FLEEING HOMOPHOBIA

QUESTIONNAIRE

European Research Project

FLEEING HOMOPHOBIA, SEEKING SAFETY IN EUROPE,

Best Practices on the (Legal) Position of LGBT Asylum Seekers in the EU Member States

Introduction

Each year, thousands of lesbian, gay, bisexual, transgender and intersex (LGBTI) people apply for asylum in the European Union. Although the EU Qualification Directive recognises that they might qualify for international protection (Article 10(1)(d)), it does not address the particular difficulties they are confronted with. As a result of this considerable differences exist in the ways in which applications of LGBTI asylum seekers are dealt with in the various EU Member States. Yet, data with respect to these issues are very scarce. Through this research project we hope to fill this data gap.

Your answers to this questionnaire (= the country reports) will supply the empirical data for the comprehensive, normative analysis we will draft. We will also make an inventory of statistical data, although our initial research shows that these are hardly available.

The data provided by the country reports will enable us to identify best practices regarding qualification for international protection and asylum procedures. We will draft a policy document, translating the best practices into policy recommendations for the EU and its Member States. We hope this will contribute to the development of a common European approach to address the specific needs of LGBTI asylum seekers and to a European practice of adequate protection for LGBTI asylum seekers.

Guidance to the questionnaire

In this questionnaire we ask you to describe legislation and policy, practice and case law concerning LGBTI asylum seekers. We use the EU Directives Articles only as a means to structure the questions.

It is clear that there are not only considerable differences in the handling of LGBTI asylum applications in each EU country, but in their numbers as well. The availability of these cases will

also vary per country. If your country has a small number of cases available, we would like you to give a full description of these cases. An extra effort should be made to find more cases. If large numbers of LGBTI cases are available, your main effort will consist of studying them. Because it may not be possible to describe all cases, we would then like you to provide a more general picture. We ask you to report on the argumentation in legal practice: decisions and/or case law. Some of you may have access to decisions, but if this is impossible or too complicated, you can confine to case law.

We strongly advise you to cooperate with other stakeholders (refugee and/or LGBTI NGOs, lawyers, UNHCR, government officials etc.) in collecting cases and answers to the questionnaire. If you cannot answer a question yourself, if there is a gap in your knowledge, please involve other experts. For example: lawyers should ask NGOs and NGOs should ask lawyers.

We consider practices 'good' when they are in line with human rights standards and 'bad' when they are not. While we aim at identifying good/ best practices, we are also very interested in bad/ worst practices. So please don't hesitate to mention all good and bad practices that came to your attention.

We would like you to point out and make explicit whether you refer to written law, decisions or practice. Please send decisions and/or case law as attachment, or a summary in English (French or German) when the question requires this. We would prefer English summaries and translations, but if this is a major obstacle for you, French or German will do as well.
If possible, please give comprehensive answers, although the maximum length of your answers should not exceed 50 pages (not including questions and attachments). In the grey boxes you can type longer answers, the yes/no boxes can be ticked with the space bar or by using your mouse. You can move through the questions with the tab key or arrow keys.

Thank you very much!

Best regards,

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General

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What is the basis of your expertise on LGBTI asylum issues?

10 plus years of activism, advocacy and academic study.

What sources did you use in responding to this questionnaire (e.g. your own cases, case law, lawyers, NGOs, government representatives)?

UK Case Law, UK Lesbian and Gay Immigration Group, and own academic research and litigation work.

Frequency of LGBTI asylum claims

1) Statistics on LGBTI asylum seekers
   a) Does your government provide statistics on LGBTI asylum seekers (their numbers, countries of origin, proportion of L, G, B, T and I cases, positive or negative decisions, recognition rates etc.)?
      ☐ No
      ☒ Yes. Please provide us with a copy/translation.
   b) Do NGOs in your country provide statistics on LGBTI asylum seekers?
      ☒ No
      ☐ Yes. Please provide us with a copy/translation.
   c) Do other sources in your country provide statistics on LGBTI asylum seekers?
      ☒ No
      ☐ Yes. Please provide us with a copy/translation.

2) If no national statistics are available, could you tell us how many asylum claims based on persecution for reasons of actual or perceived (imputed) sexual orientation and/or gender identity you know of in your country? Please explain the basis of your answer (published case law, lawyer network, LGBTI community, other NGOs, newspaper reviews, intuition) and indicate the time frame.

From the 1st of July 2011, the UK Border Agency has started to compile statistics on the number of LGB (possibly T) asylum claims on their electronic Casework Information Database. This follows an audit of LGBT claims by Stonewall and UNHCR from 1 March to 30th June 2011 (Source: Bill Brandon, Deputy Director, NAM +, Quality and Learning, Refugee Integration and Resettlement, UK Border Agency, Public Lecture, 9 June 2011 and see also Damien Green MP, Minister for Immigration, Hansard Debates, House of Commons, 19 July 2011, Column 775W). This will place the UK with Belgium and Norway, as the only EU Member States to collect statistics on LGBT asylum claims At this present time no statistics have been published and therefore analysis follows of the reported case law and statistics from the UK Lesbian and Gay Immigration Group.

The following is the "reported" case law (still in force in May 2011) since 1999 Landmark decision in Islam v. Secretary of State for the Home Department and R v. IAT ex parte Shah [1999] 2 WLR 1015 which accepted that "homsoexuals" may constitute a Particlar Social Group for the puproses of Refugee Convention protection. This case involved women from Pakistan, and the establishment of gender within the Particular Social Group Convention reason [as per Lord Steyn]: "The potential reach of the Acosta reasoning may be illustrated by the case of homosexuals in countries where they are persecuted. In some countries homosexuals are subjected to severe punishments including the death sentence. In Re G.J. [1998] 1 N.L.R. 387 the New Zealand Refugee Status Authority faced this question. Drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the U.S.A., the Refugee Status Authority concluded in an impressive judgment that depending on the evidence homosexuals are capable of constituting a particular social group with the meaning of article 1A(2): see pp. 412-422. This view is consistent with the language and purpose of article 1A(2). Subject to the qualification that everything depends on the state of the evidence in regard to the position of homosexuals in a particular country."

The most recent important judgment with respect to Lesbian, Gay and Bisexual ('LGB') asylum claims is the July 2010 UK Supreme Court judgment in HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31; [2010] 3 W.L.R. 386 (July 2010) - (the "Kylie concert case") . In describing the equal basis LGB and non-LGB cases should be determined, Lord Rodger at paragraph 53 held: "At the risk of repetition, the importance of this analysis for present purposes is that it proceeds on the basis that, so far from permitting or encouraging its agents to persecute the applicant for one of the protected grounds, the home state should have protected him from any persecution on that ground. The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they

are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them."

Following the 1999 decision of of the House of Lords in Shah and Islam, the 1999 England & Wales Court of Appeal in Jain v SSHD [2000] Imm A.R. 76 constructs a "continuum" to assess claims (a 'free' end at one end and a 'persecutory' end at the other). This case involved a gay man from India, and following Shah (1999) provided judicial guidance on how judicial decision makers should determine claims from "homosexuals" (as per Lord Justice Schiemann):

"As it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect. Of course no person has a right to engage interpersonal sexual activity. His right in this field is primarily not to be interfered with by the State in relation to what he does in private at home, and to an effort by the State to protect him from interference by others. That is the core right. There are permissible grounds for State interference with some persons' sexual life - eg those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others. However, the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a State which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee. That is one end of the continuum.

The other end of the continuum is the person who lives in a State in which such activity is not subjected to any degree of social disapprobation and he is free to engage in it as he is to breathe.

In most States, however, the position is somewhere between those two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from so doing. Some pressures may come from the State - eg State subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the Community, without those members being subjected to effective sanctions by the State to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-takers is when to ascribe the word "persecution" to those pressures on

the continuum. In this context Mr Shaw, who appeared for the Secretary of State, reminded us of the references in Shah & Islam to the concept of serious harm and the comment of Staughton LJ in Sandralingum & Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 at page 114, where the Lord Justice stated:

"Persecution must at least be persistent and serious ill-treatment without just cause ..." [emphasis added]"

In NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856; [2010] INLR 169,(successful challenge determining that sexual identity is current sexual identity and not determined by past sexual experimentation), the England & Wales Court of Appeal held [paragraph 24]"It is of course her sexual orientation at the time of the hearing which is important."

Other cases in the Court of Appeal include:

Z, A and M v Secretary of State for the Home Department [2002] EWCA Civ 952; [2002] Imm A.R. 560 (unenforced criminal legislation) and Z v Secretary of State for the Home Department [2004] EWCA Civ 1578; [2005] Imm A.R. 75 (appellant had not provided evidence on why he lived discreetly in the past in Zimbabwe).

Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600; [2006] Imm A.R. 217 (lesbian from Ethiopia had failed to provide country evidence which showed more than social stigma). This case also warned against a human rughts approach to sexual identity claims as it was not accepted that there exists a "core right" to be gay within Refugee law, as this will go beyond what has been agreed by the Contracting States to the Refugee Convention (as per Laws LJ).

RG (Colombia) v Secretary of State for the Home Department [2006] EWCA Civ 57; [2006] Imm A.R. 297 (no material error of law by the Tribunal in finding that a Colombian gay man can return and continue to be discrete, as he had in the past, and therefore avoid serious harm from vigilante death squads. This case was referred to as "troubling" by the lawyers for HJ (Iran) in the Supreme Court litigation.

Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267 (no error of law in rejecting claim of trans woman from Iran, as risk was comparable to lack of risk to gay men. Availability of surgical provisions resulted in a fidning that there is a lack of persecution).

LS (Uzbekistan) v Secretary of State for the Home Department [2008] EWCA 909 (lesbian appellant did not successfully establish her sexual identity before the Tribunal. Discrimination and harassment of lesbians may occur, but not persecution).

AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 941 (incorrect use of male pro-noun in self identified in asylum claim of trans woman from Iran. Appeal remitted due to unfairness in not allowing adjournment to enable appellant to seek legal representation)

R (on the application of PE (Cameroon)) v Secretary of State for the Home Department [2008] EWHC 1140 (Admin) (corroborative medical evidence supporting claim of rape whilst detained, and therefore past persecution by state officials, created realistic prospect of success and therefore the decision of the Secretary of State not to treat as a fresh claim was legally flawed. This aspect of the judgment was not overturned by the Supreme Court [2009] UKSC 7; [2009] 3 W.L.R. 1253).

OO (Sudan) v Secretary of State for the Home Department [2009] EWCA Civ 1432; [2010] All ER (D) 17 (Jun) (no material error in finding that the 1991 Sudan Penal Code which provides for the death penalty for a repeated offender is not enforced and is therefore not persecutory). It is important to note that the evidence from 2010 from the Country Information Service accepts that gay men in Sudan "are subject to local customs and laws" and therefore indicates that OO (Sudan) can not be relied on as an accurate up-to-date assessment of risk to gay men in Sudan.

JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432; [2010] All ER (D) 17 (Jun) and R (on the application of SB (Uganda)) v Secretary of State for the Home Department [2010] EWHC 338 (Admin) (no material error in law in the Tribunal in JM finding that in 2007 there was no evidence of arrests or prosecution of gay men or lesbians in Uganda. JM is distinguished by the findings of the Administrative Court in SB (Uganda) (see below).

Professor Jenni Millbank (2005) highlights the fact that "decision-makers in Britain have demonstrated a marked reluctance to view criminalization of gay sex per se as persecutory" . It is the continued failure to regard the impact of criminalisation as a trigger, whose effect is persecutory (enforced or not), which is a key failing in the current canon of case law (see Millbank J A Preoccupation with perversion: the British response to refugee claims on the basis of sexual orientation, 1989-2003 Social Legal Studies 2005; 14; 115).

The main challenge in OO (Sudan) and JM (Uganda) was with respect to the definition of persecution found in Article 9 (1) (b) of the 2004 Qualification Directive, which states:

"QUALIFICATION FOR BEING A REFUGEE

Article 9

Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

...

a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
...
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner"

The litigation related to this definition of persecution enabling unenforced criminal legislation which criminalises same-sex conduct amounting to persecution, as this involved a clear violation of the LGB individual's article 8 rights (drawing from Strasbourg jurisprudence - see Dudgeon v UK (1981) 4 E.H.R.R. 149,Norris v. Ireland (1988) 13 E.H.R.R. 186 and Modinos v Cyprus (1993) 16 E.H.R.R. 485 “The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8 (1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.” [§ 41 at 161, Dudgeon]] and Professor James Hathaway's definition of persecution flowing from violation of second category rights (The Law of Refugee Status (1991) (pages 112, and 109-110):

“ ... [T]he sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second, or a failure to implement a right within the third category which is either discriminatory or not grounded in an absolute lack of resources.”

...

“Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR, but form which states may derogate during a “public emergency which threatens the life of the nation and the existence of which is officially proclaimed”. These include ... the right to equal protection for all, including ... minorities; the protection of personal and family privacy and integrity; ... liberty of opinion, expression ... The failure to ensure any of these rights will generally

constitute a violation of the state's basic duty of protection, unless it is demonstrated that the government's derogation was strictly required by the existence of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way. Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted."

The Court of Appeal held at paragraphs 21 to 25:

[21] But it is on Article 9(1)(b) that Mr Chelvan relies when seeking to show that matters have changed since Amare was decided. There is no dispute between the parties that Article 9(1)(b), dealing with cases where there is an accumulation of various measures, allows for persecution to be established where there is a violation of human rights, where those rights are not confined to the non-derogable rights referred to in Article 9(1)(a). Ms Collier, on behalf of the Secretary of State, accepts that. So a sufficiently serious violation of Article 8 rights in an applicant's home country might amount to persecution. That perhaps is hardly surprising since it accords with our own domestic law as recognised in the case of J.

[22] But the appellants' case is that under Article 9(1)(b) persecution is established simply from the existence of legislation in that country criminalising homosexual conduct because that patently interferes with his Article 8 rights and does so in a continuing way. For my part, I cannot accept that proposition. Article 9(1)(b) contains 2 indicators to the contrary. The first is that the violation of human rights under that provision has to be "sufficiently severe", a phrase which in itself imports a test of severity of impact on the individual.

[23] The second is that those words are then followed by the phrase: "as to affect an individual in a similar manner as mentioned in (a)". That takes one back to the degree of impact referred to in Article 9(1)(a) involving a severe violation of basic human rights. The rights involved under (b) may well be broader than those referred to in (a), but I accept Ms Collier's submission that the reference to affecting the individual "in a similar manner" means that it has to be shown that the impact on the individual is tantamount, or broadly equivalent, to a severe violation of one of the basic rights referred to in (a). The level of severity in terms of impact has to be similar if

persecution is to be shown. That makes sense; there is no reason why one should be prescribing some lesser degree of impact on the individual under Article 9(1)(b) than under Article 9(1)(a).

[24] In short, the Directive and the consequent Regulations do not widen the scope of the concept of persecution established under our own domestic case law. Decisions such as J and Amare remain good law. There has been no material shift in international consensus since those decisions, which remain binding on us. That is perhaps not surprising; the Directive had as its purpose the setting of minimum standards for member states to apply when deciding whether a person qualifies as a refugee, standards which must be met in member states. A particular state is entitled to be more generous towards those claiming asylum in its territory than the Directive would require if it so chooses, but it cannot fall below the minimum there set out.

[25] It follows from this that, if persecution cannot be established under our jurisprudence independently of the Directive and Regulations, it is most unlikely that it can be established by reliance on those measures. Certainly the findings of fact in the present cases justified the AIT's conclusion that the appellants did not have a well-founded fear of persecution. The test in J was properly applied by the tribunals in both cases, and that discloses no error of law.

It is the author's view that the concession by the SSHD in paragraph 21 enables this point to be revisited at a future date.

Administrative Court/High Court:
R v Special Adjudicator ex parte T [2001] Imm A.R. 187 (Pakistani gay man had not told others in the United Kingdom that he was gay, and he would therefore not be at risk on return). Goldring J dismissed judicial review proceedings where it had been found by the Special Adjudicator that T had not been found to come to the attention of the authorities in the past, the law in Pakistan was not enforced, and therefore there was no reasonable degree of likelihood that he would be persecuted. Goldring J, when dealing with Counsel's submission that the existence of the law (deriving form article 8 reliance), in itself amounts to persecution held that as there was no reasonable degree of likelihood of the law being enforced, then there no likelihood of prosecution, and therefore persecution. This case should be distinguished on the following facts - in the UK, T had not 'come out' to either his family or work colleagues, and was only 'out' within the gay community [52].

R (on the application of Anthony Hylton) v Secretary of State for the Home Department [2003] EWHC 1992 (Admin) (unsuccessful challenge of inclusion of Jamaica as a safe country to enable certification, as not accepted in the Sumer of 2003 that there was a lack of effective state protection for gay men in Jamaica. Surprisingly the UK's Barister submitted that the PSG group was confined to "gay men who were involved in prostitution or those who cruised"), R (on the application of Michael Atkinson) v Secretary of State for the Home Department [2003] EWHC 2369 (Admin) (a claimant who was perceived as being homosexual can successfully internally relocate to avoid serious harm), and R (on the application of Dawkins) v Immigration Appeal Tribunal [2003] EWHC 373 (Admin) (a Jamaican appellant needs to be establish more than just he is homosexual and subject to criminal legislation to succeed in an asylum appeal) . These 3 cases can be distinguished by the 2005 Jamaican Country Guidance case of DW (Jamaica)).

R (on the application of SB (Uganda)) v Secretary of State for the Home Department [2010] EWHC 338 (Admin) (as per Hickinbottom J). JM distinguished in SB on the basis that it was accepted by an earlier Tribunal that SB had been arrested and detained by the Ugandan authorities in 2003 in 2004, and that in 2009 it was confirmed that she was on a "wanted list". Also distinguished on the basis of country background evidence which showed that in 2009 to 2010 there had been arrests of gay men and lesbians, and that after the introduction of the Anti-Homosexuality Bill in October 2009, there was an increase in the state and non-state targeting of gay men and lesbians.

Within SB (Uganda) [paragraphs 44 to 46]:

"44. First he in his decision letters, and Mr Mandalia in his submissions before me, relied heavily upon JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432, in which judgment was delivered as recently as 18 November 2009. As the case name indicates, JM was a Ugandan national, and he sought asylum on the basis that he was gay and would suffer persecution in Uganda because of the anti-homosexuality laws found in the Ugandan Penal Code. The evidence was (and the Asylum & Immigration Tribunal, from whom the appeal was made, had found) that the legislation was not enforced and there was no evidence of arrest or harassment from the Ugandan authorities or the population generally. The evidence in the case was from before December 2007, when the case was heard by the tribunal.

45. The Court of Appeal's judgment was therefore made on the premise that the ill-treatment of gay men in Uganda was limited to discriminatory legislation that was not enforced. The court held that (at [14], per Sir David Keene who gave the only substantive judgment):

"… [T]he existence of a discriminatory legislative provision in an applicant's home country will, by itself, not normally amount to persecution unless it has the consequences of sufficient severity for that individual.".

Given there was no evidence that gay men and lesbians were arrested, harassed or abused by either the state authorities or the public in Uganda, the court unsurprisingly held that JM would not face the risk of persecution on return. The mere fact of (unenforced) discriminatory legislation was insufficient to amount to persecution.

46. But this case is very different. Particularly, the premise upon which JM was based (i.e. that the only ill-treatment of homosexuals in Uganda is unenforced discriminatory legislation) is not a premise upon which the Claimant's claim for asylum can be determined. Not only is there the recent evidence of gay men and lesbians being arrested in Uganda because of their sexual identity, Immigration Judge Grimmett found that the Claimant had herself been arrested twice because she was perceived to be a lesbian. There is evidence that both public and the state in Uganda are now more active in their opposition to the gay and lesbian community. The force of the evidence relating to the Anti-Homosexuality Bill (which of course has not yet been passed), and evidence that those in authority in Uganda are increasingly suggesting that the current Penal Code provisions relate to lesbians as well and gay men, is that it arguably reflects a growing willingness on the part of the state to enforce anti-homosexuality legislation in Uganda. As Schiemann LJ said in Jain (at page 83):

"… I am conscious of decisions such as Modinos v Cyprus 16 EHRR 492, where the court held that a policy of not prosecuting provides no guarantee that the policy will continue."

There is also evidence in the material that, amongst significant sections of the public in Uganda, the Bill is a popular measure, and it has strengthened public attitudes against homosexuals there, with the result that there has been an increase in anti-homosexual ill-treatment since the Bill was tabled in October 2009."

Drawing on earlier Tribunal determinations (MN (Kenya) v SSHD [2005] UKIAT 00021, and DW [para 26]), the Court in SB held [paragraph 2]:

"Homosexuality is a matter of sexual orientation or identity rather than behaviour "

This section relates to current and in force Country Guidance determinations as posted on the Upper Tribunal (Immigration and Asylum Chamber) web site: http://www.ait.gov.uk/Public/SearchResults.aspx <<accessed on 2nd May 2011>>.

Country Guidance determinations are promulgated by the Upper Tribunal (IAC) (previously by the Asylum and Immigration Tribunal and before that, the Immigration Appeal Tribunal) as providing guidance on the country conditions for a particular risk group. The Practice Directions of the Tribunal require all judicial decision-makers to follow the guidance [Practice Direction 12.4], as otherwise this will constitute a ground of appeal (TR (CCOL cases) Pakistan [2011] UKUT 33 (IAC)), unless there is evidence which post-dates the Tribunal's determination which undermines the conclusions made (SI (Ethiopia) v SSHD [2007] UKAIT 00012 applied). PD 12.4 states:

"Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

AJ (Risk to Homosexuals) Afghanistan [2009] UKAIT 00001 (successful appeal of gay man where it was accepted that his boyfriend and family had been murdered by the Taliban following their knowledge that the appellant was gay, and this news would travel to Kabul if he were to relocate, and therefore this would not be a viable alternative and discretion would not be available to him) (7th January 2009):

"66. In any community such a tragic incident as that in 2001, with so many deaths, would have attracted considerable local attention. The Appellant as a participant in the homosexual relationship and the sole survivor would have attracted considerable notoriety. As a consequence we conclude he would still now be readily identifiable in his home community. We do not consider that he could in reality maintain any real anonymity or a private life in those circumstances, and would be at real risk in his home area from non-state agents who know of his history and would watch and target him. Thus we conclude that he would face the real risk of persecution in his home area.

67. The question then arises of internal relocation to Kabul. As simply a practising homosexual who would wish to keep his life private, we would not consider, in light of our general findings, that he could not safely relocate. However we have to take into account the prospect that his history will catch up with him and that his demonstrated willingness to take risks could expose him to public outrage even in a big city like Kabul. We have had regard to the quoted passage in the COIR from a

previous paper by Dr Giustozzi concerning the practice of neighbours and landlords checking out a newcomer's background. In this case, on its very particular and exceptional facts as established by the Adjudicator, we consider that that there is a real risk that his past notoriety would catch up with him in Kabul, with similar consequences to those he would face were he to return to Jalalabad. In those circumstances we find, albeit marginally, that he does not have a viable internal relocation option and is entitled to asylum.66. In any community such a tragic incident as that in 2001, with so many deaths, would have attracted considerable local attention. The Appellant as a participant in the homosexual relationship and the sole survivor would have attracted considerable notoriety. As a consequence we conclude he would still now be readily identifiable in his home community. We do not consider that he could in reality maintain any real anonymity or a private life in those circumstances, and would be at real risk in his home area from non-state agents who know of his history and would watch and target him. Thus we conclude that he would face the real risk of persecution in his home area."

Importantly this determination recognises when an individual relocates to a new area by exercising the internal relocation alternative, she or he will arive as a stranger and questions will be asked about the personal background which could reveal sexual or gender identity, which would subsequently lead to persectuion.

MK (Lesbians) Albania CG [2009] UKAIT 00036 (unsuccessful appeal by lesbian from Albania as country background evidence did not corroborate real risk - 10th September 2009). Currently seeking leave to appeal to the Court Appeal. Whilst accepting the possible risk to gay men who are known members of gay associations or who visit crusing areas, the Tribunal held that for lesbians [paragraphs 382 to 385]:

"382. In general terms, lesbian women do not frequent cruising areas and do not join LBTG organisations. Therefore there is lacking the opportunity for them to be harassed or persecuted by the police.

383. There are few, if any, recorded incidents of harm befalling lesbian women. Those women who carry on lesbian relationships in Albania do so privately and without any public advertisement of their sexual orientation. Some may do so out of respect for the views of their family members and the social norms accepted and valued by Albanian society generally. Others may do so out of fear of discrimination if their sexual orientation were disclosed. Others may be motivated by a mixture of both elements.

384. In general terms in Albania women of lesbian orientation are able to carry on lesbian relationships discreetly without attracting the risk of serious harm. In any particular case where the safety of the return of a lesbian woman to Albania is in issue, it will have to be determined whether she is likely to behave discreetly upon return and if so whether "discretion" is something that she can reasonably be expected to tolerate, in the light of all of the circumstances of the case, including the social norms and religious beliefs commonly held in Albania. Such a person will only establish a right to refugee status if she can establish that the apprehended violation of her fundamental rights is likely to attain a substantial level of seriousness.
385. It cannot be said that without more there is a real risk that a woman without family support in Albania would suffer destitution amounting to inhuman or degrading treatment resulting in a breach of her rights under article 3 of the ECHR or persecution, but each case must be determined on its own facts."

YF (not legal - but no real risk) Eritrea CG [2003] UKIAT 00177 (5th December 2003) (appellant had not come to the attention of the authorities prior to departure and therefore would not do so on return. There existed conflicting evidence on prosecutions and persecution of gay men) [paragraph 18.5]:
"18.5 We considered that the evidence before us as to any problems which homosexuals may be subjected to in Eritrea is very limited. We conclude as follows:
(a) that there is no evidence at all that homosexuals are at real risk of discriminatory treatment by members of the general population in Eritrea.
(b) that, provided homosexual activity is engaged in discreetly and in private, it is not reasonably likely that the Eritrean authorities would be interested in prosecuting the individual or subjecting the individual to treatment amounting to persecution or inhuman or degrading treatment. We stress that this conclusion has been reached on the basis of the article mentioned at paragraph 18.3 above which refers to the arrest of 6 gay men in October 2003. We see no reason, for the purposes of this appeal, to question the reliability or otherwise of this article. However, it has to be borne in mind that this article is obtained from a website on gay and lesbian affairs. This being evidence from a source which is not apartsian, this article may not be seen as evidence which is reliable if there is produced other reliable evidence to the contrary. "

RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117 (gay men who come to the attention of the Iranian authorities will be at real risk of arrest and prosecution on return) (8th July 2005) [paragraphs 123 and 124]:

"123. We consider that we can properly conclude from the evidence that it is most unlikely, given the statistics and the problems of proof, that the death penalty for sodomy is anything other than an extremely rare occurrence. It is clear however that, and here we are in agreement with paragraph 24 of Ms Rogers summary of the evidence, those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing.

124. Given that we consider therefore that there is a real risk that a person who comes to the authorities' attention for having committed an act falling within the relevant provisions of the code, it must follow that since this can be presumed to be known by those engaging in such acts, such actions would be likely to be carried out carefully. We have not been addressed on the issue of discretion and whether people engaging in such acts can be expected to act discreetly, which was considered by the Australian High Court recently, in Appellant S395/2002 v Minister for Immigration [2003] HCA 71. That is another argument for another day and we would not wish this determination to be interpreted as imposing a requirement of discretion, but rather a recognition that in the legal context in which homosexuals operate in Iran it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow. We also consider, bearing in mind the consequences for persons prosecuted successfully for such actions, that Adjudicators should view with healthy scepticism claims that family members or friends or neighbours reported such actions to the authorities. Given the severity of the consequences we consider that proper caution should be exercised in assessing claims that people came to the attention of the authorities in such ways. This must be particularly so in the case of family members and friends. In our view, it is the case that homosexual acts carried on in private

between consenting adults are most unlikely to come to the attention of the authorities and it is the case, and we think it is common ground, that the authorities do not seek out homosexuals but rather may respond to complaints of consensual homosexual activity being carried on. That then is the context in which these appeals must be decided."

DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168 (successful appeal of gay man who was found to have suffered persecution in the past. Secretary of State conceded that the authorities in Jamaica will not provide gay men with effective state protection.) (28th November 2005) [paragraphs 65 to 80]:

"65. This appellant did not suffer a single incident, but two serious and violent incidents and, in addition, over a lengthy period, a number of incidents of aggressive harassment. We find that, taken together, these did amount to persecution. They were persistent. It is not necessary that every incident should be as serious as the worst. What happened to this appellant amounted to persecution even without the assistance of the observations in Faraj. However, if such assistance is needed, it is available to the appellant because he was a member of a group, perceived homosexuals, many of whom have suffered in similar ways, as the country information makes clear. We have considered what is meant by "a particular group of persons" in Faraj and have concluded that it does include a group such as homosexuals in Jamaica.
66. As to causation, it is clear that the appellant was persecuted because he is or equally importantly because he was perceived to be homosexual.

67. We find that homosexuals in Jamaica belong to a particular social group and that the appellant is a member of that group. It is clear that homosexuals in Jamaica fulfil the required tests for membership of a particular social group. They are regarded as a group by the population at large. They are not identified solely by reason of the persecution they fear. We follow the reasoning of the Tribunal in MN Kenya already referred to and conclude that homosexuality is a matter of sexual identity rather than sexual activity. It is something an individual should not be required to give up even if he could.

68. Having concluded that the appellant suffered past persecution it does not necessarily follow that he has a current well-founded fear of persecution. We accept that he has a subjective fear. We do not find merit in Mr Blundell's submission that we should apply a reverse Dermirkaya principle. On

the contrary, this is a case where Dermirkaya principles obtain. The fact that the appellant has suffered past persecution is probative but not conclusive evidence of current risk.
69. In the light of the country material we find that the appellant does have a current well-founded fear of persecution for a Convention reason and there is a real risk that his Article 3 human rights will be infringed.

70. Mr Blundell accepts that the authorities will not provide the appellant with a sufficiency of protection. Had he not made the concession we would have come to that conclusion. Mr Blundell has not argued that the appellant could resort to internal relocation, but he has not conceded the point. We find that, in a small country like Jamaica, where homophobic attitudes are prevalent across the country and the appellant, because of his appearance and demeanour, would be perceived as homosexual wherever he went, he would be at risk of persecution and infringement of his Article 3 human rights throughout Jamaica. As he is at risk of persecution there is no question but that it would be unduly harsh to expect him to relocate.

General Conclusions
71. Mr Chelvan has submitted that we needed to consider both a particular social group and an imputed particular social group. We find that as the reasons for persecution must be found in the mind of the persecutor there is no need to differentiate between such categories. The only question we need to ask is whether an individual is a member of a particular social group. It may matter a great deal to an individual whether he is or is not homosexual but, certainly in the context of Jamaica, whether an individual is or is not homosexual, bisexual or asexual is of far less importance than the question whether he is perceived to be homosexual. There is some force in the suggestion, that "perception is all". Mr Blundell has conceded that gay men in Jamaica belong to a particular social group.

72. Mr Chelvan sought to persuade us that a widely defined group was at risk of persecution in Jamaica. He put this as "those seen as not conforming to what Jamaica sees as the norm of masculine identity in Jamaica." Whilst we accept that this formulation may assist in defining those who are thought to be homosexual, it is a wider definition than is required for the purposes of this determination both on the facts of the appellant's case and in relation to the expert evidence and country material before us. We have not heard sufficient argument nor has the material before us been sufficiently targeted for us to address anything other than the core group of men who are or are perceived to be homosexual. This determination is not intended to address the position of Lesbians,

Transsexuals, Transvestites or others who have encountered difficulties because of their actual or perceived sexuality.

73. In Jamaica buggery and almost all types of sexual activity between males are criminalised. There is no indication that the government intends to decriminalise such activities. On the contrary, senior and powerful politicians have indicated that they have no intention of doing so. In 2001 the Public Rights Defender indicated that he was minded to support criminal and civil action against homophobic acts, but there is no indication that any such action has been taken. However, there is no clear evidence before us as to whether and if so how often these criminal laws are enforced.
74. Those perceived to be homosexual are likely to face discrimination and harassment. There is a real possibility that discrimination and harassment can boil over into serious violence, including mob violence, and even death. The position of those perceived to be homosexual is exacerbated by the unpredictability of incidents of violence and the fact, conceded by Mr Blundell, that the authorities, usually the police, fail to provide a sufficiency of protection and are sometimes guilty of exciting or aiding and abetting violence against homosexuals.

75. Internal relocation is not, as a rule, available to a perceived homosexual who, as a stranger in another part of Jamaica, is likely to be regarded with suspicion, even before his homosexuality is identified. He is also likely to lose any protection he might have had from family and friends in his home area.

76. There are some early signs, for example in the Human Rights Watch report, of attempts to change the attitudes of health care professionals and also, amongst the population at large, by J-Flag. However, it is apparent that little progress has been made. The former head of J-Flag was murdered in circumstances where some people entertain suspicions that it was a homophobic crime, notwithstanding the police view that it was a robbery that went wrong. Others connected with J-Flag are understandably reluctant to be identified and there are signs that those who might wish to support the decriminalisation of homosexuality and a more liberal approach are deterred by strong public prejudice, the risk of adverse political consequences and of being targeted by association with those whose cause they espouse.

77. Not all homosexual men in Jamaica are likely to be at risk of persecution or infringement of their Article 3 human rights. As Mr Sobers has pointed out "a gay man with wealth and status can be left alone as long as he remains within his social circles and does not cause his sexual orientation

or his same sex partnership to attract the attention. His sexual orientation will be tolerated as long as he is not openly gay". However, Mr Sobers adds the caveat that "the affluent gay man can be subject to extortion for fear that his sexual orientation become public knowledge." A man who is not thought to be homosexual, perhaps because he has hidden his sexuality, is not likely to be at risk. There will be no perception of homosexuality and no history.

78. However, an individual may allege that, were he to return to Jamaica, he cannot be expected to modify his behaviour or hide his sexuality. How is such an allegation to be approached? In these circumstances the test is not whether he should be expected to accept any restraint on his liberties but would he in fact act in the way he says he would. We rely on the judgment of Buxton LJ in Z v SSHD [2005] Imm AR 75 at paragraph 16 where it is said;

` "Although S395 was presented to the court that granted permission in this appeal as a new departure in refugee law, and for that reason justifying the attention of this court, in truth it is no such thing. McHugh and Kirby JJ, at their paragraph 41, specifically relied on English authority, Ahmed v SSHD [2000] INLR 1. It has been English law at least since that case, and the case that preceded it, Danian v SSHD [1999] INLR 535, that, in the words of the leading judgment of Simon Brown LJ at pp 7G and 8C - D:

"In all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason…. The critical question: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."

It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution."

78. Every case will turn on both credibility and its particular circumstances. What happened to an individual before he left Jamaica will be important. If it is found that he suffered what amounted to past persecution then Demirkaya principles will assist him. If he did not, his task will be the more difficult, but not necessarily impossible. Factors to be taken into account include the extent to which an individual has been identified as homosexual, how widely spread is that perception, the extent of past acts of discrimination, harassment and violence, the extent to which an individual would present as homosexual (for example through dress, behaviour or demeanour), the extent to which he

associates with other homosexuals, whether he is a homosexual prostitute, and the extent to which he is perceived to flout what many people in Jamaica regard as the norm of acceptable heterosexual behaviour.

79. With the possible exception of affluent gay men it is likely that a man who is thought to be homosexual will be at risk of homophobic intolerance, harassment and ill-treatment. The difficulty is in assessing whether this is likely to cross the threshold of persecution. It is clear that some of those who are perceived to be homosexual have suffered to this extent, what is not clear is how many. On the one hand it is likely that the most public and violent attacks will be reported, whilst on the other those who, understandably, decided not to complain to the police may also be reluctant to risk the consequences of press or other publicity. Whilst past persecution is probative of current risk the opposite is not necessarily the case. An individual who has not suffered past persecution may yet be at risk. There is no clear test to indicate when the threshold may be crossed. Homophobic violence is unpredictable. The acceptance by the Secretary of State of the absence of a sufficiency of protection is a vital factor. A man who is perceived to be homosexual and, as a consequence, has suffered past persecution is, unless there has been a material change in his circumstances, likely to be at risk of persecution and infringement of his Article 3 human rights in Jamaica. A man who is perceived to be homosexual but has not suffered past persecution may also be at risk depending on his particular circumstances including, for example, the extent to which it is believed that he suffered threats before departure and will behave on his return.

80. It is not likely that an individual who is at risk of persecution or infringement of his human rights because he is perceived to be homosexual will be able to obtain protection from the authorities. The ability to relocate safely was not fully argued before us. It was effectively, although not specifically, conceded by the Secretary of State in this appeal. It may be an issue which requires full argument or a definitive view from the Secretary of State. Mr Sobers evidence appears to suggest that it is not readily available although other material makes it clear that it does occur. For the purposes of this appeal we accept that the Secretary of State does not seek to argue that internal relocation is available to this appellant."

DW is an extremely important Country Guidance determination as it records clearly the issue of "perception is all" with respect to the difference between LGB and straight lives [paragraph 71]. It is also very important as the UKBA conceded that there is no sufficiency of protection for LGBs

from Jamaica which was a reversal from the stance taken in the Administrative Court judicial review hearings in Hylton, Atkinson and Dawkins (see above).

SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (24th June 2011). The Upper Tribunal, accept that lesbians, or those who are perceived as lesbians (as they do not live a 'heterosexual narrative') are at a real risk of persecution (currative rape or even murder). This landmark case extends the reasoning of the UK Supreme Court's decision in HJ and HT, by analysing 'perception' and risk to those who do not live a 'straight life' :

(1) Jamaica is a deeply homophobic society. There is a high level of violence, and where a real risk of persecution or serious harm is established, the Jamaicans state offers lesbians no sufficiency of protection.

(2) Lesbianism (actual or perceived) brings a risk of violence, up to and including 'corrective' rape and murder.

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

(4) Single women with no male partner or children risk being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion.

(5) Because the risks arise from perceived as well as actual lesbian sexual orientation, internal relocation does not enhance safety. Newcomers in rural communities will be the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians. Perceived lesbians also risk social exclusion (loss of employment or being driven from their homes).

(6) A manly appearance is a risk factor, as is rejection of suitors if a woman does not have a husband, boyfriend or child, or an obvious and credible explanation for their absence.

(7) In general, younger women who are not yet settled may be at less risk; the risk increases with age. Women are expected to become sexually active early and remain so into their sixties, unless there is an obvious reason why they do not currently have a partner, for example, recent widowhood.

(8) Members of the social elite may be better protected because they are able to live in gated communities where their activities are not the subject of public scrutiny. Social elite members are usually from known families, wealthy, lighter skinned and better educated; often they are high-ranking professional people.

JMS (Homosexual – Behaviour – Persecution) Kenya CG [2001] UKAIT 00007 (having accepted that the appellant was detained and ill-treated in the past, discrete homosexuals are not at risk of prosecution or persecution on return) [paragraphs 10 to 14]:

"10. The Adjudicator appears to have accepted that there was a reasonable amount of likelihood that the appellant was detained and ill-treated. There is no justification at all for the appellant being treated in the way he has described in his interview and in his oral evidence before the Adjudicator. The Adjudicator describes these as the actions of rogue officers who should be prosecuted or disciplined. The Secretary of State in his decision letter refers to the fact that there has been a vociferous human rights debate in Kenya and there are human rights organisations that are extremely active. The appellant may well have been a victim of homophobic behaviour by the Kenyan police, but the fact remains that he was released without charge. There is no reason to believe that were he now to return to Kenya, that he would be of any interest to the authorities.
11. We agree with the Adjudicator that the evidence shows that discreet homosexuals are unlikely to face prosecution still less persecution in Kenya. The Tribunal accepts as set out in paragraph 5.25 of the CIPU Report that although there is strong social pressure against individual instances of homosexuality such as from family members, it is not an issue in the public domain. There is no strong antagonistic feeling towards homosexuals, but equally neither is there an active gay community to provoke it. Discreet homosexuals are unlikely to face prosecution or persecution. It is unlikely that criminal proceedings will be taken against a homosexual male unless some other offence is involved.

12. The appellant also asserts that he would be at risk from his family and fellow Masai were he to return. Assuming that the account the appellant has given is true of the way he was treated by his family and fellow tribesmen, he has been the victim of the kind of antagonistic feeling referred to in the CIPU Report. On the appellant's own account at the interview, he said that his family and tribe regarded him as bewitched. Ill-treatment and rejection by his family as described by the appellant is a hard burden for anyone to bear, but the issue is whether the appellant would be at risk of persecution on return to Kenya. The Adjudicator did not accept that the Masai were looking for him in the way he had described. The Tribunal agrees. In our view there are no reasonable grounds for believing that the appellant continues to be at risk from his family nor from the Masai who in effect have rejected him. In our view were he now to return to Kenya he would now be able to lead his own life without interference from his family or tribesmen.

13. In our judgement the Adjudicator has not erred in law as asserted in the Grounds of Appeal. She has considered the possibility of further persecution from the Masai warriors. There is no basis for a successful claim under Article 8 in the light of her finding that the appellant is able to have homosexual relationships provided he acts discreetly. There is no reason to believe that the appellant would be targeted as a known homosexual and be at risk on that basis.

14. In the Tribunal's view, the Adjudicator has reached conclusions that she was entitled to reach on the evidence before her. She has reviewed the evidence and looking at it as a whole has considered whether there is a reasonable degree of likelihood that the appellant would be persecuted for a convention reason on return. The Tribunal agrees with her findings and conclusions that there is no serious possibility of such a risk."

MS (Risk – Homosexuality – Military Service) Macedonia CG [2002] UKAIT 03308 (30th July 2002) (no criminal law prohibiting sexual conduct of a gay man, and not disproportionate to remove on the basis of a "registered" one year long relationship with a UK national. Nevertheless, appeal allowed under article 3 of the ECHR on the basis that appellant would be imprisoned for one year on the basis of military desertion and prison conditions breached article 3 of the ECHR [paragraphs 41 and 42]:

"41. In our considered opinion, the Appellant has not established that he is a genuine conscientious objector to military service, as found by the Adjudicator, nor has he established that the fact of his being a practising homosexual is in breach of the law in Macedonia, nor, again, has he established that his being a homosexual, by itself, would lead to his being treated in such a way if he were to do his military service, as to amount to a breach of Article 3. However, we accept that the Adjudicator was not correct in finding that the Appellant would have to serve only one month's imprisonment for failure to perform his military service, and find, on the objective evidence, that the imprisonment which the Appellant would face would be of at least one year's duration or probably more, and that, for him to have to serve that term, however long or short, in the internationally accepted bad conditions in the Macedonian prisons, would amount to a breach of his rights under Article 3 of the ECHR.

42. We have considered the Appellant's claim that the United Kingdom would be in breach of his rights under Article 8 of the ECHR, by requiring him to return to Macedonia and leave his homosexual partner behind, and the question of his homosexual relationships generally, and we find

that the concession of the Secretary of State that a homosexual relationship such as that between the Appellant and his partner should have subsisted for four or more years, before being considered, is a highly reasonable approach, in all the circumstances, and would not, in our view be in breach of the Appellant's rights, particularly in view of the fact that the present relationship has lasted for, at most, just over one year, in addition to which, weighing up the state of the relationship, we do not consider it to be disproportionate, in all the circumstances of the case, even taking into account that the relationship has been "registered" since 21 November 2001."

YK and RL (Kosovo – Risk to homosexuals) Serbia and Montenegro CG [2005] UKIAT00005 (19th January 2005) (no country background evidence of persecution, even from lesbian and gay campaigning groups) [paragraphs 29 to 33]:

"29. We do not believe that as a Tribunal we should necessarily accept, without challenge, the assertion that simply because there is no objective evidence, it is because of the lack of reporting of such incidents, rather than that they do not take place.

30. According to COC, gay rights activists receive regular reports of men being beaten up or intimidated on suspicion of being gay, but they say that the problem has failed to attract the attention of human rights groups in the area, because of fear of being "outed" stops most gays from reporting hate crime to the authorities. Whilst one might very well understand a natural reluctance to report crime to the authorities for fear of being "outed", that did not explain why there appeared to be so very little objective evidence of such attacks being reported in the media. In her very thorough and detailed report, Dr Schwanvner-Sievers refers to the setting up of Kosovo's first association for homosexual men which, apparently, launched its own website in February 2003. That association recently joined forces with Kosovo's Association of Lesbians and has enabled Kosovo homosexuals with access to computers to communicate. No evidence was adduced to us to suggest that there are reports of attacks reported on this website. If attacks were a regular occurrence then we should have expected them to have been reported on Kosovo's gay website and for copies to have been provided to us.

31. We believe that the Adjudicator had misunderstood what was reported by Dr Schwanvner-Sievers in relation to the attitude of the judiciary. He did, in any event, overlook the fact that homosexuality is not illegal for males over the age of eighteen and that there would, therefore, be no risk of someone being charged with homosexuality being taken before a judge.

32. We have borne very much in mind that Albanian Kosovars are predominantly Muslim and that particularly conservative Islamic views dominate that society in conjunction with cultural,

customary, hetero-patriarchal values shared by all Albanians. We have appreciated that these customary values emphasise notions of masculinity and of the family, of "honour" and "shame" and subsequently include discriminatory attitudes towards homosexuality. We have no doubt that such a society would breed intolerance of homosexuality and encourage discrimination against gays and lesbians, but there is simply insufficient objective material to support the contention that, on return to Kosovo, either of these respondents will face harm which would breach their Article 3 rights. We do not accept the contention that, simply because victims of homophobic violence are reluctant to report attacks, there is no objective evidence. We believe that an organisation such as UNHCR would have identified homosexuals as a vulnerable group if there was widespread and indiscriminate attacks on homosexuals. The advice given by UNHCR in London does not help us, because that is not supported by any objective material. We believe that if attacks on lesbians and gays were such a widespread problem, such that there was a real risk of either of these respondents facing persecutory harm on return, then there would have been some objective evidence to support that contention, if only from lesbian and gay campaigning groups. As it was, the only evidence we have is that quoted in the expert's report taken from the Dutch Fact Finding Mission, which referred to only one incident.

33. We find that the Adjudicator did make a material error of law by failing to give adequate reasons why he found that to return each of the respondents would involve a breach of their Article 3 rights and on the evidence before us we find there to be no risk that either respondent will suffer a breach of their Article 3 rights on return to Kosovo."

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MS (Risk – Homosexual) Turkey CG [2002] UKIAT 05654 (6th December 2002) (appellant may face discrimination on return but this will not result in persecution, and the fact that he had been subjected to rape in the past by police officers only resulted in a fanciful risk of this occurring in the future) [paragraphs 25 to 27]:

"25. The Appellant is in a situation where he is accepted as a homosexual who had suffered male rape by police officers in 1999/2000. There is no evidence to indicate that this action by the police officers was in any way condoned by their superiors and indeed on the scant objective evidence in relation to the gay cruise it would appear that such behaviour would not be condoned by the Turkish authorities. There is no evidence to suggest that an official complaint could not be lodged against what were clearly rogue officers endeavouring to threaten or intimidate the Appellant.

26. The issue before us however is that of the real risk or reasonable likelihood of the Appellant suffering such treatment on return to Turkey. Mr Siddle agrees that any risk in this situation would

arise in the Appellant's attempts to obtain a "pink card". There is simply no objective evidence that was before the Adjudicator or us that would point to a risk to this Appellant of being detained when he attended a medical or went to register for his military service. It is correct that there may be some discriminatory behaviour but this would appear, from the objective evidence before us to fall well short of persecution or torture, inhumane or degrading treatment. Thus any risk of persecution or maltreatment in breach of Article 3 of the ECHR we consider is highly remote or fanciful and certainly not at the level of a real risk.

27. In relation to the claims under Article 8 and 14 of the ECHR we do not consider that there is any evidence to indicate a real risk to a breach of the Appellant's right to a private life. It appears that he conducted a gay relationship for some two years prior to leaving Turkey. Beyond this any breach of Article 8 or indeed of discriminatory behaviour on the basis of his sexuality we consider is outweighed by the valid immigration control obligations of the United Kingdom and that it would not be disproportionate to return the Appellant to Turkey."

JM (Homosexuality: risk) Uganda CG [2008] UKAIT 00065 (10th September 208) (no evidence of actual arrests or prosecution of gay men and the appellant will act in such a way not to cause offence – approach affirmed by the Court of Appeal in JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432, but distinguished by the Administrative Court in R (on the application of SB (Uganda)) v Secretary of State for the Home Department [2010] EWHC 338 (Admin) (24th February 2010)).

JM - paragraphs 170 to 173:

"Conclusion

170. (1) Although there is legislation in Uganda which criminalises homosexual behaviour there is little, if any, objective evidence that such is in fact enforced.

(2) Although the President and government officials have made verbal attacks upon the lifestyle of homosexuals and have expressed disapproval of homosexuality in the strongest terms, the evidence falls well short of establishing that such statements have been acted upon or would be provoked or should provoke in themselves any physical hostility towards homosexuals in Uganda.

(3) Although a number of articles have been published, in particular the Red Pepper article identifying areas where the gay and lesbian community meet and indeed identifying a number by name, the evidence falls very short of establishing that such articles have led to adverse actions

from either the authorities or non-state actors and others in the form, for example, of raids or persons arrested or intimidation.
(4) Although it is right to note a prevailing traditional and cultural disapproval of homosexuality, there is nothing to indicate that such has manifested itself in any overt or persecutory action. Indeed there was evidence placed before us that a substantial number of people favour a more liberal approach to homosexuality.
(5) A number of support organisations exist for the gay and lesbian community and their views have been publicly announced in recent months. There is no indication of any repressive action being taken against such groups or against the individuals who made the more public pronouncements.
171. In general, therefore, the evidence does not establish that there is persecution of homosexuality in Uganda.
172. We considered the particular circumstances of the appellant, particularly as to his intended expression of sexual conduct and sexual identity on return to Uganda. We find that he would face no real risk of persecution, serious harm or treatment contrary to his human rights were he to return to Uganda.
173. In all the circumstances the appellant's appeal in respect of asylum, humanitarian protection and human rights is dismissed."

It is understood by the author that the Upper Tribunal will be hearing the appeal of JS (Uganda) in 2011 to enable it to revisit the findings of the earlier Tribunal in JM.

UK (Risk – Homosexuals) Ukraine CG [2003] UKIAT 00005 (29th May 2003) (no real risk to homosexuals in cities as long as they do not “advertize (sic) themselves”) [paragraphs 10 and 11]:

"10. Refugee Convention/article 3 Human Rights Convention
We should like to repeat our view that the Soros report, though prepared by a pressure-group, is an exceptionally well-balanced piece of work, which might well put to shame the productions of a number of well-known, and supposedly independent country experts. It is clear from it that homosexuals still have a number of problems in the Ukraine, especially in the countryside. This appellant said in his statement of evidence form he had last lived in Rostov on Don, one of the largest cities, and would be returned, if at all, to the capital Kyiv. The investigation practices of the Dnepropetrovsk police are clearly regrettable, though there may well be problems in following up a murder which they seem at least to have suspected had taken place within what public attitudes no doubt made a somewhat close community. We were not, however, referred to anything in the Soros

report or elsewhere to show that they are likely to be typical of police attitudes generally in the Ukraine.

11. The picture we do get from the Soros report is of a country where there is no legal discrimination against homosexuals, who wish to engage only in consensual practices, but where public attitudes remain somewhat unreconstructed. This is no doubt inevitable, where legislation leads public opinion, rather than following it: but, just as in this country not all that long ago, a process of general enlightenment is clearly taking place. On the basis of the Soros report, we see no present real risk for homosexuals in cities such as Kyiv or Rostov on Don, unless they deliberately advertize themselves as such.
Appeal dismissed"

As stated at the beginning of this section, the Country Guidance determination must be followed "unless" there is evidence which post-dates the evidence which was before the Tribunal determining the reported case, which displaces the finding by the Tribunal. In the case of Eritrea, Kosovo, Uganda and the Ukraine, the author has successfully litigated asylum appeals wehere evidence was submitted which post-dated the reported CG cases which resulted in successful asylum appeals.

UK LESBIAN AND GAY IMMIGRATION GROUP DATABASE - 2005 to 25 January 2011 - TOTAL 553 cases - lodged since commencemet of Asylum Support Project (not complete) - data includes entries which relate to contact only, and others which include knowledge of outcome of appeal proceedings.
By Country (76 countries in all): Afghanistan (6 cases), Albania (1), Algeria (16), Angola (1), Azerbijan (2), Bangladesh (6), Barbados (1), Belarus (1), Bolovia (1), Burundi (2), Cameroon (30), China (2), Colombia (3), Congo (DRC) (6), Cuba (1), Dominica (1), Ecuador (1), Egypt (4), Eritrea (2), Ethiopia (2), Gambia (5), Georgia (2), Ghana (2), Guinea (1), Guyana (1), India (4), Indonesia (3), Iran (58), Iraq (14), Ivory Coast (3), Jamaica (78), Jordan (4), Kenya (15), Kosovo (2), Kurdistan (2), Lebanon (2), Liberia (4), Libya (2), Macedonia (1), Malawi (2), Malaysia (3), Mali (1), Mauritius (2), Mongolia (2), Morocco (1), Niger (1), Nigeria (68), Paskistan (26), Palestine (6), Peru (2), Philippines (2), Qatar (1), Russia (5), Saudi Arabia (1), Senegal (1), Serbia (2), Sierra Leone (2), Somalia (5), South Africa (4), Sri Lanka (8), St. Vinvent and the Grenadines (1), Sudan (3), Syria (4), Tanzania (1), Trinidad and Tobago (8), Tunisia (2), Turkey (6), United Arab Emirates (1), Uganda (59), Uzbekistan (2), Vietnam (1), Yemen (2), Zambia (2) and Zimbabwe (24)

Total number of cases where the Database Identifies Sexual Identity: Gay (412 cases), Lesbian (117 cases), Bisexual (11 cases), Trans (10 cases), and Intersex (3 cases).
This data will be used for the replies to the questions below.

The electronic immigration network (www.ein.org.uk), is a primary source for reported cases for lawyers in the immigration and asylum field. The "ein" database records 189 cases where the word "homosexual" appears within the text, where a search was conducted of all UK (including European) immigration and asylum cases. This number also includes cases which relate to asylum claims from lesbians. 134 cases are located with the search term "gay", 68 with "lesbian", 18 with "bisexual", 10 with "transgender" (trans resulted in over 3000 hits and would not be an accurate reflectioon with respect to trans immigration cases), and 1 case where intersex was found in the text (Goodwin v UK, which is not an intersex claim) [search conducted on 2nd May 2011, updated on 3rd September 2011 to show earliest recorded case is 19th May 1994 (Livingstone v SSHD) and most recent is 10th August 2011 (SL v Westminister City Council), search required author to be a subscriber to the Database].

There are only TWO Scottish cases from either the Inner House or Outer House of Session (equivalent to the England and Wales Court of Appeal and Administrative Court). The first is Andrei Ivanov v SSHD [2008] CSOH 15 (31st January 2008) (Opinion of C J MacAulay QC) which was not located on ein using the above search. Which held [paragraphs 35 to 38]:

"Safe relocation
[35] It is clear the adjudicator was satisfied that in his home area the petitioner was at a real risk of being persecuted because of his homosexuality. As he sets out in paragraphs 34-38 of his determination (see paragraph [17]) he accepted that the petitioner had been subjected to regular beatings by the police and that there did not exist a sufficiency of protection for him. In coming to that latter conclusion, as disclosed in paragraph 38 of his determination, he relies on material that relates to the country as a whole and not just Balti. I have set out at paragraph [13] the material from the GenderDoc-M source that the adjudicator accepted when considering the risk to the petitioner. Again that material is not limited to the petitioner's home area and discloses the real risk that homosexuals as a group face generally and more particularly at the hands of the police. Not only did the adjudicator have regard to that material but he also had before him the written and oral evidence of the petitioner. It was the totality of that material that prompted him to make the clear finding in fact that I have set out at paragraph [15] namely that "... in Moldova homosexuals are

beaten by the police and people generally insult homosexuals". That finding is not limited in any way to the petitioner's local area and plainly applies to Moldova generally. In light of that finding the adjudicator's reasoning in paragraph 41 of his determination makes surprising reading. I have set that paragraph out in full at paragraph [19]. He says that he did "not read the background material as indicating that this is so widespread a problem that homosexuals cannot live anywhere in Moldova in safety" and he goes on to conclude "on this evidence that the appellant became the victim of a group of misguided police officers in his local area". There is an apparent contradiction between that reasoning and the clear finding in fact he makes to which I have already referred. In particular his finding in fact does not limit the attitude of the police to homosexuals to any particular area and, on the face of it, applies to Moldova as a whole.

[36] In giving the adjudicator's determination the anxious scrutiny that I am enjoined to give it, I am of the view that the adjudicator, in an unreasonable way, failed to follow through the logic of his own finding in fact, based as it was on background material that he was prepared to accept and the evidence of the petitioner and his sister as to general attitudes in Moldova. Having made such a clear and unqualified finding in fact, it seems to me that it was incumbent upon the adjudicator if, notwithstanding that finding, he was going to conclude that the petitioner could relocate safely, to have given clear and cogent reasons for such a conclusion. In my judgement he has failed to do so.

[37] Counsel for the respondent, as I have already indicated, sought to differentiate the level of risk that might attach to active homosexuals as against the level of risk that might have attached to the petitioner. That approach did not form part of the adjudicator's reasoning but, in any event, as at the time of his detention and maltreatment, the petitioner had decided no longer to keep his sexual orientation secret. Indeed it was the fact that he was seen holding hands with another man that triggered the police response.

[38] Accordingly, so far as this particular issue is concerned, I consider that the approach adopted by the adjudicator was one which a reasonable adjudicator would not have adopted."

The second Scottish case (located via www.bailii.org) is SMF v Secretary of State for the Home Depratment [2009] CSIH 85 - decided before the UK Supreme Court decision in 2010, where asylum was rejected as the gay man from Iran had not expressed a wish to live openly as a gay man in Iran.

The data used for analysis is therefore from the UKLGIG Database and the reported case law referred to above.

3) L, G, B, T, I separately

a) What is the approximate number of lesbian cases within these asylum claims?

In the reported case law = 6. In the UKLGIG Database: 117 cases

What are the main issues in these cases?

Firstly, the invisibility of lesbians and secondly, acceptance that to evade risk, lesbians need to live a 'straight life', as otherwise they could be 'perceived' as being lesbian.

Firstly, they individual needs to "prove" that they are lesbian (see analysis of NR (Jamaica) above). The author appeared before the Upper Tribunal in April 2011 in an appeal of a self-identified lesbian from Zimbabwe, where the lower Tribunal (First-Tier Tribunal) (IAC)) has found that the appellant was a "lesbian or bisexual" as she had had a heterosexual relationship 3 to 4 years earlier, which had lasted a year. The Senior Presenting Officer for the UKBA, and the Senior Immigration Judge indicated that in finding that she was bisexual, based on the earlier single heterosexual relationship, when she has self-identified as lesbian, and it was accepted that she was engaged to a woman at the date of hearing, was not a material error of law.

Secondly, decision-makers refuse to accept that where there is no country background material which shows ill-treatment of lesbians, that they constitute an "at risk" group (see LS (Uzbekistan) v SSHD [2008] EWCA Civ 909 [paragraph 4]):

"The respondent accepted that lesbian relationships attract a significant degree of social opprobrium in Uzbekistan and that as a result the appellant was likely to suffer discrimination and a degree of harassment, but he did not accept that she was at risk of suffering ill-treatment of a kind that could properly be described as persecution or that would violate her rights under Arts 2 and 3 of the European Convention on Human Rights ("the Convention")."

Discretion is also an issue, until the 2010 Supreme Court decision (see below).

In January 2011, Asylum Aid published their report on women's experiences of the asylum system in a report entitled "Unsustainable: the quality of immigration decision-making in women's asylum claims".

At section 5.1.4 (pages 48 to 49 of the report) Asylum Aid having perused 45 determinations, 3 of which related to claims from lesbian asylum-seekers:

"In three cases, persecution on the basis of sexual identity was the main reason the applicants feared returning to their country of origin. None of them were believed by their case owners to be lesbians. In two cases it was held that, in addition, the claim did not engage the Refugee Convention. In the third case it was accepted that lesbians in Cameroon did constitute a PSG and there was lack of state protection. However, as the applicant's account of being a lesbian was not accepted, it was held that she could be expected to return safely.

…

In all cases examined as part of the research where the applicants claimed to be lesbians, caseowners did not accept this. Though the removal of the concept of 'discretion' represents a major development, there is still a high threshold to meet for applicants to convince case owners of their sexual identity, even though the law only requires that to be established to the level of a reasonable degree of likelihood."

On the 24th of June 2011, the Upper Tribunal promulgated the eagerly awaited (hearing in Dceember 2009) Country Guidance Determination in SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251. This determination is ground-breaking as it accepts that there is not only a real risk of persecution of lesbians in Jamaica, but also a real risk of persecution (currative rape and even murder) to those perceived to be lesbians. Perception arises from not living what is recognised by straight Jamaican men as a straight life (ie the 'heterosexual narrative). This expands and deepens the understanding of the UK in engaging in the universal fact that it is the 'difference' between straight and LGBTIs which leads to identification, and then consequent risk.

b) What is the approximate number of gay cases within these asylum claims?

In the reported case law = 18 cases. In the UKLGIG Database = 412 cases

What are the main issues in these cases?

From 2006 onwards, the issue of return on the basis of " voluntary discretion", which would be held as "reasonably tolerable" (J v SSHD [2006] EWCA Civ 1238; [2007] Imm A. R. 73). At paragraph 16 of the judgment in J, Lord Justice Maurice Kay held in referring to the analysis by the Tribunal:

"It will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for "discretion" before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether "discretion" is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to "matters following from, and relevant to, sexual identity" in the wider sense recognised

by the High Court of Australia (see the judgment of Gummer and Hayne JJ at paragraph 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the "discretion" which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that "related to or informed by their sexuality" (Ibid, paragraph 81). This is not simply generalisation; it is dealt with in the appellant's evidence."

This flowed from a misreading of the High Court of Australia case of Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71; [2004] I.N.L.R 233 (case of two Bangladeshi gay men), where at paragraph 40 of the judgment, Justices McHugh and Kirby held in referring to impact of discretion:

"Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality."

Since the 7 July 2010 decision of the Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2010] 3 W.L.R 386, the "reasonably tolerable" discretion test has been held to be unlawful. The guidelines by Lord Rodger at paragraph 82 of the judgment, require the asylum seeker to show (i) that there are lesbian, gay or bisexual, or will be perceived to be, (ii) whether in the country of origin there is a well-founded fear of persecution of LGB people who live "openly and freely); (iii) will the LGB person live openly, and therefore be subject to persecution; or (iv) will the LGB person be (voluntarily) discrete and due to the fear of persecution? Lord Rodger's guidelines are [paragraph 82 of judgment]:
"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.

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. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

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. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

[emphasis in text]

With respect to state persecution, need to show enforcement of criminal law (see analysis of OO (Sudan) and JM (Uganda) v SSHD [2009] EWCA Civ 1432).

c) Did you find bisexual asylum cases within these asylum claims?

☐ No

☒ Yes. Indicate the number of male and female cases. What are the main issues in these cases?

Only in the UKLGIG Database. 11 cases involving self-identified bisexual asylum claimants (2 female, 7 male). The Supreme Court in HJ/HT, for the first time referred to bisexual asylum claims. However, there are no reported claims from bisexual asylum seekers. Main issue is with respect to "proving" that will be known to be/or perceived to be crossing accepted cultural norms in country of origin by expressing bisexual sexual identity. Can they successfully lead "double lives". Know of one bisexual asylum claim which succeeded post-HJ/HT which has not been appealed by the Secretary of State (2010, unreported).

d) Did you find transgender asylum cases?

☐ No

☒ Yes. Indicate the number of male-to-female and female-to-male cases.

What are the main issues in these cases?

In the UKLGIG Database - 10 Trans asylum claims. 5 cases where self-identified as male, and 3 cases where self-identified as female. 2 cases indicated no self-identification. Cases revealed institutional ignorance of Gender Identity issues - lack use of appropriate pro-noun and lack of understanding that trans issues are different from "homosexual" [sic] claims. Only 2 cases in the reported case law - see AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 941 (first issue) and Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267 (second issue).

In the case of AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 941 (appeal remitted to the Tribunal for re-determination as Tribunal had not granted an adjournment to allow for representation) , the Court of Appeal were at pains to distinguish cases involving homosexuality and those involving “transexuality” [sic] with respect to a claim of a self-identified trans woman (as per Sedley LJ [§ 4]):

“Before I go any further, I want to make three points about these two determinations. First of all Immigration Judge Atkinson had not made the jejune error of confusing transexuality [sic] with homosexuality. He had taken a good deal of care to distinguish the two, but had accepted the appellant's case that there was a real risk that others in Iran would not do so.”

Nevertheless, the Court referred to the pre-operative trans woman, who was biologically (natal) male, in the male gender.

In Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267, the Court of Appeal referred to a pre-operative trans-female, who was born natal male but considered herself to be female, in the female gender (as per Moore-Bick LJ [§ 1]):

"The applicant is an Iranian transsexual. She was born male but considers herself to be female and acts and dresses accordingly and I shall therefore refer to her in that way."

In Rahimi the court refused the application for permission to appeal, on the following basis [§ 8]:

"The evidence before me, both in the form of the report of Dr Tremayne, an expert on Iranian culture and particularly the treatment of homosexuals and transsexuals in that country, and in the form of the country guidance cases to which I have been referred, indicates that homosexuality itself is recognised in Iran and is not a crime. Homosexual acts clearly are criminal, but there is little to suggest that a person who is homosexual in orientation is subject to serious ill-treatment or persecution as a result. The position of transsexuals seems to be very similar. The condition is one that is recognised by the state and the state makes provision for appropriate treatment for those who wish to undergo it. There is little to support the suggestion that merely to be a transsexual in Iran will expose one to serious ill-treatment or persecution."

Rahimi is worrying, as the Country Guidance cases clearly indicate risk to "openly" gay men at the time the application for permission was heard (see RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117). The availability of surgical procedures by the state does not accurately reflect persecution by non-state agents without effective state protection.

In AB (Pakistan) (unreported) (31 July 2009) the SSHD vigorously fought the fresh claim of a trans man from Pakistan for 2 years, before conceding the merit in the claim during the hearing, following a strong indication by the judge (Ockelton J) that the claim achieved the legal test of a "realistic prospect of success" before a Tribunal. Initial claim was based on a sexual identity as a lesbian (accepted targeting by girlfriend's father following discovery of the relationship). Fresh claim highlighted the actual transitioning of the claimant from a natal (biological) woman to a trans man. Case resulted in international media attention in July 2009.

Case Count: 2 male-to-female cases 1: male-to-female case. AB (Pakistan) would have been the first reported Tribunal case giving guidelines on how to determine Gender Identity asylum claims. However, on the 22nd of February 2011, the Secretary of State for the Home Department granted Refugee status to AB, and therefore the appeal did not proceed to hearing.

On the 13th of June 2011, the UK Border Agency published it's Asylum Instruction on "Gender Identity issues in the Asylum Claim". This ground-breaking document (first published with the Sexual Orientation Asylum Instruction on the 6th of October 2010), is the first free-standing guidance note, specifically dealing with Gender Identity Asylum Claims (see http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary). This document importantly accepts the following when establishing credibility in gender identity asylum claims:

"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 gender identity. Altering one's birth sex is not a one-step process, but a complex process that occurs over a period of time. Transition may include some, or all of the following personal, legal and medical adjustments: telling family, friends and colleagues, changing one's name and/or sex on legal documents; dressing, behaving and/or living as a different sex; hormone therapy; and possible surgery. Interviewing officers should ask open questions that allow applicants to describe the development of their identity and how this has affected their identity and how this has affected their experiences both in their own country and in the UK."

e) Did you find intersex asylum cases?

☐ No

☒ Yes. What are the main issues in these cases?

In UKLGIG Database - 3 Intersex Asylum Claims (Iran, Jamaica and Pakistan). Main issue is the ignorance surrounding intersex cases with respect to the interlink between biological and social recognition. None of these cases are reported.

4) What are the most common countries of origin of LGBTI asylum seekers in your country? If possible, quantify.

1 Jamaica (78) (14.10 %)
2 Nigeria (68) (12.30 %)
3 Uganda (59) (10.67 %)
4 Iran (58) (10.49 %)
5 Cameroon (30) (5.42 %)

6 Pakistan (26) (4.70 %)

7 Zimbabwe (24) (4.34 %)

8 Algeria (16) (2.89 %)

9 Kenya (15) (2.71 %)

10 Iraq (14) (2.53 %) - Top 10 Total = 70.15 % (another 64 countries appear in UKLGIG's Database (2005 to 25 January 2011).

5) Are you aware of L,G,B,T or I people who do not apply for asylum because of fear of the consequences?

☐ No

☒ Yes. Please explain.

Clear numbers who do not claim asylum on basis of fear of being returned to country of origin.

6) When asylum/ protection is granted to LGBTI asylum seekers, is this generally:

☒ refugee status based on membership of a particular social group? (If so, what is the description of the particular social group, e.g. lesbian women in Pakistan)

Since the 1999 House of Lords case of Shah and Islam, UK Courts have accepted that in general "homosexuals" coome within the Refugee Convention reason of Particular Social Group. For LGBTI claims. Article 10 of the "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 2004 Qualification Directive') has been transposed into domestic legislation in the "Refugee or Persons in need of International Protection (Qualification) Regulations 2006 ("the 2006 Qualification Regulations") . Regulation 6 stipulates the following:

"Reasons for persecution

6. —(1) In deciding whether a person is a refugee:

…

(d) a group shall be considered to form a particular social group where, for example:

(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;

(e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom".
The age of consent in the UK for same-sex or different-sex consensual conduct is 16 (see section 1 of the Sexual Offences (Amendments) Act 2000 (equalling age of consent) and Sexual Offences Act 2003 (repealing gross indecency laws)).
It is important that as a matter of domestic UK law, the UK does not require both d (i) and (ii) for PSG Convention reason to be established (see Fornah v SSHD [2006] UKHL 46; [2007] 1 AC 412 and HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31). This approach is permissible through Article 3 of the 2004 Qualification Directive, which states:
"Article 3

More favourable standards
Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive."

☒ refugee status for fear of persecution for reasons of sexual orientation or gender identity based on another Convention ground (political opinion, religion, nationality, race) If so, please explain.

In cases where the individual is also a political LGBTI activist - political opinion could be pleaded. Additionally, religion could also be a Convention reason, for example in Islamic or Catholic countries of origin (e.g. Iran and Cameroon). Nevertheless, such claims also include PSG Convention reason grounds.

☒ subsidiary protection? On which basis?

Not generally - as accepted since House of Lords decision in 1999 that "homosexuals" come within PSG Convention reason (see above). However, when the asylum seeker is under the age of consent, i.e. under 16, then the claim for protection has been Humanitarian Protection (eg case of gay minor from Iran - VO (Iran) (unreported)).

7) Do you have any information on LGBTI asylum seekers receiving another form of protection on the basis of national law, such as:

a) humanitarian grounds?

☐ No

☒ Yes. Please quantify and explain.

Those under the age of consent at 16 (see answer to question 8 below).

b) other grounds (discretionary leave)?

☐ No

☒ Yes. Please quantify and explain.

Article 8 (family and private life) - pre-landmark decision of the European Court of Human Rights of Schalk and Kopf v Austria (24th June 2010)- same-sex claimants could not come within "family life" (see Krasniqi v SSHD 2006] EWCA Civ 391; Times, April 20, 2006 (lesbian appellant living with same-sex partner and same-sex partner's daughter). "[T]he approach of the parties and of the tribunals below has been to treat the appellant's private life as cognate with family life" as per Sedley LJ [§ 4]). Nevertheless, they would win under article 8 (private life) (see Krasniqi). The Strasbourg Court held in Schalk and Kopf v Austria (Application No 31041/04) (Judgment 24th June 2010) [2010] ECHR 995 [at paragraph 94]:

"In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would."

The author is aware of cases post-Schalk and Kopf which are now succeeding on "family life" grounds either under the domestic Immigration Rules (paragraph 281), EEA Regulations (civil partnerships/durable relationships), or article 8 ECHR grounds (private/family life).

8) Do you have information about LGBTI applicants in your country who are, according to your national law, under the age of consent?

☐ No

☒ Yes. Please quantify and explain.

Due to Article 10 (1) (d) / Regulation 6 (1) (d) prohibiting LGB Refugee Protection am aware of ONE gay claim from a minor child from Iran which succeeded on Humanitarian Protection grounds (VO (Iran) (unreported) allowed at first Tribunal stage).

Expertise, Support

9) Do you know general or specialised NGOs supporting LGBTI asylum seekers in your country?

☐ No

☒ Yes. Provide their name and explain what kind of activities specifically aimed at LGBTI asylum seekers they undertake.

UK Lesbian and Gay Immigration Group - legal gateway for LGBTI asylum seekers to access free legal advice, representation and support.

a) What are the main problems they face while providing support?

Continued attacks by national government on legal aid. This has an immense impact on the number of legal aid suppliers, and there is constantly a demand for legally aided representation.

b) Do they employ staff or do they work with volunteers only?

1 paid member of staff (Executive Director) - the rest are un-paid Trustees, lawyers and volunteers (April 2011)

c) Are they supported by bigger LGBTI and/or refugee umbrella organisations?

☒ No ☐ Yes. Which organisation(s)?

However they do liaise with LGBTI organisations (ie Stonewall) and refugee umbrella organisations (ie Immigration Law Practiotner's Association/Refugee Action/Asylum Aud etc..)

d) Do they work with lawyers or with UNHCR on LGBTI issues?

☐ No ☒ Yes. In what form?

Lawyers - volunteer lawyers provide tuime and resources to support the charity. UNHCR have always consulted UKLGIG since 2008, during the drafting of the UNHCR Guidance Note..

e) Do they have contact with the government?

☐ No ☒ Yes. In what form?

Partner organisation with the UK Border Agency (the government department responsible for LGBTI asylum claims within the Home Department).

10) Special training for NGOs

a) Do people working for general refugee NGOs receive special training on LGBTI issues?

☐ No ☒ Yes

b) Do people working for LGBTI NGOs receive special training on refugee law?

☐ No ☒ Yes

c) Do people working for LGBTI Asylum NGOs receive special training on refugee law?

☐ No ☒ Yes

11) Lawyers' expertise on LGBTI

a) Are there lawyers with expertise in LGBTI asylum cases?

☐ No ☒ Yes

b) Are there networks of lawyers with expertise in LGBTI asylum cases?

☐ No ☒ Yes. Please provide the web address of the network

Through UKLGIG (see www.uklgig.org.uk).

12) Sometimes potential asylum seekers are not aware of the fact that sexual orientation or gender identity is a ground for asylum. Are they informed about this?

☐ No

☒ Yes. Who gives the information and how is such information given? (If it is given through a booklet or leaflet, please attach.)

In 2006, there was a UKLGIG leaflet initially available through Non-Governmental Organisations and Detention Centres.

Policy, legislation, case law

13) Specific law and/or policy

a) Does your country have specific law and/or policy concerning LGBTI asylum seekers? (primary or secondary legislation, guidelines, internal instructions and/or circulars, etc.)?

☐ No

☒ Yes. Please give English (French/German) translations **and** attach the text in the original language. Are these binding? ☐ No ☐ Yes

Asylum Instruction on Asylum Claims involving Sexual Orientation and Gender Identity (6th October 2010) [attached].

b) Does your country have gender guidelines for the handling of asylum claims?

☐ No ☒ Yes

Are these guidelines used in LGBTI claims? ☒ No ☐ Yes. Please explain.

LGBTI was previously only a small section in the Asylum Instruction on Gender - after two years of lobbying - is now a "free-standing" document. In this author's view - a good first step. This is now published as the UKBA Asylum Instruction "Sexual Orientation and Gender Identity in the Asylum Claim" (October 6th 2010). The January 2011 Asylum Aid report refers to the development of the gender guidelines. UKLGIG was specifically involved in the drafting of the 2010 Asylum Instruction.

14) Does your country have explicit law and/or policy on LGBTIs coming from specific countries of origin , for instance to grant asylum to LGBTIs from a specific country? (We do not ask for Country Reports.)

☐ No

☒ Yes. Please describe them.

Operational Guidance Notes ("OGN") are held to be "policy statements" of the SSHD/UKBA (held by the Upper Tribunal (Immigration and Asylum Chamber) MD (Lone Women) Ivory Coast [2010] UKUT 215 (IAC)). The only country where there is a blanket acceptance within an OGN that "open"/known LGBs in same-sex relationships will be at risk of persecution, and are therefore refugees, is Jamaica (Operational Guidance Note - 14th January 2011 - paragraph 3.7.11):

"… If there is a real risk that a gay man, lesbian or bisexual sexual relationship has, or will, become known, the applicant would on return to Jamaica face a real risk of discrimination and violence by members of the public or criminal gangs, to the extent that this would amount to persecution. As gay men, lesbians and bisexuals in Jamaica may be considered to be members of a particular social group, they should be granted asylum."

This still requires an indidviual to prove sexual identity/gender identity and that the reason for (voluntary) discretion if employed is due to fear of persecution. There are no other published policy documents with respect to other LGBTI claims. However, it is known to the author that prior to HJ/HT in the case of Nigeria, whilst accepting that asylum seekers could not be returned to the Muslim North, the UKBA argued that they could be returned to the Christian Sotuh "as long as they were discreet".

15) Do you have leading or binding court decisions on LGBTI asylum?

☐ No

☒ Yes. Please provide a brief summary of the case. Provide full citation and attach judgment.

HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31; [2010] 3 W.L.R. 386 [judgment attached]. This case, it is argued:

"What appears to be a 'levelling-up' of sexual identity asylum claims to other Convention reasons grounds, reflects a recognition that the framers of the Refugee Convention were wrong to erase, adn silence, those who were exterminated in the gas chambers and wore the Pink Triangle, rather than the Star of David, as their badge of identity."

(see 'Put Your Hands Up (If You Feel Love)' S. Chelvan (2011) Vol 25, No 1 IANL 56-66, 66).

The following paragraphs are taken from the Course Materials the author published as part of the materials for the European Legal Network on Asylum ('ELENA') Course on "Vulnerable Groups in the Asylum Procedure" in Leuven, Belgium on the 16th of April 2011 "Refugee claims on the basis of Sexual Orientation/Identity and Gender Identity" [bar paragraph 31 below].

1. The central question which arose in these appeals is whether a gay person (gay man, lesbian, or bisexual ("LGB")) can be reasonably be expected to tolerate discretion on return and therefore not be entitled to refugee status (the J test). The Supreme Court ruled unanimously that this test, as applied by the Court of Appeal was wrong, in that it wrongly interpreted the Australian High Court case of Appellant S/ 395 and undermined the underlying rationale of the Convention which is to afford protection to enable a person to live freely. As Lord Rodger held at § 53 :

"At the risk of repetition, the importance of this analysis for present purposes is that it proceeds on the basis that, so far from permitting or encouraging its agents to persecute the applicant for one of the protected grounds, the home state should have protected him from any persecution on that ground. The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them."

2. This drew upon the earlier dicta of Lord Hope in Hovath v Secretary of State for the Home Department [2001] 1 AC 489, 495D-G, which approved the Hathaway ¬definition with respect to surrogate protection [§ 52 of HJ & HT).

3. The definition of what constitutes a Particular Social Group is defined by 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.

4. Following Shah and Islam[1999] 2 A.C. 629, as affirmed by the House of Lords in K and Fornah v SSHD [2006] UKHL 46, a particular social group can be defined as containing the identifiable characteristics found in (i) or (ii), and therefore does not need to satisfy both limbs. This is another example of UK case law providing more favourable standards which should be applied in favour of those contained in the "minimum standards" in the Directive and Regulations.

5. The Supreme Court in HJ and HT only referred to both appellants satisfying limb (i) [§ 42]:

"Indeed regulation 6(1)(e) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) really puts the point beyond doubt by providing that, subject to an exception which is not relevant for present purposes, "a particular social group might include a group based on a common characteristic of sexual orientation". The Secretary of State therefore accepts that, in the case of Iran and Cameroon, homosexuals do indeed form a particular social group, of which HJ and HT are members."

6. It should also be noted that Regulation 6 (i) (e) states that a particular social group might include a group based on a certain characteristic or sexual identity but sexual identity cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom. Sexual identity claims of applicants under 16, if not considered under a different Convention reason, are to be considered under Humanitarian Protection provisions.

7. The "cultural relativism" test, requiring consideration of social norms and cultural beliefs in deciding whether discretion is reasonably tolerable (Pill LJ in the Court of Appeal, where there is defference to a respect for cultural and religious norms) is rejected on the basis that, if the

"reasonably tolerable test" was accepted, then such an assessment would be by [as per Sir John Dyson SJC § 129]:

"[O]bjective human rights standards, and not by reference to the social mores of the home country. As Lord Hoffmann said in R v Immigration Appeal Tribunal, Ex p Shah [1999] 2 AC 629, 655E:

"The findings of fact as to discrimination have not been challenged. They cannot be ignored merely on the ground that this would imply criticism of the legal or social arrangements in another country. The whole purpose of the Convention is to give protection to certain classes of people who have fled from countries in which their human rights have not been respected."

8. Lord Hope rejected the Respondent's submission that when an individual is discrete on internal relocation, this would provide a safe haven [§ 21] :

"The objection to it is that it assumes that the applicant will be prepared to lie about and conceal his sexual orientation when he moves to the place of relocation. Unless he does this he will be no better off than he would be if he did not relocate at all. The misconception lies in the idea that he will be willing and able to make a fresh start when he moves to somewhere where he is not known. In Hysi v Secretary of State for the Home Department [2005] EWCA Civ 711, [2005] INLR 602 the Court of Appeal held that the tribunal had not assessed the consequences of expecting the applicant to lie and dissemble in the place of relocation about his ethnic origins. He would have to be a party to the long-term deliberate concealment of the truth, living in continuing fear that the truth would be discovered: para 37. 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."

9. Lord Rodger rejected, as unacceptable, the Secretary of State's submission that an individual would have to succeed on a secondary persecution basis (intolerability of discretion would reach a persecution threshold) [§ 75]. This therefore nullifies what was advanced by Buxton LJ in RG (Colombia).

10. Lord Rodger highlighted that there was no yardstick to measure the suffering which would find an existence "reasonably tolerable ... it is something that no one should have to endure" [§ 80].

11. Such a test would require an individual to [§§ 75 to 76]:

"[A]ct discreetly and conceal his sexual identity indefinitely to avoid suffering severe harm. … The New Zealand Refugee Status Appeals Authority observed in Re GJ [1998] (1995) INLR 387, 420 that "sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed" (emphasis in the original). So, starting from that position, the Convention offers protection to gay and lesbian people – and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour - because they are entitled to have the same freedom from fear of persecution as their straight counterparts. No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution: Atta Fosu v Canada (Minister of Citizenship and Immigration) 2008 FC 1135, para 17, per Zinn J." [emphasis added][additional emphasis added]

12. Summarising the objections to the J test, Lord Rodger at § 77 held:

"At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship

would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable."

13. What is protected is the "right to live freely and openly" as an LGB person [§ 78]:

"It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in Appellant S395/2002 v Minister for Immigration (2003) 216 CLR 473, 500-501, para 81:

"Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality"

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

Causation:

14. The central issue is causation. If there is a well-founded fear of persecution, then the LGB person is entitled to refugee status, even where s/he acts discreetly due to that fear of persecution. The Court of Appeal wrongly interpreted the High Court's decision in S/395, by negating to

consider why the individual would act discreetly on return. It was accepted that if an individual did not act discreetly on return, then if there was evidence of persecution of LGB persons, the individual is a refugee. Where the divergence lies is the ruling that if discretion is employed due to fear of persecution, which can be one of many reasons for concealment, then the LGB person is entitled to surrogate protection by the UK [§ 62]. This is firstly a subjective test. The central question which is answered in the affirmative, is [§ 62]:

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

15. The guidelines for the fact-finding Tribunal, approved by the whole court, is summarised at § 82 [as per Lord Rodger]:

"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.

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. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

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. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

[emphasis in text]

16. This requires an assessment of:

(i) whether an individual is Lesbian, Gay or Bisexual?;
(ii) what the country background evidence is with respect to persecution?; and
(iii) whether, if discretion is employed on return, one of the reasons for such conduct us due to a fear of persecution?

Both appeals were allowed and remitted back to the Upper Tribunal for reconsideration, limited to point (iiii).

17. In November 2010, HT was granted refugee status , and therefore did not have to have his appeal reconsidered by the Upper Tribunal. However, HJ is still awaiting a decision on refugee status, whilst the proceedings in the Upper Tribunal are stayed pending this decision .

18. These guidelines should apply to all Convention reasons (see Fornah v Secretary of State for the Home Department [2006] UKHL 46, [2007] 1 AC 412, para 20, per Lord Bingham of Cornhill) cited by Lord Rodger at § 10, and Sir John Dyson at § 113).

UKBA Policy responses to HJ (Iran) and HT (Cameroon):

19. HJ and HT has been classed as being "streets ahead" of S395 (Millbank, 2010) .

20. UK Lesbian and Gay Immigration Group's Report "Failing the Grade" (April 2011) reported that 98 to 99% of initial home office decisions they analysed from 2005 to 2009 resulted in refusals of the claim. This compared to a 73% initial refusal for all other claims.

21. The coalition government's as part of the Equalities Manifesto (20 May 2010) made the following promise:

"We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution."

22. This document published before the judgment was handed down requires a pro-active approach. For example in the setting of removal directions, where all appeal rights have been exhausted, the fact that HJ and HT was handed down would provide an arguable challenge to such removal directions (see § 54 of R (on the application of Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin) (26th July 2010) as noted by Silber J).

23. In a briefing paper to all MPs (9th July 2010, Melanie Gower: Home Affairs Section), the government commits itself to complete adherence to the "new guidance" from the Supreme Court.

24. In reply to a question from Lord Avebury, Baroness Neville-Jones indicated that asylum decision-makers have been 'asked to review, in the light of the new test, cases in which a decision has been made, but in which appeal rights have not yet been exhausted' (see Hansard – House of Lords – 21.07.10 Column WA216) :

"Baroness Neville-Jones: Asylum decision-makers were instructed to apply the new test contained in the judgment immediately after the judgment was published. They have also been asked to review, in the light of the new test, cases in which a decision has already been made but in which appeal rights have not yet been exhausted.

There will not be an automatic review of cases where appeal rights have been exhausted but individuals are able to ask for their case to be reviewed in light of the new judgment.

An asylum policy instruction will be published within the next few months. This will reflect the judgment and we will develop better training to promote understanding of sexual orientation and identity issues in order to help decision-makers to decide on the basis of the best available information and knowledge."
[emphasis added]

25. This relates to internal guidance (dated 7th and 8th of July 2010) from Ian Cheeseman (from NAM+) which addressed the need for the SSHD to review all sexual identity asylum claims following the Supreme Court's decision. The 7th of July memo stated:

"The Supreme Court has now established a new test which should be applied with immediate effect when assessing a claim based on fear of persecution because of the applicant's sexual orientation:

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.

26. Importantly, at §§ 4 and 5 it is stated:

[4] The above test should, with immediate effect, be applied to all cases based on fear of persecution because of the applicant's sexual orientation. As well as applying the test to any new cases, it should also be applied to any ongoing cases. Please ensure that all case owners and decision makers are informed immediately of this development. Case owners should, of course, continue to consider cases on their individual merits and credibility should be assessed in the same way as at present.

[5] We shall be publishing revised guidance and training materials based on the Supreme Court judgement as soon as possible. In the meantime, we have advised Ministers that we will monitor the application of the new test and any impact of the judgement. I appreciate that it may have to be done manually but I should be grateful if you could make temporary arrangements for cases in which this new test is applied to be flagged and recorded. I shall be writing to Protection Leads in more detail about this shortly. You may wish to be aware that we shall be arranging for samples of sexual orientation cases to be audited as part of our regular audit of 10% of first instance decisions. [emphasis in text]

27. The 8th of July memo indicated that the 7th of July memo should also be circulated to Presenting Officers.

28. There is concern from the Immigration Law Practitioners Association ('ILPA') (October 2010) that this "active review" is responsive (with current appeals and in response to further reps where appeal rights have been exhausted), rather than a pro-active (looking at any case where sexual identity arises and review in light of the guidelines). Nevertheless, what is important to note is that the 7th of July 2010 circular requires Case Owners to record claims based on this point, for both LGBTI and non-LGBTI asylum seekers (will we at last get some statistics – Belgium is the only country in the EU which actively records the number of claims based on sexual identity).

29. At a meeting with ILPA on the 18th of February 2011, Mr Cheesman was alerted to concern about reference points where review could be conducted (see above).

30. The newly published Asylum Instruction (6th October 2010) entitled "Sexual Orientation and Gender Identity in the Asylum Claim" is a massive step for UKBA (after two years of lobbying by UKLGIG). Nevertheless, it does not address all the points raised by UKLGIG to the draft document (e.g. no reference to "sexual identity" or "intersex" claims). However, UKLGIG is involved in drafting the Course Pack and training of UKBA Caseowners.

31. In an article published on the 2nd of May 2011 ("Coalition failing to count gay asylum seekers despite pledge" Karen McVeigh, The Guardian, page 4) the following is recorded:

"… The UK Border Agency was told by the Home Office last year that the new rules should be applied "with immediate effect" and that relevant cases should be "flagged and recorded".
But more than six months on, the government still does not know how many cases they are dealing with, let alone whether the ruling is being followed.
Last week, the US secretary of state, Hilar Clinton, launched her department's 35th Human Rights report, which said: "Stonewall claimed that, by 'fast tracking' these more complicated cases and denying them quickly, UKBA staff did not give applicants time to talk openly about their sexual orientation."
…
A UKBA spokesperson said: "we are reviewing how data on sexual orientation cases can be recorded more effectively."

APPLYING THE HJ (IRAN) & HT (CAMEROON) GUIDELINES –

THE FOUR STEPS:

32. The guidance below seeks to address what factual and legal issues arise out of the 4 steps outlined by Lord Rodger's guidelines at § 82 of HJ and HT:

Step 1: Proving LGBTI:

33. The first limb states:

(i) 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.

34. The UK Supreme Court accepts that this guidance also applies to claims from lesbian and bi-sexual applicants. Importantly, the Supreme Court accepts "imputed" sexual identity.

35. One disturbing consequence arising out of the apparent success of S395 is the evolution of a "cancer of disbelief". As Millbank (2009) records, since S395 in Australia, there had been a significant increase in the proportion of asylum claims where claimed sexual identity was doubted or disbelieved (see Jenni Millbank, From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom, The International Journal of Human Rights, Vol. 13, Nos 2-3, April-June 2009, 391-414. See also Jenni Millbank, ""The ring of truth": a case study of the credibility assessment in particular social group refugee determinations", International Journal of Refugee Law (2009) 21(1), 1-33 and Jenni Millbank, Constructing the personal narratives of lesbian, gay and bisexual asylum claimants, Journal of Refugee Studies (2009) 22(2), 195-223) . This trend will, let alone could, be repeated in the UK following HJ and HT.

36. In NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856; [2010] INLR 169, Goldring J accepted [§ 24]:

"It is of course her sexual orientation at the time of the hearing which is important."

37. In NR's case, her claim was based on being a lesbian from Jamaica. The deportation appeal was based on her conviction for drug supply of Class A drugs. Having the UK as a minor (a few months from her 14th birthday), the Tribunal accepted that she had fled due to "something to do with criminal gangs" but rejected her claim of being gang-raped. There was substantial evidence, in the form of documentary evidence (exceptionally sexually explicit love letters to NR from her girlfriend which had initially resulted in a concession by the SSHD that she is a lesbian which was subsequently withdrawn) and evidence from her girlfriend (which the Tribunal held had been deliberately manipulated by NR to support her asylum claim). NR's evidence was that since the age of 16 she had been in exclusively lesbian relationships. Her case was that she had been forced into prostitution to be able to survive. However, in the Pre-Sentence Report, there was reference to a "boyfriend". Having been sentenced in 2004, the Tribunal held that her same-sex relationships whilst in prison were due to the fact that she had "no other choice bar celibacy".

38. The Court of Appeal held that the reasoning of the Tribunal on this point was unlawful, in light of the corroborative evidence with respect to NR's "current sexual identity". The appeal was remitted to the Upper Tribunal, which held that NR was "exclusively lesbian" and even with the guidelines in HJ from the Supreme Court, the fact that she would be returning as an individual who does not engage in straight relationships, in light of the country background evidence (including an expert report of Mr Sobers), she would be perceived as a lesbian and therefore at risk of persecution (Upper Tribunal – July 2010 – unreported). The SSHD did not appeal this determination.

39. The fallacy in looking at evidence of "heterosexual" conduct in the past, specifically where in the country of origin LGBTI's have had to live "double lives" in order to evade persecution can not be ignored. This existence is something which is common to LGBTI individuals, even in the UK. Therefore, being witness to a submission by a Senior Presenting Officer in 2002 in Atlantsetseg Ochirkhuyag v Secretary of State for the Home Department [2002] UKIAT 02991, that an appellant could not be a lesbian as she had married a man and borne him a son, created suitable outrage during an adjournment between appeals (the author castigated the Senior Presenting Officer for adopting this approach).

40. Bisexual claims: it is vitally important not to discount bisexual claims, as they are also individuals targeted for their non-conformity to a heterosexual narrative in the country of origin. A thorough fact-finding exercise requires identifying "difference" which leads to identification of difference and subsequent harm.

The narrative of "difference":

41. What is at the core of all LGBTIs claims is the recognition of difference to those around them. This is usually a gradual process, usually commencing at childhood, before there is any self-recognition of emotions linked to sexual conduct.

42. It is of vital importance that any LGBTI client has a detailed statement drafted prior to having their claim substantively considered.

The perception test:

43. The Tribunal in DW (Jamaica) (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168, accepted that there is force to the submission that "perception is all" [§ 71]. This is what the author refers to as the "heterosexual narrative" (see 'SB (Uganda) - Case Comment' (2010) Vol 24, No 2, IANL, 191-198 - to be determined in the CG case of SW (Jamaica) (2011) (UKUT)).

44. As NR establishes, the determinative factor is current sexual identity, and how that presently is expressed . However, even when practiced "discreetly" (ie by telling lies to those who share the public sphere with you, or "hiding" by "non-disclosure")) there exists in every society a profile connected with gender and sexual roles, which requires positive acts on the part of the (heterosexual) individual to show "sameness". An individual who does not act in accordance with the stereotype is therefore "different", and is identified as being so. Such identification, leads to a perception of "deviancy" which in sexual identity claims leads to a perception that an individual who is not heterosexual, is therefore homosexual, and accordingly "at risk".

45. This will still be country specific, i.e. in Syria, it is not unusual for two unmarried adult men to live together (evidence from the country expert Dr. Alan George 2010).

Stereotypes:

46. Stereotypes are dangerous. See "No Going Back" (Stonewall: May 2010). Questions which assume that an LGBTI asylum seeker will be aware of British gay authors (ie Oscar Wilde) are not an indicator of the individual's sexual identity (see discussion in credibility section below). The fact that s/he is not aware of certain gay venues in London (Old Compton Street)/Manchester (Canal Street) will be more likely than not to be linked to lack of financial resources.

47. However, non-conformity with cultural stereotypes in the country of origin, will/may identify the difference of the individual from the majority of the population. Such difference will first of all be identified as "gender role" differences (for example dress, mannerisms, etc…) and lead to further investigation with respect to perceived "sex (conduct) role" (Jamaican woman with no men visiting – why not? – must be a sodomite (lesbian).

Corroborative Evidence:

48. In the case of an Iranian gay man in 2007, the Presenting Officer's submission at the hearing in Newport, Wales, that there was no medical evidence to prove that the appellant was a "passive" in his sexual conduct, and therefore provided an adverse credibility point, is absolutely irrational and vulgar (there are no longer the virginity tests for Asian Brides) .

49. Other examples of cruel, inhuman or degrading forms of fact-finding, which would breach article 3 of the European Convention on Human Rights, include phallometry, a method used by the Czech authorities in attaching electrodes to the penis to measure sexual arousal in those claiming to be gay men (decision of the German administrative court, 7 September 2009). Refusal to comply with such testing resulted in refusal of asylum by the Czech authorities. Vaginal photoplethysmography is the method used to test those claiming to be lesbian asylum seekers. See for critique of such procedures in refugee determination of gay and lesbian asylum seekers 'Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings' (ORAM – Organization for Refugee, Asylum & Migration, February 2011).

50. In BN (psychiatric evidence - discrepancies) Albania [2010] UKUT 279 (IAC), the Upper Tribunal in August 2010 ruled that psychiatric evidence addressing the reason for discrepancies, could not displace negative credibility findings of an Immigration Judge, where cogent reasons for rejecting the credibility for an appellant claiming to be gay had been given. This resulted in a conclusion that the appellant had 'fabricated his condition' to the psychiatrists. Credibility is therefore the determinative factor at this stage.

51. If lucky, evidence of present or past relationships. Evidence from friends who the Appellant has "come out" to.

52. Evidence relating to sexual conduct (Eritrean gay man who had the membership cards for a gay sauna in Manchester, Jamaican gay man who had the appointment card for the STD clinic specifically for gay and bisexual men to treat syphilis, Gaydar profile of a Jamaican lesbian which pre-dated the refusal letter).

Step 2: Discrimination or Persecution?

(ii) 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.

53. Refer to the CG cases (listed above). Evidence can emanate from a variety of sources, including LGBTI groups from the country of origin . Important reference points are the US DOS Reports, Amnesty International, Human Rights Watch, ILGA etc….

54. Where there is a lack of Country background evidence, this does not mean that persecution of LGBTIs does not exist. This specifically relates to risk to lesbians/bi-sexual women, trans-men and those who are intersex. It is highly likely that if there is evidence of risk to gay men, then these groups will also be at risk.

55. There will be a rise (as what occurs in Canada) with a finding that what exists in discrimination and not persecution.

56. What amounts to persecution (Article 9 of the 2004 Qualification Directive/Reg 5 of the 2006 Regulations):

QUALIFICATION FOR BEING A REFUGEE
Article 9
Acts of persecution
1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
(a) acts of physical or mental violence, including acts of sexual violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment, which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
(f) acts of a gender-specific or child-specific nature

57. The Asylum Instruction on "Sexual Orientation Issues in the Asylum Claim" (6th October 2010, revised on 13th June 2011) accepts that discrimination may amount to persecution, where (at page 5 of 15) :

Hostility or the threat of violence towards LGBT 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.

58. The UNHCR Guidance Note on Sexual Orientation and Gender Identity (November 2008) states [§ 10]:

"A pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution. While the element of discrimination is often central to claims made by LGBT persons, they also frequently reveal experiences of serious physical and in particular sexual, violence. Each of the incidents of harm must be assessed in a holistic manner. They must be evaluated in light of the prevailing situations and attitudes with regard to sexual orientation and gender identity in the country of origin."

Step 3 – will live openly?

(iii) 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.

59. So if "open" on return, even in "bad faith" then the LGBTI individual is a refugee.

Step 4 - The final question – why discrete?:

(iv) 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. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

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. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

[emphasis added]

60. There are various reasons why an LGBTI individual will claim asylum. Social disapproval will be an ingredient. Family disapproval can boil over into honour killing, which is clearly persecutory. In RG (Colombia) (2006) Buxton LJ held that as a fear of the vigilante death squads in Colombia was not found to be the primary reason, then RG failed in his appeal. This reasoning can no longer survive following HJ and HT. In 10 years of practice in this area, I have never encountered a claim where fear of persecution has not been part of the factual narrative.

61. The ‘lacuna’ in the reasoning of the Supreme Court, is the sub-class of applicants who will not be refugees, where there is a complete lack of discretion-driven conduct linked with a well-founded fear of persecution.

62. Arguably, following membership of the group which suffers persecution should entitle an individual to refugee status (see Secretary of State for the Home Department v. Hassan Hussein Adan [1998] Imm A R 338, HL affirming Jeyakumaran).

63. This therefore does not require a quantitative assessment of exposure to risk, especially as the Supreme Court in HJ/HT have referred to the well-founded fear of those "living openly and freely" [§ 82]. In the majority of cases involving sexual identity, this would refer to a minority, rather than the majority of the class of claims, as the Supreme Court did not expect that the majority of lesbian, bisexual or gay male individuals to become "gay martyrs" and deliberately subject themselves to persecution. Lord Rodger stated that an individual would have "no real choice" but to act discreetly in the face of such a threat [§ 59].

64. Dauvergne and Millbank (2003) state :

"Many lesbian and gay asylum seekers from countries as varied as Malaysia, India, Bangladesh and Iran, testify that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes – and takes all possible steps – to remain closeted does, in fact, become increasingly 'visible' with the passage of time."

(see Catherine Dauvergne and Jenni Millbank, Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh, (2003) Sydney Law Review (25) 97, 122).

65. The Tribunal in AJ (Homosexuals) Afghanistan [2009] UKAIT 0001, accepted the fact that in some societies, the fact that a person is gay could potentially be revealed when enquiries are made with respect to the stranger's background (on internal relocation to Kabul in this case).

66. The lacuna identified above is easily filled by applying the "perception test" (see paragraphs above – should have been determined by the Upper Tribunal in SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (24th June 2011). However, the Upper Tribunal limited their analysis solely to the country evidence surrounding risk, rather than the point of principle. They did however accept risk to those lesbians who did not live, or perceived to live a 'heterosexual narrative').

The KEY issues, derived from the author's case strategy over the past decade is to establish the FOUR following core issues, which are found in the majority (but necessarily not all due to

recognition that not all human beings are the same) of LGBTI asylum claims 'DSSH' (promounced DISH'):

(a) DIFFERENCE - recognition and identification of difference;

(b) STIGMA - recognition of isolation from the majority and the views of the majority on the group the individual belongs to;

(c) SHAME - resulting feelings of disgust; and

(d) HARM - fear of, if not actual harm/persecution.

16) Did you find any references to the Yogyakarta Principles[1] and/or to UNHCR's Guidance Note on Refugee Claims Related to Sexual Orientation and Gender Identity[2] in decisions or case law?

☐ No

☒ Yes. Please specify where you found these references.

The Upper Tribunal in SW (lesbians – HJ and HT applied) [2011] UKUT 00251 (24th June 2011) refer to the 2008 UN Guidance Note, but find that this does not expand on what had already been decided by the 2010 UK Supreme Court in HJ and HT [2010] UKSC 31; [2011] 1 A.C. 596.

Qualification Directive[3], Council Directive 2004/83/EC

Article 4 Qualification Directive: Credibility (of sexual orientation/ gender identity)

17) How is sexual orientation/ gender identity generally established?

"Proving sexual or gender identity" - battleground - references in Stonewall's "No Going Back" report (May 2010) illustrated the homophobia and transphobia which still exists within the system - based on stereotypes and ignorance. This includes expecting a gay man to know about the works of Oscar Wilde. Anecdotal evidence includes questionning bordering on the pornographic with respect to a lesbian asylum seeker , and asking a gay man when he first committed "buggery" with his boyfriend (2010 example before the First-Tier Tribunal (Immigration and Asylum Chamber)). Proving this issue ranges from the individual being believed by themselves, to having witnesses attend to corroborate, to psychiatric evidence in cases where severe trauma and shame arises within the personal narrative. Gender identity claims and the process of transitioning is very much misunderstood - leading to confusing issues relating to surgical procedures and the wider

[1] Yogyakarta Principles: http://www.yogyakartaprinciples.org/
[2] UNHCR Guidance Note: http://www.unhcr.org/refworld/docid/48abd5660.html
[3] Qualification Directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML

issue of transitioning which is not always connected to surgery. The UKBA Asylum Instruction on Gender Identity issues in the Asylum Claim seeks to address this misunderstanding (see above).

See also Toni A. M. Johnson "On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings" Social & Legal Studies 2011 20: 57, 71:
"The importance of maintaining narrative legitimacy is incredibly important."
This article examines the 'nature of silence in UK asylum cases involving lesbian and gay claimants'.

18) Could you describe cases in which credibility of the stated sexual orientation/ gender identity was the reason for denying asylum?

☐ No. Please go to question 19.

☒ Yes. Please answer questions 18A and 18B.

18A) If the stated sexual orientation or gender identity was not believed, what was the reason given for this?

Finding that sexual conduct in prison was a continuation of teenage sexual experimentation, where the lesbian appellant had "no choice, bar celibacy" whilst imprisoned in a women only prison (finding reversed by the England & Wales Court of Appeal in Augsut 2009 in NR (Jamaica) v SSHD [2010] INLR 169). The Court of Appeal in August 2009 held [paragraph 24 as per Lord Justice Goldring] " Even taking into account that the Tribunal saw and heard the appellant, it seems to me its analysis is not without difficulty. A great deal of weight appears to have been placed on what was said very shortly in two reports. The appellant has now been in a series of exclusively lesbian sexual relationships over some 4 years. That is on its face cogent evidence that she is a lesbian, or predominantly a lesbian, by sexual identity. What might have begun as sexual experimentation with lesbianism could have ended with it being her sole or predominant sexual orientation. That does not appear to have been adequately considered or, at least, explained by the Tribunal. It is of course her sexual orientation at the time of the hearing which is important."
The UK Lesbian and Gay Immigration Group in April 2010 published their study of 50 refusal letters relating to the claims of lesbian and gay asylum-seekers (2005 to 2009). The report is called "Failing The Grade: Home Office initial decisions on lesbian and gay claims for asylum". At page 8, the following evidence is referred to:

"Evidence that a Person is a Lesbian or Gay Man

"There is no real way to ascertain your sexuality" (Refusal letter to Cameroonian man)

In the sample, 48% of cases were denied because the person was not believed to be lesbian or gay. Normally, no documentary evidence exists to "prove" sexual identity. Applicants often have deep feelings of shame, self-loathing or internalized homophobia, and answering questions about the sexuality is very difficult, especially when speaking to an authority figure.

…

In three sample cases, the person's previous marriage or heterosexual relationship was taken as proof that they were lying. However, many lesbians and gay men have been married or involved in heterosexual relationships in the past. Sometimes these relationships are as a result of forced marriages, as was the case of one lesbian asylum seeker with a child from Gambia. In others, including the case of a Jamaican gay man, people have opposite sex partners as "cover" in an attempt to conform to social pressure and avoid detection. Some people are bisexual, and others enter a heterosexual marriage and discover that they are lesbian or gay after some time. The fact that a previous heterosexual relationship existed cannot be used to dismiss the claim wihtout a more detailed investigation into the circumstances surrounding the relationship. Decisions on sexual identity need to relate to current sexual identity and not be determined solely by conduct in the past."

Stonewall in their report "No Going Back: Lesbian and Gay People and the Asylum System" (May 2010) outlined the following which flowed from interviews with UK Border Agency ('UKBA') staff, the UK government agency responsible for determining asylum claims (names have been changed) (page 14):

"4: Can you prove you are a homosexual? The Full Asylum Interview.

…

UKBA staff admit that they receive no specific training or guidance on how to interview gay applicants and often lack confidence when approaching claims where sexual orientation is a key element. There is no accepted UKBA approach and this leads individual interviewing officers to pursue a wide range of strategies and line of questionning that vary considerably in quality and effectiveness.

Interviewers will often attempt to probe an applicant's sexual orientation through detailed questionning of specific sexual experiences that they've had. This type of questionning is generally not effective and simply creates barriers between the applicant and case owner."

One horrific example of questionning is highlighted at page 15 of the report:
" 'I would look at how they've explored their sexuality in a cultural context - reading Oscar Wilde perhaps, films and music. Nicholas, UKBA senior caseworker.'
..
This focus on relationships is also applied to applicant's behaviour once in the UK, despite the fact that people who have fled persecution, torture, sexual violence and rape are unlikely to feel able to have relationships for some time. Some feel under great pressure to have relationships in order to prove their sexuality.
'You have to ask, what is the behaviour in the UK? If you were a gay man and you ahd been repressed or ostracised in your home country, then presumably coming to London would give you the chance to go to Soho or Heaven and enjoy the kind of lifestyle and bars and opportunities that that presents. Nicholas, UKBA senior caseworker.
'A person cannot be gay in a country for five years and not go out to a gay pub or have a gay relationship or have some kind of background to support their sexuality. Oliver, UKBA caseworker."

Decisions and/or case law. Good/bad practices.

Recently publicised decision relating to Ugandan lesbian appellant (30th January 2011) where the First-Tier Tribunal (Immigration and Asylum Chamber) could not accept that the appellant was not more familiar with lesbian books and magazines (BN (Uganda)) reported on LGBT Asylum law website). This is a clear example of Bad Practice. The gay rights organiation Stonewall in tehir "No Going Back" report (May 2010) provide varioues examples of bad practices adopted by the Home Office and Judges prior to the Supreme Court decision in HJ/HT.

18B) Which patterns - if any - do you perceive in rejecting LGBTI cases based on credibility?

As the legal test on "reasonably tolerable" discretion was struck down by the Supreme Court in July 2010, decision-makers (UKBA, Immigration Judges) are shifting analysis to concentrate on the first limb of Lord Rodger's guidelines [para 82] (ie) whether the indivdiual is, or will be perceived to be lesbian, gay or bisexual, limb (i) and whether the reason for (voluntary) discretion is actually based on reasons which are unconnected with a fear of persecution (ie societal of family dissaproval reasons only) (limb iv of the guidelines).

19) Is supporting evidence required and/or accepted to prove sexual orientation/ gender identity, apart from the declaration of the person concerned?

☐ No.

☒ Yes. What does the supporting evidence include (e.g. witness statements from other people than the applicant, membership of LGBTI organisations, declarations of LGBTI organisations, other)?

Witness evidence from others and declarations of LGBTI organisations which have a worked closely with the asylum seeker. Membership of LGBTI organisations can also help, as well as instances of appointments at clinics which treat sexually transmitted diseases, and cater specifically for gay or bisexual men.

Decisions and/or case law. Good/bad practices

NR (Jamaica) v SSHD [2010] INLR 169.

20) Is medical/ psychological/ psychiatric/ sexological evidence requested or accepted in proving the sexual orientation?

☒ No

☐ Yes

a) Who is considered a 'medical expert' in this respect?

b) What does the examination include?

c) Does it include any inhuman/degrading element? Please explain.

d) What weight is given to the 'expert's' opinion?

Decisions and/or case law. Good/bad practices

Bad Practice - Court of Appeal - RG (Colombia) v SSHD (2006) where the Court of Appeal did not attach the appropriate weight to evidence which showed that concealment of sexual identity on return would result in a breakdown.

21) Is medical/ psychological/ psychiatric/ sexological evidence requested or accepted in proving the gender identity?

☐ No

☒ Yes

a) Who is considered a 'medical expert' in this respect?

Medical Experts with connection with specialist Gender Identity clinic. The country's specialist Gender Identity Clinic is the clinic at Charringv Cross Hospital.

b) What does the examination include?

Both physical examination and psychological assessment.

c) Does it include any inhuman/degrading element? Please explain.

No

d) What weight is given to the 'expert's' opinion?

No reported case law in this area. The SSHD in AB (Pakistan) even refused to use the male pronoun when referring to an asylum claim of a self-identified trans man , until the substantive judicial review hearing in July 2009 (even though the specialist medical evidence had done so for the previous eighteen months). It is for the Tribunal to assess the evidence of the expert "in the round" and explain with cogent reasons if they are to reject the opinion of the expert (Mibanga v SSHD [2005] EWCA Civ 367; [2005] INLR 377).

Decisions and/or case law. Good/bad practices

See AB (Pakistan) above.

22) Are explicit questions asked about sexual activities?

☐ No

☒ Yes. Please describe them and include the source of the information.

Within the asylum interview, the questions can border on the pornographic (anecdotal evidence).

23) Are questions asked about stereotypical LGBTI conduct?

☐ No

☒ Yes. Please describe them.

See Stonewall Report "No Going Back" (May 2010). Surprise that the gay male applicant was not aware of the works of Oscar Wilde.

24) Are questions asked with respect to familiarity with gay scenes or membership of LGBTI groups in the country of origin or in the country where asylum is claimed?

☐ No

☒ Yes. Please describe decisions and/or case law in which such questions were relevant.

No reported case law on this point. Nevertheless, Stonewall reports on questions regarding familiarity with gay scene.

25) Did you find cases in which the sexual orientation/ gender identity was not believed because the applicant was married or had children?

☐ No ☒ Yes. Decisions and/or case law. Good/bad practices

Mongolian case of lesbian asylum seeker Ochirkuyag v SSHD [2002] UKIAT 02991 (Immigration Appeal Tribunal)

Article 4-3 Qualification Directive; Article 8-2 Procedures Directive: Country of origin information

26) Do decision makers/ courts /tribunals have effective access to Country of Origin Information (COI) concerning the position of LGBTI asylum seekers?

☒ No ☒ Yes

Yes and No, whilst decision makers have access to Country of Origin Information Reports, they still need to be updated to reflect "invisibility" of lesbians - work in progress.

27) Does your country have national COI researchers?

☐ No. Please go to question 29

☒ Yes. Are they trained in investigating LGBTI issues? ☒ No ☐ Yes

Please give details.

UKLGIG are involved in on-going meetings with the senior management in the COI section to highlight concerns with respect to the LGBTI sections in the reports.

28) Does the COI from these national researchers report that state protection is available for LGBTIs?

☒ No

☐ Yes. Could you describe this information?

29) Can the legal representative of the applicant consult and instruct an independent COI expert?

☐ No

☒ Yes

a) Can the expert draft a report? ☐ No ☒ Yes

b) How is the expert paid for?

Either through legal aid (government funding which is paid to the solicitor to pay the expert thorugh the Legal Services Commission) or through privately being paid by the asylum seeker (rare).

c) What weight is given to the expert's report?

See (FS (Expert Evidence) Somalia [2008] UKAIT 0004 "evidence in the rpound", can reject country expert report, but will have to do so with reasons).

30) How is the available COI concerning the position of LGBTI asylum seekers dealt with by decision making authorities, and by judges?

Favourably. Due to current budget cuts, UKBA has reached an understanding with the Tribunal that they do not need to supply the full COI report at the hearing.

31) Do your decision makers or courts consider the reasons why reports of persecution may be unavailable in some countries?

☐ No

☒ Yes. Please give examples.

COI (Country of Origin Information) researchers have started to realise that the lacuna in the evidence relating to lesbian claims does not necessarily mean that there is no persecution. This has not fully merged into the UKBA and/or the fact-fidning Tribunals.

32) Sometimes a lack of information on lesbian/ bisexual/ trans/ intersex people or a lack of criminal sanctions against same-sex conduct by women or against trans/intersex individuals is regarded as a lack of evidence of persecution. Did you find examples of this?

☐ No ☒ Yes. Please describe the examples.

Refusal letters relating to the claims of Jamaican lesbian claims (see "Failing the Grade" report (April 2010) UK Lesbian and Gay Immigration Group).

33) Sometimes general COI which is not relevant for the situation of the LGBTI concerned is used as a basis for a decision (e.g. information on gay men used wrongly to assess the risk for lesbians or trans people; information on heterosexual women's status used for lesbians). Did you find examples of this?

☐ No ☒ Yes. Please describe the examples.

See trans case of Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267. Nevertheless, since late 2005 there has been a specific section in all COI Reports with respect to risk to LGBTIs.

Article 5 Qualification Directive; Article 32 Procedures Directive: Coming-out late

34) Does it occur that LGBTIs who have "come out" after leaving the country of origin, are recognised as refugees or as being in need of subsidiary protection?

☐ No

☒ Yes. Please explain with decisions and/or case law. Good/bad practices

No real distinction in current case law relatuing to claims of refugees sur plus.

35) Does it occur that LGBTIs who – for instance out of fear or shame – did not speak about their sexual orientation or gender identity immediately, but do so later (in a later phase of their first procedure, or in a repeat procedure), are recognised?

☐ No

☒ Yes. Please explain with decisions and/or case law. Good/bad practices

Both Stonewall Report and Asylum Instruction refer to "[A]pplicants may not always feel able to disclose this straight away and it will need to be explored in greater depth at interview."

Article 6 Qualification Directive: Persecution by the state

36) Are LGBTI applicants granted asylum if in their country of origin homosexual acts and/or identity is criminalised (by explicit 'sodomy laws' or by other criminal law provisions)?

☐ No. Please go to question 37.

☒ Yes. Proceed with question 36A.

36A) Is it required that those criminal law provisions are actually enforced, or is the existence of those criminal law provisions sufficient? Please provide further information. Decisions and/or case law. Good/bad practices

Criminal laws need to be enforced to constitute persecution (see JM (Uganda) and OO (Sudan) v SSHD [2009] EWCA Civ 1432; [2010] All ER (D) Jun 17)

Article 6 Qualification Directive: Persecution by non-state actors

37) Do you have examples of LGBTIs who have suffered or feared persecution or serious harm inflicted upon them by non-state actors?

☐ No. Please go to question 38,.

☒ Yes. Proceed with questions 37A and 37B.

37A) Did they get protection?

☐ Yes

☒ No. Do you know what were the reasons to consider that they did not have a well founded fear of future persecution or serious harm?

Effective State Protection test. Arguable that where the prevailing climate is homophobic - no protection (see DW (Jamaica) v SSHD [2005] UKAIT 00168 (Country Guidance case on those who are, or perceived to be gay men, from Jamaica - SSHD concedes that there is no sufficiency of protection for gay men from Jamaica - still current case law)). Also arguable that where LGBs are specifically targetted are an "at risk" group will require specific "additional" protection (see Bagdanavicius [2003] EWCA Civ 1605 (CA)).

37B) Did you find that persecution by non-state actors was relatively more common in lesbian or transgender/ intersex claims?

☒ No ☐ Yes. Decisions and/or case law. Good/bad practices

No real difference in the majority of claims, bar Iran (for gay men , enforcement of criminal sanctions accepted since 2005 Country Guidance case - RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117).

Article 7-2 Qualification Directive: State protection + effective legal system

38) Are LGBTI asylum seekers who fled persecution from non-state actors required to have sought protection from the police or other authorities prior to fleeing their country of origin in order to prove that the authorities are unable or unwilling to provide this protection?

☐ No. Please go to question 39

☒ Yes. Proceed with questions 38A, B and C.

38A) Is seeking protection from the police or other authorities also expected when the LGBTI asylum seeker came from a country that threatens homosexuality, homosexual acts (and/or transgender identity) with criminal laws?

☒ No ☐ Yes. Please give details. Decisions and/or case law. Good/bad practices.

Not in practice (see DW (Jamaica) (above)).

38B) Is seeking protection from the police also expected when the LGBTI asylum seeker came from a country where the police has a reputation of being homophobic, transphobic, etc.?

☒ No ☐ Yes. Please give details. Decisions and/or case law.

As above (DW).

38C) Is the requirement to seek protection dependent on country of origin information showing that protection would generally be available for LGBTIs?

☐ No ☒ Yes. Decisions and/or case law. Good/bad practices

In theory yes, but the author is unaware of a country example where there exists non-state agent persecution where state protection would be provided.

39) Do your decision makers and courts acknowledge that the existence of criminal sanctions against LGBTIs, even if not enforced, contribute to a homophobic atmosphere in which persecution by state and/ or non-state actors can flourish?

☐ No

☒ Yes. Could you give examples?

This is directly relevant to instances of non-state agent harm (see R (on the application of SB (Uganda)) v SSHD [2010] EWHC 338 (Admin)).

Article 8 Qualification Directive: Internal relocation

40) Has an internal relocation alternative been held available for LGBTI asylum seekers?

☐ No. Please go to question 41.

☒ Yes. Please answer questions 40A and 40B.

40A) Could you give examples of reasoning to consider places or situations in the country of origin a good relocation alternative?

Pre-HJ/HT - internal relocation alternative was always an option for UKBA decision-makers and the Tribunal in line with an ability to be (voluntarily) "discrete". The Supreme Court has ruled that this is not a lawful exercise when it comes to discretion.

40B) If so, was discretion reasoning involved in this matter, i.e. could the LGBTI be open about her/his sexual orientation or gender identity in the relocation alternative or was he/she expected to hide there?

☐ No ☒ Yes. Decisions and/or case law. Good/bad practices

See above. However, the Courts did start to look at whether this would actually occur (see AJ (Homosexuality) Afghanistan [2009] UKAIT 0001). Following the Supreme Court decision in HJ/HT [2010] UKSC 31, it was held that being discrete in an internal relocation alternative was no longer to be considered a real option.

Article 9 Qualification Directive: Acts of persecution

41) Could you describe what kind of persecution or serious harm LGBTI asylum seekers who fled to your country experienced in their country of origin (physical violence, ("corrective") rape or other sexual violence, detention, other criminal penalties, execution, honour killings, medical abuse (as a "cure"), harassment, threats, blackmail, intimidation, forced marriages, other psychological violence, no access to education, health care, housing, welfare, employment, judiciary, and so on…)?

All examples above have been referred to in the Country Guidance case law listed earlier.

41A) Which of these experiences have been recognised as persecution or serious harm, and which were found to be insufficient to constitute persecution or discrimination that did amount to persecution?

As long as the harm crosses the threshold for article 3, then it is held to be persecution, as per Article 9 of the 2004 Minimum Standards Directive (see OO (Sudan) and JM (Uganda) v SSHD [2009] EWCA Civ 1432 for further discussion on this point).

41B) Please describe differences in the nature of persecution experienced by men and women respectively, due to their gender (in all of the categories of LGBTI).

See Asylum Aid Report of January 2011:

"Women present some of the most complex claims of all.

They can present a range of issues different from those presented by men. Recent studies show the very high likelihood, for example, that many asylum-seeking women have been raped. Women seeking asylum may be trafficking victims; they may be fleeing 'honour' crimes and threats from family. They may have been persecuted in response to their own political activity, or that of fathers, uncles, brothers.

Of the women whose cases were examined in 'Unsustainable', 87% were refused asylum, the majority because the UKBA didn't accept the credibility of their claim. This proportion is far higher than the official statistics that include men and women's asylum claims."#
(extract from LGBT Asylum News summary of report see - http://madikazemi.blogspot.com/2011/02/in-uk-new-report-says-asylum-system.html)

42) Is attention being paid to non-conformity to heterosexual gender roles and social roles in the decisions and/or case law?

☐ No ☒ Yes. Please give examples.

Paragraph 71 of DW (Jamaica) referred to there is force in the submission that "perception is key". The Upper Tribunal in SW (Jamaica) will be delaing with this point specifically (awaiting promulgation).

Article 9 Qualification Directive: Discrimination /persecution

43) Are LGBTI asylum seekers refused because the harm/ persecution they experienced is labelled as discrimination instead of persecution?

☐ No

☒ Yes. Please give examples. Decisions and/or case law. Good and bad practices.

November 2005 decision of the Court of Appeal in Amare (claim of lesbian from Ethiopia). Expecting greater degree of discrimination, rather than persecution, in decision-making following July 2010 decision in HJ/HT. OO (Sudan) and JM (Uganda) [2009] EWCA Civ 1432 (CA) recognised discrimination which existed in (unenforced) criminal legislation.

Article 9-1-a,b, f /10-1-d Qualification Directive: Discretion (upon return)

44) Decision makers sometimes argue that LGBTI people will not be persecuted as long as they act discreetly or hide their sexual orientation or gender identity to avoid persecution ('go home and be discrete'). Do the asylum authorities in your country use this reasoning?

☒ No

☐ Yes. Could you provide further information and describe decisions and/or case law in which this happens? Good and bad practices.

Since the Court of Appeal decision in 2004 in Z (gay man from Zimbabwe), can not force discretion. From July 2006, there was the test on whether (voluntary) discretion could be expected to be "reasonably tolerable" (J v SSHD [2006] EWCA Civ 1238; [2007] Imm A.R. 73). This test is no longer lawful, BUT if an individual is voluntarily discrete, and this discretion has nothing to do

with a well-founded gear of persecution (the causation point), then the individual is not a refugee (paragraph 82 of HJ (Iran) and HT (Cameroon) [2010] UKSC 31).

Article 10-1-d Qualification Directive; Article 37-38 Procedure Directive: Implementation

45) Does your law or practice recognise explicitly that people who flee because of their sexual orientation can belong to a particular social group?

☐ No

☒ Yes. Are there any differences between L, G and B applicants, and if so, what differences?

Since 1999 decision of the House of Lords in Shah and Islam v SSHD [1999] 2 A.C. 629.

46) Does your law or practice recognise explicitly that people who flee because of their gender identity can belong to a particular social group?

☐ No. Does your country have any other policy that provides protection to transgender asylum seekers?

☒ Yes. If there is explicit policy or legislation, please give a translation into English (French or German).

Asylum Instruction: "Gender Identity issues in the Asylum Claim" (13th June 2011).

47) Does your country apply Article 10(1)(d) of the Qualification Directive in such a way that members of the group must not only share an immutable/innate/ fundamental characteristic, **and** also the condition that the group has a distinct identity, because it is perceived as being different by the surrounding society, or is one of these requirements sufficient?

☒ No ☐ Yes

UK Case Law does not require both elements (see Fornah and K v SSHD [2006] UKHL 46; [2007] 1 AC 412).

48) How is the Qualification Directive's concept of 'gender related aspects' taken into consideration in your legislation?

No qualification further than transposition into Regulation 6 of the 2006 Regulations.

Article 11-1-e, 14 Qualification Directive: Cessation/Withdrawal of asylum status

49) Do you have examples of LGBTI asylum seekers whose asylum status was withdrawn, because the credibility of their lesbian, gay, bisexual orientation or gender identity was doubted later on?

☒ No

☐ Yes. What was the reason?

50) Do you have examples of LGBTI asylum seekers whose asylum status was withdrawn, because their lesbian, gay, bisexual orientation or gender identity had changed?

☐ No

☒ Yes. What was the reason?

Only one anecdotal example where the lesbian appellant from Jamaica had then married a man following her grant of asylum.

51) Are there cases in which asylum status was withdrawn because the position of LGBTIs in the country of origin had improved?

☒ No

☐ Yes. Please give examples.

If the answer to questions 49 and/or 51 was yes:

51A) Did the authorities examine whether the person involved could still be at risk in the country of origin for being a perceived LGBTI?

☐ No ☒ Yes. Please give details.

R (on the application of Michael Atkinson) v Secretary of State for the Home Department [2003] EWHC 2369 (Admin) (a claimant who was perceived as being homosexual can successfully internally relocate to avoid serious harm).

Article 20-3 Qualification Directive: Vulnerable persons

52) Are LGBTI asylums seekers considered part of a 'vulnerable group' or a 'group having special needs' in your national legislation/policy/practice?

☐ No

☒ Yes. Please give details

Hence launch of Asylum Instruction on the 6th of October 2010 (Sexual Orientation) and 13th June 2011 (Gender Identity).

Procedures Directive[4], 2005/85

Article 13 Procedures Directive: The interview

53) Can asylum seekers ask for an interviewer and/or interpreter of the gender (sexual orientation/ gender identity) of their own choice?

☐ No

☒ Yes. Is such a preference usually recognised? ☐ No ☒ Yes

54) Can asylum seekers express a preference for an interviewer and/or interpreter who is not a member of their own ethnic community?

☐ No

☒ Yes. Is such a preference usually recognised? ☐ No ☒ Yes

As long as interpreter can be located who speaks the same language/dialect but is from a different ethnic community.

55) Do you have trainings on LGBTI issues available for officers who take interviews and decisions?

☐ No. Please go to question 56.

☒ Yes. Please answer questions 55A, B, C, D, E and F.

55A) Is this part of a general training or is it a specific training?

Specific Training has been conducted for UKBA decision makers post HJ/HT in 2010, and is currently ongoing and being assessed by the UKBA and protocols will be developed in conjunction with outside agencies (ie UKLGIG, Stonewall and UNHCR)..

55B) Is the training:

- Obligatory ☐ No ☒ Yes. For whom?

UKBA.

- Optional ☐ No ☐ Yes. How many people follow this training (coverage)?

55C) Who has access to this training?

UKBA

[4] Procedures Directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF

55D) Are judges included in these trainings?

☒ No ☐ Yes

55E) What is the level and frequency of these trainings?

Current - Judges have their own training and are specifically being trained on the implications of HJ/HT, especially as the ratio (core legal rule) is being applied to also non-LGB asylum claims (see RT (Zimbabwe) v SSHD [2010] EWCA Civ 1285 (imputed political opinion claims from Zimbabwe).

55F) Who does the training?

For UKBA - UKBA Staff - input given by UKLGIG and Stonewall. Immigration Judges provide their own training, either at Tribunal level (UKLGIG since 2006), or nationally (Stonewall - 2010-2011 - Source: Stonewall and Designated Immigration Judge Manuell, Public Lecture, 9th June 2011).

56) Do you have trainings available for interpreters on the appropriate terminology for use with LGBTI asylum seekers?

☒ No ☐ Yes

Article 23-3,4 Procedures Directive: Accelerated procedure

57) Does your country have accelerated asylum procedures?

☐ No

☒ Yes. Is an exception made for claims of LGBTI asylum seekers?

☒ No ☐ Yes. Please explain.

There is current litigation (2010 to current), and political lobbying (July 2010 to current) to remove LGBTI claims from the Detained Non-Suspensive Appeals Procedure (safe country lists ie Jamaica, Nigeria and Ghana) and/or Detained Fast-Track (claim is determined not to be complicated).

58) Are applications from LGBTI asylum seekers prioritised by the national authorities?

☐ No ☒ Yes. Please explain.

In a way. Since the HJ/HT judgment, the UK Home Secretary and her department have accepted that they will need to take a more -pro-active approach to determine which cases may be affected by the judgment (letter from Home Secretary to Immigration Law Practitoners' Association - 21st

December 2010). However, this is not being applied to all cases at point of removal, and therefore does not indicate a "pro-active" approach.

Articles 29-31 Procedures Directive: Safe countries

59) Do the asylum authorities use lists of 'safe countries of origin'?

☐ No. Please go to question 60.

☒ Yes. Please answer questions 59A and B.

59A) Does the list include countries that have criminal provisions against same-sex conduct (or obvious homophobic practice)?

☐ No

☒ Yes. Please give the names of these countries.

Jamaica, Nigeria and Ghana. These countries are deemed safe, both generally (section 94 (4) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act')) .

59B) Does the list provide exceptions for LGBTIs from specific countries?

☒ No ☐ Yes. Please explain.

This power is found in section 94 (5C) (a) [gender] of (f) [membership of a social or other group] of the Nationality, Immigration and Asylum Act 2002. This relates to the "description of a person". The power has only been exercised by the government in 2007 when exercising the power to issue an Order with respect to women (Asylum (Designated States) (No. 2) Order 2005 and Asylum (Designated States) Order 2007). In all the parliamentary debates in the House of Lords where this issue has been raised, the UK government has refused to exercise this power to exclude LGBTI claims from claims from nationals from these countries - (i) 25th November 2005 (Debate on Asylum (Designated States) (No. 2) Order 2005); (ii) 10th of July 2007 (Debate on Asylum (Designated States) Order 2007); (iii) 9th February 2010 (Debate on Asylum (Designated States) Order); and (iv) 7th March 2011 (Questions: Immigration: Asylum Seekers). 52. Having asked questions on the 14th of June 2010: Column WA88, and the 19th of July 2010: Column WA174, with respect to the general power to rely on section 94 (5C) (h) [any other attribute or circumstance that the Secretary of State thinks appropriate] with respect to general claims based on sexual-orientation, resulting in answers which revealed no wish to exercise such a power, at Column 1358, Lord Avenury asks for the fourth time with respect to Jamaica on the 7th of March 2011:

"To ask Her Majesty's Government whether they will exercise the power in Section 94(5) of the Nationality, Immigration and Asylum Act 2002 so as to restore the right of appeal against refusal of asylum to lesbian, gay, bisexual and transsexual people from Jamaica, Nigeria and Ghana.

Earl Attlee: My Lords, unsuccessful asylum claimants have a right of appeal to the UK courts. Designation under Section 94(5) does not deny a right of appeal to lesbian, gay, bisexual and transsexual applicants from designated countries including Jamaica, Nigeria and Ghana. However, claims from nationals of non-suspensive appeal designated countries that are clearly unfounded must be certified as such and can be appealed only from outside the UK. There are no plans to change this."

This point is currently subject to litigationwith respect to Jamaica as this enables the Secretarty of State to detain the LGBTI asylum seeker and process them through the Fast-Track procedures which shortens drastically the time scale for preparation and effective representation of the individual. Earlier litigation, where challenge was only available with respect to designation of the country with respect to general conditions failed (R (on the application of Anthony Hylton) v Secretary of State for the Home Department [2003] EWHC 1992 (Admin)).

Article 27, 36 Procedures Directive: Dublin Regulation

60) Did you find examples of LGBTI asylum cases in which the European country responsible for examining the asylum application (Dublin Regulation) was not considered a safe country (because of LGBTI aspects of the case)?

☒ No

☐ Yes. Please give details.

Litigation with respect to Greece not being a safe country did not relate to LGBTI asylum claims.

Family Reunification Directive[5], Council Directive 2003/86/EC

Article 10 Family Reunification Directive: Family members

61) Does your country recognise same-sex marriage or same-sex partnership for nationals?

[5] Family Reunification Directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0086:EN:HTML

☐ No. Please go to question 62.

☒ Yes. Please answer question 61A.

61A) Does your country provide family reunification rights based on same sex relationships for partners of refugees?

☐ No ☒ Yes. Please explain under which circumstances.

No difference in treatment of straight and same-sex relationships.

Reception Directive[6]

Article 17 Reception Directive: Reception

62) Do LGBTI asylum-seekers face problems (harassment, ill-treatment etc.) while in reception/ accommodation centres or in immigration detention, based on their sexual orientation/ gender identity?

☐ No. Please go to question 63.

☒ Yes. Please answer questions 62A, B and C.

62A) By whom are these problems caused?

Fellow detainees (including violence) and in some extreme cases, reception centre staff.

62B) Are the authorities aware of these problems?

☐ No ☒ Yes. How do they react?

Through invesitigation.

62C) Does a complaints mechanism exist?

☐ No

☒ Yes. Is it effective? ☒ No ☐ Yes

63) Does the possibility of housing in private accommodation exist during the asylum procedure?

☐ No

☒ Yes. Please explain

Through the NASS (National Asylum Support Services).

[6] Reception Directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0009:EN:HTML

64) Is it possible in reception/ accommodation centres or immigration detention to be placed in an accommodation separate from people from the same country and/or religious background?

☒ No

☐ Yes. Are asylum seekers informed about this possibility? ☐ No ☐ Yes

Articles 17 and 15 Reception Directive: Transgenders/ intersex

65) Do transgender and intersex people have the possibility to choose whether they want to be housed in a women's or men's (section of) reception/ accommodation and detention centre?

☒ No ☐ Yes

66) Do transgender/ intersex applicants have access to specific health care and support,

a) during the asylum procedure

☒ No ☐ Yes

b) after they are granted asylum?

☐ No ☒ Yes

67) If your country provides the possibility to legally change a person's name and sex, does this also apply to trans/ intersex asylum seekers and trans/ intersex refugees?

☐ No ☒ Yes

Any other issues

68) Are you aware of any other specific problems for LGBTI asylum seekers?

Noting that Belgium is the only EU member state the author is aware of which records LGBTI asylum claims, the published commitment of UKBA (in July 2010 and May 2011 (see above)) to record data will be essential in being able to access appropriate resources to LGBTI asylum claims.

69) Are you aware of any other good practices concerning LGBTI asylum seekers?

The guidance in HJ/HT was recognised by the Supreme Court in the May 2010 hearing to have international significance. Academic commentators such as Professor Jenni Millbank have already commented that the landmark decision is "streets ahead of S395" (E-mail communication 14th July 2010).

70) Please add any other comments on the situation of LGBTI asylum seekers in your country.

The most recent analysis of the situation for LGBTI asylum seekers in the UK was published in March 2011 "Sanctuary, Safety and Solidarity 'Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland'" (Equality Network, BEMIS and GRAMNet)". The report refers to an institutional "culture of disbelief". The author fully agrees with their recommendations:

"Recommendations:

Sanctuary

We wish to see a radically different asylum process for LGBT asylum seekers, one which

- is fair, informed and without prejudice
- places respect for human rights at the cornerstone of all its decision making
- allows sufficient time for LGBT asylum seekers to safely tell their stories
- ensures sufficient access to specialist legal advice and representation throughout
- celebrates the importance of offering protection to those fleeing persecution
- does not routinely rely on the use of detention and fast-track decision making

Safety

We wish to see a reduction in the social isolation and mental health suffering experienced by LGBT asylum

seekers/refugees, including by

- restoring the right to work for asylum seekers
- having an asylum support system in which no one is left in poverty and all have a sufficient income to lead a dignified life
- ensuring access to suitable housing throughout the whole asylum process
- encouraging the provision of safe spaces for LGBT asylum seekers to access support within community settings
- enabling services to be sensitive to the individual needs of lesbian, gay bisexual and transgender asylum seekers/refugees, including children and young adults
- giving a voice to LGBT asylum seekers/refugees to have their stories heard and to influence service development

Solidarity

We wish to forge new and innovative partnerships in order to bring about lasting change for people fleeing

persecution because of their sexual orientation or gender identity, including by:

- enhancing links between LGBT organisations, refugee community groups, immigration lawyers, academics and activists
- facilitating the development of a network of organisations in Scotland which by pooling resources and knowledge will act as a coordinating hub, source of expert help and a catalyst for change
- celebrating diversity and creating unity through the use of arts and cultural activity
- developing a range of information and educational tools that improve awareness of the human rights abuses suffered by LGBT people across the globe
- creating pathways for joint work between Scottish LGBT and human rights organisations and international NGOs working in countries where LGBT people face persecution"

Thank you!

SHORT LGBTI GLOSSARY

Age of consent
The minimum age at which a person is considered to be legally competent of consenting to sexual acts.

Bisexual
An individual who is physically, romantically and/or emotionally attracted to both men and women. Bisexuals need not have had equal sexual experience with both men and women. In fact, they need not have had any sexual experience at all to identify as bisexual.

Coming out
A lifelong process of self-acceptance. People forge a lesbian, gay, bisexual or transgender identity first to themselves and then may reveal it to others. Publicly identifying one's sexual orientation may or may not be part of coming out.

Gay
Used to describe people whose enduring physical, romantic and/or emotional attractions are to people of the same sex (e.g., *gay man*, *gay people*). Often used to describe a man who is sexually attracted to other men, but may be used to describe lesbians as well.

Gender
Refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.

Gender Identity
Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. It includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Intersex
Refers to a condition of having sexual anatomy that is not considered standard for a male or female. Intersex can be used as an umbrella term covering differences of sexual development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical. The term *intersex* is not interchangeable or a synonym for *transgender*.

Lesbian
A woman whose enduring physical, romantic and/or emotional attraction is to other women.

Sexual Orientation
Refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.

Sodomy Laws
Laws that define certain sexual acts as crimes. The precise sexual acts meant by the term sodomy are rarely spelled out in the law, but are typically understood by courts to include any sexual act deemed unnatural. Consensual homosexual acts between adults are illegal in about 70 to 80 countries in the world; in 40 of these, only male-male sex is outlawed.

Transgender
An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Transgender people may or may not decide to alter their bodies hormonally and/or surgically.