



Homosexuals and Asylum - LGBT Guidance Notes

1 The acronym LGBT stands for Lesbian, Gay, Bisexual and Transgender and the guidance notes to which this paper refers are prepared by the UK Border Agency for the benefit of caseworkers who have to consider and make decisions on asylum applications made by foreign nationals who claim asylum on the ground that they face persecution in their countries of origin because of what is regarded there as their sexuality. Under the 1951 United Nations Convention on the Status of Refugees a person claiming the protection of a host state as a refugee needs to be able to show that he has a well-founded fear of persecution in his country of origin for one or other of the reasons specified in the Convention. In claims based on sexuality the usual reason is “membership of a particular social group”. The guidance notes have been in existence for some time have now been revised to take account of the consequences of the Supreme Court’s judgment on this matter in the case of ***H J (Iran) and H T (Cameroon) v. Secretary of State for the Home Department*** [2010] UKSC 31 decided in July 2010, which overrules a previous decision of the Court of Appeal. That decision is explained in [Legal Briefing Papers MW 193](#). I quote paragraph 5 of the latter:

“In allowing the appeals the Supreme Court took a radically different view of the rights of homosexuals under the Asylum Convention. The following is taken from the Press summary and succinctly summarises the views on this fundamental aspect of the case as expressed by Lord Hope and Lord Rodger, who delivered the two main judgments:

“To compel a homosexual person to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny him his fundamental right to be who he is. Homosexuals are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight.”

2 It is reasonable to sum up the Supreme Court’s judgment by saying that it would regard any country of origin whose laws and customs are less tolerant and liberal than those of the UK in relation to the social treatment of homosexuals as a country in which a homosexual asylum seeker could readily claim to have a well-founded fear of persecution if returned there. The essence of the judgment is summarised at page 13 of the Guidance Notes as follows:

“The Supreme Court has now established the test which should be applied when assessing a claim based on fear of persecution because of the applicant’s sexual orientation. As such, the following steps need to be considered:

- Is the applicant gay or someone who would be treated as gay by potential persecutors in the country of origin?
- If yes, would gay people who live openly be liable to persecution in that country of origin?
- How would the applicant behave on return? If the applicant would live openly and be exposed to a real risk of persecution, he has a well-founded fear of persecution even if he could avoid the risk by living discreetly.
- If the applicant would live discreetly, why would he live discreetly? If the applicant would live

discreetly because he wanted to do so, or because of social pressures (e.g. not wanting to distress his parent or embarrass his friends) then he is not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if he lived openly, then he is a refugee.

With due regard to gender equality, the decision maker is now required to look at the risk a lesbian, gay or bisexual person might be exposed to if they chose to live openly on return to their country of origin. The previous test based on the concept of “reasonable tolerability” **no longer applies.**”

3 The Supreme Court’s judgment greatly widened the scope of protection for homosexual asylum seekers. As I noted in Briefing Paper 8.41, the applications had been initially rejected by the UKBA and appeals against rejection had previously been dismissed by the Asylum and Immigration Tribunal and the Court of Appeal. Clearly those decisions were based on the relevant law as it stood before the Supreme Court’s decision. The Guidance Notes have had to address the problem now faced by caseworkers in UKBA in trying to assess whether the applicant’s fear of persecution is well-founded. Clearly the question posed in (d) above is crucial and so is the credibility of the applicant’s answer to the question. He is unlikely to be advised to say that he would live discreetly because he wanted to do so or because of social pressures, but will certainly want to give the impression that he will live discreetly because he fears persecution if he is open about his sexual orientation. The result of the Supreme Court’s decision must be that the proportion of asylum seekers successfully relying on their sexual orientation as the basis for their fear of persecution will greatly increase.

4 Looking at the Guidance Notes overall, I am impressed by the careful way in which they are drafted, taking account of relevant psychological, social, legal and other factors of which caseworkers are expected to be aware when considering applications. However, I do not envy the task which caseworkers and immigration judges now face in applying the Supreme Court’s judgment.

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