

## Written evidence from Rainbow Migration (NBB0066)

Rainbow Migration supports lesbian, gay, bisexual, trans, queer and intersex (LGBTQI+) people through the asylum and immigration system. Our vision is a world where there is equality, dignity, respect and safety for all people in the expression of their sexual orientation or gender identity.

We have responded below to the questions that are most relevant to our work.

Do proposed changes to the application and appeals process for asylum applicants provide adequate human rights protection, including provisions providing for credibility and the weight given to evidence to be affected by the timeliness of applications and supportive evidence?

No. Clauses 10, 16, 17, 18, 20, 21, 23 and 34 all penalise people who do not make their asylum claim or provide evidence at specified points in their time in the UK. Such rigid requirements do not take account of the experiences of LGBTQI+ people in need of asylum. This group has characteristics that mean their experience of claiming asylum is different to others. For example, many LGBTQI+ people do not know that it is possible to claim asylum on the basis of their sexual orientation or gender identity, often saying that they thought it was only possible to be a refugee if you were fleeing war, or because of your political beliefs. Rainbow Migration frequently sees people who only learn that it is possible to claim asylum due to their sexuality or gender identity after spending months or even years in the UK.

In Rainbow Migration's report "Still Falling Short", Home Office refusal letters for LGBTQI+ asylum claims were analysed, and in all "*refusals where delay was relied on [by the Home Office] and where the person claimed no knowledge of the asylum process as an explanation for not having claimed previously, the Home Office did not accept that as an explanation.*"<sup>1</sup> The report also noted that "*It is of concern that this study found that there were refusals in which there is very little reason to refuse the claim, other than delay. On the other hand, where delay arose, the disbelief of reasons for delay very often followed.*"<sup>2</sup> The report was published in 2018, however the issues identified in the report in relation to Home Office decision making unfortunately continue. The human rights that are engaged here are

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<sup>1</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf) page 21

<sup>2</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf) page 21

Article 8 of the European Convention on Human Rights, as well as Articles 2 and 3 where a person is facing removal from the UK due to the application of these clauses, and where to do so would put their life at risk.

Clause 10, together with clause 34, provides for the differential treatment of recognised refugees, with a requirement that a person “presented themselves without delay to the authorities”. If they do not meet this requirement, people will be granted a shorter period of leave (unspecified in the Bill), with very limited family reunion rights and subject to a restriction on their ability to access public funds. They will also need to wait a longer period of time (also unspecified) before they are eligible for settlement in the UK. This is likely to have a significant impact on the ability of LGBTQI+ people to integrate into the UK. They will be likely to be less inclined to live openly, in the knowledge that the UK will be reviewing their status regularly with a view to returning them, as this could open them up to additional risk on return to their country of origin.

This proposed change does not provide adequate protection of the Article 8 rights of LGBTQI+ people. Further, Article 8 permits interference with these rights only where “necessary in a democratic society”, and paragraph 21a of the Equality Impact Assessment states that “evidence supporting the effectiveness of this approach is limited”. In light of this, it is difficult to see how clause 10 can be considered a proportionate interference with Article 8, given the evidence of the harm that it will cause in acting as an obstacle to integration, being able to form relationships with others and personal integrity (if they are hiding their sexual orientation or gender identity for fear of being returned to their country of origin and therefore having to conceal), restricting people’s ability to reunite with their families and access public funds, as well as leaving them in limbo without permanent status for a prolonged period of time.

Clause 16 provides for the Home Office to serve an “evidence notice” on a person, requiring them to provide evidence in support of their claim by a certain date. Clause 17 amends section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (claimant’s credibility), to include that, where evidence is provided on or after the deadline given in the “evidence notice”, this will be considered to have damaged the person’s credibility.

Clause 18 provides for the Secretary of State for the Home Department to issue a person with a “Priority Removal Notice”, requiring them to provide a statement as to the basis on which they should be allowed to remain in the UK, information if they may be a victim of trafficking, and any supporting evidence. A cut-off date for responding to the Notice is also given. Clause 20 sets out the consequences for missing that cut-off date, which is that the Secretary of State **must** take it as being damaging to the person’s credibility, unless there are good reasons as to why it was provided late. It is unclear what the Home Office would consider to be a “good reason”. In “Still Falling Short”, examples of reasons given for a delay in claiming asylum include a lack of knowledge that it was possible to claim asylum on the grounds of sexual orientation. This was rejected by the Home Office on the basis that the claimant was well educated and had research skills, and had used the internet to find partners. The Home Office rejected another person’s explanation that the reason they delayed claiming asylum was because it had taken time to accept his sexual orientation.<sup>3</sup>

Further consequences for missing the Notice cut-off date are set out at clause 21, namely that the person will lose the ability to appeal a refusal to the First-tier Tribunal. Instead, they will have to appeal directly to the Upper Tribunal, thereby losing a vital layer of appeal rights. Again, this is subject to the Secretary of State being satisfied that there were good reasons for missing the cut-off date, in which case the right of appeal to the First-tier Tribunal may be retained.

Clause 23 sets out further penalties for those who are unable to provide their evidence at the time determined by the Secretary of State as set out in clauses 16 and 18, namely that any evidence provided after the required date will be given minimal weight when considering the asylum or human rights claim. This includes when considering whether a claim can be certified as clearly unfounded, or whether further submissions will be accepted. There is an exception provided, for where there are “good reasons”.

All of the above clauses will disproportionately affect LGBTQI+ people. The reasons for this are twofold. The first is that as stated above, many people are unaware that they are able to claim asylum based on their sexual orientation, and so may claim well after their arrival in the UK for that reason, and often only once their existing leave is due to expire. As has been

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<sup>3</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf) page 21

accepted in case law in other jurisdictions, where a person has sought to emigrate initially using routes other than asylum, that should not be held against them when it comes to an assessment of credibility.<sup>4</sup>

The second reason is the well-recognised difficulty that many LGBTQI+ people have in disclosing their experiences. UNHCR have expressly stated this in their Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity:

“Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant’s capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of “safe country of origin” concepts.”<sup>5</sup>

These issues around disclosure are acknowledged in the Home Office guidance “Sexual orientation in asylum claims”<sup>6</sup>, yet are absent from the draft Bill. The guidance states:

“Recognising, understanding and accepting one’s own sexual orientation, if it differs from mainstream social expectations, can be a long and or painful process, and in some instances, may only come in later stages of life. In such cases this must not be seen as undermining the ‘genuineness’ of an individual’s claim. Many claimants may come from cultures which shun any open discussion of sexual orientation and it should be noted that LGB activity and identity will be [sic] often be surrounded by taboo, stereotypes

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<sup>4</sup> Refugee Status Claims Based on Sexual Orientation and Gender Identity – A Practitioners’ Guide, International Commission of Jurists, 19 February 2016 <https://www.icj.org/refugee-status-claims-based-on-sexual-orientation-and-gender-identity-icj-practitioners-guide-n-11-launched/> page 41

<sup>5</sup> Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/01, UN High Commissioner for Refugees, 23 October 2012 at [59]

<sup>6</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf)

and prejudice and be seen as being contrary to the fundamental moral, religious and political values of many societies.”<sup>7</sup>

“Caseworkers should be aware that some claimants may find it difficult to substantiate their claim or provide full disclosure of sensitive information. Discrimination, hatred and violence in all its forms may impact detrimentally on a claimant’s capacity to present their claim and, where a claimant is in the process of coming to terms with his or her sexual orientation, or where they openly fear expressing it, they may be reluctant to identify the true extent of the persecution suffered or feared.”<sup>8</sup>

“Caseworkers must not therefore make an adverse credibility finding merely because the claimant did not rely on LGB grounds on the first occasion on which they claimed persecution there must be more weighing against the claim.”<sup>9</sup>

These clauses were therefore drafted in the knowledge that LGBTQI+ are less likely than other groups to be able to provide disclosure or claim asylum at a specified time. While there is a residual discretion for the penalties to be disapplied where there are “good reasons”, and the Equality Impact Assessment talks about mitigation in general terms, the Home Office does not have a sufficiently positive record on decision making in LGBTQI+ cases for this to provide sufficient reassurance (“Still Falling Short”<sup>10</sup> documented issues our service users continue to experience three years later).

These proposals have implications under Article 8 but also Articles 2 and 3<sup>11</sup>. A refusal to consider evidence, place less weight on it, or restrict appeal rights is likely to have the effect of returning people to a country where their life is at risk owing to their sexual orientation or gender identity.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf) Page 34-35

<sup>10</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf)

<sup>11</sup> Where the rights in question are engaged, there are also procedural obligations on the states and therefore there are likely breaches of procedural aspects of those rights.

Do the proposed powers to remove asylum seekers to “safe countries” while their asylum claims are pending, with a view to supporting the processing of asylum claims outside the UK in future, comply with the UK’s obligations under refugee law and human rights law?

No. Rainbow Migration does not support the offshore processing of asylum claims for any person. In relation to LGBTQI+ people, it is important to remember that there will be additional considerations in relation to proposed “safe countries”. For example, although subsequently denied<sup>12</sup>, Ghana was recently mentioned as a potential country where the UK may be looking into offshoring the processing of asylum claims. Consensual same-sex sexual acts are criminalised in Ghana, LGBTQI+ people are targeted by the police, and several arrests have been documented in recent years.<sup>13</sup>

This risk to LGBTQI+ people in particular with offshore processing has already been demonstrated with Australia sending gay men to Papua New Guinea, where consensual same sex acts are criminalised.<sup>14</sup> People seeking asylum were told at their orientation at the processing centre that same sex relations are illegal, yet were then expected to disclose their sexuality where that was the basis for their asylum claim.<sup>15</sup>

Any country which is not fully supportive of equal rights for LGBTQI+ people, including having mechanisms available to enforce those rights, is unlikely to be safe for them because of their unstable status, vulnerability, discrimination in access to services and enforced concealment of their sexual orientation or gender identity. The risks will range from countries such as Ghana where LGBTQI+ people are criminalised<sup>16</sup>, through to countries without sufficient protections for those who find themselves at risk. This could include where people are housed inappropriately, for example with other people from the community of the home country they fled due to persecution. This is something that also happens in the UK, however, there are laws and mechanisms by which these decisions can be challenged. Any country which lacks the same level of safeguards is unlikely to be safe for LGBTQI+ people. These proposals therefore create a real risk of human rights violations and potentially refoulement

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<sup>12</sup> <https://twitter.com/GhanaMFA/status/1435935177964990465>

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[https://ilga.org/downloads/ILGA\\_World\\_State\\_Sponsored\\_Homophobia\\_report\\_global\\_legislation\\_overview\\_update\\_December\\_2020.pdf](https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf) page 117

<sup>14</sup> <https://www.opendemocracy.net/en/asylum-seekers-in-australia-cruel-policies-and-processes/>

<sup>15</sup> <https://www.theguardian.com/world/2014/sep/24/gay-asylum-seekers-manus-island-fear-persecution-png>

<sup>16</sup> <https://www.theguardian.com/global-development/2021/jul/23/ghana-anti-gay-bill-proposing-10-year-prison-sentences-sparks-outrage>

in breach of the Refugee Convention if LGBTQI+ people are sent to a country where they are at risk due to their sexual orientation or gender identity.

Will the proposed instructions to decision-makers on how to interpret the Refugee Convention secure or restrict the protections that Convention guarantees?

Clauses 27 through to 35 of the Bill set out how a person, court or tribunal should interpret the Refugee Convention, when making a decision on whether or not a person is to be recognised as a refugee. Our primary concern is with clause 29, which raises the standard of proof for a person to show that they have a characteristic that could cause them to fear persecution. For LGBTQI+ people, this means they need to prove their sexual orientation or gender identity. The current standard of proof is “reasonable degree of likelihood”, however, clause 29 will raise this to “on the balance of probabilities”. This means that LGBTQI+ people will face a higher hurdle than they currently do to “prove” their sexual orientation or gender identity to the Home Office. Even with the existing standard of proof, LGBTQI+ people are commonly disbelieved by the Home Office.<sup>17</sup> Almost half of Home Office refusals of LGBTQI+ asylum claims are successfully challenged on appeal.<sup>18</sup>

There are many reasons why proving sexual orientation or gender identity to the current low standard of proof is difficult.

Firstly, the sole evidence that many LGBTQI+ people have is their own account of their sexual orientation or gender identity<sup>19</sup>.

Secondly, as explained by UNHCR, a person’s social and cultural background may affect how they self-identify, and that some LGBTQI+ people “*may harbour deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles.*”<sup>20</sup>

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<sup>17</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf)

<sup>18</sup> <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021/asylum-claims-on-the-basis-of-sexual-orientation-2020>

<sup>19</sup> Refugee Status Claims Based on Sexual Orientation and Gender Identity – A Practitioners’ Guide, International Commission of Jurists, 19 February 2016 <https://www.icj.org/refugee-status-claims-based-on-sexual-orientation-and-gender-identity-icj-practitioners-guide-n-11-launched/> page 21

<sup>20</sup> Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/01, UN High Commissioner for Refugees, 23 October 2012 at [63i]

Thirdly, the UNHCR Guidelines on Gender-Related Persecution states that: “*Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared.*”<sup>21</sup>

Further, some women only form a same sex sexual orientation later in life<sup>22</sup>, and face being disbelieved on this basis, particularly where they have been in heterosexual relationships or marriage previously.

This non-exhaustive list demonstrates that a higher standard of proof will make it even more difficult for people in all of these common situations to evidence their claims. Raising the standard of proof will result in fewer LGBTQI+ people being recognised as refugees, which will mean they will face return to countries where they will be mistreated and in many cases their lives will be at risk. Raising the standard of proof in this manner will certainly result in people being returned to danger, in breach of the Refugee Convention’s principle of non-refoulement.

For further information, contact:

Leila Zadeh, Executive Director

[leila@rainbowmigration.org.uk](mailto:leila@rainbowmigration.org.uk)

07726 165118

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<sup>21</sup> UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at [35]

<sup>22</sup> [https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18\\_0.pdf](https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf) page 25