

## Written evidence from The Law Society of Scotland [EAP0013]

### Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Immigration and Asylum sub-committee and our Equalities Law sub-committee welcome the opportunity to consider and respond to the call for evidence from the Women and Equalities Committee to its Inquiry Equality and the UK Asylum Process<sup>1</sup>. The sub-committees have the following comments to put forward for consideration.

### Executive Summary

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- Each of the protected characteristics can be seen as having congruity with one of the five grounds for asylum.
- There are limited statistics publicly available which shed light on the nature and extent of UK asylum claims based on discrimination or persecution relating to the protected characteristics. Further statistical evidence is welcome.
- There can be significant challenges with establishing that a 'protected social group' exists. This is in part due to a lack of clarity in relation to the definition of 'protected social group' in the relevant legislation.
- The nature and dangers for those with protected characteristics who are seeking asylum in the United Kingdom vary on a case-by-case basis.

<sup>1</sup> <https://committees.parliament.uk/call-for-evidence/598/>

- The degree to which asylum seekers are integrated within communities can play a significant part in their successfully navigating the asylum process.
- Disabled individuals can face significant barriers in accessing appropriate support (for example, accommodation). Issues relating to learning disabilities and mental health can also impact on the quality of evidence that individuals provide.
- The focus on the genuineness of a person's sexual identity in claims for asylum based on sexual orientation generally requires a person to gather confirmatory evidence of their identity which can be particularly challenging for those struggling with being more open about their identities and where claims are determined by decision makers with lack of knowledge of LGBTQI+ experience.
- Claims based on sexual identity are often made after initial claims made on other grounds are rejected. Making a fresh claim on the basis of sexual identity when it has not been mentioned before raises additional challenges. The added restrictions on fresh claims under the New Plan for Immigration will have a disproportionate impact on LGBTQI+ asylum seekers.
- There is limited jurisprudence on asylum claims by transgender people. Academic commentary has identified inconsistency and unpredictability in definitions used in published cases and specific challenges faced by transgender asylum seekers and refugees.
- There is limited information on asylum claims involving intersex people.
- There is a lack of guidance on how the decision makers should determine claims based on fear of persecution because of LGBTQI+ identity, and significant discretion afforded to tribunals. A lack of use of non-Western terminology in tribunal decisions has been reported and claims of stereotyping by decision makers have been made.
- The apparent need for corroborative evidence of sexuality and the discretion afforded judges in determining claims presents particular challenges for LGBTQI+ asylum seekers.
- There is no formal priority afforded to particular protected characteristics in the asylum process.
- Despite the equality protections available in Great Britain, prejudice and disadvantage related to the protected characteristics remains an issue which may affect those with protected characteristics who are granted asylum.
- It would enhance the existing support offered by the Government to asylum seekers if adequate funding was provided to those organisations devoted to furthering the interests of particular protected characteristics.
- The COVID pandemic and related restrictions have had the effect of isolating asylum seekers from their communities and related support (for example, community assistance with substantiating the genuineness of LGBTQI+ identities).

## Asylum and Protected Characteristics

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### 1. What is the nature and extent of UK asylum claims based on discrimination or persecution relating to the protected characteristics?

The majority of UK asylum claims are arguably based on discrimination or persecution relating to the protected characteristics with each of the protected characteristics capable of being seen as having congruity with one of the five grounds for asylum.

The nine protected characteristics under Section 4 of the Equality Act 2010 are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race, religion or belief; and sex.

Article 1A(2) of the UN Refugee Convention 1951 defines a “refugee” as any person who:

*...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence... ..is unable or, owing to such fear, is unwilling to return to it.*

The overlap between the grounds for asylum and protected characteristics is illustrated in the table below.

| Ground for Asylum                       | Protected Characteristics   |
|---|---|
| Race                                    | Race  |
| Nationality                             | Race  |
| Religion                                | Religion or Belief  |
| Political Opinion                       | Religion or Belief  |
| Membership of a Particular Social Group | Age<br>Disability.<br>Gender Reassignment<br>Marriage and Civil Partnership<br>Pregnancy and Maternity<br>Sex<br>Sexual Orientation |

There appear to be limited statistics publicly available which would shed light on the nature and extent of UK asylum claims based on discrimination or persecution relating to the protected characteristics. Experimental statistics are available on the Government website which show all main asylum claimants for whom the sexual orientation identifier has been completed on the Home Office system. This identifier

should be completed by caseworkers where the basis of claim includes sexual orientation (lesbian, gay, bisexual - LGB).<sup>2</sup>

Further statistics would be welcome to identify the extent to which each protected characteristic forms the basis of a claim for asylum in the UK.

## **2. Are those with certain protected characteristics more or less likely to be granted asylum in the UK**

The definition of a refugee has two requirements, firstly that a person has a well-founded fear of persecution and secondly that this persecution is due to one of the five 'convention reasons'. This is relatively straightforward for Race, Nationality, Religion, and Political Opinion however for Membership of a Particular Social Group (PSG) there are additional hurdles to overcome in that they have to establish that the PSG exists.

Membership of a PSG was a late addition to the Convention<sup>3</sup>, adopted without discussion.<sup>4</sup> As a living instrument it has been the most litigated<sup>5</sup> particularly given the Convention did not specifically define the term.<sup>6</sup>

The leading case on PSG in the United Kingdom is *Shah and Islam v SSHD*<sup>7</sup>, in which the House of Lords relied on the definition of a PSG found in the American case of *Re Acosta* (1985) 19 I. & N.211 and the Canadian case of *Attorney General for Canada v Ward* (1993) 2 SCR 689. They held that in order to qualify as a PSG a group of people should: share a common immutable characteristic which they are unable to or should not be expected to change<sup>8</sup>; that there was not an additional requirement of "cohesiveness, co-operation or interdependence"<sup>9</sup>; and the group must exist independently of persecution<sup>10</sup>.

The definition articulated in *Shah and Islam* has been identified in UNHCR Guidelines on membership of a PSG<sup>11</sup> as what is referred to as the 'protected characteristics' approach<sup>12</sup>, which stands alongside the

<sup>2</sup> Home Office, Immigration statistics data tables, year ending June 2021, available at [Immigration statistics data tables, year ending June 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/immigration-statistics-data-tables-year-ending-june-2021). Last accessed 1 November 2021

<sup>3</sup> A. Good, *Anthropology and Expertise in the Immigration Courts* (Abingdon, 2007), 74.

<sup>4</sup> C. Bohmer & A. Schuman, *Political Asylum Deceptions* (2018), 83.

<sup>5</sup> Macdonald & Toal, *Immigration Law*, para 12.80

<sup>6</sup> Bohmer & Schuman, *Political Asylum Definitions*, 84.

<sup>7</sup> *R v Immigration Appeal Tribunal, ex p Shah: Islam v The Secretary of State for the Home Department* [1999] UKHL 20; [1999] 2 AC 629.

<sup>8</sup> *Ibid.*, 640-641.

<sup>9</sup> *Ibid.*, 651.

<sup>10</sup> *Ibid.*, 639-640.

<sup>11</sup> UNHCR 'Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (Geneva, 2002)

‘social perception’ approach. The latter being where a group shares a common characteristic making them recognisable as a group or which sets them apart from the rest of society<sup>13</sup>. However, the question of how these two approaches should be treated – as cumulative or alternative tests for PSG - is not completely clear and case law is contradictory.<sup>14</sup>

The challenges in simply establishing that a PSG exists can be significant. While there is overlap between Membership of a PSG and several protected characteristics it would be very difficult to establish a claim independently on the basis of Pregnancy and Maternity however it could play part of a claim where the PSG is based on one or more other protected characteristics.

### **3. What is the nature and the dangers for those with protected characteristics who are seeking asylum in the United Kingdom?**

The nature and dangers for those with protected characteristics who are seeking asylum in the United Kingdom is as broad as human experience and varies on a case-by-case basis.

## **The Asylum Process for Individuals with Protected Characteristics.**

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### **1. Is the UK asylum process safe and fair for those with protected characteristics?**

#### **a. Are individuals with certain protected characteristics more at risk of harm or unfair treatment when going through the UK asylum process?**

*The response to this section in relation to LGBTQI+ asylum seekers and refugees draws on the recent LLB dissertation of a member of the Law Society of Scotland’s Immigration and Asylum sub-committee. The member is a former Home Office Presenting Officer and has worked closely with LGBTQI+ refugees and asylum seekers in Scotland for the past decade.*

There are particular challenges for individuals with various protected characteristics which are often based on the level of support they are able to gain both within and out-with the process. The degree to which they are integrated within communities can play a significant part in their successfully navigating the asylum process. The support that individuals can gain from these communities can be both practical and in gathering evidence to support their claims.

### **Disability**

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<sup>12</sup> Ibid., para 6.

<sup>13</sup> Ibid., para 7.

<sup>14</sup> *AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC) and *SB (PSG – Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002 and *Joined Cases C-199/12 to C201/12 X, Y and Z v Minister voor Immigratie en Aseil* [2013] EU:C:2013:720 c.f. *Fornah v. The Secretary of State for the Home Department; The Secretary of State for The Home Department and HJ (Iran) v The Secretary of State for the Home Department; HT (Cameroon) v The Secretary of State for the Home Department* [2010] UKSC 31. See also discussion in G. Clayton & G. Firth, *Immigration & Asylum Law* 8<sup>th</sup> edn. (Oxford, 20), Para 12.8.4.

Disabled individuals can face significant barriers in accessing appropriate support as highlighted in a recent case in which the High Court upheld claims of breach of the Equality Act 2010 by 5 individuals arising from failures to timeously provide appropriate accommodation under the asylum support system.<sup>15</sup> Additional challenges can be faced by those with undiagnosed disabilities, in particular learning disabilities and mental health. Issues relating to learning disabilities and mental health can impact on the quality of evidence that individuals provide. Without access to specialist support and with the limited resources available to legal aid lawyers this can have a significant impact on their claim.

## Sexual Orientation

In contrast to the Netherlands and Canada, which recognised ‘homosexuals’ as being capable of constituting a PSG in 1981<sup>16</sup> and 1991<sup>17</sup> respectively, it was not until 1999 that the United Kingdom did so in *Shah and Islam*<sup>18</sup>. Whilst these were obiter comments this was the first time that the Upper Courts had established the possibility that an LGBTQI+ person could establish a claim as a member of a PSG under UK law, as prior to this the situation was far from clear. Article 10(1)(d) of the Qualification Directive (2004/83/EC) confirmed that ‘a common characteristic of sexual orientation’ was capable of establishing a PSG; this was transposed into domestic law in regulation 6(1)(e) of the The Refugee Or Person in Need of International Protection (Qualification) Regulations 2006. Although much of the case law on sexuality focuses on gay men, however in *HJ and HT* Lord Rodger was clear that PSG covered what he referred to as “a broad spectrum of sexual behavior”<sup>19</sup> with particular reference to lesbians and bisexuals.

Two key elements in the leading judgement of Lord Rodger in *HJ and HT* were: the recognition that sexual identity is inherent to a person’s identity, putting to bed any suggestion that a choice is in any way involved<sup>20</sup>; and in establishing a series of questions that a tribunal should ask itself when faced with a person claiming that they have a well-founded fear of persecution because he is gay<sup>21</sup>. Lord Rodgers test requires not only that an appellant convince the tribunal that they are gay or would be perceived as such, but also that they are living their life openly, or where they are discreet this is not because they are ‘naturally discreet’ or do so only because of ‘social pressure’. Unsurprisingly this has led to greater focus being placed on the question of the genuineness of an individual’s sexual identity, a pattern which has been noted to have been replicated in other jurisdictions<sup>22</sup>.

<sup>15</sup> *DMA, AHK, BK and ELN v THE SECRETARY OF STATE FOR THE HOME DEPARTMENT* [2020] EWHC 3416 (Admin)

<sup>16</sup> S. Jansen ‘Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe’ in T Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (Abingdon, 2013), 1

<sup>17</sup> N. La Violette, ‘Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process’ (2009) 13 *The International Journal of Human Rights* 437-476 at p. 440

<sup>18</sup> 643-644

<sup>19</sup> *HJ and HT*, para 76

<sup>20</sup> *HJ & HT*, paras.78-79

<sup>21</sup> *HJ & HT*, para 82

<sup>22</sup> L. Middelkoop, ‘Normativity and credibility of sexual orientation in asylum decision making’ in T Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (Abingdon, 2013), 154.

The focus on the genuineness of a person's sexual identity generally requires a person to gather confirmatory evidence of their identity. This can be particularly challenging for those who are struggling with being more open about their identities after potentially several decades of hiding from the people closest to them. Their claims are then assessed by decision makers who have little or no knowledge or experience of life for LGBTQI+ people in the United Kingdom or further afield where there can be significant cultural differences.

Very often it is not until after their first claim has been rejected that a person will make a claim based on their sexual identity, as they may previously have had little to no contact with other LGBTQI+ people in the UK either through lack of opportunity or the impact of having spent most if not all of their life having to hide who they are from even the people closest to them. Making a fresh claim on the basis of sexual identity when it has not been mentioned before raises additional challenges where unsympathetic decision makers may not understand the justifiable reasons why an asylum seeker has not mentioned at the earliest opportunity the real reason why they are seeking international protection. The added restrictions on fresh claims under the New Plan for Immigration will therefore have a disproportionate impact on LGBTQI+ asylum seekers.

## **Gender Reassignment and PSG**

LGBTQI+ identities are of course not limited to sexual orientation/identity as issues of gender identity and gender expression also fall within this categorisation, despite the reference to 'sexual behaviour' by Lord Rodger in *HJ and HT*, Foster believes this extends to a much wider range of categories including transgender people<sup>23</sup>. Despite this there remains limited jurisprudence in relation to transgender people: with a total of only 37 publicly available decisions being found in 5 jurisdictions over the period of 17 years leading up to 2011<sup>24</sup>; and 4 cases, none of which were heard in any court higher than the Upper Tribunal (Immigration and Asylum Chamber) contained in a review of UK caselaw related to Sexual Orientation and Gender Identity (SOGI) claims between 1989 and 2019<sup>25</sup>.

In identifying the 37 publicly available decisions, 3 of which were from the United Kingdom<sup>26</sup> Berg and Millbank considered there was an inconsistency and unpredictability to the definitions used in the cases they considered, with some of the descriptions that appellants used for themselves being rejected or overlooked<sup>27</sup>. They saw a concerning tendency to frame the PSGs within sexual orientation rather than gender identity, something they considered might be due to the appellants own lack of certainty around their identities or the terminology they should use<sup>28</sup>. Though also this may be something resulting from their

<sup>23</sup> Foster M, 'Why we are not there yet: The particular challenge of 'particular social group' in E. Arbel *et al* (eds.), *Gender in Refugee Law: From the Margins to the Centre* (London, 2014), 35

<sup>24</sup> L. Berg & J. Millbank, 'Developing a jurisprudence of transgender particular social group' in T Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (Abingdon, 2013), 123.

<sup>25</sup> M. Dustin & R. Jones, 'SOGICA – Table of UK SOGI asylum case law' (University of Sussex, updated April 2019) < [http://www.sogica.org/wp-content/uploads/2019/04/SOGI-Cases\\_April-2019\\_1.pdf](http://www.sogica.org/wp-content/uploads/2019/04/SOGI-Cases_April-2019_1.pdf) > accessed 20 September 2019

<sup>26</sup> Berg & Millbank, 'Transgender Particular Social Group', 126

<sup>27</sup> *Ibid.*, 135-136

advocates or a lack of relevant terminology in their own cultures<sup>29</sup>. The significant challenges of framing a PSG in a trans claim is something that they see as requiring an awareness of the 'multiplicity of gendered experience' and the evolution of how individuals express their gender<sup>30</sup>.

While there is limited jurisprudence in the United Kingdom the Home Office has published an Asylum Policy Instruction on transgender Identity issues in asylum claims which clearly acknowledges that transgender claims are likely to fall under PSG<sup>31</sup>.

While not specifically dealing with the situation in the UK a recent report about Transgender asylum seekers and refugees in The Netherlands provides some insight into the specific challenges that individuals may face<sup>32</sup>. The report highlights three major areas of concern: a lack of trans specificity in the asylum process, with a failure to understand key areas where trans claims differ from LGB claims; a failure to correctly interpret the specific circumstances for trans asylum seekers in their countries of origin; and a failure to take a holistic approach in the consideration of the claims of trans asylum seekers and the impact of intersecting issues<sup>33</sup>.

## Intersex People and PSG

As well as transgender people Foster considered intersex people to be covered by Lord Rodgers formulation<sup>34</sup>, nevertheless in an article published in March 2018 Dustin noted the complete absence of information on intersex claims and asylum seekers<sup>35</sup>, this is no longer the case as there has been some limited information in the media pointing to: a person granted asylum in May 2018<sup>36</sup>, and another asylum seeker whose status is unknown<sup>37</sup>, in the United Kingdom; an athlete granted asylum in Germany<sup>38</sup>; and a short film produced about an Asylum seeker in the United States<sup>39</sup>. There are no published tribunal cases relating to intersex people, giving us very little information to work from.

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<sup>28</sup> Ibid., 137-139

<sup>29</sup> Ibid., 139

<sup>30</sup> Ibid., 146

<sup>31</sup> Gender Identity Issues in the Asylum Claim, (UK Visas and Immigration, 13 June 2011) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257387/genderissueintheasylum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257387/genderissueintheasylum.pdf)> accessed 22 January 2020, 10-11.

<sup>32</sup> W. van Kempen and A. Ortiz 'TRANSCRIPT FROM THE MARGINS', (TNN, October 2021) <<https://www.transgendernetwerk.nl/wp-content/uploads/Transcript-from-the-Margins-Opmaak-V6.2.pdf>>

<sup>33</sup> Ibid., 10-15

<sup>34</sup> Foster, 'particular challenge', 35

<sup>35</sup> M. Dustin, 'Many rivers to cross: the recognition of LGBTQI asylum in the UK' (2018) *International Journal of Refugee Law* 104-127, 104

<sup>36</sup> S. Rocca, 'Kaira and Muhammed's stories' (*Micro Rainbow*, 05 October 2018) <<https://microrainbow.org/kaira-and-muhammeds-stories/>> accessed 04 February 2020

<sup>37</sup> Reuters, 'Gay and intersex asylum seekers find place to call home in Britain' (*NBC News*, 16 January 2018) <<https://www.nbcnews.com/feature/nbc-out/gay-intersex-asylum-seekers-find-place-call-home-britain-n837971>> accessed 04 February 2020

<sup>38</sup> B. Rumsby, 'Intersex ex-athlete Annet Negessa 'relieved and happy' to be granted asylum in Germany' (*The Telegraph*, 05 December 2019) <<https://www.telegraph.co.uk/athletics/2019/12/05/intersex-ex-athlete-annet-negessa-relieved-happy-granted-asylum/>> accessed 04 February 2020

<sup>39</sup> Y. Pang & R. Tokanel, 'She's Not a Boy' (*Pulitzer Center*, 31 May 2019) <<https://pulitzercenter.org/projects/shes-not-boy>> accessed 04 February 2019

## How the Decision Makers Approach the Question of LGBTQI+ Identity Post *HJ and HT*.

While *HJ and HT* abolished the idea that any LGBTQI+ person could avoid persecution by being discreet, it has retained the idea that there is a category of LGBTQI+ people who would be discreet because they are naturally so or to avoid social pressures rather than to avoid persecution<sup>40</sup>. Lord Rodgers test places a requirement on claimant not only to prove to the required standard of proof that they are an LGBTQI+ person but that they live their life openly as such, failure to do so means they have to prove their discretion is not because of a natural tendency towards being discreet or due to social pressures. Unhelpfully *HJ and HT* provides no guidance on how these tests should be performed giving tribunals a great degree of discretion.

The division of asylum seekers into those who live their lives openly and those who are by nature (or for social reasons) discreet is something which applies a western understanding of LGBTQI+ identities. This is apparent in the United Kingdom given the significant advances in legal rights and social attitudes towards LGBTQI+ people, making it much easier to distinguish individual's reasons for discretion than when a person lives in a much more hostile environment. This approach also effectively requires asylum seekers to conform to western normative standards to satisfy decision makers that they are who they claim to be<sup>41</sup>; with empirical data suggesting that this is something which persists throughout the asylum system<sup>42</sup>. This is not however a phenomenon that is exclusive to the United Kingdom having been observed across the EU<sup>43</sup> and in other western jurisdictions<sup>44</sup>. In a case where great concern was shown for the privacy and dignity of LGBTQI+ asylum seekers the ECJ warned in 2014 of an over-reliance on stereotypes rather than conducting a personalised assessment.<sup>45</sup> The ECJ also warned in this case against the use of 'tests' to demonstrate sexuality and allowing applicants to submit explicit evidence of intimate acts even where applicants may consent, being worried that this might lead to this becoming a requirement<sup>46</sup>. The approach laid down in *ABC v Staatssecretari* is now referred to in Home Office Guidance<sup>47</sup>, but as Dunne notes while the decision very specifically details what should not be done it provides very little guidance as to what should<sup>48</sup>.

<sup>40</sup>*HJ and HT*, para 82

<sup>41</sup> M. Dustin, 'Many rivers to cross: the recognition of LGBTQI asylum in the UK' (2018) *International Journal of Refugee Law* 104-127, 119; N. Held, 'What Does a Genuine Lesbian Look Like?: Intersections of Sexuality and 'Race' in Manchester's Gay Village and in the UK Asylum System' in F. Stella *et al* (eds.) *Sexuality, Citizenship and Belonging : Trans-National and Intersectional Perspectives* (Abingdon 2016), p144-145; D. James and E. Killick, 'Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London' (2012) *37(2) Law & Social Enquiry* 430, 443.

<sup>42</sup> T. Y. Khan, 'Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum-Seekers: Theoretical and Empirical Perspectives on Fairness' (PhD, University of Liverpool 2016), 223

<sup>43</sup> P. Dunne, 'A, B and C v Staatssecretaris van Veiligheid en Justitie: fairer assessment procedures for gay and lesbian asylum applicants in the European Union' (2015) *40(3) European Law Review* 411-423, 417; Middelkoop, 'Normativity and credibility', 154

<sup>44</sup> Millbank J, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) *13(2-3) The International Journal of Human Rights* 391-414, 392

<sup>45</sup> *Joined Cases C-148/13 to C-150/13 ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECR I – 2406, para 62

<sup>46</sup> *ABC v Staatssecretaris*, para 65

<sup>47</sup> 'Asylum Interviews: Version 7.0' (*Home Office*, 05 June 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/807031/asylum-interviews-v7.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807031/asylum-interviews-v7.0ext.pdf) > accessed 09 October 2019, 32 ; 'Asylum Policy Instruction: Sexual orientation in asylum claims: Version 6.0' (*Home Office*, 03 August 2016) <[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) > accessed 09 October 2019, 9-10

Possibly due to this lack of guidance, and the fact that while *ABC v Staatssecretari* did not put an outright ban on the use of stereotypes there is evidence that stereotyping continues. For example: an Immigration Judge rejecting an asylum seeker for not being effeminate enough, comparing him to a witness who wore lipstick and making reference to how the witness spoke and looked around the room<sup>49</sup>; the Judge who thought that a woman did not look like a lesbian<sup>50</sup>; another Judge disbelieving a claimed sexuality due to a failure to provide testimony from a former or current partner<sup>51</sup>, seemingly not understanding that LGBTIQ+ people can be single particularly at age 67; the continuing problem of women being disbelieved due to past marriages to male partners<sup>52</sup>; and judges struggling to understand bisexuality<sup>53</sup>. In addition to this the use of non-western terminology in tribunal decisions is quite rare, with immigration judges preferring to use the language familiar to them. An example being that in one of only two reported cases on LGBT people in Uganda does the term Kuchu<sup>54</sup> appear<sup>55</sup> with 2 occurrences; as opposed to 188 uses of 'gay', 55 of 'lesbian' and 1 of 'bisexual', 2 of 'transgender' and 7 of 'LGBT'.

An alternative approach has been put forward in S Chelvan's DSSH model<sup>56</sup> which provides decision makers with a framework based around an asylum seeker's experiences of difference, stigma, shame, and harm<sup>57</sup>. The model has been endorsed by the UNHCR and adopted by a number of countries, including the United Kingdom<sup>58</sup>, where it appears in a form in guidance to caseworkers on sexual orientation claims<sup>59</sup>. While the approach is widely accepted it is not without its critics with Dawson and Gerber being concerned that the model might lead to an expectation that claimants will meet a normalised and 'hegemonic' narrative of difference<sup>60</sup>; and that the model is based on western gay male norms making it not necessarily suitable for the diverse identities that may be under consideration<sup>61</sup>. While Gomez is concerned about the fact that the narrative of shame will become another stereotype used by immigration judges<sup>62</sup>.

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<sup>48</sup> Dunne, 'Fairer assessment procedures', 421

<sup>49</sup> R. Booth, 'Judge rejected asylum seeker who did not have gay 'demeanour'' (*The Guardian*, 21 August 2019) <

<https://www.theguardian.com/uk-news/2019/aug/21/judge-rejected-asylum-seeker-who-did-not-have-gay-demeanour> > accessed 09 February 2020

<sup>50</sup> Khan, Khan, 'Investigating the British Asylum System', 224

<sup>51</sup> H. Pidd, 'Home Office gives man asylum after accepting people can be gay and single' (*the Guardian*, 23 December 2019) <

<https://www.theguardian.com/uk-news/2019/dec/23/home-office-gives-man-asylum-after-accepting-people-can-be-gay-and-single> > accessed 09

February 2020

<sup>52</sup> Booth, 'Judge rejected asylum seeker who did not have gay 'demeanour''; Khan, "Investigating the British Asylum System", 172.

<sup>53</sup> Khan, 'Investigating the British Asylum System', 172.

<sup>54</sup> Tamale S, 'Out of the Closet: Unveiling Sexuality Discourses in Uganda (2003) 2 *Feminist Africa*, 3

<sup>55</sup> JM (homosexuality: risk) Uganda [2008] UKIAT 65, para 48

<sup>56</sup> S. Chelvan, 'DSSH Model and LGBTI asylum claims' (*No5 Chambers*, April 2014)

<<https://www.no5.com/cms/documents/DSSH%20Model%20and%20LGBTI%20Asylum%20Claims.pdf> > accessed 10 March 2020

<sup>57</sup> J. Dawson and P. Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women of Asylum Based on Sexual Orientation' (2017) 29(2) *International Journal of Refugee Law* 292-322, 302 (Table1.)

<sup>58</sup> *Ibid.*, 293-294

<sup>59</sup> 'Asylum Policy Instruction: Sexual orientation in asylum claims: Version 6.0' (*Home Office*, 03 August 2016), 12-17 & 26-27 <

[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) > accessed 09 October 2019,

<sup>60</sup> Danson and Gerber 'DSSH Model', 303

Due to the lack of published decisions from the First-tier Tribunal much of the evidence comes from alternative sources such as the media, making it difficult to quantify how prevalent these practices are and preventing the drawing of explicit conclusions. Nevertheless, what this means is that asylum seekers will use terms and a narrative more familiar to judges in an attempt to meet their perceived expectations, a process which Yoshino refers to as ‘reverse covering’<sup>63</sup>. In the legal system this is a phenomenon that only seems to occur in asylum<sup>64</sup> standing in contrast to the more widely used approach of ‘covering’ where people instead seek to ‘...tone down a disfavoured identity to fit into the mainstream’<sup>65</sup>.

So how do individuals substantiate their identity?

### Substantiating an LGBTQI+ Identity

For many LGBTQI+ asylum claimants the only evidence they may have is their own testimony making the task of proving their sexuality even more difficult, with UKGLIG noting in 2018 that in a sample of cases analysed for their report that none succeeded at appeal without significant corroborative evidence<sup>66</sup>. Though this is by no means determinative as the case of Aderonke Apata demonstrates. In 2015, despite having her partner in court (who had been recognised as a lesbian in her own claim), significant support from LGBTQI+ activists, and petitions signed by several hundred thousand people, she was still found to be being untruthful about her identity by a High Court Judge who found that:

*I find it difficult to disagree with the conclusions of the First Tier Tribunal that ‘she has engaged in same-sex relationships in detention in order to fabricate an asylum claim based on claimed lesbian sexuality’. I also accept the associated submission made by [the Home Office] that she has in effect adjusted her conduct so as to adopt other customs, dress and mores of a particular social group purely as a way of gaining refugee status.’<sup>67</sup>*

Ultimately Ms Aderonke was granted asylum 2 years later, 13 years after she had first claimed asylum, but only after submitting a witness list for a further appeal with 11 prominent witnesses including activist Peter Tatchell and Lady Barker, a Liberal Democrat Peer. However not every LGBTQI+ person has the ability to access to this sort of support. A report commissioned by the Metropolitan Community Church in relation to African asylum seekers found that they face significant challenges with restricted social life and discrimination from other Africans and Black-British people:<sup>68</sup> an issue which they believed was not

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<sup>61</sup> Ibid., 305

<sup>62</sup> E. Gomez, ‘The Post-ABC Situation of LGB Refugees in Europe’ (2016) 30(3) *Emory International Law Review*, 475-500, 496

<sup>63</sup> K. Yoshino, ‘Covering: The Hidden Assault on Our Civil Rights’ (New York, 2006), 23

<sup>64</sup> Ibid, 93

<sup>65</sup> Ibid., ix (preface)

<sup>66</sup> UKGLIG, ‘Still Falling Short’ (*United Kingdom Gay and Lesbian Immigration Group*, July 2018) < <https://uklgig.org.uk/wp-content/uploads/2018/07/Still-Falling-Short.pdf> > accessed 09 October 2019, 31

<sup>67</sup> E. Dugan, ‘Nigerian gay rights activist has her High Court asylum bid rejected – because judge doesn’t believe she is a lesbian’ (*The Independent*, 03 April 2015) <<https://www.independent.co.uk/news/uk/home-news/nigerian-gay-rights-activist-has-her-high-court-asylum-bid-rejected-because-judge-doesnt-believe-she-10155083.html>> accessed 07 February 2020

<sup>68</sup> J. Dyck, ‘LGBT African Asylum Seeker Research Project Report’ (*Metropolitan Community Church*, September 2019) < <http://mccnorthlondon.org.uk/wp-content/uploads/2019/09/LGBT-African-Asylum-Seeker-Research-Project-Report.pdf> > accessed 09 October 2019, 27-28

properly taken into account in the asylum process, when expecting them to provide corroborative evidence. Supporting this perception Bohmer and Shuman point to an organisation where it is estimated that 85% of attendees are not out in any place other than the support group<sup>69</sup>.

Even where an asylum claimant is able to provide supporting evidence from witnesses the way the evidence of these witnesses is treated can be very different as illustrated by two recent cases heard at the Upper Tribunal a day apart. In the first, heard on the 20<sup>th</sup> November 2019 by Upper Tribunal Judge Bruce<sup>70</sup>, the First Tier Tribunal Judge had not been satisfied that the appellant was gay based on his own testimony<sup>71</sup> despite the supporting evidence of two men who worked for an organisation supporting gay asylum seekers, concluding the tribunal was in a better position to assess the appellant's claim to be gay even though they had significant experience in their field and had spent significant time with the appellant<sup>72</sup>. Judge Bruce remitted the appeal for a fresh hearing<sup>73</sup> accepting that the FTT Judge had failed to examine the witnesses' evidence with adequate care<sup>74</sup> and had erred in his assessment of the appellant as a "contented heterosexual" when married to a woman<sup>75</sup>.

In the second case, heard on the 21<sup>st</sup> November 2019 by Upper Tribunal Judge Jackson<sup>76</sup>, the FTT Judge had found the evidence of the appellant and his witnesses to be totally unreliable, going so far as to describe the witnesses as having given "...the impression of being paid advocates on his behalf rather than independent witnesses who kept gave factual evidence in a straightforward way."<sup>77</sup> These witnesses had given evidence in a significant number of appeals and one is recorded as being the chair of an LGBTQ+ organisation<sup>78</sup>. Despite this Judge Jackson upheld the decision of the FTT Judge.

These cases show that the discretion granted to Immigration Judges when it comes to the question of assessing an appellant's claim to be an LGBTQI+ person can result in very different results even where evidence is provided by established members of the LGBTQI+ community. In extreme cases this can result in a case being heard by a number of different tribunals and courts over a number of years until an appellant is successful, such as in the case of Aderonke Apata. Another example of how this discretion can lead to a very difficult situation is the case of AR<sup>79</sup> which had at least six decisions over 4 years before being remitted to the First Tier Tribunal for a seventh hearing by the Inner House in 2017<sup>80</sup>. This was a

<sup>69</sup> Bohmer & Shuman, *'Political Asylum Deceptions'*, 90

<sup>70</sup> *AMYZ v The Secretary of State for the Home Department* [2019] UKUT PA/02144/2019 (IAC) (unreported)

<sup>71</sup> *Ibid.*, para 4

<sup>72</sup> *Ibid.*, para 6

<sup>73</sup> *Ibid.*, para 14

<sup>74</sup> *Ibid.*, para 8

<sup>75</sup> *Ibid.*, para 10

<sup>76</sup> *SA v The Secretary of State for the Home Department* [2019] UKUT PA/14247/2018 (IAC) (unreported)

<sup>77</sup> *Ibid.*, para 5

<sup>78</sup> *Ibid.*, para 6

<sup>79</sup> AR (AP) Against a decision of the Upper Tribunal (Immigration & Asylum Chamber) [2017] CSIH 52

case where the appellant was successful in convincing a Judge of his identity in 2013<sup>81</sup>, but whom subsequent judges disbelieved and not necessarily with good reason with the Inner House noting that evidence from a supporting witness had been more or less ignored<sup>82</sup> and criticising the approach taken by the Judge who disbelieved the appellant and whose decision they were hearing an appeal from<sup>83</sup>.

The subjective nature of this 'unstructured discretion' available to decision makers is something Khan sees as unique to LGBTQI+ claims, with one of his correspondents Liz Barrat stating: "It's only in LGBT cases that people, judges and decision-makers, think that they can draw upon their own brilliance to determine somebody else's sexuality."<sup>84</sup> The discretion afforded to immigration judges is potentially concerning given the vulnerable nature of many claimants, who as Khan and Alessi observe are already under significant psychological pressure from the requirement to 'reverse cover'<sup>85</sup>.

#### **b. Are particular protected characteristics given priority in the asylum process?**

No, we are not aware that there is any formal priority given to particular protected characteristics.

#### **2. What challenges do those with protected characteristics face on the basis of those characteristics if they are granted asylum in the UK? What specific issues do those with certain protected characteristics face?**

The Equality Act 2010 offers protection against discrimination, victimisation and harassment on grounds of the 9 protected characteristics cited above, and in a number of contexts including work, education and service provision. There is also a duty on certain individuals to make reasonable adjustments (e.g. in the workplace) to alleviate disadvantage suffered by persons with a disability. Despite the equality protections available in Great Britain, however, prejudice and disadvantage related to the protected characteristics remains an issue.<sup>86</sup>

#### **3. Do current domestic and international laws and conventions governing the UK's asylum process provide effective protection against discrimination for those with protected characteristics?**

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<sup>80</sup> Ibid., para 38

<sup>81</sup> Ibid., paras. 2-4

<sup>82</sup> Ibid., para 32

<sup>83</sup> Ibid., para 36

<sup>84</sup> Khan, 'Investigating the British Asylum System', 231

<sup>85</sup> S. Khan & E. J. Alessi, 'Coming Out Under the Gun: Exploring the Psychological Dimensions of Seeking Refugee Status for LGBT Claimants in Canada' (2017) 31 (1) *Journal of Refugee Studies* 22-41, 4 & 14

<sup>86</sup> See, e.g. data findings in recent report commissioned by the Equality and Human Rights Commission, D Abrahms, H Swift and D Houston, *Developing a national barometer of prejudice and discrimination in Britain* (Equality and Human Rights Commission, Research Report 119, October 2018) <https://www.equalityhumanrights.com/sites/default/files/national-barometer-of-prejudice-and-discrimination-in-britain.pdf>

#### **4. How is the Government addressing any discrimination or specific dangers for those with protected characteristics in the asylum process, and what more could be done?**

The Government's support for asylum seekers includes an additional payment for pregnant women (and women with young children), a maternity allowance and education provisions for school-age children. Consideration is also given to certain needs of those with a disability and to members of a religious group in the Home Office guidance on 'Allocation of Accommodation'. This guidance provides that a:

*request made for accommodation within reasonable travelling distance of a particular place of worship used by a religious group (for example a church, mosque or temple) should be considered carefully and agreed wherever possible. Although the factor should be given limited weight if there are other places of worship used by the same religious group in other areas.*<sup>87</sup>

Further, the guidance provides that 'caseworkers should have regard to the particular vulnerabilities of asylum seekers and their children who have disabilities or serious health problems.'<sup>88</sup>

The Scottish Government provides funding to a range of organisations which provide support to refugees and asylum seekers. It would enhance the support offering if adequate funding could be provided by the Government to those organisations devoted to furthering the interests of particular protected characteristics, with a view to facilitating the provisions of support by such organisations to asylum seekers, throughout the asylum process and beyond.

#### **5. How has the Covid-19 pandemic affected those with protected characteristics who are seeking asylum?**

There have been significant challenges with individuals being isolated from their communities and the support they might otherwise receive, with a disproportionate number of the recent reported deaths of asylum seekers in Scotland being of members of the LGBTQI+ community. Additionally, the pandemic and the restrictions put in place made it particularly difficult for LGBTQI+ asylum seekers to gather the required evidence required to substantiate the genuineness of their identities as they were unable to make contacts within established communities who could provide supporting evidence for their claims.

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<sup>87</sup> Home Office, *Allocation of Accommodation Policy*, (Home Office, 27 May 2021), p. 9 (available at [Allocation of accommodation policy \(publishing.service.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97422/Allocation_of_accommodation_policy_publishing.service.gov.uk) – last accessed 1 November 2021)

<sup>88</sup> *ibid.* p. 11