

Women and Equalities Committee

Oral evidence: Equality and the UK asylum process, HC 726

Wednesday 23 February 2022

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Members present: Caroline Nokes (Chair); Theo Clarke; Jackie Doyle-Price; Carolyn Harris; Kim Johnson; Anum Qaisar and Bell Ribeiro-Addy.

Questions 73 - 106

Witnesses

I: Dr S Chelvan, Barrister and Head of Immigration and Public Law, 33 Bedford Row; Leila Zadeh, Executive Director, Rainbow Migration and Nuno Ferreira, Professor in Law and leader of the SOGICA project, University of Sussex.

Written evidence from witnesses:



Examination of witnesses

Witnesses: Dr S Chelvan, Leila Zadeh and Nuno Ferreira.

Q73 **Chair:** Good afternoon, and welcome to this afternoon's evidence session of the Women and Equalities Select Committee and our inquiry into equality and the UK asylum process. Our three witnesses this afternoon are Dr S Chelvan, a barrister and head of immigration and public law at 33 Bedford Row. Leila Zadeh, who is the executive director of Rainbow Migration, and Professor Nuno Ferreira, who is professor in law and leader of the SOGICA project at the University of Sussex.

Can I thank all of our witnesses for being with us this afternoon and ask you to introduce yourselves before I turn to Members of the Committee? Can I start with you, please, Dr Chelvan, and could you indicate how you would like to be referred to?

Dr Chelvan: My formal name is S Chelvan, but everybody knows me as Chelvan. My preferred pronouns are he and him. I am a barrister and head of immigration and public law at 33 Bedford Road chambers.

Leila Zadeh: My name is Leila Zadeh. I am the executive director of Rainbow Migration. We have been supporting LGBTQI+ people through the asylum and immigration system since 1993. Thank you for inviting me today.

Nuno Ferreira: Thank you so much for the invitation. My name is Nuno Ferreira. Besides being a professor of law here at the University of Sussex, I am also a co-director of the Sussex Centre for Research on Human Rights. I have co-led the SOGICA project, which explored the social and legal experiences of individuals claiming asylum on the grounds of sexual orientation and gender identity in Europe, with a focus on the UK, Germany and Italy.

Chair: Thank you very much. The first set of questions are going to come from Anum Qaisar, please.

Q74 **Anum Qaisar:** Leila, as I understand, the experimental statistics that the Home Office hold do not show the full lived experiences of people, and some of these include but are not limited to: whether sexual orientation was the sole basis for their claim, at what stage of the process sexual orientation was raised as a basis for the claim, and whether the sexual orientation element of the claim had any bearing on the initial decision, appeal or final outcome. Taking this into consideration, how useful are the Home Office experimental statistics in understanding LGBT+ people's experiences and the fairness of the asylum process?

Leila Zadeh: I would like to start by saying that we do commend the Home Office for publishing the statistics that they do. I acknowledge the limitations that you have just mentioned, and I imagine the Home Office themselves would recognise that, but they are a very useful data source to us, and it is very positive that they are making this data available on



an annual basis. Despite the fact that they are experimental and there are limitations on what conclusions we can draw from the data, you can still see some trends. For example, it is very helpful to see trends in the numbers of people applying from particular countries or who is having their asylum claim granted. For example, we can see in some of the countries that the grant rates indicate that the Home Office does recognise and protect people from countries where there is recognised persecution, for example, Uganda or Malaysia.

Other data would be valuable; for example, breaking down this data by gender. We know that women can sometimes find it much harder to prove that they have a well-founded fear of persecution. In 2016, the Home Office did respond to a freedom of information request and they gave the breakdown of the data for Kenya by gender in terms of claims based on sexual orientation, but we have not seen any other data breaking down those statistics by gender since that time.

It would also be incredibly useful to see statistics for claims based on gender identity. We would add to that that we find it very important for the Home Office to start monitoring and publishing data on LGBT+ people in immigration detention—including the outcomes of their asylum claims if they are made while they are in detention—and to find out what happens at the end. For example, how many of those people are released back into the community or how many people are removed from the country and how long they were detained for.

It goes without saying that we would love to see the accuracy improved. These are experimental statistics; they do not meet the level or the standard that is set out by the Office for National Statistics. I understand that the Home Office say that their new database, Atlas, will record better if people's claims are based on their sexual orientation or gender identity, so I would like to see an improvement in future in the accuracy of that data.

Q75 Anum Qaisar: Thank you, Leila. Dr Chelvan, I am going to come to you and then I will ask Nuno with the same question. The new Scots strategy implemented by the Scottish government has taken considerable time to listen and acknowledge the lives of LGBT+ people and the impact the asylum process had on them. Should the UK Government consider taking a similar approach to this and consider the experiences of LGBT+ refugees and asylum seekers during the planning and implementation of the asylum process, and are there countries that publish a more useful range of data on experiences of LGBT+ people in their asylum processes?

Dr Chelvan: Let us give some historical context. In 2010 there was something called the Fleeing Homophobia project, which was based in the University of VU in Amsterdam, and that is where I first met Professor Ferreira. He was the expert from Portugal and I was there from the UK. It was an analysis of 25 different EU states and their processes for LGBT asylum claims, plus Israel. What we found at that time was that the only countries to provide statistics were Belgium and Norway. Following the



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Supreme Court judgment in July 2010 there was a shift to the issues of credibility after the UK Lesbian and Gay Immigration Group reported 98% to 99% being refused at decision stage because they could be discreet.

What happened then is there was a lot of lobbying by organisations, including the Immigration Law Practitioners Association for statistics, and the Home Office did work with NGOs and civil society to provide them, with statistics being provided from 2015 onwards. Those statistics are vital to ensure we know what is the issue in relation to certain countries. For example, the most recent statistics were published in August 2021, which showed that 44% of LGB claims were being allowed at decision level, and that 47% of the remaining were being granted on appeal. We know from the Home Office statistics that around 60% of overall LGB claims are granted refugee status. Contrary to the rhetoric in the media, the majority of people who come to the UK are genuine refugees, based on sexual orientation.

On 8 December 2020, the Home Office published the thematic review on sexual orientation. I was appointed the independent reviewer, and those statistics were also very important to show whether these individuals were being refused because they were not believed for being gay or lesbian or bisexual, or whether it was because the country information did not show that they were at risk.

The most recent statistics I refer to, the August 2021 statistics, show that the majority of people who were LGB and claiming asylum were from Pakistan. We know that the Home Office country information accepts that if you are lesbian, gay or bisexual, you will be at risk of persecution on return to Pakistan. We know that the majority of those refusals at first instance were because they were not believed for being lesbian, gay and bisexual. Those statistics are very important in relation to showing what is the failing point in relation to the grant of status. Is it because they are not believed because they are LGB? Is it because the Home Office country information—I am sure we will go into that later on this afternoon—does not show that openly gay people will be at risk of persecution? Or is it the issue regarding the developing of the case law? My report looked at all those statistics to show where the systems were with respect to certain countries.

We know from the Home Office evidence that Pakistan has the greatest number of applicants. There were just over 1,000 LGB applicants in 2020. The second country was Uganda, and that is also with respect to country information which accepts that Ugandan LGBT people are at risk of persecution. Those statistics are important in relation to where in the process points individuals are failing to be able to be granted refugee status.

In relation to trans issues, I provided 10 recommendations as part of my review. Six were fully accepted by the Home Office, two were partially accepted, and two were rejected. One of the ones which were partly



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accepted is that they accepted the recommendation I made regarding continuation of experimental statistics for LGB, but did not accept the recommendation in relation to statistics of gender identity.

What was frightening—sorry frightening is too strong a term, I apologise, I am a very emotional advocate—what was interesting in relation to the Home Office response to this Committee is they refer to age and sex as part of the categories in relation to where statistics are provided, but do not include sexual orientation.

We are hoping that there are further updated statistics in August 2022 to cover 2021, but I hope this Committee seeks an undertaking by the Home Office that they do continue to provide the statistics because they provide a fantastic basis to look at where the fracture points are, where the pressure points are in relation to these claims. I apologise; it is a far more detailed response than you may have been expecting.

Alum Qaisar: Thank you for that. That was very thorough indeed. I am going to come to Nuno. Would you like me to repeat the question for you?

Nuno Ferreira: No, that is okay. Thank you so much for the question. I would not have much to add in any case; I will be quick. I would just like to reiterate that it is, indeed, very positive that the Home Office offers these statistics, but they are experimental, as Leila mentioned.

The UK stands positively in the European and international context in terms of offering at least these experimental statistics, but we can do better. I think it is very important that these statistics meet the required standards to become official statistics. It is also very crucial to include gender identity, gender expression and sexual characteristics.

Q76 **Anum Qaisar:** Thank you so much. In 2019, the Home Office reviewed the way in which LGBTQI+ claims were assessed and developed a new action plan. What is your understanding of what this review found, and what has changed since then?

Leila Zadeh: The review that was undertaken was an internal review by the Home Office, and we were told that this is the reason why that review has not been published, so I can only speak to what I have been told by civil servants within the Home Office.

This review looked at how they deal with claims based on religious grounds or claims that are brought by LGBT+ people. From what I understand from the information that I was given, I would pick out three issues that the review found. One is that the guidance that decision-makers have to use is not user friendly. I know from what is available on the Home Office website that the guidance can often be pages and pages long. I am not going to suggest how it can be made more user friendly because, obviously, it is also important to make sure that decisionmakers



have all the necessary information that they need, but this is one of the findings that was reported back to us.

Another one was that decision-makers did find that asylum claims from LGBT+ people could be quite complex, and I do not think that is a surprise. I think a lot of people would agree with that because there is a very tricky issue here, which is that the applicant has to prove to the required standard of proof that they are LGBT+. This is something very difficult for anybody to do and it can be quite difficult, I believe, for an interviewer or a decision-maker to establish.

Another one of the findings was that there needed to be more training on interview skills to address this challenge, and I understand that a training programme was developed to look at this.

There is one final point which stood out to me when we received this report, which was that because of the complexity of this type of asylum claim people may need longer in order to review the information that they have gathered, to analyse it and reflect on it, before they can reach a decision on whether or not to grant asylum to somebody. It appears to me that the productivity targets that are there for decision-makers can be an obstacle to this and can act as a blockage to the time that somebody needs to take to deliberate properly on someone's asylum claim. There is a bit of tension there between a quality, thorough decision-making process but also delivering in a target-driven or an output-focused environment.

I understand that the review also identified that an improvement would be to try to keep the decision closer to the interview—in other words, having the person who interviews the asylum claimant working in the same team as the person who makes the decision on the asylum claim. I understand that the Home Office was trying to increasingly use this model, but I do not know if that is still in operation.

Anum Qaisar: Thank you so much, Leila. Thank you, Chair.

Q77 **Chair:** Thank you very much. Can I turn to Nuno, please? You have given us evidence that there is an overreliance on membership of a particular social group ground for sexual orientation-based claims. What do you think some of the challenges and consequences are of that reliance?

Nuno Ferreira: Thank you so much for the question, Caroline. Yes, we do believe on the basis of the experiences of our UK participants that the moment the Home Office realises the claimant is a member of a sexual orientation or a gender identity minority then they simply focus on the particular social group ground. I think that that leaves out lots of experiences from our participants. This ignores that members of SOGIE minorities in need of international protection may have a valid refugee claim on grounds of race, religion, nationality and political opinion. It also disregards the overall experiences and journeys of refugees.



I would like to give some examples from our participants because it is very important to bring into this discussion the experiences of those who actually undergo this process. On the basis of interviews we carried out with participants in the UK, we saw that the Home Office really focuses on the particular social group ground and leaves other grounds aside. For example, Miria from Uganda, was a political activist, but that was disregarded by the Home Office. Ibrahim from Egypt was also an activist and he had the same experience. Ximena from Guatemala was a human rights activist. Again, she was only seen as a trans person. And Amber from Malaysia was not only a political activist, she was also perceived as a non-Muslim, and she suffered persecution on those grounds but, again, religion was not considered.

Our point is that it is not because a claimant is a member of a SOGIE minority that they should automatically just be boxed into the particular social group category. We recommend that the Home Office should more proactively consider whether other asylum grounds could offer useful avenues for protection for members of SOGIE minorities. This would also recognise the multiple and intersecting grounds for claiming protection and the many factors and identities that are the basis for persecution. This could also enhance the likelihood of members of SOGIE minorities who also need to do justice to their political activism obtaining international protection. Our recommendation is that decisionmakers should really make an effort to consider the whole experience and the whole journey of these claimants and do justice to their political activism.

Q78 Chair: Do you think there is any danger that considering a broader range of grounds for asylum to be granted could actually lengthen the time taken?

Nuno Ferreira: It could what, sorry?

Chair: It could lengthen the time taken for a decisionmaker to come to a decision. The point I am trying to make is that if somebody is deemed to be at risk of persecution because of their sexual orientation in Uganda, Pakistan, wherever, could a decision be made more quickly if it was done exclusively on one ground? I think Chelvan would like to come in on that as well.

Nuno Ferreira: I do not believe that would in any way make the procedure more complex or lengthier. I think it would simply do justice to the actual journey and life and identities of these claimants, and the same procedural steps would have to be taken anyway. It is a matter of exploring a few more issues during the interview and considering them in the decision. I do not think it would have any negative impact in the procedure or the length of the procedure.

Dr Chelvan: I agree with Nuno in relation to the length of the decision-making. It should not in any way be delayed because of the various intersections between the five Convention reasons—race, religion, nationality, particular social group and political opinion. In the 20 years I



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have been practising, there has never been an issue with raising more than one ground. The reason why there is a safe space for LGBT+ refugees from a particular social group goes to one of the core issues regarding sexual or gender identity and the issue of difference, hence the persecution.

Let me give you two examples: Aderonke Apata was a Nigerian lesbian activist client of mine. It took 13 years for the Home Office to accept that she was a lesbian. She was also a political activist. There was no issue in relation to conjoining her risk elements based on her sexual identity and also in relation to political activism. Clients I have, for example, from Russia who are HIV positive, you have the Convention reason or particular social group, but you have the intersections between sexual identity, the persecution of Russia's gay men, but also disability.

I think there is also a duty on legal representatives, and Leila said this at the beginning. It is a complex area, but it also needs expert legal representation because in the last 20 years a lot of my clients have gone through the system not only once, but twice or even three times.

I gave the example of Aderonke Apata. If the Home Office had had their way, she would have been deported in 2012. She had to draft her own grounds for a stay of removal in 2012 because legal aid lawyers told her she had no claim for asylum. It was only after the Court of Appeal remitted her case in 2016 that the case went back through the process, and on 1 August 2017 she was granted asylum. If it was a one-stop notice and a one-process appeal, Aderonke Apata would now be in Nigeria facing persecution. We have to realise that.

When it comes to decision-making by the UK for refugee claims, it is not only the Home Office, it is also our independent judges and our independent courts and tribunals. Also, I am part of the system as a lawyer. We are all part of the UK decision-making process to ensure that those who have a genuine, well-founded fear of persecution get refugee status. It is about all those little pieces of the jigsaw working together.

I have been on the Home Office National Asylum Stakeholder Forum equality subgroup since the end of 2015, Rainbow Migration are also members and Nuno talked about the Home Office, so that is the forum. The Home Office at decision-making level, at management level, is receptive, and I know we will be talking about that in relation to credibility assessment as well. It is about having those forums of conversations.

We do not always get a positive answer and when we fail at a policy level, then my three favourite words are litigation, litigation, litigation, because the courts have been developing the law through our common law system to ensure refugee protection. When it comes to intersectionality within Convention reasons or crossing over—like a Venn diagram—I do not think there is a policy resistance to that. I think it



requires those who represent refugees to be able to understand and appreciate the various Convention reasons and refugee law.

Q79 **Chair:** I am going to go back to the case you highlighted of the Nigerian lady that it took the Home Office 13 years to agree that she was a lesbian. Surely, if she was also a political activist it would have been much better to just grant asylum, give her refugee status, on those grounds than to waste her time and everybody else's time arguing about whether she was a lesbian or not. Or am I being too simplistic?

Dr Chelvan: The High Court in 2015 was given submissions by the Home Office counsel that this was all just make believe, it was just a show to be able to get asylum. We were able to establish her sexual identity. As someone who is a lawyer, somebody who works in policy and also in academia, I have no issue in saying that it is not a bad thing for particular social groups. In 1999, that is how—48 years after the Refugee Convention came to be—women, through the House of Lords cases with Shah and Islam v SSHD, came within refugee protection and, in what I call the “obiter breadcrumbs from the judicial table”, Lord Stone said, “Well, also these homosexuals have an innate and immutable characteristic”, so it provided a fix to the historical injustice.

It is important to understand that the court, through the case law, has accepted that these are characteristics which cannot change or cannot be required to change, so it gives a greater understanding of what it is to be a human with sexual or gender identity. The concern is that if you only look at one element—Aderonke Apata is a clear example—there is always, “This is a bogus claim; this is all a show; it is all a media circus.” You can look at the judgment of the Deputy High Court Judge Bowes QC in relation to that. Those were the submissions which were used, “This is all a farce.” For the first time Aderonke Apata was able to tell her story through the Difference, Stigma, Shame and Harm model, which is a model I created to give the refugee an ability to talk about their emotional journey. The end of her journey was 1 August 2017 when the Home Office said: “We accept you are a lesbian.” She had not suddenly become a lesbian but, “We accept that you have discharged the burden of proof on you to prove that you are a refugee.”

Q80 **Chair:** You have been quite critical of the Home Office's Country Policy and Information Team, describing it as “not fit for purpose”. Is it the team that is not fit for purpose or the policy?

Dr Chelvan: Wow. I am going to be very careful in my answer. I am going to give you three examples. The first example is Sri Lanka on LGBT claims. I was born in Sri Lanka; I have a link, I am a first-generation immigrant. In November 2016, the Sri Lankan Supreme Court, in a case called Galabada, handed down a judgment which said that British laws were clearly in force; they were active. They changed them in 1995 because there was a constitutional challenge saying, “It is discriminatory; this only deals with men, not women.” In 1995 the Sri Lankan Parliament



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said, "We can't be discriminatory; we have to now include lesbians." They changed the legislation to also criminalise lesbians.

The Sri Lankan Supreme Court said in the case of two gay men who were prosecuted and sentenced in 2003 to 12 months for gross indecency. They said, "Look, this is very much part of our law. We know that England and Wales have got rid of this legislation— Sexual Offences Act 2003—but we're Sri Lanka." If an individual comes before a magistrate in relation to this charge, instead of 12 months they increased it to 24 months with a five-year suspension if it is a first-time offence for the opportunity to reform.

What do you and I understand "an opportunity to reform" to mean? Conversion therapy. I am glad I can put it on the record that, Chair, you have nodded your head in agreement and so have several other members. That is what I understood by that. Therefore, in late 2016-17 in my guise of membership of the NAS Equality subgroup, I provided this judgment saying, "Look, the Home Office position is in line with what is called country guidance cases. The upper tribunal provide these judgments called determinative or country guidance cases." They said there had been no prosecutions in Sri Lanka since 1948. We had evidence there had been at least two in 2003.

I gave this to the Home Office and said, "Look, you've got to change your country information, and the country guidance case cannot continue." In July 2017, the Home Office published their updated report; it did not refer to the Galabada judgment. In October 2018, they updated their country policy information note again. They omitted the suspension for five years for an opportunity to reform. Why did they do that?

Then in October 2020, they updated their country policy information note but included the five-year suspension for an opportunity to reform, but they said, "We have no evidence of conversion therapy."¹ On 30 November 2021, that is the most recent CIPN report, we now know from evidence from Human Rights Watch and the Sri Lankan media that in October 2020 judicial officers were conducting—and I give a trigger warning before I say this—forced anal and vaginal examinations of those suspected to be gay who had been prosecuted in Sri Lanka.

The Home Office position on 30 November 2021 is these are isolated incidents. However, the Foreign and Commonwealth Office in July 2021 published a report regarding countries of concern with respect to human rights violations. In that report, which predates the most recent report, they quoted from the justice minister in Sri Lanka, who said, "We must stop this practice." Not isolated incidents.

The question is why is the country policy information team publishing reports which are—and I put this in the broadest sense I can—inaccurate

¹ Footnote from witness: The updated 2020 Sri Lankan SOGIE CPIN was published in September, not October, 2020.



and misleading? Who is driving the pressure for the Home Office to publish evidence, country background material, to decide cases of LGBT+ Sri Lankans which chooses to omit a Supreme Court judgment of Sri Lanka when they had it in their possession before the July 2017 publication, and then chooses to selectively edit sections?

Compare and contrast the Indian country policy information note. On 6 September 2018, the Indian Supreme Court handed down the judgment of *Johar & Ors v Union of India* which struck down criminalisation in Sri Lanka.² Within a month, the Home Office country policy information team had updated the report for India. How is it that we can update the report for India within a month for a positive change to country conditions, therefore, reducing the risk to LGBT+ individuals from India, but we take years to provide accurate information regarding Sri Lanka? The question this Committee needs to ask itself, and it is not a question I can ask, is what is causing the drive?

I will give you another example, Bangladesh. A client of mine, a lesbian from Bangladesh, AN (Bangladesh). September we were before the upper tribunal. The previous year my junior, Dr Tariq Mahmood at 33 Bedford Row, took a case to the Court of Appeal regarding our client, a lesbian from Bangladesh. The Home Office accepted remittal to the upper tribunal on the basis that the starting point for deciding the risk to open lesbians in Bangladesh will have to be the Home Office April 2020 country and policy information note on Bangladesh.

Their strategic litigation and policy position is that whilst they accepted that gay men in Bangladesh are at risk of persecution because of the murders of the two journalists in 2016, their position is that lesbians from Bangladesh are not at risk. Thousands of pounds have been spent on legal aid in litigating that case but, fortunately for my client, a couple of months before the September hearing, the Home Office granted asylum to her girlfriend from Bangladesh. We pointed out, "Wait a minute. You say that lesbians from Bangladesh aren't at risk. However, you've granted my girlfriend, who is a lesbian from Bangladesh, refugee status." They folded. They conceded and granted appeal. The Home Office CPIT report was used as a policy and litigation position to say that lesbians are not at risk where we could show the Home Office themselves were granting lesbians from Bangladesh refugee status.

Another example, Kenneth Macharia—

Q81 Chair: I am sorry, but we have had a lot of examples. Can I just pick you up on a specific point? What could make it better? Is it a lack of resources? Or is wilfully ignoring judgments that they are aware of?

² Footnote from witness: The *Johar* judgment of the Indian Supreme Court (judgment of 6 September 2018) decriminalised homosexual sex in India, not Sri Lanka. The Indian CPIN, not the Sri Lankan CPIN, was updated a month after the judgment.



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Dr Chelvan: I would say structural change. There needs to be a change in the culture in the country policy information team. This has not been going on for one or two years but many years, and there has to be a change in the culture because it—

Q82 **Chair:** Is structural change cultural change? I would argue not.

Dr Chelvan: I would say it is the first step.

Q83 **Chair:** Thank you. Can I turn to Leila first? Could you give us an indication of how you think asylum NGOs could assist the Home Office in its country notes?

Leila Zadeh: The country policy information team has said several times that they would like to work with NGOs to receive information on countries of origin. However, speaking for ourselves as Rainbow Migration, we are not the experts to be able to provide the kind of evidence they need on the situation on the ground around the world. Where we could engage with the Country Policy Information Team is on the policy that stems from what is happening on the ground. In that sense, I do think that the Home Office could engage more with NGOs in terms of country of origin policy and how that affects decisions on asylum claims.

Chair: Thank you. Nuno, did you have anything you wanted to add to that?

Nuno Ferreira: Just a couple of quick points. From the interviews we carried out and our analysis, there were two things that stood out in terms of country of origin information in the UK. The first one is in terms of the content of these documents, which very often homogenise sexual orientation and gender identity minorities. We think it is very important that the Home Office keeps working on considering the different experiences that these minorities have in their countries of origin. Not just considering them as a single group or just focusing on the experiences of gay men, but also specifically considering the experiences of lesbian women, trans people, intersex people, because the experiences of all these subgroups can be quite different.

Our second point here would be that it is not just about the quality of the country of origin information, it is how it is applied. We realise very often decision-makers have the right country of origin information before them, but they just apply it in a very simplistic way. It is important that decision-

makers are trained better and are offered conditions to apply the country of origin information they have in a more sophisticated and more careful way to make sure that they do not just take out the headline of the country of origin information and apply it in a simplistic way.

Q84 **Chair:** Using the example that Chelvan gave us from Bangladesh, there is also a case for them to use it in a consistent way?



Nuno Ferreira: Yes, definitely.

Q85 **Chair:** You found that elements of discretion reasoning persist in some of the European asylum authorities. Is that the same in the UK Home Office?

Nuno Ferreira: Yes, very much. We would probably say that the UK is, unfortunately, the worst example in terms of retaining discretion logic across Europe because, of course, the Supreme Court decision in *HJ (Iran) v SSHD* in 2010 clearly retained an element of discretion allowing claimants to be sent back if they “choose” to conceal their sexuality. Simply, the previous discretion requirement was transformed into a new and cumbersome test. This decision has been criticised on several grounds. It has been found to be unreasonable, discriminatory, unworkable—even by the UK Equality and Human Rights Commission—and it runs against UNHCR guidance, which is also important to note.

We are effectively asking sexual orientation asylum claimants in the UK to overcome an additional hurdle because they need to prove that if they were sent back, they would not be discreet for any reason. It is clearly discriminatory.

We also need to consider that SOGIE claimants often escape their home countries after having gone to great lengths to hide their sexuality and were not successful, so this discretion reasoning is very often quite theoretical. Still, it is a dangerous policy because it assumes that decision-makers can establish the future behaviour of an individual and ignore the fact that choosing whether or not to disclose their sexual orientation if they are sent back to their countries of origin, is rarely within their control. We think that retaining this element of discretion also made decision-makers increasingly focus on whether claimants are really members of a sexual orientation minority and how open they are, because decision-makers now need to assess how open they would be if they were sent back to countries of origin.

Our participants were very critical of this because they found that it is not realistic to expect sexual orientation claimants to have the financial resources or time or energy to have a social life, to go out to LGBT venues, to attend social groups. Several of our participants felt the pressure to be out and open and have this sort of evidence for the Home Office so that they could show that they would not be discreet if they were returned to their countries of origin, but it is really unrealistic in their circumstances.

We saw several times evidence of the Home Office pushing this discretion reasoning in upper tier tribunal observations we did in London. Even claimants who are clearly open about their sexuality are expected by some judges to change their conduct, become more discreet. Again, in an upper tier tribunal observation in London, we observed a judge expecting a lesbian woman to act less mannish if she were sent back to her country of origin.



This discretion element still affects lesbian and bisexual women in particular as well because a lawyer was very clear about the fact that lesbians and bisexual women are more likely to be told that if they were sent back to their countries of origin, they would be discreet for reasons not related to persecution. Our recommendation here is very clear. The decision in HJ (Iran) needs to be challenged. We cannot retain this element of discretion because it is very negative and discriminatory for sexual orientation asylum claimants. We need to also make sure that the Home Office policy eliminates all traces of discretion logic.

Q86 Chair: I will come to you in a moment, Leila. I just wanted to ask Chelvan whether there was anything he wanted to add specifically on that case?

Dr Chelvan: It is not a policy; it is a legal test. The Home Office cannot be blamed for following something which is still, in law, a legal test. So HJ (Iran) says in the penultimate limb on conduct, "If a person only chooses to be discreet because of personal social pressure, they're not a refugee." If there is a material reason for discretion, for example, "I don't want Mum and Dad to know, and the neighbours will call me names, but the mob will kill me," then you are still a refugee. It is going to be litigation rather than a policy development because the Home Office has to follow the law of the land under the case law.

Nuno was talking about lesbian and bisexual women. In *SW Jamaica v SSHD*, a case which postdates HJ (Iran) in 2011, it is not about keeping quiet because you do not prove that you are straight to the potential persecutor by proving that you are not gay; it is actually by pretending that you are straight. For lesbian and bisexual women in Jamaica, to give an example, the country evidence says that women—that is all women—between the ages of 16 and 60 in Jamaica are supposed to be sexually receptive to the potential persecutory male. You can only evade such harm if you have a male partner, have children or recent evidence of widowhood. If you then reject a potential persecutor and you are not able to prove straight, you are at real risk of curative rape or murder. That is the country guidance case here in the UK since June 2011.

It is not about whether you are discreet, but can you successfully prove that you are straight enough to the potential persecutor? I do a lot of strategic litigation. My mother always used to say "God says yes, no or later"—I always believe that is the same response from the Court of Appeal. In 2017 in the case in the Court of Appeal called *LC (Albania) v SSHD*, the position there was that they tried to change the discretion tests by saying, "Look, it's not an automatic refusal, the majority of people will succeed". As Nuno was trying to emphasise, there is an over-concentration on how an individual will behave here, how open they are here. That is not the test and is not what the Supreme Court said. It is about how would an individual behave on return. Madam, if I may, if I point a gun towards you, would you run towards the gun or away from the gun?



Chair: Away.

Dr Chelvan: Away from the gun, that is the majority, it is fight or flight. But in SW (Jamaica) the tribunal accepted that she would be open about her lesbianism, even though there is evidence of curative rape or murder. "But the majority of people will not be the gay martyr", are the words which Lord Roger used in HJ (Iran), because we will choose flight—the majority of us will be discreet.

The issue is, is discretion successful? No, because to be successfully discreet to the potential persecutor, you will have to engage in same sex conduct or identity conduct to be able to evade, which in itself is persecutory.³ To summarise, because we do not have a three-hour lecture here, what we need is to get rid of the discretion test. This is not to do with the Home Office, or to do with the courts. We have to be able to say that this is not a realistic test, because the majority of people will have to employ conduct which is against their immutable characteristic. What that penultimate limb of the HJ test gives is a charter to give the adverse credibility finding. We accept that you are gay. The four limbs are, are you gay or perceived to be gay? That is the first limb of HJ (Iran), which is subjective: the individual has to prove it. The second limb is, do openly gay people have a well-founded fear of persecution? It has nothing to do with what I say, it has got to do with those who are the gay martyrs, that tiny minority in the bigger population, what happens to them if they are found to be gay? That is why the country policy information notes are so vital. It has nothing to do with my narrative. The third limb is, am I going to be open on return? If I am then I am a refugee. The fourth limb is, if I choose voluntary discretion, is the only reason because of personal social choice? Then I am not a refugee, but it is a material reason.

We can see how the test evolves and it is not only for LGBT claims. The HJ (Iran) test is for all refugee protection claims in the UK. That is why it is important to get rid of the discretion test, because the biggest hurdle for the individual, having made their physical and emotional journey to come to the UK to claim asylum, is to prove that they are gay or perceived to be gay. To then be refused asylum on the basis that you will be voluntarily discreet only because of social personal reasons, means that individual goes back to their country of origin and does not lie for a day or a week or a month, but has to lie for the rest of their lives about who we accept they naturally are. That is the reality of the discretion test. It is not an issue of hiding, it is an issue of lying.

Chair: Thank you. Leila.

Leila Zadeh: One of the problems we have with the current discretion test that Chelvan explained is that it is not currently applied correctly a

³ Footnote from witness: To be successful, the person would have to engage in opposite-sex conduct, not same-sex conduct, to prove themselves to be straight, which is persecutory.



lot of the time. If it were applied correctly, many more people would rightly be granted refugee status. I would like to refer to the historic context to this, which is that this Supreme Court judgement came about because prior to that, people were being refused asylum on the basis of “Well, nobody will know that you are LGB, or nobody will know that you are gay, so it is fine for you to go back because nobody knows anyway”. Chelvan has already talked through some of the problems with that assumption, but that is the context from which the current case law evolved. Whatever happens in future, we need to make sure that we do not end up in another situation where, just because nobody knows that you are LGB, then it is okay for you to go back to your country of origin.

Also within the current model we have there is something that the Home Office or the courts could improve in their application of the model to their decision making, which is that if somebody is hiding their sexual orientation—or if they say they would hide it if they were returned to their country of origin—it is extremely likely they would do so to avoid persecution, because that is why they are applying for asylum in the first place. For example, an Iranian man here might choose not to tell many people that he is gay because he wants to make friends and he is worried how people might react. But if the same man went back to Iran, I think it is extremely unlikely that he would say, “No, the fact that there is a death penalty in Iran has absolutely nothing to do with the reason why I am concealing this”. But in most cases people will say that they would conceal, and most people would be doing so because of their fear of persecution. The Home Office could include a strong presumption that, if they accept that somebody is LGB, and if they accept that there is risk of persecution of LGB people in their country of origin, then there could be a strong presumption that that person should be granted asylum.

Q87 Carolyn Harris: This is for Nuno and for Chelvan. In the previous session we heard that other countries, including Switzerland and the Netherlands, have far more effective legal representation for claimants. What is the difference between their system, and what could we actually benefit from, by having that system in this country?

Dr Chelvan: Increase the legal aid budget. It is all about legal representation. A couple of years ago there were pilot projects, specifically in Nottingham in the Midlands. One law firm with which we were working where lawyers were very much at the interface, touching hands in effect, with the Home Office pre-decision. There was a lot of correspondence between the legal representative and the Home Office pre our decision. What happened? A number of decisions got granted positively for asylum. Now, that is the elephant in the room, isn't it? I am sure we will be talking about the Nationality and Borders Bill. What is the problem? Too many people are getting asylum. Too many people are being allowed to stay here in this country. It goes against our manifesto promises to keep control of our borders, because we in the UK accept that there are people who come across our borders who need safety and sanctuary.



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I listened to the evidence on 26 January in the first session, and where Switzerland and Norway, have those examples where lawyers are brought in early; great. Find the budget. Then also explain to certain politicians why we should be ensuring that those who positively need asylum get asylum, because they are provided with access to proper representation and proper decision making.

Nuno Ferreira: We agree that it is a matter of funding, and also other factors. These can be quite complex asylum claims requiring legal representatives who have experience and expertise in this area. Participants in our fieldwork expressed great difficulties accessing good legal advice. People in detention centres, reception centres or remote accommodation are particularly likely to have difficulties. One problem is the funding of course, as Chelvan mentioned, and problems arise because of the low level of funding available to solicitors. Solicitors working under a legal aid contract generally say that it is not viable to carry out their work, so they just abandon their legal aid contracts.

It also seems that very few claimants receive legal advice prior to the screening interview, and that can have a dramatic negative effect in the success of the claim. Although lawyers are entitled to attend the main interview, this is usually not covered by legal aid, and in practice lawyers have a tendency to only attend if privately funded. Even when they do attend, the lawyer's role in the interview may be quite limited. All of this compounds to have a negative effect on the success of the claim.

We have several examples from our refugee participants that I think it is important to highlight, because these are real people suffering the consequences of these policies. For example, Zaro from Pakistan told us that she tried to call her solicitor weekly and was always ignored. Maria from Uganda was asked by her lawyer not to mention sexuality as the real ground for requesting asylum, although she understood that this entailed a serious risk for the assessment of her claim. Another claimant we interviewed discovered after two years that her first claim, which was supposed to have been submitted, had never been filed because the lawyer doubted her client's sexuality. Also, Amadin from Benin initially had a lawyer who prepared a country report on Nigeria instead of Benin, because the lawyer got confused about the two countries. To make it worse the lawyer then dropped the case, which obviously had a negative impact on the case.

The substantial amount of money that good legal representation costs is very problematic. In this respect we have got another example. Amber from Malaysia was pushed to choose a specific firm for its expertise with Malaysian claimants, and her legal fees amounted to £3,000 which is of course unrealistic for asylum claimants who cannot even work in the UK. From the perspective of those working under legal aid contracts, this is not interesting, realistic or viable. Several lawyers have told us that they are just not interested in this type of work because it does not pay. It is also very difficult to obtain legal aid to fund country of origin reports,



psychiatric reports, medical reports, which of course has a further negative impact on the claims. Some claimants only manage to proceed with their claims with the support of NGOs like Rainbow Migration here, or representing themselves, which is far from ideal because they do not have the necessary knowledge.

Our recommendation in this respect is obviously that the Government needs to invest a lot more in legal aid. Not just as an ethical requirement, but also in the interest of the efficiency of the whole system. Legal representation ideally should be not only available but also compulsory and supported through legal aid from the start of the asylum process; not only at the appeal level, but also at the level of the Home Office.

Q88 Carolyn Harris: How common is it for applicants not to have had legal representation before their screening interview?

Nuno Ferreira: I am not aware of precise statistics on this—maybe Leila or Chelvan will be—but I would assume it is the great majority that will not have legal support by then.

Dr Chelvan: Even if you do have legal representation, unless you are very encyclopaedic about the funding schedules with the Legal Aid Agency, the funding is very small so therefore the amount of time and preparation in relation to preparing the individual before not only the interview but even the decision, is limited. What happens is, those lawyers who work in this area are passionate about working in this area. The amount of pro bono work which the Government relies on by legal aid lawyers doing this work because we are committed to ensuring our clients are not returned to countries of persecution, is massive—impossible to estimate. Some lawyers are stepping in, but the point here is that we need more funding. I am more than aware that this is not the right committee to make those representations to, and I have made those representations to other committees already.

Q89 Carolyn Harris: This is for you again, Dr Chelvan. The Home Office Policy Instruction on Sexual Orientation Claims follows key elements of your widely endorsed Difference, Stigma, Shame and Harm model. But you have said there is a gap between policy guidance and application by the Home Office—can you explain this gap?

Dr Chelvan: Human error and frailty. There was a lot of work done, because what happened was in February 2013 the *Observer* reported the interview of a bisexual asylum seeker at a removal centre—a trigger warning here again. The applicant was asked, “What attracts you about a man's backside? Did you ejaculate in him, or did he ejaculate in you? Did you wear a condom?”. All these sorts of questions. That happened at the end of 2012, it was reported in February 2013. Theresa May, the then Home Secretary, ordered an urgent review by the Independent Chief Inspector, John Vine, into the handling of LGB claims. That had two parallels, the Independent Chief Inspector and the Home Office Internal LGBT Advisor Committee, which I co-founded with Ian Cheeseman and



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other NGOs, including what was then the UK Lesbian and Gay Immigration Group.

I created the model in 2011 because when we are looking at the issues around the standard of proof, the individual can tell their story if they are provided a safe space and the time to be able to tell their story. They have to trust the person they are speaking to. I created the model Difference, Stigma, Shame and Harm as four composite areas in relation to exploring the narrative, where the only evidence the individual has to rely on is their statement, is their story. Because there is no gay membership card. I do not have a gay recognition certificate.

When I was an undergraduate in Southampton—Chair, I know you are a Southampton MP, but I did my undergraduate degree at Southampton—there was a joke, which is, “What is the difference between a straight man and a gay man? Two pints of lager”. We are not talking about sexual conduct, we are talking about identity, life, the Yogyakarta principles of emotional, sexual and conduct.

The Home Office invested a lot of time and, after the Independent Chief Inspector recommended that they should endorse the model, they applied the model. It was endorsed by UNHCR in 2012, by various governments, and the European Asylum Support Agency Office. Many of the presenting officers received a lot of training, but I think what is missing is the retraining, the refresher training, because we are now having examples where one refusal letter was reported on social media as saying, “Well, you can't be lesbian because you've only had one-off relationships, you don't have a girlfriend, you're not in love”. That has nothing to do with the model. It is not based on the experiences here in the UK, it is about the experiences in the country of feared persecution.

The gap is in relation to application of the model—training, refresher training. As I said, the Home Office are receptive to issues such as this, and whenever I have had a problem they have always said, “With the client's consent, send it to the Home Office so we can look at the individual casework or decision-maker in relation to retraining”. I have used that that source when required. The issue is not only that, but also the training of legal representatives and NGOs.

The point is, the first time an individual tells their story should not be the time they meet the Home Office interviewer. I usually have my direct access clients for two or three months, to be able to give them that safe space to write their story. They are about 30 or 40 pages long, and the devil is in the detail, because it is their life story, their journey, their emotional journey, and why they cannot be returned back to their country of origin. When they have been able to write their story down and tell their story in that safe space, when they then go to the Home Office interview, they are not shocked by questions because they have never had to explore those issues. We do not tell a criminal defendant, “The first time you give your evidence is when you are in the witness



box”, do we? You prepare your witness with your legal representatives before you go into the witness box. The point is, it is not just the Home Office, it is also the legal representatives and NGOs to provide that safe space for the refugee. I do not say “People seeking asylum”: Aderonke Apata, the Nigerian activist says, “That merges the human being into the system”. I talk about a person seeking asylum, it is not the asylum seeker, it is the person seeking asylum to be able to have that safe space to tell their story.

That statement is all that is needed. People do win. I lose money. The model is not trademarked, I have solicitors who sit down with their clients and draft the statement. One of my very good solicitors, Mervyn Cross at Duncan Lewis said, “Got the statement, went for interview, got asylum”. That is how it should be, that the individual is not taken by surprise or feels uncomfortable by telling their story for the first time in front of a stranger who is part of the state.

Carolyn Harris: That is resource intense, both emotionally and professionally.

Dr Chelvan: Absolutely.

Q90 **Carolyn Harris:** Leila, can I ask you, to what extent are the problems in claims related to misapplication of existing guidance prejudiced, homophobic or transphobic interpretations of the assessment of claims?

Leila Zadeh: There is a mix of issues going on. One is that guidance is not applied correctly, and sometimes the Home Office does have very good guidance, and it is quite disappointing when it is not implemented in practice. However, the guidance for claims based on sexual orientation and gender identity could do with updating, particularly the guidance for claims based on gender identity. We know the Home Office is working on this—we are looking forward to hopefully being consulted on that, and helping produce even better guidance—but that alone will not be enough, it has to be implemented in practice.

In terms of interpreters, we do see homophobia, biphobia and transphobia among the people who are interpreting for people seeking asylum during their interviews with the Home Office. We have heard of interpreters using derogatory language, or sometimes not interpreting because they do not want to talk about this issue, or sometimes even making judgments and talking to the applicant in a way that would amount to harassment towards them. Our service users have also reported to us that because they do not necessarily feel safe with an interpreter they have had to hold back or not say everything in full to the interviewer in the way that they would have wanted to.

What we think should happen is that interpreters should receive adequate training on LGBTQI+ awareness and sensitisation. This would also help them to become familiar with the terms and issues and avoid the use of derogatory language. At the start of interviews the Home Office should



also help put people at ease by explaining that the interpreter's role is not to judge them, and that the interpreter has a duty of confidentiality, because our service users are also afraid that the interpreters will share information about them with people outside of the interview room.

Another recommendation we have is that the asylum substantive interview is recorded and automatically made available or shared with the person claiming asylum. Hopefully this would encourage better behaviour by the interpreter, and can also then be reviewed by the asylum claimant, together with the assistance of their lawyer. This may also help with that issue of people feeling afraid to raise issues in the interview itself. I believe Nuno, in the research at SOGICA, also has some findings related to interpreters.

Q91 Bell Ribeiro-Addy: I have some questions about accommodation and detention and will start with Leila. You have said complaints by LGBTQ+ people about asylum accommodation are often ignored or dismissed, could you give us some examples of that?

Leila Zadeh: Yes, we often see people who are called names in their accommodation by the people they are sharing that accommodation with; they are sexually harassed and they are physically abused and all of this increased during lockdown. People will often therefore do one of two things: they will either spend their entire time in their room and be too afraid to go out, or they will spend as much time as they possibly can actually away from their accommodation because they think it is safer to be anywhere else rather than at the home that has been provided for them.

People are also afraid that they will be outed by their housemates. For example, we have service users who have been repeatedly questioned by their housemates, "Where is this place you go? What is this community centre you go to?", and the person has been going to an LGBT+ community centre but they are really afraid and do not want to say that to the housemate. If the housemate is persistently asking questions, they are afraid that they are going to somehow find out and they will be outed. We have service users who are afraid of receiving post in case the envelope somehow reveals that the sender is from an LGBT+ organisation and, again, that they could be outed. We also have service users who have been questioned by their housemates as to why they are not praying.

The result of this is that people end up severely depressed. We have seen people who end up self-harming. People often do not know how to complain. There are induction packs that the Home Office gives to people when they are placed in accommodation, but clearly something is still not getting through. I imagine it is a lot to do with the amount of information people have to take in, not being familiar with the systems in this country and their rights in this country, and all the fears and traumas that are playing on their minds.



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Even if they do know how to make a complaint, many people will just be too afraid to do it, often because they are afraid that it will make the situation worse. We do help people to make complaints, and often we end up complaining to the accommodation provider, to the Home Office and also to Migrant Help, who run a service contracted to the Home Office. It takes a lot of chasing by us. Normally the outcome is one of two things: one, the situation is resolved, but it has taken weeks and that person has been left self-harming or left with severe depression and living with fear daily, or we end up moving them out to accommodation that is provided by a charity, for example, Refugees At Home or Micro Rainbow.

The situation is particularly acute for people who are trans, and particularly so if they are in hotels. These individuals in particular will spend a lot of time in their rooms because they are just far too afraid to go out. There is an added issue of isolation here if you are not housed in a city. Most cities will have some kind of LGBT+ centre or organisation or service available, but if you are cut off from those you can feel incredibly isolated, especially if you are living in fear of your housemates. Living on the £40 or so a week that the Home Office provides means that you do not have the money to travel to access those services.

In terms of what is happening in response to this, Micro Rainbow do provide accommodation exclusively for LGBT+ people seeking asylum, but they do not have enough beds for everybody who needs them. One of the issues is that they need permission from local authorities to buy properties in order to house people seeking asylum. In some parts of the country no more purchases of property are being allowed, which is particularly the case for boroughs in London—a place where there is a lot of support for LGBTQI+ people. This is not helping with this issue around isolation.

We also have to bear in mind that not everybody will necessarily want to live in accommodation just for LGBTQI+ people. The problem with the system that we have is that accommodation is offered on a no choice basis. We strongly believe that people should be given a choice about where they live, who they live with, if the accommodation is shared or not, and so on.

There are a number of actions that I believe the Home Office was going to take, but I do not have any updated information on this. For example, they were going to instigate a safeguarding working group between the Home Office and the accommodation providers. I am not sure what has changed in practice as a result of this. The Home Office was also going to be reviewing its complaints procedures—again, I am not sure what the outcome of this has been. We do believe that the Home Office or a third party should review how complaints are handled and to make sure that actions are always taken in response and that those actions are taken promptly.



Similarly, the Home Office needs to clarify who is responsible for resolving a situation. If a claimant is being verbally, physically or sexually harassed by a housemate, it needs to be clear if the accommodation provider or the Home Office is responsible for either moving out the Rainbow Migration Service user—the LGBTQI+ person—or the person who is instigating or causing the problem. At the moment, all too often we see the ball is passed around, which is why we spend a lot of time trying to help people get their complaints resolved.

- Q92 **Bell Ribeiro-Addy:** To follow on from that, you mentioned Micro Rainbow as an organisation that houses specifically LGBTQ+ asylum seekers. I am aware that two of the contracted providers actually subcontract to charitable foundations. Is Micro Rainbow one of these, and overall how effective is it if they subcontract to specifically LGBT organisations?

Leila Zadeh: Micro Rainbow is one of the subcontractors. The fact that Micro Rainbow initiated this housing project has been crucial to many people who have found safety after really awful housing situations. The Micro Rainbow model has been very effective in providing safe housing for LGBTQI+ people who are seeking asylum. They are keen to scale up, but there are some barriers in place to that. But this is not the only solution amongst the people we have spoken to. Many of our service users want to go into their houses, but some people do not want to feel that they are being segregated—they want the issues to be resolved so that they are not having to be treated differently because they are LGBT+.

- Q93 **Bell Ribeiro-Addy:** Many of us as Members of Parliament receive lots of different casework about different asylum accommodation, emergency asylum accommodation, the contingency ones—quite horrid hotels at times. Last summer I visited one of these myself and saw first-hand the types of conditions that people were living under and the poor treatment they were receiving. I was wondering if you could give us any more specific examples of the experiences of LGBTQ+ people in this contingency asylum accommodation—hotels, any other type of housing and obviously military barracks.

Nuno Ferreira: Several of our participants in the UK do tell us about horrible circumstances and conditions in some of the accommodation they experience. I remember the example of Jayne from Malawi. She was offered a flat for her and her son and when they arrived at the small flat there were smears on the walls and holes that looked like bullet holes. She could not bring herself to stay in the flat with her son in those conditions. They were then placed in a hostel for two days while the flat was being renovated, but the conditions were so bad they even had to use the toilet facilities at a nearby McDonald's because there were no toilet facilities in the hostel.

NGO workers we interviewed had also witnessed how LGBT+ refugees face bullying, are beaten up and harassed, as Leila mentioned. Lutfor



from Bangladesh told us about being physically assaulted by other men who were living with him. He called the police and precisely what Leila described happened to him: he complained to Serco, the accommodation provider, about the harassment and the assault, and instead of moving the perpetrator out of the accommodation it was Lutfor who was moved to another accommodation. He felt like he was being punished, although he was actually the victim in that circumstance. This does not inspire any confidence and any trust in LGBT+ refugees, because they keep hearing these stories of abuse and rape and threats.

We completely agree with the recommendations that Leila mentioned and would add another recommendation that the provision of accommodation should not cease so soon after international protection is granted. When LGBT+ refugees receive a final decision they are required to leave their accommodation within 28 days. This is usually a crucial period for them as they might not have the support network to move on to other accommodation and they might not receive the benefits they need in time because of administrative difficulties. We have heard of many cases where they end up being destitute and homeless. It is very important that both these and other claimants retain access to publicly funded accommodation for a sufficiently long period to allow them to find alternative accommodation while they search for work or access education, or make other suitable arrangements for their particular circumstances. We have heard that in other countries like Germany, they have a much longer period of time to find their own accommodation, and they are supported by authorities. This does not seem to be the case in the UK, which leads to very dramatic situations.

Q94 **Bell Ribeiro-Addy:** Leila, have you any examples?

Leila Zadeh: Yes, I have two examples for you. One is we had a disabled service user who was given his own studio flat in London, however his partner was housed in a hotel outside London. The disabled man living in London required daily support, which was normally provided by his partner, but they were not able to see each other because of the distance and because they did not have the money to pay for trains. They were having difficulty proving that they were partners and difficulty proving that our service user needed daily care. We ended up having to go to judicial review because we couldn't resolve the issues.

We are also aware of somebody who was held in the barracks who went through extreme suffering. He was being harassed by the others there, and there was no private space—the showers were communal, and they were sleeping in dorms, effectively. We worked very hard with other partner NGOs to try to get this person out but, to our knowledge, vulnerable people are being placed in accommodation like barracks and other forms of contingency accommodation which are completely unsuitable. To give you another example of the issues that our service users have faced, this time it is another gay man who was sharing with other men who found out that he was gay. He was sexually assaulted,



and they would also play pranks on him and stop him from sleeping. The system needs to be sorted out so that people are not put into these situations in the first place.

Q95 **Bell Ribeiro-Addy:** Nuno, I am aware that you have previously expressed that you do not believe that LGBT people seeking asylum should be subject to immigration detention. Could you outline your reasons for that?

Nuno Ferreira: Thank you for that question because I think it is a crucial point that we need to explore. I would like to start by referring to the UN Working Group on Arbitrary Detention, who in 2018 were very clear in saying that detention of migrants in situations of vulnerability or at risk—including lesbian, gay, bisexual, transgender and intersex persons—must not take place. Of course, that is not the situation in the UK where we see migrants and asylum claimants being detained indefinitely.

Our position is that this is not suitable for claimants on grounds of sexual orientation, and several sources in the UK also agree with this. For example, the 2018 Equal Treatment Bench Book says that there is substantial evidence that LGB asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence. In 2019 the House of Commons Home Affairs Committee Inquiry into Immigration Detention also identified particular concerns for LGB people in detention and urged the Government to do more to implement equality, and LGBTQI+ officers in detention centres. In 2020 the Independent Chief Inspector found inconsistencies across the Home Office in understanding vulnerability and the impact on certain groups, particularly LGBTQI+ detainees.

Referring to our participants again, I think it is really important to place them at the centre of our discussion and give them a voice. I would like to quote a respondent to our survey who, after having been in detention, said, “This was my worst nightmare. At first I was in an open dormitory with about 50 people, just like beds in a hall. Then I was taken to another detention, and to be honest, I really don't want to talk about it. I was told to take off my clothes to be checked and I remained totally naked”. These are really traumatising experiences.

Linking back to the issue of legal representation which we discussed earlier today, a lawyer we interviewed, Alan, pointed out that SOGIE claimants do not only face homophobic abuse in detention, but their vulnerability also makes it more difficult to work on their claims. In detention centres phone and internet access is limited—many websites are blocked, and detainees in remote locations often cannot get support to retrieve the evidence they may need.

Another participant in our fieldwork from Jamaica said that her case had been dropped by her solicitor while she was in detention and she was not able to find another solicitor. She ended up having to represent herself before the judge while she was in detention. Nine of our asylum claimant



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participants in the UK spoke of having been detained—it is not an isolated experience. They stayed in detention from short periods of 1 week up to 32 months in the case of a gay man, Luc from Cameroon. That is a very substantial amount of time for someone who is just seeking international protection. All nine of our participants who had been detained were subsequently released with no explanation and proceeded with their asylum claims, which shows that there was no reason for them to have been detained in the first place.

NGO workers tell us about the inappropriate use of detention. For instance, one woman was detained simply to collect proof of her nationality and issue a travel document, which does not seem to be a good use of detention. NGO workers also told us that the impact on the women detained is devastating, especially in terms of mental health—it often leads to suicidal thoughts. The irony in all this is that detention destroys all the work that the NHS is doing. Many of the LGBT+ asylum claimants in the UK are undergoing counselling, anti-depression treatment and other NHS treatments. But then any treatment is wasted when they go into detention as they suffer terrible conditions and need counselling when they leave detention again.

I will just give another example of Miria from Uganda who was detained in Yarl's Wood, which I guess everyone here is familiar with. When she claimed asylum, she was detained. She was detained only for a week, which does not seem much, but by the time she left, and I will quote, she says, "By that time, when I got out of that detention, I was just touching the walls to walk. I couldn't manage to stand on my own. I was very weak, very sick and because I was not eating, I was not sleeping. It was a really, really bad time."

Essentially, we have got two recommendations. Detention is an injustice to any individual who has not been charged with, or found guilty of, a crime. We do not believe asylum claimants should be detained at all. Our second recommendation is that the Government should definitely end detention of SOGIE asylum claimants, including detention without a time limit.

Q96 **Bell Ribeiro-Addy:** Do you have any recommendations as to where specifically, or how, the Government should be housing LGBT asylum claimants whilst they are awaiting decision, and any examples of international best practise that the UK might be able to learn from?

Nuno Ferreira: Yes, we were very happy to hear about the developments with Micro Rainbow when they started a few years ago, because that seems to be the way forward. Not in terms of imposing that sort of accommodation for LGBT+ refugees because, as Leila mentioned, it is very much about giving the choice. We also recommend giving that option. It is up to LGBT+ asylum claimants whether they want to be housed with other LGBT+ asylum claimants or in other general accommodation. The important thing here is to give that choice.



The participants we heard from in our field work did have a very good experience with Micro Rainbow. The only issue there is capacity because there is a waiting list. We need to increase that capacity and keep funding and supporting that specific accommodation for those asylum claimants who want it.

Q97 **Bell Ribeiro-Addy:** Leila, finally, I want to ask you about transgender people in asylum accommodation. It is currently the Home Office's policy that we should not detain transgender people, but it is still happening quite frequently. Could you explain a bit more about where you see this happening and what the Home Office's response has been when you have raised this issue in the past?

Leila Zadeh: Yes, trans people and intersex people are recognised as being at risk of harm in immigration detention, and we would argue that LGB people should also be recognised as being at risk of harm. If we look at the case with trans individuals, by being recognised as being at risk of harm in detention there should really be a presumption against their detention, but it does still happen in cases where the Home Office says that the immigration control imperative outweighs the risk of harm.

Where we see the issue really arising is people who are not open about their gender identity before they entered detention. If somebody starts questioning their gender identity once they are detained, it becomes much more difficult to convince the Home Office this person should be released. The irony of it is that if you are detained, you do not have access to that specialist community support or a safe space in which to reflect on or think about your gender identity so it makes it much harder for you to think about yourself. It is also then much harder to prove to the Home Office that you really should not be in detention because it is not safe for you.

The Home Office requires evidence under the adults at risk policy, but there really is not any evidence as such to prove that you are trans. Added to that, the Home Office does not keep statistics on LGBTQI+ people that it detains. There are no official statistics on how many trans people are detained, how long they are in detention for or how many people are then released from detention into the community or removed from the country and what the outcome of their asylum claim is. Nuno touched on the extensive harm that can happen to people; we had one person who called us from inside a cupboard, telling us his detailed plan for how he was going to kill himself. Detention is extremely damaging to people's mental health and their physical health as well. Given the seriousness of this, the Home Office really should not be detaining any LGBTQI+ person, and they need to be monitoring the statistics in this area as well.

Dr Chelvan: Can I just add a caveat to this? I think it is very important. If you think that things are bad now, they will be 10 times worse if we have offshore processing. It will be off the scale because we will be sending a lot of these individuals, who we accept are genuine refugees



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under current statistics, from one prison cell in their country of fleeing persecution into another prison cell. How can that be morally acceptable? You hear these stories now but just think what these stories will be in six months to a year if offshore processing happens.

I will depart slightly from what Leila and Nuno say; I do not believe anybody should be detained because all refugees are vulnerable. That is the definition of a refugee—they have a well-founded fear of persecution. I have clients who have been waiting up to three years between the point of applying for asylum to even getting an interview. The current statistics, from what I hear from colleagues, are that there is a 16-week delay to even get an appointment to register your asylum claim. When we hear rhetoric that the asylum system is broken and needs fixing, where should the focus be? Is it the system or the Department? I just want to really highlight that issue. If you think things are bad now, if the Bill goes forward with offshore processing, where would you have oversight? These are individuals who have come to the UK for protection. It will be 10 times worse. It will be off the scale.

Q98 Chair: Thank you. Nuno, I just want to follow up with you because you cited an example of an asylum seeker who was housed somewhere and you used the phrase, please correct me if I have this wrong, they were in a dormitory style accommodation with 50 beds. Is that correct? Can you tell us where that was?

Nuno Ferreira: I am afraid I would have to go back to the interview and read the transcript. I do not know the name off the top on my head, but I can send that information if necessary.

Chair: It is quite important that we should be able to identify whether the Home Office is supporting paying for contracted-out facilities where there are 50 bed dormitories. I have certainly been to Napier barracks to look at the facilities there and there were not. I would be very interested to know where that actually is so that we can raise that with the Home Office.

Q99 Kim Johnson: The contested Nationality and Borders Bill will increase the burden of proof for people seeking asylum on the basis of sexual orientation and gender identity or expression. A lot of you have already spoken about the additional hurdles that people have to overcome. What needs to be done to ensure people facing persecution in their home countries are accepted safely into Britain?

Leila Zadeh: We are extremely concerned that the way the Nationality and Borders Bill will increase the standard of proof will mean that many LGBTQI+ people will not find safety in this country. To be recognised as an LGBT+ refugee, you have to prove your sexual orientation, gender identity, gender expression or sex characteristics and currently you have to prove it to the level of reasonable likelihood. What the Bill does is it raises that threshold to the level of balance of probabilities.



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It is already incredibly difficult to prove your sexual orientation, gender identity, gender expression or sex characteristics. We are extremely worried that by raising the threshold, many people will be refused. The Home Office have said that they will provide guidance, but guidance or training alone is not going to mitigate this risk. If somebody cannot prove it to a higher level, doing a better interview is not going to help them suddenly produce more evidence that they are a lesbian, for example. If you have only got so much that you can talk about, so much other forms of evidence that you can produce, you are really making it extremely difficult for people. This is so dangerous because the asylum system exists to protect lives and so, by doing this, lives are being threatened in this way.

The equality impact assessment for the Nationality and Borders Bill did say that "there is a risk that our policies could indirectly disadvantage protected groups. However, our analysis is that with appropriate mitigation and justification, such impacts would not amount to unlawful indirect discrimination." Given that the Home Office does not monitor statistics on LGBTQI+ asylum claims to the level that we need, as discussed earlier, we are quite worried that this indirect discrimination will continue to the detriment of people's lives.

The Home Office also said in that same assessment that "members of this cohort might find it more difficult than others to disclose what has happened to them." Now, given this acknowledgement by the Home Office, it is not clear why they cannot explain already, before the Bill is passed, how this potential harm will be mitigated. We have responded. We responded to the consultation on the new plan for immigration. We have put in written submissions where it is possible. We have raised the issues during stakeholder meetings that the Home Office has conducted. We have not received a satisfactory answer as to how they are going to make sure that LGBT+ people who apply for asylum in this country will get the protection that they need and they will not be sent back to a place where they could be raped, tortured or killed.

Q100 **Kim Johnson:** Thank you, Leila, for sharing some of the damning indictments of this Bill on the group that we are talking about today. Nuno, do you have anything extra to add to what Leila has just said?

Nuno Ferreira: Yes, thank you so much. I completely agree with everything Leila said. We also believe that it is a Bill that is of course going to be very damaging to all asylum claimants but particularly to those fleeing homophobia and transphobia. Most sexual orientation and gender identity refugees have very limited choice as to how they arrive to the UK. They arrive to the UK with no papers or evidence to support their claim and they have a very understandable fear of speaking openly to officials about what they have suffered in their countries of origin. Many sexual orientation and gender identity asylum claimants do not even know that that sort of persecution can be the basis for claiming protection.



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We believe the one-stop process will, in many ways, disadvantage this group of claimants because they will not be able to bring up all the relevant issues at once in the process, and this will exacerbate the harms and discrimination that affects SOGIE claimants in the UK asylum system. We also believe the Bill will disadvantage SOGIE claimants in terms of denial of access to justice because of the reduced appeal rights and a discriminatory two-tier decision-making system which will depend on the route taken to reach the UK, which is beyond most claimants' control. Those with more than one protected characteristic are likely to be particularly disadvantaged, for example, LGBTQI+ people who are also members of religious minorities, and those individuals already find it difficult to access support. With this Bill, it will be even more difficult for them.

We believe that this Bill will disproportionately impact those with protected characteristics and this will undermine the ability of public bodies like local authorities and health providers to carry out their responsibilities under the public sector equality duty, not least because of the chilling effect that the Bill will have in making it less likely that asylum claimants like sexual orientation and gender identity claimants will feel confident to come forward and engage with service providers.

The Bill will have many unintended consequences on a national level, ranging from lower rates of covid vaccination to non-completion of census among asylum seeking communities, and these are issues that have also been raised by a range of charities. If anything comes out of this session today, this is probably the one single recommendation that I would highlight, and it is that in line with UNHCR and international refugee law standards, there should be no distinction drawn between the way refugees reach the UK. That should be irrelevant. We cannot really let that become a standard in statutes. Secondly, we really need to make sure the Government prioritises compliance with the public sector equality duty and other measures in the Equality Act, which is clearly not a priority in this current Bill.

Q101 **Kim Johnson:** Dr Chelvan, did you have anything to say?

Dr Chelvan: How long have I got? What I love about the United Kingdom is our separation of powers and checks and balances, because I see this Bill being steamrolled through Parliament without real thought or care because of an agenda. Lord Rosser stood up in the House of Lords on 8 February at the committee stage and said, "What is the Government's motivation for this Bill?" And Lord Wolfson, on behalf of the Home Office, said, "Well, it is in our manifesto to protect our borders". There was nothing in the manifesto to say, "Get rid of refugees. Take them to an island outside the UK". It is not a manifesto promise.

What I sense will happen is years and years of protracted litigation in our courts. Independent judges will have to step in to make sure that the rule of law and our obligations under the 1951 Refugee Convention and the 1967 Protocol are kept safe. We know that even in the immigration rules,



clause 6 talks about the human rights convention “As it currently has effect”. Political agendas actually transcribed into secondary legislation, and even the Bill itself, says the human rights convention, “As it currently has effect”, in clause 28.

Under the particular social group definition directly relevant to LGBTs, the Government proposes the two-limb test—the one of innate and immutable characteristic, and found as different by surrounding society. That has not been our law since 2006; since the case in the House of Lords of *SSHD v Fornah and K*, affirmed by our Supreme Court in 2010, and *HJ (Iran)*, because we in the UK provide more favourable standards because of our history.

One of the things which I did put in my paper, we talk about pull factors. The UK has a historic debt to LGBT+ refugees because when we had our empire, we transported those laws which formed the basis for discrimination and persecution of LGBT countries. Sixty-nine per cent. of countries currently have some criminal laws which persecute LGBT people; two thirds of those are in our commonwealth. One of our pull factors for LGBT refugees is our historic debt. We cannot pass it on to the Ascension Islands just because they have gay pride and equal marriage. We have a historical debt towards them. Nuno talked about criminalisation of those who come through so called safe countries. Our divisional court in *R v Uxbridge Magistrates’ Court, Ex p Adimi* said that those who transit on their way should be able to come and claim asylum in the UK. We know that if you are an LGBT individual in Afghanistan, you will not be safe in Pakistan, Iran or Turkey. What are we going to do?

The motivation is we no longer want refugees but the British public have spoken. When it came to the Afghan crisis, what did the British public say? We want to protect. We want to open our homes. When it comes to the rhetoric around the Bill, that it is because of a manifesto promise, that this is what the British people want, we do not. We provide safety and harbour, and if Parliament fails in its duty to its international obligations, then our judges will have to step in and that will lead to a constitutional issue here. But knowing the separation of powers and the checks and balances are here—that is why I am a lawyer and not a politician—if I had my magic wand, I would say defeat the Bill, but given the realpolitik it is not going to happen.

Q102 Kim Johnson: Leila, you mentioned before about the equality impact assessment and about the Home Office not having looked at any mitigations. I would like to know what discussions you think the Home Office has had with refugee rights sector about operationalising effective mitigations. Do you know of anything?

Leila Zadeh: I know that they are starting to consult on the guidance which will need updating because of the Bill. What I am concerned about is that they are not talking directly to the people who will be affected by this change—the people who are seeking asylum or the people who now have refugee status in this country. I do believe that consultation process



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could be improved by talking with people who have got real lived experience of the issues.

Q103 **Kim Johnson:** Thank you, Leila. Do Nuno or Dr Chelvan have anything further to add to that?

Nuno Ferreira: If I may just add a couple of points. I am not aware of any mitigation plans and, unfortunately, the Bill might come through with its worst elements. If that is the case, we also need to consider another two aspects to mitigate the negative effects of the Bill. The first one is that we need to be much more serious about the humanitarian admission programme and introduce humanitarian visas which can actually offer a serious alternative for LGBTQI+ refugees to reach the UK. The second one is a much more serious engagement with UNHCR resettlement programmes. The numbers are minimal compared to the UNHCR needs and compared to other countries. With this Bill going through we really need to be more serious about humanitarian visas and resettlement.

Dr Chelvan: One thing that is very important is that in the Lords and in the parliamentary debates, the Government has said it will be in the policy. Well, how can parliamentarians vote on those provisions without seeing the policy? I have never known a policy guidance to be published prior to the legislation being enforced, but the Government is actually telling parliamentarians, "Trust us, we'll put it in the policy". As we know from several cases throughout the years, there has had to be judicial reviews and challenges on policy to being lawful. I have seen amendments to the legislation where they have actually introduced amendments to say the opt outs are for those with protected characteristics, innate immutable characteristics, or those governed by the Equality Act because, for example, one of those is a delay and therefore if you delay saying that your asylum claim is based on sexual identity, then you will be fast-tracked in the process.

The Court of Justice in the case of A, B, C v Staatssecretaris van Veiligheid en Justitie in December 2014, says that it is unlawful. If you are an LGB person, as I said, the first thing you do is not tell a stranger, especially a government official, elements of your private sexual or gender identity. The Home Office accepted it in their published guidance, they have accepted that guidance exists, it is law, and said, "We will not solely on the basis of the delay reject an LGB asylum". On what rational basis do you then introduce new legislation which says, "No, we are changing our mind. If you do delay and tell us about your LGB, we are going to fast track you." Litigation, litigation, litigation.

Kim Johnson: Thank you for identifying how damning this Bill will be to this very vulnerable cohort. Thank you. Thank you, Chair, that is all my questions.

Q104 **Chair:** Thank you, Kim. Chelvan, can I just follow up? You focus very heavily on offshoring and use the Ascension Islands as an example. Could you perhaps identify what concerns you might have if offshoring is not



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offshoring and sent to the Ascension Islands, but instead the Government seeks to engage with a third country—we have seen examples of both Rwanda and Albania—and what challenges there might be for LGBT people if we seek to offshore in that way?

Dr Chelvan: Albania has gone on the record to say, “No, we are not part of the plan”. Ghana was another country and Ghana, as we know, is currently passing a bill in relation to criminalisation which actually includes provisions for conversion therapy. My concern is twofold. I understand that the issue is, “Well, as long as we have an amendment saying that we will only allow for offshore processing if there is an agreement with the other country”. The first issue specifically for LGB individuals is the issue in relation to how safe it will be. Leila provided brilliant examples in relation to that, even within the UK, as a safe space if you are LGBTQI. There are issues in relation to safety.

The other issue I am very concerned with is that parliamentarians think that by providing an amendment which says, “We will only allow offshore processing if the third country gets into an agreement and approve”, it will be okay. We know that the Home Secretary has gone on record in the last few months to say that if individual countries refuse to have returnees to their country, she will ensure that there will be a reduction in the number of visas granted to those nationals to come into the UK. That was reported in the media. We know that there has been the rhetoric reported and, unfortunately, we have had various stories, usually in *The Times*, reported about what the Home Office policy is even before you as parliamentarians know; just to “test the water”. We know that this rhetoric is already there. If the Houses think by including an amendment to say, “As long as the third country agrees”, it will be okay, well, we know that the carrot or the stick has already been drawn to say, “If you do not agree, your nationals will not be able to be granted visas to come into the country”. We can see that you are a country of the global south who requires migration to support your local economies, that is not really a fair deal. But Rwanda is also interesting because, of course, Rwanda was an example of a country which actually refused to have an offshore processing when the Danish Government proposed it in line with covid vaccines. They said, “No, we are not going to have that”.

What are we doing? What sort of country have we become? Did we not hear about Australia and what happened with Nauru and Manus Island? These people are detained for not one month but years. What about access to legal representation? Where would there be jurisdiction? As I said, where would you have oversight? Which courts and tribunals will be determining these claims? Why are we going decades back rather than progressing forward?

We have got Ukraine currently going to be invaded, or if not been invaded, by Russia. We are going to have waves of refugee migration on our doorstep in the next couple of weeks and months. What are we going to do with them? Are we going to offshore process them as well? Because



we know when there are times of struggle, of war, of human sacrifice, asylum claims will increase. We have got climate refugees coming as well. Climate refugees are a new category of refugees which are going to come to our nations. What does it say about us as a nation? I remember, as a child growing up in the '70s and '80s, having my parents turn off the TV when they saw Enoch Powell and the "Rivers of Blood" speech—that sort of clear anti-racist rhetoric.⁴ I am proud to call myself an immigrant. I am a first-generation immigrant. What are we saying to populations in our cities, in our towns, in our villages, in our localities, when we are just telling them we have had enough? We need to eject you. We need to not provide you safety. This has got to stop. I am not a politician. That is your job.

Q105 **Chair:** Thank you. Can I ask a follow up question to Nuno, as well? You referenced UNHCR and resettlement and humanitarian visas: is it your position that LGBTQI applicants' referrals should be prioritised over other categories?

Nuno Ferreira: That is very much the case in some countries. Canada and the US very often prioritise LGBTQ+ refugees who are registered with UNHCR and are waiting to be resettled. For example, they are in camps in Turkey, so they are seen as particularly vulnerable refugees waiting to be resettled and they are resettled in the US and in Canada. They are prioritised and the UK could do the same.

Q106 **Chair:** Would you see the same being possible with humanitarian visas as opposed to resettlement programmes?

Nuno Ferreira: Yes. The humanitarian visa programmes can be shaped and designed as each country pleases, but that could also be part of a UK programme prioritising LGBTQ+ refugees as particularly vulnerable. Depending on the conditions in the country of origin, of course.

Chair: Thank you. Does any other member of the Committee have any additional questions they would like to ask any of the witnesses? Can I take this opportunity to thank all three of our witnesses for attending either in person or virtually? If there is anything you would like to add in writing, please do feel free to send in any additional information that you think might be helpful.

⁴ Footnote from witness: To be clear, parents were engaging in anti-racist rhetoric when Enoch Powell appeared on the TV, not Enoch Powell himself.