual activities 'specifically targets homosexuals',<sup>7</sup> supporting the finding of *HJ (Iran)* that LGB individuals are a recognised social group. Mere criminalisation, however, is insufficient to be acknowledged as persecution, the laws must be actively enforced for asylum to be successful.<sup>8</sup> Protection was further strengthened by *ME v Sweden* in 2013, which found that member states may not return people when they have a well-founded fear of persecution. These strengthened legal protections have substantially increased protections to LGB asylum seekers, and the progress made should be noted and applauded. The application of these principles and putting theory into practice has proved to be a challenging task, however, and despite strong precedent for protection, there are still challenges faced by an immigration system often overwhelmed by sheer numbers.

### III. Discrimination in processing

Parallel to legal developments has been the progress made in improving processing, and the interpretation of guideline judgments, directives and policy pronouncements by those working on the frontline. Before 2010, the manner of determining asylum claims came under heavy criticism from LGBT rights groups, with reports from Stonewall and the UK Lesbian and Gay Immigration Group (UKLGIG) revealing a troubling process of determination.<sup>9</sup> Problems identified included blunt lines of questioning, reliance on Western stereotypes of sexual types and a punitive approach taken when information was not immediately forthcoming. The officers involved from the Immigration Department had a lack of training that manifested

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<sup>5</sup> *HJ (Iran) v Secretary of State for the Home Office* [2010] 3 WLR 386.

<sup>6</sup> *HJ (Iran) v Secretary of State for the Home Office* [2010] 3 WLR 386, 96.

<sup>7</sup> *Minister voor Immigratie en Asiel v X (United Nations High Commissioner for Refugees intervening)* [2014] 1 QB 1111, 48.

<sup>8</sup> *Ibid.* 61.

<sup>9</sup> Stonewall, *No going back: Lesbian and gay people and the asylum system* (2010); UK Lesbian & Gay Immigration Group, *Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum* (2010).

itself as a lack of sensitivity to possibly traumatised individuals who often experienced a deep shame and stigma due to their sexual orientation.

The pressure from civil society was a catalyst in the implementation of new Home Office guidelines for handling asylum claims based on sexual orientation.<sup>10</sup> Despite these advances, the 2013 report 'Missing the Mark' from UKLGIG asserted that 'old problems are creeping back'.<sup>11</sup> By 2014, the *Observer* had reported on a particularly offensive line of questioning taken in regard to an LGB asylum seeker that caused yet another outcry.<sup>12</sup> This sparked another review in March-June 2014 of the asylum system from the Independent Chief Inspector of Borders and Immigration.<sup>13</sup>

Reform in the area of asylum processing may have seemed to be a somewhat Sisyphean task thus far, but the 2014/15 Parliamentary Inquiry into Immigration Detention has created real momentum for change in all areas of immigration detention. The problems in proving sexual identification can be traced back to what has been described as a 'culture of disbelief' within the Home Office for all asylum applications.<sup>14</sup> Applicants for all purposes must battle with officers trained to probe stories, but who have become inclined to doubt every narrative they encounter due pressure from above to reduce numbers. The particular problems faced by LGB applicants is often derived from their struggle to express themselves when talking about their sexual identification 'due to feelings of 'shame, painful memories or cultural implications', whilst it may be difficult to establish trust with the interviewing officer.<sup>15</sup> The problems of LGB asylum applications come down to credibility issues which have 'come to be at the core of many, if not most, asylum cases'.<sup>16</sup> There are great difficulties in using medical and psychological reports, when it is considered not appropriate or legitimate in determining sexuality. Interrogative questioning is only likely to elicit defensiveness. The further problem of late disclosure is a result of many applicants natural tendency to hide their sexual identity when they are used to being persecuted for it in their home country.

These difficulties can be seen as a contributing factor in the over-reliance on inappropriate questioning, though this has been limited by an EU directive and the decision of the joined cases A-148/13 to C-150/13 heard before the European Court

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<sup>10</sup> UKBA, *Asylum Policy Instruction: Sexual orientation issues in the asylum claim*, (2010).

<sup>11</sup> UK Lesbian & Gay Immigration Group, *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (2013), p. 30.

<sup>12</sup> Travis, A (2014), 'Ga y asylum seekers face 'intrusive' sexual questions', *The Guardian*, (23 October 2014).

<sup>13</sup> John Vine, 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* (2014).

<sup>14</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 26 March 2015, 1581 (Baroness Hamwee).

<sup>15</sup> Home Office, *Asylum Policy Instruction: Sexual orientation issues in the asylum claim* (2015), 3.1.

<sup>16</sup> Jansen, S and Spijkerboer T, *Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, COC Nederland, Vrije Universiteit Amsterdam (2011), p. 9.

of Justice in December 2014<sup>17</sup>. The judgement interpreted Directive 2004/83/EC<sup>18</sup> as precluding 'detailed questioning as to the sexual practices of an applicant', the acceptance of films of homosexual acts as evidence, and treating the late disclosure of sexual orientation punitively.<sup>19</sup>

#### IV. Discrimination in detention

The Parliamentary Inquiry into Immigration Detention criticised how LGB asylum seekers suffer from 'bullying, harassment and abuse inside detention centres'.<sup>20</sup> For any person, regardless of special vulnerabilities, detention can be an extremely traumatic experience, leaving detainees to 'count your days up' rather than counting them down.<sup>21</sup> The particular challenges faced by LGB detainees are not unique to the British system, also occurring in Canadian and US detention centres.<sup>22</sup> The unfortunate irony is that those seeking asylum for persecution in their own countries face similar attitudes and threats in the UK, and for much the same reasons. As one individual stated in oral submission to the Parliamentary Inquiry, 'What I've been through in my country, I was going through it again in detention centres'.<sup>23</sup> The recent case of *JB (Jamaica) vs Home Office*<sup>24</sup> illustrates the tragic level of verbal and physical abuse aimed at LGB detainees. As Lord Scriven described in the House of Lords, it is a life of 'fear and prejudice'.<sup>25</sup>

The Detained Fast Track system, where applicants are detained whilst their claims are supposedly handled with haste, is often applied to LGB asylum seekers, with highly damaging consequences. The level of abuse often leads to LGB detainees voluntarily removing themselves into 'non-punitive isolation', which is 'tantamount to conditions of penal solitary confinement', according to Tabak and Levitan.<sup>26</sup> This is seemingly contradictory to the guidelines of the UNHCR, which state that '[w]here their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.'<sup>27</sup>

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<sup>17</sup> A (C-148/13), B (C-149/13), C (C-150/13) v *Staatssecretaris van Veiligheid en Justitie* [2014] WLR(D) 512.

<sup>18</sup> Council of the European Union, *Council Directive 2004/83/EC* [2004].

<sup>19</sup> A (C-148/13), B (C-149/13), C (C-150/13) v *Staatssecretaris van Veiligheid en Justitie* [2014] WLR(D) 512, 73.

<sup>20</sup> APPG on Refugees and the APPG Group on Migration, Parliament of UK, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom* (2015) p. 68.

<sup>21</sup> APPG on Refugees and the APPG Group on Migration, Parliament of UK, Souleymane, 1<sup>st</sup> Oral Evidence Session, 18 November 2014.

<sup>22</sup> Fialho, C (2013) 'A model immigration detention facility for LGBTI?', *Forced Migration Review*, vol. 42 pp. 50-51.

<sup>23</sup> APPG on Refugees and the APPG Group on Migration, Parliament of UK, Aderonke, 3<sup>rd</sup> Oral Evidence Session, 18 November 2014.

<sup>24</sup> R (*JB (Jamaica)*) v *Secretary of State for the Home Department* [2015] UKSC 8.

<sup>25</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 26 March 2015, 1576 (Lord Scriven).

<sup>26</sup> Tabak, S and Levitan, R (2013) 'LGBTI migrants in immigration detention', *Forced Migration Review*, vol. 42, p. 48.

<sup>27</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), 9.7.

## V. What should be done?

The joined cases of A-148/13 to C-150/13 provide valuable guidance on what should not be done, and this is useful in preventing the worst forms of questioning. The court, however, whilst providing negative requirements, gives no positive guidelines. It is the role of the respective governments, and in the UK, the responsibility of the Home Office to take the initiative to improve processes. As a reference for best practice, the Yogyakarta Principles established by experts on gender identity, sexual orientation and human rights law define sexual orientation and illustrate how human rights relate in particular to LGBT people.<sup>28</sup> Furthermore, the latest literature on credibility assessment provides positive guidelines on how to draw out honest answers with sensitivity.<sup>29</sup> The adoption of new Home Office principles in February 2015 was welcomed by UKLGIG Executive Director Paul Dillane as the 'first step in tackling poor standards of decision-making'.<sup>30</sup> It remains to be seen whether the latest review can make a lasting impact on the questioning practices of Home Office representatives. It would appear officials are simply vulnerable to the same societal influences that encourage stereotyping and prejudice as the rest of the population, and as long as homophobia exists in the wider community, the Home Office must remain perpetually vigilant against the slipping standards of staff.

Secondly, as it can be demonstrated that LGB detainees are clearly vulnerable in detention, it may seem intuitive to suggest that they should be included as one of the official categories of vulnerable people that are excluded from detention. These categories include 'people with serious mental or physical health conditions, survivors of torture, elderly or disable people, pregnant women'.<sup>31</sup> It should be noted, however, that simply because a person fits in a category of vulnerability does not, in practice, guarantee protection from detention. The Detained Fast Track (DFT) programme has a troubling track record, with a third of those placed in DFT wrongly allocated,<sup>32</sup> in a process that suffers from 'poor quality decision-making' according to the UNHCR.<sup>33</sup> This would be an inadequate safeguard for LGB asylum seekers.

Finally, it should be noted that the problems faced by LGB detainees could often be solved by an abolition of the UK's reliance on detention. The UK is the only country in Europe to detain immigrants indefinitely. Indefinite detention is especially damaging

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<sup>28</sup> The Yogyakarta Principles: The Application of International Human Rights Law in relation to Sexual Orientation (2006).

<sup>29</sup> Gyulai, G et al (2015), *Credibility Assessment in Asylum Proceedings: A Multidisciplinary Training Manual*, (vol. 2), Hungarian Helsinki Committee.

<sup>30</sup> UK Lesbian and Gay Immigration Group (2015), 'UK Home Office orders staff not to ask lesbian, gay and bisexual asylum seekers 'questions of a sexually explicit nature'', *Press Release Tuesday 17 February 2015*

<sup>31</sup> Home Office, *Enforcement Instructions and Guidance* (2015), Chapter 55.10.

<sup>32</sup> House of Commons Home Affairs Committee, *Asylum: Seventh Report of Session 2013-14* (2013), 65.

<sup>33</sup> UNHCR, *Home Affairs Select Committee Inquiry on Asylum Submission of the United Nations High Commissioner for Refugees* (2013).

for those who are vulnerable to abuse, and other nations provide guidance on better community assisted programs that can reduce the risks to the mental and physical wellbeing of detainees.<sup>34</sup> The Parliamentary Inquiry into Immigration Detention illustrated the wide range of damaging effects of indefinite detention. The extreme harms posed to LGB detainees is only one impact of a policy that is at the intersection of mental health issues, women's rights and anti-torture activism. The simplest solution to many of the issues experienced by LGB asylum seekers can be found in the abolition of indefinite detention.

## **VI. Conclusion**

The fear and prejudice experienced by LGB asylum seekers is a distressing reminder of the human impacts of current asylum policies. Abuse in detention is ongoing and will continue unabated unless there is radical change in the use of detention. Responses to abuse, such as voluntary solitary confinement, are manifestly inadequate. In conclusion, the use of Detained Fast Track process for LGB asylum seekers is inappropriate due to the length of time it takes to determine claims. Positive guidelines for questioning should be established and properly implemented to ensure that discriminatory attitudes do not seep in. Ultimately, as the Parliamentary Inquiry revealed, the harm to LGB asylum seekers is just one negative consequence of the policy of indefinite detention, and alternatives should be explored.

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<sup>34</sup> See Immigration Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention* (2011).