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Navigation guide

Lesbian, gay, bisexual and transgender (LGBT) refugees and asylum seekers

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About the author

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Introduction

This navigation guide aims to be a 'rough guide' to the issues relevant to lesbian, gay, bisexual and transgender (LGBT) asylum seekers and refugees, and to provide information on resources and links on this topic.

In the 'Context' section, some background and contextual information is given, as well as an explanation of the terms used. In the 'Legal aspects' section, an outline of the relevant legislation, guidelines and legal developments (including case law) is provided. Many LGBT asylum seekers have difficulties fitting into the existing definition of a 'refugee' according to current interpretations of the Refugee Convention. Initially, the main legal obstacle was the question of whether 'homosexuals' could be considered 'members of a particular social group'. However, since the House of Lords decision in the case of *Shah & Islam*¹ and the implementation of the European Convention of Human Rights (ECHR) in the UK through the Human Rights Act in 2000, the focus in asylum (and human rights) cases of LGBT people has shifted to credibility issues and to the definition of 'persecution' or 'inhuman and degrading treatment' (Article 3 ECHR), as well as to issues relating to rights to private and family life (Article 8 ECHR).

The 'Key issues' section addresses firstly the problems many LGBT people have in identifying and declaring their sexual orientation (or gender identity issues) in a timely manner, if at all, in the asylum procedure, and the consequences this may have for the assessment of their claim. Other key issues discussed in this section are the lack of country information and the complications of so-called 'safe third countries' for LGBT people. Important key issues are also the lack of awareness of LGBT refugee issues and existing prejudices, including homophobia, heterosexism and racism. The section addresses the difficulties many LGBT refugees have in accessing social and legal services, as well as their isolation in ethnic minority, refugee and/or LGBT 'communities'.

The section on 'Statistics' is unfortunately very limited due to the lack of available data on this issue. The section 'Resources', 'Projects and initiatives' and 'Links and contacts' should speak for themselves. Please note that this guide in general, and the resources section in particular, are indicative only and do not attempt to provide exhaustive information on this issue.

¹ *R v IAT ex parte Shah* [1999] INLR 144, Imm AR 283 (HL) and *Islam v SSHD* [1999] 2 WLR 1015. Available from EIN database, <http://www.ein.org.uk>. Note: the author has referred to case law available in the EIN database and mentioned any other places of publication where known. Some cases are not published anywhere and so no link is possible at all. The EIN database is only accessible to members so direct hyperlinks are unfortunately not possible.

Context and terminology

Despite increased visibility, some enhanced legal protection and greater societal acceptance in some countries, LGBT people are still experiencing many attacks worldwide. These attacks may be physical, emotional, verbal or legal. They consist of discrimination, intimidation, social exclusion, prosecution or other forms of persecution and oppression. In 2001, [Amnesty International](#) reported that 'lesbians, gay men and bisexual and transgender people all over the world suffer persecution and violence simply for being who they are'.² Many are tortured, raped, imprisoned, subjected to forced medical treatment, denied the right to form sexual or familial relationships with their partners, denied access to, or legal bonds with, their children, harassed, discriminated against and ostracised at school, work, in places of worship and in their own family or community.³

Most LGBT people struggle to accept themselves and to find acceptance with others. Many (attempt to) live with, and/or fight against, discrimination, ill treatment and oppression. Some LGBT people are forced to leave their own country and claim asylum abroad where they hope to receive protection and to be treated with more dignity and respect. However, 'the reality for lesbian and gay refugees in the UK is often one of invisibility and isolation' (*InExile* 2002).⁴ Moreover, although legal developments in the UK have moved towards greater legal protection of LGBT asylum seekers (and LGBT people in general) in the last few years, 'convincing the Home Office of the need for protection is a different matter. Those representing lesbian and gay asylum seekers need all the legal armoury at their disposal' (O'Leary 2002).⁵

Little research has been done into the legal and social experiences of LGBT asylum seekers and refugees. Since the question of whether 'homosexuals' could be considered as 'members of a particular social group' has been more or less settled, publications on LGBT refugees have also been rare. Much of the information in this navigation guide is therefore 'first hand' and based on the limited and often piecemeal data and research that does exist. The findings are therefore indicative only and should not be considered as an expression of 'the' experiences of LGBT refugees in the UK.

Please note that this navigation guide has a slightly more legal focus than some of the other navigation guides as this reflects what is being fought out at the moment in relation to the issue. Moreover, given the lack of research, legal case studies are some of the only examples available.

The term 'LGBT refugees' in this navigation guide, includes of course 'refugees' according to the Refugee Convention. However, the term will also be used to refer to all those LGBT people seeking protection against violations of their human rights under the Refugee Convention or under the Human Rights Act implementing the European Convention of Human Rights, irrespective of whether they are or will be accepted by the authorities or not. Therefore, the terms asylum seekers and refugees will be used interchangeably, except where a distinction may be necessary to indicate the legal differences.

² **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, torture and ill-treatment based on sexual identity*, available at <http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347>.

³ See for example, **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, torture and ill-treatment based on sexual identity*, available at <http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347>; **Human Rights Watch** (2002) *Lesbian, Gay, Bisexual and Transgender Rights, 2002 World Report*, available at <http://www.hrw.org/wr2k2/lgbt.html>; **Human Rights Watch** (2001) *Hatred in the Hallways – Violence and Discrimination against Lesbian, Gay, Bisexuals and Transgender Students in U.S. Schools*, available at <http://www.hrw.org/reports/2001/uslgbt/>; **International Lesbian and Gay Association**, visit <http://www.ilga.org>; **International Gay and Lesbian Human Rights Commission**, visit <http://www.ilghrc.org>.

⁴ **InExile (editorial)** (September/October 2002) 'A lonely exodus', in: *InExile*, issue 23.

⁵ **O'Leary, Barry** (September/October 2002) 'Protection secured?', in: *InExile*, issue 23.

In addition, although this guide will concentrate on those LGBT refugees seeking asylum because of the ill-treatment they received for reasons of their sexual orientation or gender identity, it is useful to remember that there may also be many LGBT asylum seekers and refugees that have sought asylum on other grounds, or partially on other grounds. For example, they may have been political activists or members of an ethnic or religious minority. The sections on prejudice, isolation and inability to access social services may be equally relevant to those LGBT refugees seeking asylum on other grounds.

UK case law and legislation often use the term 'homosexuals' to describe those with a sexual orientation other than heterosexual. However, this term is now generally considered inappropriate or even offensive by many English speaking LGB people and LGB groups. The reasons for rejecting the term 'homosexual' are diverse. They include the previous derogatory usage as well as its 'medical' association. In addition, the term does not express the diversity of LGB people as it does not recognise bisexuality nor is it gender specific. The term also does not include transgender issues. Although gender identity issues are in many ways distinct from sexual orientation issues, there are also strong commonalities when it comes to refugee issues. This navigation guide does also address transgender asylum seekers and refugees and therefore the term 'LGBT people' will be used. The term 'homosexuals' in inverted commas, will also be used when discussing case law or legislation that uses the term for reasons of clarity.

For a good explanation of the terms 'sexual orientation' and 'transgender', see the *Study Guide on Sexual Orientation and Human Rights*, by the Human Rights Learning Centre Human Rights Learning Centre (undated), available at www.hrea.org/learn/guides/lgbt.html [visited 2 June 2003].

Legal aspects

Legislation

There is no special legislation for LGBT asylum seekers and refugees in the UK. For the assessment of their asylum and/or human rights claims the usual legislation applies:

- The [Convention Relating to the Status of Refugees 1951](#) and the [Protocol Relating to the Status of Refugees 1996](#) (Refugee Convention).⁶
- The [Human Rights Act 1998](#) (HRA)⁷ implementing the [Convention for the Protection of Human Rights and Fundamental Freedoms 1950](#) ([European Convention on Human Rights](#) – ECHR).⁸
- The [Nationality, Immigration and Asylum Act 2002](#)⁹ and its associated statutory instruments, [guidelines and instructions](#).¹⁰ (See also ‘[Relevant guidelines](#)’ section).

For an overview of issues relating to international human rights and sexual orientation, see the *Study Guide on Sexual Orientation and Human Rights*, by the Human Rights Learning Centre Human Rights Learning Centre (undated), available at <http://www.hrea.org/learn/guides/lgbt.html> [visited 2 June 2003].

See also the ‘[Resources](#)’ section for further information.

Guidelines

There are no special, dedicated guidelines for the assessment of asylum or human rights claims made by LGBT asylum seekers and refugees in the UK. Some other countries such as Sweden have developed specific guidelines for the assessment of asylum claims on the basis of sexual orientation, in addition to gender guidelines.¹¹

Nevertheless, the [Immigration Appellate Authorities \(IAA\) Asylum Gender Guidelines 2000](#) (IAA gender guidelines), include a brief section on ‘Homosexuals/Sexual Life’.¹² The IAA gender guidelines also state that ‘a woman’s choice of sexual orientation may itself be, or may be perceived as, an expression of political

⁶ Available at http://www.unhcr.ch/cgi-bin/texis/vtx/basics/+SwwBmeJAIS_www3wwwwwwwhFqA72ZR0gRfZNFqtxw5oq5zFqtFEIfglAFqA72ZR0gRfZNDzmxwwwwww1FqtFEIfgl/.opendoc.pdf.

⁷ Available at <http://www.hmso.gov.uk/acts/acts1998/19980042.htm>.

⁸ Available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

⁹ Available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=3784>.

¹⁰ Available at: <http://www.ind.homeoffice.gov.uk/default.asp?pageid=19>.

¹¹ **Swedish Migration Board - Migrationsverket** (28 January 2002) *Guidelines for investigation of asylum cases in which persecution based on given sexual orientations is cited as a ground*, available at http://www.migrationsverket.se/pdf/verket/vemfar/sex_en.pdf.

¹² **Immigration Appellate Authority (IAA)** (November 2000) *Asylum Gender Guidelines*, s.25A.25-25A.26, available at <http://www.asylumsupport.info/publications/iaa/gender.pdf>.

opinion'.¹³ There is no explicit reference to transgender people. However, the IAA gender guidelines 'may apply to both women and men' and claim to address the role of gender in the asylum determination process generally.¹⁴ As such, the IAA gender guidelines as a whole can be relevant to LGBT asylum seekers and refugees.

The [Home Office Asylum Policy Instructions \(API\)](#) refers to the case of *Shah & Islam*¹⁵ and states that 'In light of the judgment, groups who share an immutable characteristic (including women and homosexuals or other persons defined by sexual orientation) may constitute a social group if they are subject to persecution in their society by reason of their being members of that group'.¹⁶

The Refugee Women's Legal Group (RWLG) developed the [Gender Guidelines for the Determination of Asylum Claims in the UK](#),¹⁷ and launched these in the House of Commons in 1998.¹⁸ However, these were not implemented by the Home Office, who claimed gender was to be incorporated within the mainstream Asylum Policy Instructions (API). Nevertheless, at the time of writing (May 2003), the Home Office was in the process of developing their own gender guidelines for their part in the assessment of asylum claims. (The IAA gender guidelines only apply to the appeals part of the asylum process.)

The 4th draft (October 2002) of these Home Office Asylum Policy Instructions (API) Gender Guidelines,¹⁹ makes no reference to transgender people and refers to sexual orientation only once: 'Many gender-related issues only affect women asylum seekers but there are some aspects of this guidance (for example, on sexual orientation and social norms) which will affect men'.²⁰ However, this 4th draft did not actually contain any further specific references to sexual orientation or transgender issues.

Legal developments and issues in case law

LGBT people as 'members of a particular social group'

For various reasons many LGBT refugees have difficulties fitting into the legal definition of a 'refugee' of the Refugee Convention. For a long time the main obstacle was the fact that sexual orientation or gender (let alone gender identity) are not explicitly mentioned amongst the 'reasons for persecution' for which people can claim refugee status. LGBT people persecuted for their sexual orientation or gender identity will need to 'fit' within the existing 'Refugee Convention grounds' in order to receive protection under this convention.

¹³ **Immigration Appellate Authority (IAA)** (November 2000) *Asylum Gender Guidelines*, s.3.31, available at <http://www.asylumsupport.info/publications/iaa/gender.htm>.

¹⁴ **Immigration Appellate Authority (IAA)** (November 2000) *Asylum Gender Guidelines*, s.1.4-1.7, available at <http://www.asylumsupport.info/publications/iaa/gender.htm>.

¹⁵ *R v IAT ex parte Shah* [1999] INLR 144, Imm AR 283 (HL) and *Islam v SSHD* [1999] 2 WLR 1015. Available from EIN database, <http://www.ein.org.uk>.

¹⁶ **Home Office - Asylum Policy Instructions (API)** (undated), *Deciding Claims, Assessing the Asylum Claim, Part II*, available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=3792>, visited 3 June 2003.

¹⁷ **Refugee Women's Legal Group (RWLG)** (July 1998) *RWLG Gender Guidelines for the Determination of Asylum Claims in the UK*, <http://rwlg.org.uk> (website temporarily unavailable) (Also published as appendix 3 in: **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans.)

¹⁸ **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 1.6.6.

¹⁹ **Home Office** (October 2002) *Asylum Policy Instructions (API), Gender Guidelines, 4th Draft*, October 2002 (unpublished, final version will be available at www.homeoffice.gov.uk).

²⁰ **Home Office** (October 2002) *Asylum Policy Instructions (API), Gender Guidelines, 4th Draft*, October 2002 (unpublished, final version will be available at www.homeoffice.gov.uk), para. 3.

The treatment they fear has to be acknowledged as taking place 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'.

As has been argued in women's asylum cases²¹ and as mentioned in the [IAA gender guidelines](#),²² a proactive decision by LGBT people not to conform outwardly with politicised gender roles and/or religious, legal or social norms, can make '(imputed) political opinion' or 'religion' the appropriate Refugee Convention grounds. However, firstly, this might not be an option in all cases and, secondly, the option has so far been largely ignored. Instead, in the UK the main debate for many years in LGBT asylum cases revolved around the question whether 'homosexuals' could constitute 'a particular social group'.

The social group category was added as a last minute amendment to the Refugee Convention. At the time it was not clear who should be recognised in this category but the term was open-ended enough to allow for evolution of the refugee definition to include groups or individuals not considered at the time of drafting. The social group category was further developed by legal scholars and case law in the mid and late 1990s, broadly defining social groups as 'groups defined by some innate or unchangeable characteristic' and 'cohesive, homogenous groups in voluntary association for reasons fundamental to their rights'. Groups only defined by the common factor of their persecution, were not included in the definition of 'social group', as this would run contrary to the purpose of the Refugee Convention to protect not 'anyone who is persecuted' but only those persecuted for a *particular* reason.²³

This caused the main debate in lesbian and gay cases to centre on the question of whether sexual orientation is an innate and/or unchangeable characteristic, so that it would qualify 'homosexuals' as members of a particular social group.²⁴ In the UK, in 1989 the High Court held that 'homosexuals' are not a social group because their only common characteristic (i.e. their sexual orientation) is normally concealed and only revealed in private.²⁵ In 1994, two Tribunal cases - decided one day after each other - took more or less opposite positions. In *Vraciu*,²⁶ the Tribunal held that homosexuals are a 'particular social group' within the meaning of the Refugee Convention but in *Jacques*²⁷ the Tribunal held that 'homosexuals' per se do not constitute a social group. In 1998, in the cases of *Apostolov*²⁸ and *Vitali*,²⁹ the Tribunal dealt with the question explicitly again and confirmed that sexual orientation is an 'immutable characteristic' and an 'innate and unchangeable characteristic', and that therefore 'homosexuals' per se are a 'particular social group'.³⁰

Not much has been written about the developments in transgender cases in relation to the social group category, possibly because of a lack of cases. Nevertheless, for transgender cases, for cases involving gay and bisexual men, and particularly for cases involving lesbian and bisexual women, the recognition of gender-based persecution and the acknowledgement of women (or particular subsets of women) as 'a

²¹ See e.g. **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 3.5.5.

²² **Immigration Appellate Authority (IAA)** (November 2000) *Asylum Gender Guidelines*, s.3.31, <http://www.asylumsupport.info/publications/iaa/gender.pdf>.

²³ See **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 3.5.5, for details of this development.

²⁴ **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 8.4.

²⁵ *R v SSHD ex parte Binbasi* [1989] Imm AR 595 (QBD). Available from EIN database, <http://www.ein.org.uk>.

²⁶ *Vraciu v SSHD* (unreported) 21 November 1994 (11559) (IAT). Available from EIN database, <http://www.ein.org.uk>.

²⁷ *Jacques v SSHD* (unreported) 22 November 1994 (11580) (IAT). Available from EIN database, <http://www.ein.org.uk>.

²⁸ *Apostov v SSHD* (unreported) 24 September 1998 (18547) (IAT). Available from EIN database, <http://www.ein.org.uk>.

²⁹ *Vitali v SSHD* (unreported) 15 December 1998 (17528) (IAT). Available in EIN database, <http://www.ein.org.uk>.

³⁰ For a detailed description of these cases, see **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 8.4.

particular social group' in the House of Lords case of *Shah & Islam*³¹ in 1999, was crucial. For more information on gender-based persecution and women as a social group, see also the ICAR navigation guide on [refugee and asylum seeking women](#) and Crawley (2001).³²

In the cases of *Shah & Islam*³³, one of the main issues was whether women in Pakistan, suspected of adultery, fearing domestic violence as well as state sanctions and not receiving any state protection, could be defined as a 'particular social group', as this 'social group' appeared not to exist independently from the persecution the members feared. The House of Lords decided that this particular subset of women could in fact constitute a particular social group. In addition, Lord Steyn and Lord Millet explicitly mentioned the implications for 'homosexuals' as members of a particular social group.

The case of Shah & Islam

In the case of *Shah & Islam*³⁴, Lord Steyn made an explicit analogy with 'homosexuals' who may in some countries be a particular social group. He compared the cases of Ms. Shah and Ms. Islam with 'a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state'. The fact that some privileged individuals might be able to escape persecution, does not mean that a social group of 'homosexuals' cannot exist. He also stated that the inclusion of homosexuals in this category was '(s)ubject to the qualification that everything depends on the state of evidence in regard to the position of homosexuals in a particular country'. Lord Millet concluded that in countries where only practising homosexuals were subjected to persecution, the relevant social group is still 'homosexuals' rather than a subset of 'practising homosexuals'. Therefore, even non-practising 'homosexuals' are members of the particular social group of 'homosexuals', although they might have more difficulty in establishing a well-founded fear of persecution. However, he saw that as a matter of evidence rather than a matter of inclusion in 'social group'.

In short, the issue of whether 'homosexuals' or 'practising homosexuals' either per se or only in certain countries constitute 'a particular social group', still remains partly unresolved, at least in theory. In practice, following *Shah & Islam*, the Home Office³⁵ and the Immigration Appellate Authority have generally accepted in LGB cases that 'homosexuals' are members of a particular social group, starting with the Court of Appeal decision of *Sahm Sunder Jain*.³⁶ The UK case law in LGBT cases from then on concentrates on other aspects, such as credibility and whether the treatment feared amounts to persecution. In addition, with the implementation of the ECHR in the UK by the Human Rights Act 1998, the question of whether a particular treatment amounts to torture or to inhuman or degrading treatment or punishment (Article 3 European Convention on Human Rights) becomes more relevant.

³¹ *R v IAT ex parte Shah* [1999] INLR 144, Imm AR 283 (HL) and *Islam v SSHD* [1999] 2 WLR 1015. Available from EIN database, <http://www.ein.org.uk>.

³² For a detailed description of the developments for women's cases, see **Crawley, Heaven** (2001) *Refugees and Gender. Law and Process*, Jordans, para. 3.5.5. See also ICAR navigation guide on [refugee and asylum seeking women](#).

³³ *R v IAT ex parte Shah* [1999] INLR 144, Imm AR 283 (HL) and *Islam v SSHD* [1999] 2 WLR 1015. Available from EIN database, <http://www.ein.org.uk>.

³⁴ *R v IAT ex parte Shah* [1999] INLR 144, Imm AR 283 (HL) and *Islam v SSHD* [1999] 2 WLR 1015. Available from EIN database, <http://www.ein.org.uk>.

³⁵ See also the section on 'Relevant guidelines'.

³⁶ *Sahm Sunder Jain v SSHD* [2000] (CA)[2000]INLR. Available in EIN database, <http://www.ein.org.uk>. However, in that case it was decided that the treatment feared did not amount to persecution.

State persecution and prosecution

The term persecution in the meaning of the Refugee Convention is usually taken as specific actions undertaken at a particular moment by state agents. In many countries, this form of persecution of LGBT people, often in the guise of 'prosecution', does take place. About 80 states criminalise same-sex sexual relations, whilst others use public order or morality provisions to punish LGBT people. In some countries the punishment is death, in others imprisonment, hard labour, lashings and/or fines.³⁷ An example of a 'revival' of anti-LGBT state actions after a period of relative tolerance, is the situation in Egypt, where LGBT people, gay men in particular, are being arrested (sometimes even via entrapment), and prosecuted under legislation of 'public morals'.³⁸

The mere prohibition of homosexuality or of sodomy is generally not sufficient to amount to persecution (or to require international protection under human rights law), although it has been appreciated that 'the very existence of a legal prohibition can continuously and directly affect a person's private life'.³⁹

The case of Dawkins v IAT

'It simply cannot be the law, in my judgment, that merely because the law of Jamaica has a criminal statute which criminalises homosexual behaviour, that mere fact cannot, of itself, be sufficient to require this country to grant immigration status to all practising homosexuals in Jamaica. On that basis, anybody who was a homosexual could come to this country and claim asylum'.⁴⁰

Queen on the application of Dawkins v IAT

(See also the section 'Private life and family life: the implications of Article 8 ECHR'.)

Even when active prosecution does take place, this may be considered to be too sporadic to amount to persecution. Some decision makers even hold the view that prosecution cannot be persecution.⁴¹ This position is related to the idea of many more decision makers that countries are (at least to some extent) entitled to regulate sexuality in accordance with their society's perceived sense of morality and that citizens of these countries should obey the rules of the country they live in. This idea is borne out of the position that sexual orientation is a morality and sexual freedom issue, rather than an identity and human rights issue. Decision makers do not automatically consider the prohibition and oppression of homosexuality a violation of core rights but rather they consider it a question of the extent to which sexual freedom should be allowed.

³⁷ See for example, **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity*, available at <http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347>; **Human Rights Watch** (2002) *Lesbian, Gay, Bisexual and Transgender Rights, 2002 World Report*, available at <http://www.hrw.org/wr2k2/lgbt.html>; **International Lesbian and Gay Association**, visit <http://www.ilga.org>; **International Gay and Lesbian Human Rights Commission**, visit <http://www.ilgsrc.org>.

³⁸ **Amnesty International** (20 December 2001) *Egypt: Torture and imprisonment for actual or perceived sexual orientation*, available at <http://web.amnesty.org/library/Index/ENGMDE120332001?open&of=ENG-347>.

³⁹ *Sahm Sunder Jain v SSHD* [2000] (CA)[2000]INLR. Available in EIN database, <http://www.ein.org.uk>.

⁴⁰ *Queen on the application of Dawkins v IAT* neutral citation no [2003] EWHC373 Admin [Available in EIN database, <http://www.ein.org.uk>].

⁴¹ See e.g. the adjudicator's initial decision in *Ahmed Mohammed Saeed v SSHD* [2002] UKIAT 01465. Available in EIN database, <http://www.ein.org.uk>. (The adjudicator's decision was overturned by the IAT).

The assessment of the level at which discrimination and oppression becomes a violation of core rights is subject to change over time.⁴²

'Official' prosecution, either directly or indirectly, for being LGBT, often takes place in combination with other state sanctioned human rights violations such as torture, beatings, rape, unlawful detention and harassment. However, this ill treatment does not always take place in one or a few single action(s). The type of ill treatment many LGBT people suffer is actually accumulative and consists of prolonged discrimination and harassment, both in the private and in the public sphere, which can complicate their asylum and human rights applications. Existing case law is unclear about how severe and prolonged discrimination should be, before it amounts to 'persecution' under the Refugee Convention or to 'inhuman or degrading treatment' under the Human Rights Act.⁴³

Non-state agents and availability of protection

Although state persecution of LGBT people is widespread, even more common and more invisible is the ill treatment of LGBT people (and of women generally and LGBT women in particular) in the private sphere and by so-called non-state agents. [Amnesty International](#) (2001) pointed out that 'It is important to recognise that the different patterns of violence against LGBT people – whether in police custody, in prison, in the community or in the home – form a continuum'.⁴⁴ These forms of violence and oppression may all be expressions of a homophobic, transphobic and strongly gendered society.

When persecuted by 'non-state agents', such as family, members of the community, vigilante groups or other actors in society, an asylum seeker will need to prove that the state is not 'willing or able' to protect them. This means they should normally seek protection from the police and courts in their own country, before claiming asylum abroad. However, in countries where homophobia is widespread or where homosexuality is illegal, LGBT people will be extremely reluctant to go to the police to complain of a homophobic crime, as further abuse or prosecution are expected rather than protection.⁴⁵ [Amnesty International](#) stated that according to the reports they received 'gay men who report attacks to the police are at best met with indifference and at worst face further victimisation' (2001).⁴⁶

[Amnesty International](#) also reported that in Jamaica '(...) the police have failed to protect gay people from violence in police detention or to assist victims or witnesses of homophobic crimes. In some cases, reporting

⁴² See e.g. *Sahm Sunder Jain v SSHD* [2000] (CA)[2000]INLR. Available in EIN database, <http://www.ein.org.uk>.

⁴³ See for example, **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, chapter 8, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

⁴⁴ **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity*, 'Introduction – a planetary minority', available at <http://web.amnesty.org/library/Index/ENGA400162001?open&of=ENG-347>.

⁴⁵ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, chapter 8, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

⁴⁶ **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity*, 'Ch. 5 – State responsibility for violence in the community', available at <http://web.amnesty.org/library/Index/ENGA400162001?open&of=ENG-347>.

incidents of homophobic violence to the authorities has resulted in further victimization and ill-treatment at the hands of the police' (2001).⁴⁷

It can be very difficult for LGBT people to 'prove' that it was reasonable for them not to first seek protection in their own country. This is partly because of the lack of information on the situation for LGBT people in many countries. Although some information on countries with a more vocal LGBT movement such as Jamaica is available, in other countries the issue is almost invisible. (See also 'Key issues: Country information').

Torture and inhuman or degrading treatment and punishment: the implications of Article 3 of the European Convention on Human Rights

The European Convention on Human Rights (ECHR) (implemented by the Human Rights Act [HRA] in the UK) protects all individuals, including LGBT refugees, within the jurisdiction of a member state, such as the UK, against human rights violations by that state. However, the ECHR does not oblige member states to protect refugees and asylum seekers against human rights violations committed by other states (extra-territorial effect). The need to regulate migration is considered sufficient justification for the decision by member states to the ECHR to send foreign nationals back to countries where their human rights are violated.

However, this is not true for Article 3 ECHR. The UK Home Office takes the position that refugees and asylum seekers fearing torture and/or inhuman and/or degrading treatment or punishment, cannot be sent back.⁴⁸ Like all other applicants, in order to be protected under this provision, LGBT refugees need firstly to assert and prove whether the treatment they fear amounts to torture or to inhuman or degrading treatment or punishment, and secondly whether there is a 'real risk' that they will be subjected to that treatment. The relevant issues under this provision are similar to the issues relevant to the Refugee Convention and are largely discussed in the sections on state persecution (and prosecution) and non-state agents and availability of protection.

Private life and family life: the implications of Article 8 of the European Convention on Human Rights

Article 8 of the European Convention on Human Rights (ECHR)

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As mentioned above, ECHR rights apply to all individuals *in relation to* the authorities of ECHR member states. However, these rights are still not being applied equally to LGBT people in general, let alone to LGBT refugees and immigrants in particular. Moreover, as with Article 3, Article 8 is also an ECHR right that

⁴⁷ **Amnesty International** (10 April 2001), *Jamaica: Killings and Violence by the Police: How many more victims?*, p. 40, available at <http://web.amnesty.org/library/Index/ENGAMR380032001?open&of=ENG-347>.

⁴⁸ **JCWI** (2002) *Immigration, Nationality & Refugee Law Handbook*, p. 240.

can play a role in cases involving a claim for protection against violations occurring in other countries. The relevant issues are therefore: 1) are ECHR member states required to protect LGBT people fearing violations of the right to private and/or family life in countries other than the UK (extra-territorial effect), and 2) does Article 8 ECHR protect LGBT people equally, both against violations by the authorities of an ECHR member states and extra-territorially? These issues are closely interlinked and will be discussed integrally.

The European Court

Although the British courts are developing their own case law in interpretation of the ECHR rights, the position of the European Court and Commission⁴⁹ set the minimum standard by which ECHR member states such as the UK need to comply. Much of the European Court and Commission's case law relating to LGBT people and Article 8 are British cases.

Regarding protection of LGBT people against violations by ECHR Member States, the European Court established long ago that 'private life' includes sexual life, although initially a complete criminal prohibition of (male) 'homosexual activities', was considered justifiable under article 8(2) as 'necessary for the protection of health and morals'.⁵⁰ Only in 1981, in the case of *Dudgeon v UK*,⁵¹ the European Court held that a complete criminal prohibition of (male) 'homosexual' sex in the UK amounted to a violation of the right to private life, as this level of interference was not considered justified. This position was confirmed in the cases of *Norris v Ireland*⁵² and *Modinos v Cyprus*.⁵³

The protection provided by Article 8 to family relationships of LGBT people, including their relationships with a same-sex partner, are particularly relevant to LGBT refugees and immigrants as they might not be allowed or able to live with their partner or children in their country of origin and/or they may want to bring their family members over to the UK. According to the European Court and Commission, family life includes relationships between parents and children, including LGBT parents and their children.⁵⁴ Whether family life exists between foster children (or stepchildren) and their carer, is more complicated, even in cases where the adult carer is 'heterosexual'.⁵⁵ So far, the European Court has held only in one case explicitly that family life existed between a minor child and a 'non-related' caring adult, namely in the case of *X, Y and Z v. the UK*,⁵⁶ involving the family life of a female-to male transsexual person.

The case of X, Y and Z v. the UK

In the case of *X, Y and Z v. the UK*,⁵⁷ the European Court held that X had lived with Y (the biological mother of Z), to all appearances as her male partner, since 1979; that X was involved throughout the process of artificial insemination of Y and that he has acted as the Z's 'father' in every respect since the birth. In these

⁴⁹ Since November 1998, the European Commission and the European Court have ceased to exist and are now absorbed in the 'new' European Court.

⁵⁰ *X v. Germany*, App. 530/59. Available in HUDOC, at <http://www.echr.coe.int>.

⁵¹ *Dudgeon v. the UK*, App. 7525/76, 1981, Series A no 45. Available in HUDOC, at <http://www.echr.coe.int>.

⁵² *Norris v. Ireland*, 1988, Series A no 142. Available in HUDOC, at <http://www.echr.coe.int>.

⁵³ *Modinos v Cyprus*, 1993, Series A no 259. Available in HUDOC, at <http://www.echr.coe.int>.

⁵⁴ *Salgueiro da Silva Mouta v Portugal*, App. 33290/96, 21 December 1999. Available in HUDOC, at <http://www.echr.coe.int>. The Court held that treating a gay father's sexual orientation as a negative and determining factor in denying him custody of his daughter was incompatible with article 14 in combination with the right to family life under article 8.

⁵⁵ *X v Switzerland*, 1978, 13 D.R. 248 ; *Erikson v Sweden*, pp. 37900/99, 26 October 1999, at 58. Available in HUDOC, at <http://www.echr.coe.int>.

⁵⁶ *X, Y and Z v UK*, App. 21830/93, 1997, 24 EHRR 143. Available in HUDOC, at <http://www.echr.coe.int>.

⁵⁷ *X, Y and Z v UK*, App. 21830/93, 1997, 24 EHRR 143. Available in HUDOC, at <http://www.echr.coe.int>.

circumstances, the Court considered that de facto family ties link the three applicants.⁵⁸ Nevertheless, the Court held that the legal consequences of X not being registered as Z's father were unlikely to cause undue hardship and that X was not prevented in any way from acting as Z's father in the social sense. The Court concluded that there had been no violation of Article 8.⁵⁹

As may be clear from the case of *X, Y and Z v. the UK*⁶⁰, family life also includes the relationship between unmarried opposite-sex partners, even when one of the partners is a transsexual.⁶¹ However, so far, relationships between same-sex partners have not been recognised by the European Court as 'family life' within the meaning of Article 8 of the Convention, instead, starting with the 1981 case of *X & Y v. the UK*,⁶² same-sex relationships have been classified as 'private life' only.

The case of X & Y v. the UK

In 1983 in the case of *X & Y v. the UK*⁶³, a Malaysian man relied upon his gay relationship with a UK citizen in his request for a residence permit, claiming that their right to private life and family life had been violated by the UK's denial of such a permit. The European Commission stated that: 'Despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicant's relationship does not fall within the scope of the right to respect for family life ensured by Article 8. On the other hand, as the Commission and Court have recognised in the case of *Dudgeon* (...), certain restraints on homosexual relationships could create an interference with an individual's right to respect for his private life ensured by Article 8 (...). The Commission finds that the applicants' relationship is a matter of their private life (...).'⁶⁴

Following the cases of *X & Y v. the UK*,⁶⁵ the European Commission considered several cases in which lesbian applicants (and sometimes their child), claimed a violation of their family life. In all these cases the European Commission repeated that a same-sex couple could not form family life and that their claims were therefore 'manifestly ill-founded' and inadmissible.⁶⁶ One of these cases was a British immigration case, namely *C and LM v. UK*.⁶⁷ In the latest case of *Craig v UK*⁶⁸ (not an immigration case), the European Court avoided defining the lesbian relationship as either private life or family life, but instead stated that 'even

⁵⁸ *X, Y and Z v. the UK*, App. 21830/93, 1997, 24 EHRR 143 at 37. Available in HUDOC, at <http://www.echr.coe.int>. (Nevertheless, at 48-52, the Court held that the legal consequences of X not being registered as Z's father were unlikely to cause undue hardship and that X was not prevented in any way from acting as Z's father in the social sense. The Court concluded that there had been no violation of article 8.)

⁵⁹ *X, Y and Z v. the UK*, App. 21830/93, 1997, 24 EHRR 143 at 48-52. Available in HUDOC, at <http://www.echr.coe.int>.

⁶⁰ *X, Y and Z v UK*, App. 21830/93, 1997, 24 EHRR 143 at 48-52. Available in HUDOC, at <http://www.echr.coe.int>.

⁶¹ *X, Y and Z v UK*, App. 21830/93, 1997, 24 EHRR 143 at 48-52. Available in HUDOC, at <http://www.echr.coe.int>.

⁶² *X & Y v. the UK*, App. 9369/81; see also the similar case of *X and Y v UK*, App. 12513/86, 13 July 1987. Available in HUDOC, <http://www.echr.coe.int>.

⁶³ *X & Y v. the UK*, App. 9369/81; see also the similar case of *X and Y v UK*, App. 12513/86, 13 July 1987. Available in HUDOC, <http://www.echr.coe.int>.

⁶⁴ *X & Y v. the UK*, App. 9369/81, at 221. Available in HUDOC, <http://www.echr.coe.int>.

⁶⁵ *X & Y v. the UK*, App. 9369/81; *X and Y v UK*, App. 12513/86, 13 July 1987. Available in HUDOC, <http://www.echr.coe.int>.

⁶⁶ *Simpson v UK*, App. 11716/85, 1986, 47 DR 274; *C. and L.M. v. the UK*, App 14753/89, 9 Oct 1989 and *Kerkhoven, A.M. Hinke and S. Hinke v. the Netherlands*, App. 15666/89, 19 May 1992. All available in HUDOC, <http://www.echr.coe.int>.

⁶⁷ *C. and L.M. v. the UK*, App 14753/89, 9 Oct 1989. Available in HUDOC, <http://www.echr.coe.int>.

⁶⁸ *Craig v UK*, App. 45396/99, 21 March 2000. Available in HUDOC, <http://www.echr.coe.int>.

assuming that there was an interference with private and family life', in that case, the interference was justified under Article 8(2) of the Convention.⁶⁹

The case of C and LM v. UK

The case of *C and LM v. UK*⁷⁰ concerned the complaints of an Australian lesbian (C) and her minor daughter (LM) conceived by artificial insemination. One of the complaints was that the deportation order for C and her daughter LM, constituted a violation of Article 8. Regarding the question of whether C's relationship with her lesbian partner fell within the protection of Article 8, the Commission stated that '(a) lesbian partnership involves private life (...).⁷¹ Interestingly, despite the fact that the child (LM) was a second applicant, the Commission did not address the status of the relationship between LM and her (non-biological) second parent: C's partner.

Qualifying same-sex relationships as 'private life' severely limits the protection for same-sex couples compared to the protection provided to relationships defined as 'family life' under Article 8 ECHR. Deportation or removal in 'family life' cases is usually considered an interference of the right and consequently the legal test is about the assessment of whether that interference was justified under paragraph 2 of Article 8. The European Court has established that interferences with existing family life in immigration cases is not justified when a 'fair balance' is not struck between the applicants' and the State's interests.⁷² The deportation or removal of a partner whose relationship is qualified as 'private life' only and not 'family life', has so far never even been considered to constitute an interference with paragraph 1 of Article 8 by the European Court, let alone an 'unjustified interference'.

The case of X and Y v UK

In the case of *X and Y v UK*⁷³, the Commission held that whilst an expulsion must necessarily affect private life, it cannot in principle be regarded as an interference with the right to respect for private life.⁷⁴ In *C and LM v UK*⁷⁵ it held that 'although lawful deportation will have repercussions on such relationships, it cannot, in principle, be regarded as an interference with this Convention provision, given the State's right to impose immigration controls and limits'. In another case - not concerning a same-sex couple - the European Court held that only in *exceptional* circumstances could a disruption of a person's private life be considered an interference with the right to respect for private life.⁷⁶

⁶⁹ *Craig v UK*, App. 45396/99, 21 March 2000. Available in HUDOC, <http://www.echr.coe.int>.

⁷⁰ *C. and L.M. v. the UK*, App 14753/89, 9 Oct 1989. Available in HUDOC, <http://www.echr.coe.int>.

⁷¹ *C. and L.M. v. the UK*, App 14753/89, 9 Oct 1989. Available in HUDOC, <http://www.echr.coe.int>.

⁷² See for example, *Berrehab v the Netherlands*, 21 June 1988, Series A no. 138; *Gül v the Netherlands*, at 8. Available in HUDOC, <http://www.echr.coe.int>.

⁷³ *X & Y v. the UK*, App. 9369/81; see also the similar case of *X and Y v UK*, App. 12513/86, 13 July 1987. Available in HUDOC, <http://www.echr.coe.int>.

⁷⁴ *X and Y v UK*, App. 9369/81, referring to *Chandra v. the United Kingdom*, App. 10427/83, 5 December 1986, DR 47 p. 85. Available in HUDOC, <http://www.echr.coe.int>.

⁷⁵ *C. and L.M. v. the UK*, App 14753/89, 9 Oct 1989. Available in HUDOC, <http://www.echr.coe.int>.

⁷⁶ *Chandra v. the United Kingdom*, App. 10427/83, 5 December 1986, DR 47 p. 85. Available in HUDOC, <http://www.echr.coe.int>.

In addition to the limited protection for LGBT refugees and immigrants against interferences in their private and family life by ECHR member states, they also lose out on the 'extra-territorial' protection. In 'family life cases', there may be a so-called 'positive obligation' on ECHR member states to allow immigration *if it is impossible for family members to enjoy their family life elsewhere*.⁷⁷ In the light of this 'positive obligation' and considering the (often severe) difficulties same-sex couples have in many countries to enjoy 'family' life with each other, a recognition of same-sex relationships as 'family life' under the ECHR, could potentially provide a very strong protection for these relationships. This could then have significant consequences for the level of protection member states to the ECHR are required to provide to LGBT refugees.

UK case law

As a member state to the ECHR, the UK is politically and under international law bound by the minimum standard of protection as defined by the European Court and Commission. Nevertheless the UK courts have also developed their own case law on this issue and can provide protection beyond the standards set by the European Court. In UK refugee case law⁷⁸, the rights under Article 8 have been dealt with as follows. Before the implementation of the Human Rights Act, the Court of Appeal decided on the case of *Sahm Jain v SSHD*.⁷⁹ This case involved an Indian gay couple that feared discrimination and persecution if they returned to India. The Court of Appeal referred to the broad international consensus that everyone has a right to respect in their private life which included sexual life and that, on the face of it, a statute which rendered illegal homosexual activity, was likely to be a breach of Article 8. However, at that time human rights intervention was not yet enforced in UK.

After implementation of the Human Rights Act (HRA), the Immigration Appeals Tribunal decided in the case of *Ashley* in 2001.⁸⁰ The applicant had been convicted to imprisonment and hard labour for sodomy in Zimbabwe but the sentence would only be imposed if he repeated the offence. The IAT decided that there would be no breach of the private life of the applicant if he was removed to Zimbabwe, partly because he had given evidence that he would be faithful to his partner (who would be remaining in the UK) and therefore he would not be sexually active in Zimbabwe and not at risk of further prosecution or persecution, therefore there was no risk of a violation of his private life under Article 8. This type of reasoning continues to be regularly repeated in Home Office refusal letters.⁸¹

The case of *Ashley*⁸² was one of the three cases heard by the Court of Appeal in *ZA & M*⁸³ in 2002. All three cases involved the return of a gay man to Zimbabwe. The Court of Appeal had a broad discussion on the impact of Articles 3 and 8. This judgement has been discussed by Wesley Gryk, who noted that – unlike claims made by some news reports – the judgment did not completely reject the possibility of LGBT individuals making a successful claim under Articles 3 and 8 of the Human Rights Act. Instead, the Court of Appeal suggested that the appropriate approach in articulating the law in such a delicate area should be to develop the law on a case-by-case basis in light of the facts prevailing in particular cases, rather than to rule on points in the abstract.⁸⁴ The Court of Appeal also noted that the European Court had thus far not

⁷⁷ *Abdulaziz, Cabales and Balkandali v UK, Ahmut v the Netherlands*, App. 21702/93, 28 November 1996. Available in HUDOC, <http://www.echr.coe.int>.

⁷⁸ Due to lack of space, I have not included a discussion of immigration cases in this section.

⁷⁹ *Sahm Jain v SSHD* [2000] Imm AR 76. Available from EIN database, <http://www.ein.org.uk>.

⁸⁰ *Darnley Ashley v SSHD* [2001] 01THO1837, 17 August 2001. Available in EIN database, <http://www.ein.org.uk>.

⁸¹ See for example, **O'Leary, Barry** (September / October 2002) 'Protection secured?', in *InExile issue 23*.

⁸² *Darnley Ashley v SSHD* [2001] 01THO1837, 17 August 2001. Available in EIN database, <http://www.ein.org.uk>.

⁸³ *ZA & M* [2002] EWCA Civ 952. Available in EIN database, <http://www.ein.org.uk>.

⁸⁴ **Gryk, Wesley** (25 July 2002) Note on the Court of Appeal (Civil Division) Judgment handed down on 5 July 2002 in the cases of: *SSHD - and - Z*, Case No: C/2001/2766; *A - and - SSHD*, Case No: C/2001/2520; *M - and - SSHD*, Case No: C/2001/2325. Neutral Citation No: [2002] EWCA Civ 952

explored the responsibility of an expelling state beyond Article 3, but suggests that there have been 'several indications by the Court that it has not ruled out an extension beyond Article 3' to include, for example, expulsion to a country where an individual would face a violation of his or her Article 8 rights by 'an inhibition on the expression of his sexuality in a homosexual context'.⁸⁵

Nevertheless, the Court stated that it could not rule in such broad terms as to say that 'no immigration policy considerations could justify the return of an individual to a country where his expression of his sexual desires with another adult in private is in any way inhibited'. Wesley Gryk remarked that 'In refusing to accept that no immigration policy considerations could justify under Article 8(2) the return of an individual in these circumstances, Lord Justice Schiemann obviously is concerned by the possibility of "opening the flood gates"'.⁸⁶

Regarding the case of Z, the Court of Appeal ordered a re-hearing suggesting that the Tribunal should have explored whether there would be any possibility of a prosecution as 'It was wrong summarily to reject outright the Secretary of State's submission that there would be no interference because the law was not enforced in Zimbabwe'. In addition, the Court of Appeal held that the Tribunal should have examined whether, why and in what circumstances a criminal investigation short of prosecution might be embarked upon and whether this might be an interference with his private life. Wesley Gryk points out that this makes clear 'that the possibility of prosecution itself is not a prerequisite to a finding of an Article 8 violation', and that 'other interferences with private life, short of prosecution, such as criminal investigation, (...) in themselves might be circumstances comprising an Article 8 violation'.⁸⁷ Regarding the case of A, the Court of Appeal ordered a re-hearing as the Tribunal had only dealt with the treatment of homosexuals in Zimbabwe and not considered whether the removal of A from the companionship of his partner in the UK might amount to an infringement of his rights under Article 8, nor whether any reliance by the Secretary of State on immigration control policy was proportionate in this particular case.⁸⁸

Wesley Gryk concludes that 'therefore, the Court of Appeal in both the cases of Z and A has left open the possibility of adducing evidence about a wide range of factors which might apply in making out a case that a violation under Article 8 (and perhaps in more extreme cases Article 3) will occur if an individual is expelled'. However, he also notes that '(t)here is no clear indication of the direction in which the interpretation of these articles will proceed (...)'.⁸⁹

⁸⁵ **Gryk, Wesley** (25 July 2002) Note on the Court of Appeal (Civil Division) Judgment handed down on 5 July 2002 in the cases of: SSHD - and - Z, Case No: C/2001/2766; A - and - SSHD, Case No: C/2001/2520; M - and - SSHD, Case No: C/2001/2325, Neutral Citation No: [2002] EWCA Civ 952.

⁸⁶ **Gryk, Wesley** (25 July 2002) Note on the Court of Appeal (Civil Division) Judgment handed down on 5 July 2002 in the cases of: SSHD - and - Z, Case No: C/2001/2766; A - and - SSHD, Case No: C/2001/2520; M - and - SSHD, Case No: C/2001/2325, Neutral Citation No: [2002] EWCA Civ 952.

⁸⁷ **Gryk, Wesley** (25 July 2002) Note on the Court of Appeal (Civil Division) Judgment handed down on 5 July 2002 in the cases of: SSHD - and - Z, Case No: C/2001/2766; A - and - SSHD, Case No: C/2001/2520; M - and - SSHD, Case No: C/2001/2325, Neutral Citation No: [2002] EWCA Civ 952.

⁸⁸ The appeal of M against the decision by the Tribunal to grant leave to appeal, was dismissed by the Court of Appeal on the basis that the Tribunal did not err in law by deciding that the case would not have a real prospect of success because of negative findings of credibility at the adjudicator stage.

⁸⁹ **Gryk, Wesley** (25 July 2002) Note on the Court of Appeal (Civil Division) Judgment handed down on 5 July 2002 in the cases of: SSHD - and - Z, Case No: C/2001/2766; A - and - SSHD, Case No: C/2001/2520; M - and - SSHD, Case No: C/2001/2325, Neutral Citation No: [2002] EWCA Civ 952.

In the Administrative Court case of *Queen on the application of Dawkins v IAT*⁹⁰, it was considered whether Article 8 could be applied extra-territorially. The Court held in that case that 'It simply cannot be the law, in my judgment, that merely because the law of Jamaica has a criminal statute which criminalises homosexual behaviour, that mere fact cannot, of itself, be sufficient to require this country to grant immigration status to all practising homosexuals in Jamaica. On that basis, anybody who was a homosexual could come to this country and claim asylum'.

In the current climate, it seems unlikely that the UK courts will in practice go much further beyond the protection provided by the European Court to LGBT refugees and immigrants. For example, it seems unlikely that UK case law will qualify same-sex relationships as 'family life' (equal to unmarried heterosexual couples) for the purpose of Article 8 ECHR (see also the section on 'Unmarried partner immigration and family reunion'). Moreover, despite the Court of Appeal's judgement in the case of *ZA & M*,⁹¹ it seems unlikely that deportation of a same-sex partner - whilst the other partner remains in the UK - will any time soon be considered an unjustifiable violation of 'private life'. Even the European Court stated that this would only be the case in *exceptional* circumstances (see above under ECHR case law). Extra-territorial protection under Article 8 may be relatively strong in 'family life' cases, where protection may be required if it is not possible for family members to establish their family life elsewhere, but in 'private life' cases such as same-sex couples, protection remains limited. UK case law may acknowledge that there can be an interference with private life under Article 8 if the applicant has a same-sex relationship established in the UK, but the next question is whether the interference is disproportionate? The Home Office will always argue that the interference is proportionate as the foreign national can return home and enter as an unmarried partner under the immigration rules.

However, in some cases returning under the immigration rules may just not be an option. Barry O'Leary, an immigration lawyer at Wesley Gryk solicitors and member of UK Lesbian and Gay Immigration Group, mentioned one example where a Romanian national lost his asylum appeal but won the appeal on Article 8. He had a long-term relationship with a British partner but the Home Office held that returning him to Romania was not an unjustifiable interference with Article 8 as he could re-enter as an unmarried partner. However, in this particular case, the applicant would lose his passport for three years under Romanian law due to past actions and could therefore not return to the UK. The adjudicator agreed and stated it would be a disproportionate interference with Article 8. Barry O'Leary recommended that: 'Practitioners must always look to see if an unmarried partner application is actually possible. If it can be shown that it is not, you can win under Article 8'.

⁹⁰ *Queen on the application of Dawkins v IAT* neutral citation no [2003] EWHC373 Admin. Available in EIN database, <http://www.ein.org.uk>.

⁹¹ *ZA & M* [2002] EWCA Civ 952. Available in EIN database, <http://www.ein.org.uk>.

Unmarried partner immigration and family reunion

In almost all countries same-sex partners⁹² are not able to marry legally. Even in situations where same-sex partners are able to marry legally or have gone through a religious, cultural or other type of 'wedding' or commitment ceremony, these marriages or unions are not recognised as valid marriages in the UK.⁹³

The UK published a white paper on 30th of June proposing legislation on the introduction of partnership registration for same-sex couples, giving them more legal rights that are similar to married couples. It is unclear at this moment whether and how this will affect the interpretation of terms such as 'married partner' and 'family life' in the UK if the legislation comes through.

In addition, the UK also does not provide full legal recognition of the new gender of transsexual people and they are therefore not able to marry a partner of the sex opposite to their 'new' sex. In July 2002 the European Court decided that this situation in the UK breached the European Human Rights Convention⁹⁴ and on 10th April 2003 the House of Lords also decided that the Marriage Act 1973 was incompatible with the Human Rights Act as it did not allow transgender people to marry.⁹⁵ On 11 July 2003, the government published a draft Gender Recognition Bill, which will finally allow transsexual people to apply for legal recognition of their change of gender and therefore be able to marry someone of the opposite sex to their 'new' sex. However, the draft Bill requires transsexual people who are already married to dissolve their marriages before completing the legal recognition process, so that there are no legal same-sex marriages.⁹⁶

In view of this situation, the UK immigration rules for unmarried partners are likely to be relevant to LGBT refugees who have a (same-sex) partner settled in the UK, or to LGBT refugees themselves settled in the UK whom have a (same-sex) partner abroad. For the latter, the right to family reunion with a spouse for those with a refugee status (or another form of protection) does not apply to unmarried partners.⁹⁷ Possibly, same-sex partners of acknowledged refugees could be allowed under the rule of 'exceptionally allowing other members of the family to come to the UK if there are compelling, compassionate circumstances'.⁹⁸ However, this would require the recognition of a same-sex relationship as 'family' and this rule is also an 'exception' rather than a right. It is therefore more likely that the foreign same-sex partner of a LGBT refugee can only come to live in the UK under the immigration rules for unmarried partners.

For a very long time, there was no provision in the UK immigration rules to allow a foreign person to live in the UK with their same sex partner. Only in October 1997, the Unmarried Partners Concession was introduced allowing same-sex partners to live in the UK if one of them was settled here, no recourse to

⁹² In many countries transgender people, even those who have undergone gender re-assignment treatment, are not legally and/or socially acknowledged in the gender they identify with. Therefore, even if they have an opposite-sex partner, this is still viewed as a same-sex relationship.

⁹³ Legal marriages are for example possible in the Netherlands and Belgium, and other countries allow for partner registration. Moreover, same-sex partners may also have gone through a customary or religious ceremony that would have been acknowledged as a marriage by the UK if it had been heterosexual.

⁹⁴ *Goodwin v the UK*, App, 28957/95, 11 July 2001. Available in HUDOC, at <http://www.echr.coe.int>.

⁹⁵ *Bellinger (FC) (Appellant) v. Bellinger*, [2003] UKHL 21, at

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm>.

⁹⁶ **Press for Change** (11 July 2003) *Press release: Transsexual leader welcome draft Bill to allow legal change of gender* <http://www.pfc.org.uk/gr-bill/pressrel.pdf>

⁹⁷ **Home Office Asylum Policy Instructions** (undated), unmarried partners, available at <http://www.ind.homeoffice.gov.uk/default.asp?PagelD=2665>, visited 3 June 2003.

⁹⁸ **Home Office Asylum Policy Instructions** (undated), unmarried partners, available at <http://www.ind.homeoffice.gov.uk/default.asp?PagelD=2665>, visited 3 June 2003; **JCWI** (2002) *Immigration, Nationality & Refugee Law Handbook*, p. 225.

public funds was made and the relationship had subsisted for four years. In June 1999, this period was reduced to two years. In October 2000 the Concession was upgraded to the status of an Immigration Rule.⁹⁹

Although these unmarried partner rules were initially only for those couples for whom there was a legal impediment to marriage, this was changed by statutory instrument early 2003,¹⁰⁰ effectively creating equality for heterosexual couples who do not wish to marry. This change is now incorporated in the Nationality, Immigration and Asylum Act 2002.¹⁰¹ The probationary period for married couples has also been increased from one to two years, creating further 'equality' between the rules for married and unmarried partners.¹⁰²

These changes in UK legislation are relevant in view of the developments on the EU level. The draft 'Dublin II' regulation on the determination of the state responsible for processing an asylum application was published on 25 February 2003.¹⁰³ The definition of family in this draft uses the formula already found in the recent EU Directives on Temporary Protection (2001/55) and Reception Conditions (2003/9): an unmarried partner 'in a stable relationship' is only recognised where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its laws relating to aliens.¹⁰⁴

⁹⁹ Information obtained from the website of the **Lesbian and Gay Immigration Group UK** at <http://www.stonewall-immigration.org.uk>.

¹⁰⁰ Statement of Changes of Immigration Rules HC 538, effective 1 April 2003.

¹⁰¹ Full text available at: <http://www.ind.homeoffice.gov.uk/default.asp?PageId=3784>.

¹⁰² **Lesbian and Gay Immigration Group UK** (2003) *Newsletter Spring 2003*, <http://www.stonewall-immigration.org.uk>.

¹⁰³ COM (2001) 447.

¹⁰⁴ See also **Bell, Mark; Krickler, Kurt & Swatschek, Sheila** (June 2003) 'Asylum Regulation Published' in *ILGA Europe Newsletter*, Vol. 3, Issue 2, p. 8.

Key issues

Credibility and ‘coming out’

As in all asylum applications, before the assessment of whether someone fits within the refugee definition or should be receiving protection under the Human Rights Act, an assessment is made of the credibility of the applicant. If the facts or reasons for fleeing the applicant states are not believed, he or she is less likely to be given protection.

One factor in the assessment of credibility is the timing of the statements that are made. Decision makers in asylum cases often do not appreciate it when an applicant discloses new facts or reasons for fleeing late in the procedure, particularly when new statements are made after an initial refusal or a dismissed appeal. As O’Leary states (2002), ‘A delay in claiming can have a severely negative impact on the credibility of the asylum seeker in the eyes of the Home Office, and is commonly used as a reason for refusal’.¹⁰⁵

However, this is a difficult point for many LGBT asylum applicants. Many LGBT asylum seekers find it extremely difficult to declare their sexual orientation (or ‘come out’) to the Home Office interviewer, their legal representative and / or in the presence of an interpreter. The Safra Project found, for example, that many Muslim LBT women found it particularly difficult to ‘come out’ if the legal representative or interpreter were Muslim themselves or from a Muslim cultural background.¹⁰⁶ This is likely also to be true for applicants from other ethnic, cultural or religious backgrounds. The inability of some LGBT asylum seekers to speak about their sexual orientation, or about what has happened to them, may also be related to feelings of shame, guilt (particularly in relation to religion), self-hatred, fear, trauma and other mental health issues. This is particularly the case if they were raped or otherwise tortured.¹⁰⁷

Moreover, some LGBT asylum seekers do not immediately realise that they can ask for asylum or human rights protection against on the ground of sexual orientation or gender identity. One solicitor who is also active with the Lesbian & Gay Immigration Group (formerly Stonewall Immigration Group), stated that he found that ‘it often takes some time before lesbian and gay people become aware of their rights’.¹⁰⁸ This fear of ‘coming out’, and/or the lack of awareness of their rights, sometimes leads to LGBT asylum seekers not raising the true reasons for fleeing their country.

In addition, decision makers may not believe that an asylum seeker is really lesbian or gay due to a lack of awareness, heterosexist attitudes or homophobia (see also the relevant section below). For example, they may perceive the fact that someone is or was married; is or was otherwise engaged in a heterosexual relationship or has children as indications of heterosexuality. These perceptions often stereotype LGBT people, ignore bisexuality and demonstrate a lack of knowledge of the realities of LGBT people’s lives. For

¹⁰⁵ O’Leary, Barry (September / October 2002) ‘Protection secured?’, in *InExile issue 23*.

¹⁰⁶ Safra Project (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.8. Available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹⁰⁷ Safra Project (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.9. Available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹⁰⁸ O’Leary, Barry (September / October 2002) ‘Protection secured?’ in *InExile issue 23*.

example, the Safra Project pointed out that many Muslim women marry at a young age and have children, sometimes before they come out to themselves or to others as being lesbian, bisexual or transgender.¹⁰⁹

The case of Arash Khajehnoori v SSHD

The Adjudicator in *Arash Khajehnoori v SSHD*¹¹⁰ considered that: 'The Appellant told me that in interview he had a woman present and so it was impossible for him to relate all of the facts including in particular his homosexuality. Indeed the Appellant told me that until he felt more secure he could not confess his homosexuality to anybody including members of his family. I was a little troubled by this since the Appellant left Iran in order to find a "safe haven" and one might have thought that he was aware that the attitude to homosexuality in the United Kingdom was more relaxed than in his own country. Nevertheless applying the lower standard I accept what the Appellant had to say about why it was that he did not mention his homosexuality until much later and as I have already said, the fact of his homosexuality was not an issue since the Respondents accepted at the outset that once the Appellant gave evidence to that effect it would not be contested'.

In an attempt to 'prove' that someone is really gay or lesbian, sometimes recourse is taken to medical reports or reports from mental health providers. However, the use of medical reports in providing 'evidence' of homosexuality, re-affirms the idea that homosexuality is somehow an illness or mental disturbance. Doctors or counsellors cannot 'declare' or 'prove' that someone is really lesbian, gay or bisexual, although, arguably, in some cases these reports may be useful in proving that someone is transgender.¹¹¹ In the case of *Krasniqi v SSHD*¹¹², the adjudicator's disbelief in the appellant's homosexuality because the medical report about his mental health status makes *no* mention of it, was considered valid and justified by the Tribunal.

Availability of country information

Facts

- Same-sex sexual activities for women are explicitly illegal in more than 40 states around the world.
- Same-sex sexual activities for men are explicitly illegal in more than 80 states around the world.
- LGB people are officially subject to the death penalty in nine countries in the world, in three of which recent executions have taken place.

Source: International Gay and Lesbian Association [World Legal Survey](#) (visited 3 June 2003).¹¹³

¹⁰⁹ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.5. Available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹¹⁰ *Arash Khajehnoori v SSHD*, 5 September 2000, CC-15492-00. Available from EIN database, <http://www.ein.org.uk>.

¹¹¹ See also, **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.4. Available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹¹² *Krasniqi v SSHD*, 19 June 2001, 01TH02140, CC-22108-00. Available in EIN database, <http://www.ein.org.uk>.

¹¹³ Available at http://www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm.

There is a lack of specific, detailed country information on the persecution of LGBT people. This general lack of information as well as the absence of an infrastructure for sharing existing information, complicates asylum claims when legal representatives cannot find sufficient objective country information to support their client's claim. Many national as well as international human rights groups still considered the subject taboo or at least 'difficult' or 'problematic'. Some groups, particularly religious human rights groups, do not consider discrimination against LGBT people a human rights issue. Groups may state that gay rights are a 'western concept' or, if they are more sympathetic, they may consider the persecution of LGBT people as less of a priority. Human rights groups also risk losing support, credibility, esteem and funding, or they may even be persecuted themselves, if they take on LGBT rights issues. This 'invisibility' of LGBT people in human rights reports, is doubled for LGBT women, by the general 'invisibility' of problems facing women.¹¹⁴

However, some international human rights groups are increasingly, albeit slowly, taking the issue on board. Examples of dedicated human rights reports providing country information on sexual orientation and gender identity issues are:

Amnesty International (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity.*

<http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347>

Human Rights Watch (HRW) & the International Gay and Lesbian Human Rights Commission (ILGHRC) (14 May 2003) *More than a name. State-sponsored homophobia and its consequences in Southern Africa.*

<http://hrw.org/reports/2003/safrica>.

ILGHRC also runs an Asylum Project that is currently (2003) under revision. This project sells country information packs on LGBT issues, consisting largely of materials obtained from the Internet.

<http://www.ilghrc.org>

The **International Lesbian and Gay Association (ILGA)** website includes a World Legal Survey of LGBT rights by country on their website. However, depending on the country, the information is often limited and/or dating from between 1997-2000.

http://www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm

The **Safra Project** is planning a research project in 2003/2004 on the situation for LGBT people in countries with a Muslim majority population.

<http://www.safraproject.org>

For more links and contacts for country information, see the '[Resources](#)' section.

White lists

¹¹⁴ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.7

http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf

Under the Nationality, Immigration and Asylum Act 2002¹¹⁵ and its associated statutory instruments, guidelines and instructions,¹¹⁶ some countries may be presumed to be safe and placed on a so-called 'White List' (section 115(7) of the Act). Asylum applications from nationals of these countries will be certified as 'clearly unfounded', which has severe consequences for the assessment of their case and their appeal rights.

The assessment of the safety of these countries does not appear to take the specific situation of LGBT people into account. The list includes the ten EU accession countries. Although the enlargement of the European Union, has proven to be an opportunity for the LGBT movement to encourage prospective member states to enhance the rights of LGBT people in their country, some accession states still contain discriminatory provisions in their penal codes. Some of these countries, such as Romania, have made changes only reluctantly and it remains to be seen how and if change is taking place in practice. Another example of a country included on this list is Jamaica, despite the evidence that severe human rights violations of LGBT people continue to take place and appeals from gay male refugees have recently been won on appeal.¹¹⁷

Romania

The EU had made repeal of the criminalisation of homosexuality a pre-condition of Romania's membership of the EU. The process of this repeal started in 1994 and was finally completed on 14 January 2002. Because of strong resistance against this repeal, the Romanian government had to bypass the Romanian Parliament and issue an Emergency Ordinance (no. 89/21) to complete it. The Commission of the European Communities and the US Department of State have both clearly indicated that the legal development 'appears to have more to do with appeasing the EU and ECHR than with a heartfelt desire to create a liberal and tolerant Romanian society'.¹¹⁸ In fact, the Chairman of the Legal Committee responsible for the legal reforms was quoted saying: 'I have always been against homosexuals, but at present, the political circumstances come first, compared to my personal beliefs'.¹¹⁹

In Romania, societal attitudes towards LGBT people continue to be very negative, whilst the taboo and indifference surrounding homosexuality means that most attacks on LGBT people are not reported.¹²⁰ Police attitudes in Romania towards LGBT people are also extremely negative. There are many reports of police chasing, beating up and raping gay men and lesbians as well as torturing and ill-treating them in custody.¹²¹ The Canadian Immigration and Refugee Board also reported cases of unofficial police ill-treatment of LGBT people. Gay men were summoned to the police station and questioned on their private life, verbally abused,

¹¹⁵ Available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=3784>

¹¹⁶ Available at <http://www.ind.homeoffice.gov.uk/default.asp?pageid=19>

¹¹⁷ *W v. SSHD*, 20 September 2002 (unreported); *M v. SSHD*, 18 March 2002, HX/08532/2002 (unreported).

¹¹⁸ **US Department of State** (March 2002) *Country Report: Romania*, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8327.htm>; **Commission of the European Communities** (October 2002) *Regular Report 2002*, available at http://europa.eu.int/comm/enlargement/report2002/ro_en.pdf.

¹¹⁹ **Mediafax** (28 June 2001) *Romanian Chamber of Deputies votes for repeal of Article 200*, available at <http://www.mediafax.ro/eng/index.shtml>.

¹²⁰ **Amnesty International** (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity*, 'Introduction – discrimination and impunity'. Available at

<http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347>; **The Guardian** (3 October 2001) 'Homophobic hysteria greets US ambassador', available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,562549,00.html>.

¹²¹ **Human Rights Watch & the International Gay and Lesbian Human Rights Commission** (January 1998) *Public Scandals: Sexual Orientation and Criminal Law in Romania*, Ch. 7, <http://www.hrw.org/reports97/romania/>.

humiliated and threatened with arrest. These cases illustrated that 'the non official acting of police officers, [was] based on the anti gay personal feelings, and the past anti gay policy of the police as an institution'.¹²² De-criminalisation of homosexuality might have stopped official prosecution, but that does not automatically eliminate persecution and human rights violations.

Jamaica

In Jamaica, homosexual intercourse between men is prohibited by Article 76 of the Offences Against Persons Act and punishable by imprisonment with hard labour for up to 10 years.¹²³ The retention of this law and its public defence by the government 'lends support to a climate of prejudice in which discrimination, physical attacks and other abuses against people who are believed to be gay are likely to occur' (Amnesty International 2001).¹²⁴ The UK Home Office's Country Information Policy Unit report of March 2003 states that 'In addition to the above legislation, homosexuals in Jamaica also face considerable societal prejudice, discrimination, and homophobic violence',¹²⁵ and Amnesty International reports that the gay and lesbian community face extreme prejudice and ill-treatment.¹²⁶

Lack of awareness and prejudices in the asylum procedure

'Sexual orientation is a relatively recent notion in human rights law and practice and one of the controversial ones in politics. Prejudices, negative stereotypes and discrimination are deeply imbedded in our value system and patterns of behaviour. For many public officials and opinion-makers the expression of homophobic prejudice remains both legitimate and respectable - in a manner that would be unacceptable for any other minority'.

Human Rights Learning Centre (undated) *Study Guide on Sexual Orientation and Human Rights*, available at <http://www.hrea.org/learn/guides/lgbt.html> (visited 10 March 2003).

Some examples of lack of awareness and lack of understanding of the realities of LGBT people's lives, have already been mentioned in the section 'Credibility and "coming out"'. Other examples include:

- use of inappropriate language, most notably using the terms 'homosexuals' and 'homosexual practices';

¹²² Immigration and Refugee Board (IRB)-Canada (11 June 2001) *Romania-homosexuals*, available at <http://www.irb.gc.ca>.

¹²³ For details of the legislation, see footnote 45 in: Amnesty International (10 April 2001), *Jamaica: Killings and Violence by the Police: How many more victims?*, p. 40, available at <http://web.amnesty.org/library/Index/ENGAMR380032001?open&of=ENG-347>.

¹²⁴ Amnesty International (10 April 2001), *Jamaica: Killings and Violence by the Police: How many more victims?*, p. 41, available at <http://web.amnesty.org/library/Index/ENGAMR380032001?open&of=ENG-347>.

¹²⁵ Home Office, IND, CIPU (March 2003) *Jamaica Assessment*, s. 6.41, available at <http://www.ind.homeoffice.gov.uk/default.asp?PagelD=3454>.

¹²⁶ Amnesty International (10 April 2001), *Jamaica: Killings and Violence by the Police: How many more victims?*, p. 40, available at <http://web.amnesty.org/library/Index/ENGAMR380032001?open&of=ENG-347>; Amnesty International (22 June 2001) *Crimes of hate, conspiracy of silence, Torture and ill-treatment based on sexual identity*, 'Ch 1 – The Caribbean: a colonial legacy of cruelty', available at <http://web.amnesty.org/library/Index/ENGA400162001?open&of=ENG-347>.

- mixing up ideas of 'effeminate' or 'camp' men and transgender and transvestite issues;
- associating homosexuality with paedophilia; and
- confirming other stereotypes through the legal argumentations used, such as those concentrating on LGBT people's ability to have sex.

Lord Justice Evans in *Sahm Sunder Jain v SSHD* [2000] (CA)[2000] INLR

'For my part I am anxious to emphasise that the applicant makes this application as a homosexual man who seeks, or would seek, an adult male partner and whose homosexual practices would be conducted in private with that partner. I assume this in his favour. If there was any suggestion that section 377 discriminates in India against homosexual men who engage in homosexual practices with minors or in public then, in my view, entirely different considerations would arise.'

Although it is becoming more and more accepted that LGB people do have human rights, the idea that homosexuality is in essence 'wrong' or immoral, still pervades the asylum procedure. When arguments are made for protection, homosexuality is still largely seen as something that 'should be permitted',¹²⁷ at least to some extent, rather than as an equally valid form of sexual orientation.

An example of an argument confirming stereotypes and demonstrating a lack of awareness is the argument that LGB people would not suffer any persecution if they would just not be openly gay in their country. It is often held that as long as LGB people conduct their 'homosexual practices' in private, they will be safe. (The so-called 'stay in the closet' argument). Another argument often made is that there are known gay 'cruising areas' in the country of origin and much of the case law concentrates on the fact that gay men are able to go out to gay nightclubs or meet other gay men in parks. This type of argumentation reduces the personal identity of LGB people to being able to 'have sex with same-sex partners' and ignores the fact that many may want to have a normal life and be able to live with their partner and not have to pretend to be heterosexual in all other areas of their life. The argument also ignores other relevant factors such as gender, social class, wealth and location.

Home Office, Immigration and Nationality Directorate, Country Information and Policy Unit Iran Assessment

'Although homosexuality is never spoken about and thus a hidden issue, in practice it is not difficult to encounter homosexuals in Iran. There are special parks in Tehran, known as homosexual meeting places. There are also a large number of transvestites walking around in North Tehran. Furthermore, sex changes are permitted in Iran and operations are frequently and openly carried out. A different sexual orientation may, however, create problems. Still, homosexuality is practised every day, and as long as this happens behind closed doors within your own four walls, and as long as people do not intend to proselytise 'transvestitism' or homosexuality, they will most likely remain unharmed.'

(October 2002 s. 5.151 Available at <http://www.ind.homeoffice.gov.uk/default.asp?PagelD=3441>).

¹²⁷ See for example, the concurring opinion of Lord Justice Evans in *Sahm Sunder Jain v SSHD* [2000] (CA)[2000] INLR. Available from EIN database, <http://www.ein.org.uk>.

Queen on the application of Dawkins v IAT¹²⁸

In paragraph 26, the Court considered that 'The adjudicator had stated that she accepted that the applicant was homosexual. She accepted that he had undertaken homosexual activity since he was 19 and did so for three years prior to leaving Jamaica at the age of 22. She found that he was able to visit homosexual nightclubs regularly, about three times a week, in order to meet other homosexuals, and that he was able to engage in sexual activity by returning with them to guest houses for that purpose.'

Lack of awareness and prejudices amongst service providers and within refugee communities

Unfortunately prejudices are not limited to the Home Office or the Immigration Appellate Authority. Some refugees who have 'come out' to their legal representatives, interpreters or other social service providers, have experienced homophobic, heterosexist or gender insensitive attitudes.¹²⁹ In addition to the social, legal and (mental) health problems refugees in general are dealing with, many LGBT refugees experience rejection by family and friends; intensified pressure to get married, sometimes leading to forced marriage; domestic violence; homelessness; losing custody of children and/or abduction of children. However, many LGBT refugees and asylum seekers find it difficult to access appropriate social services to address the social and legal problems they face. Because of the lack of awareness and research in this area, as well as limited visibility of LGBT refugees and particularly women, many service providers are not aware of the issues. Homophobia, racism, xenophobia or 'anti-refugee-ism' as well as a more general culturally insensitive, gender biased and heterosexist attitude, are likely to be experienced in combination.¹³⁰

Although many service providers have started providing specific services, for either refugees and asylum seekers or ethnic minorities, or for LGBT people (sometimes specialised for women). This is a somewhat compartmentalised approach that often overlooks the needs of LGBT refugees and asylum seekers. The Safra Project stated in relation to Muslim LBT women in the UK that the discrimination and exclusion they experience is the result of multiple interrelated factors and therefore needs a comprehensively inclusive approach.¹³¹ This is also true for LGBT refugees. A truly inclusive approach ensures that cultural sensitivity does not ignore diversity, including sexual diversity within refugee and ethnic minority communities. Service providers too often assume that refugees are not LGBT or that LGBT people are not refugees. One-dimensional cultural sensitivity can result in service providers not raising LGBT issues in relation to refugees because they fear negative reactions or accusations of racism and cultural insensitivity.

¹²⁸ *Queen on the application of Dawkins v IAT* neutral citation no [2003] EWHC373 Admin (available in EIN database, at <http://www.ein.org.uk>).

¹²⁹ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹³⁰ See for example, **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

¹³¹ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

'Sometimes I look at life and feel it is not worth living. It's not like I can call my Mum and tell her what I am going through. I have no friends that I can talk to. Even if you make friends you can't tell them you are lesbian. And it's people's opinions that really hurt.'

From *InExile* (2002) 'Ruth's Story', issue 23, September/October 2002.

The isolation many refugees and LGBT people experience, is experienced 'doubly' by LGBT refugees in mainstream services or social circles. In addition, they do not necessarily 'fit in' with existing ethnic, cultural, religious or refugee communities, as often it is the pressures and prejudices of these communities they have sought to flee. When placed within these communities, they may be forced to continue a life of lies and exclusion. The general drive by the statutory and voluntary sector to consult with 'representatives' of refugee or black and ethnic minority communities, therefore may not be a method that secures the representation and inclusion of LGBT perspectives, and alternative models of ensuring the participation of a wider range of refugee perspectives may be required.

Sandy Buchan, Chief Executive of Refugee Action, spoke out in *inExile* (2002) about the importance of ensuring that refugee services do not exclude gay refugees.¹³² He said: 'It's important to show that it is possible to be relaxed about sexual diversity. I hope that will help to make the refugee sector more welcoming to lesbian and gay staff and therefore – and this is the bottom line – more welcoming and accessible to lesbian and gay refugees. (...) If gay staff are comfortable to be out, then lesbian and gay refugees will be happier to express their needs – that's the aim, but there is quite a long way to go. The refugee sector employs many people who for cultural or religious reasons think that homosexuality is wrong. The challenge is to create a culture where people can be tolerant of each other and be themselves.'

Suhraiya Jivraj of the Safra Project also mentioned that one prerequisite for service providers to be more inclusive of the multiple identities of their clients, is for their (LGB) employees to be legally protected against discrimination. She pointed out that although the Employment Equality Regulations,¹³³ due to come into force on 1 December 2003, will outlaw harassment, abuse, victimisation and other forms of discrimination affecting LGB people, the government introduced a totally new exemption in the final draft. This exemption will allow religious employers to discriminate against, and even dismiss, LGB employees. The new exemption states that when employment is 'for the purposes of an organised religion', then employers can discriminate on the ground of sexual orientation in order to 'comply with the doctrines of the religion' or to 'avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'. The effect of the regulation is therefore severely watered down by the exemption and this legislation is likely to further marginalise LGB people as employees and as a consequence also as clients. This is particularly relevant in the asylum and refugee sector, where often homophobia is justified with religious (or cultural-religious) arguments.¹³⁴

On the other hand, many LGBT refugees also do not 'fit into' mainstream LGBT social life. Much of the 'gay scene' continues to be white-dominated and some parts of the 'LGB community' may be racist, islamophobic or 'anti-refugee'. Moreover, many refugees do not have the financial funds to take part in an often expensive LGB scene. Fortunately diversity in LGBT social groups and alternatives to the 'gay scene'

¹³² Buchan, Sandy (September/October 2002) 'A question of human rights' in *InExile* issue 23.

¹³³ Implementing EU Council Directive 2000/78/EC.

¹³⁴ Suhraiya Jivraj (11 July 2003) Interview by author.

are increasing. However, the isolation of LGBT refugees is often worsened by dispersal to cluster areas defined by ethnic group and language, where it is unlikely that they will find suitable places to socialise.

Recent research by the [Safra Project](#) concluded that there is a need for training, education and awareness raising amongst all those working with refugees and people seeking asylum to increase their understanding of the issues that LGBT asylum seekers and refugees face, and also stressed the need for more information sharing between legal practitioners and service providers on these issues.¹³⁵

¹³⁵ **Safra Project** (January 2003) *Report of Initial Findings. Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services*, s. 8.12-8.13, available at http://www.safraproject.org/Reports/Safra_Project-Initial_findings-2002.pdf.

Statistics

The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection, and the data it keeps on gender does not reflect transgender issues. Most social and legal service providers also do not collect this information on their clients. Therefore, disaggregating LGBT refugees from data collected by service providers and others is very difficult. The lack of research on this issue also means that no statistical conclusions about the size and profile of the LGBT refugee and asylum seeking population can be drawn.

However, some organisations specifically working on the issues may be able to give estimates based on their client caseload. For contact details, please see the sections '[Contacts and links](#)' and '[Projects and initiatives](#)'.

Resources

This section contains references for useful resources on this issue. If you would like to suggest a resource to be included in the list, please contact esme.peach@kcl.ac.uk.

Organisational websites are listed in the [contacts and links](#) section.

Publications

Amnesty International (10 April 2001), *Jamaica: Killings and Violence by the Police: How many more victims?*, p. 40, available at <http://web.amnesty.org/library/Index/ENGAMR380032001?open&of=ENG-347>.

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Contributors

Barry O'Leary, Immigration lawyer at Wesley Gryk solicitors and member of UK Lesbian and Gay Immigration Group (July-August 2003) *email contact with author*.

Suhraiya Jivraj, Safra Project co-ordinator (11 July 2003) *Interview by author*.

Projects and initiatives

This section provides basic information relating to a number of current or recently completed projects and initiatives addressing the issue of LGBT refugees and asylum seekers and related topics. This list is intended to be indicative only. If you would like your project to feature in the list and ICAR's projects database, then please contact us at esme.peach@kcl.ac.uk.

Asylum Project

International Gay and Lesbian Human Rights Commission (IGLHRC)

The Asylum Project sells country information packs, consisting largely of materials obtained from the Internet, and is currently (2003) under revision. IGLHRC is a USA based international organisation campaigning on LGBT human rights issues worldwide. The IGLHRC website contains a country information section, with mostly IGLHR publications and 'action alerts'.

<http://www.iglhrc.org>

Country Information Research Project (CIRP)

The Safra Project

Starting in 2003/2004, the project will result in the publication of ten brief reports on the legal and human rights situation for LGBT (including men) people in countries with a significant Muslim population specifically for the use in asylum cases.

P.O. Box 35929

London

N17 OWB

Email info@safraproject.org

<http://www.safraproject.org>

Refugee Women's Resource Project (RWRP)

Asylum Aid

This was set up specifically for female refugees and asylum seekers, providing free legal representation and advice. RWRP is very experienced in dealing with difficult and sensitive issues such as rape, sexual violence, forced sterilisation, genital mutilation, domestic violence and HIV/AIDS. RWRP also does outreach work outside of London.

Asylum Aid

RWRP

28 Commercial Street

London

E1 6LS

Email rwrp@asylumaid.org.uk

<http://www.asylumaid.org.uk/RWRP/RWRP.htm>

Safra Project

The Safra Project is a resource project on issues relating to lesbian, bisexual and transgender women who identify as Muslim culturally and/or religiously, including refugee women. The Safra Project does not (yet) have an office or any paid staff. Their website contains useful links for Muslim LBT women and service providers, including information on issues around gender, sexuality and Islam. The Safra Project also

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the INFORMATION CENTRE *about* **asylum and refugees** IN THE UK

published a **Report of Initial Findings** identifying the difficulties experienced by Muslim LBT women in accessing social and legal services. The report covers issues such as mental health, domestic violence, housing and forced marriage and includes a chapter on asylum (chapter 8). The report is available on the website.

P.O. Box 35929

London

N17 0WB

Email info@safraproject.org

<http://www.safraproject.org>

Contacts and links

This section aims to provide contact details for organisations and individuals whose work relates to LGBT refugee and asylum seeker issues. This list is by no means comprehensive, and is continually developing, so if you would like to add details of your organisation to these pages then please email esme.peach@kcl.ac.uk.

Links to publications are incorporated in the [resources](#) section.

Amnesty International LGBT Network

<http://www.ai-lgbt.org/>

Amnesty International UK - LGBT Network

<http://www.aigbt.co.uk/index.htm>

Amnesty International - Thematic reports on sexual orientation

<http://web.amnesty.org/library/eng-347/index>

Asylum Research (USA)

A national (USA based) organisation monitoring and documenting issues relating to gay refugees and the problems they face seeking political asylum in the USA.

<http://www.asylumresearch.org/pages/about/about.html>

Behind the Mask

A website dedicated to providing country information on LGBT issues in African countries.

<http://www.mask.org.za/sections/africapercountry>

Datalounge

Website with LGBT relevant news articles.

<http://www.datalounge.com/datalounge/issues/index.html?storyline=280>

Equality Network

A Scottish national campaign for LGBT equality.

<http://www.equality-network.org/index.shtml>

Gender Trust

The Gender Trust is based in the UK and offers information and support to transsexual, [gender dysphoric](#) and transgender people.

<http://www.gendertrust.org.uk/>

International Lesbian and Gay Association (ILGA)

International organisation working on LGBT rights issues.

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<http://www.ilga.org>

Their website also contains a **World Legal Survey** of LGBT rights by country. Depending on the country, the information can be limited and most information dates from 1997-2000.

http://www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm

International Lesbian and Gay Association Europe (ILGA-Europe)

The European section of ILGA working on LGBT rights issues on a European level, including in relation to asylum and immigration.

<http://www.ilga-europe.org/>

International Gay and Lesbian Human Rights Commission (IGLHRC)

USA based international organisation campaigning on LGBT human rights issues worldwide. The IGLHRC website contains a country information section, with mostly IGLHR publications and 'action alerts'.

<http://www.iglhrc.org>

The organisation also runs an **Asylum Project** that is currently (2003) under revision. The Asylum Project sells country information packs, consisting largely of materials obtained from the Internet.

Lambda Legal USA

National USA LGBT civil rights organisation. Website includes a resource guide on asylum and immigration issues in the USA.

<http://www.lambdalegal.org>

Lesbian and Gay Immigration Group UK (formerly Stonewall Immigration Group)

A voluntary organisation based in the UK, set up to campaign for immigration rights for same-sex partners and increasingly also working on issues relating to LGBT asylum seekers. The group meets every third Saturday of the month (except August) at 2pm at the University of London Union, Malet Street, London, WC1. Their website contains useful information on both immigration and asylum issues and lists solicitors in the UK that are likely to be gay friendly. The group does not (yet) have any staff or an office.

<http://www.uklgig.org.uk>

Press for Change

UK based group working on rights issues relating to transsexual and transgender people.

<http://www.pfc.org.uk/index.htm>

Refugee Women's Legal Group (RWLG)

The RWLG is a UK based informal group of lawyers, practitioners, academics and others working with refugee and asylum seeking women. Central among its aims is the development of a gendered perspective on refugee law and policy. The group published gender guidelines for the determination of asylum claims in the UK in 1998.

<http://www.rwlg.org.uk>

Refugee Women's Resource Project (RWRP)

Set up by Asylum Aid specifically for female refugees and asylum seekers, providing free legal representation and advice. RWRP is very experienced in dealing with difficult and sensitive issues such as rape, sexual violence, forced sterilisation, genital mutilation, domestic violence and HIV/AIDS. RWRP also does outreach work outside of London.

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London
E1 6LS
Email rwrp@asylumaid.org.uk

<http://www.asylumaid.org.uk/RWRP/RWRP.htm>

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<http://www.safraproject.org>

Wesley Gryk Solicitors

Wesley Gryk Solicitors is a law firm in London dealing exclusively with British immigration, asylum and nationality law. They are specialised in cases involving lesbians and gay men seeking asylum, as well as casework for those seeking to remain in the United Kingdom on the basis of long-term, committed relationships with British-based partners. They are also experienced in immigration and asylum casework for people affected by HIV/AIDS and women who are victims of domestic violence. They do private client work as well as publicly funded (free) work for those who are eligible.

Wesley Gryk Solicitors
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