



**LGBT CLAIMANTS DENIED REFUGEE STATUS
DUE TO MULTI-LAYER MARGINALISATION**
Allan Briddock abr@onepumpcourt.co.uk

HJ (Iran) v Secretary of State for the Home Department
(Rev 1) [2010] UKSC 31 (07 July 2010)

In 2010 the Supreme Court found that gay men (and by analogy all LGBT people) did not have to conceal their sexuality (be 'discreet') in order to avoid persecution. The Court found:

what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them' – § 78

The new 'test'

The Supreme Court set out a 4-stage test for decision makers at § 82:

1. Is the person LGBT?
2. If the person lived 'openly', would they face persecution?
3. Would they live openly in country of origin?

The new 'test'

4. If not, why not? If would conceal '*simply because that was how he himself would wish to live, or because of social pressures*' then not a refugee.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution.

The return of 'discretion' and further marginalisation

- The 4th stage of the test has since been misinterpreted
- This part of the test is often used to refuse refugee status incorrectly
- Affects already marginalised claimants as comparison made how the person lives in the UK to form a view of why they would conceal in country of origin
- Rarely consideration given as to why they conceal in the UK

SW (lesbians - HJ and HT applied)

Jamaica

(3) Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear.

LH and IP (gay men: risk) Sri Lanka

The present appellants maintained a very low profile in terms of their sexuality in the UK. Only a very few close friends are aware. In Sri Lanka they would also choose to live discreetly because that is what they prefer and due to social pressure, such as not wishing to distress their parents or embarrass their friends - § 87

OO (Gay Men) Algeria (CG) [2016]

Where a gay man remains living with his family to whom he has disclosed his sexual orientation in circumstances where they are prepared to tolerate that, his decision to live discreetly and to conceal his homosexuality outside the family home is not taken to avoid persecution but to avoid shame or disrespect being brought upon his family. ...

OO (Gay Men) Algeria (CG) [2016]

That means that he has chosen to live discreetly, not to avoid persecution but for reasons that do not give rise to a right to international protection.

OO (Gay Men) Algeria (CG) [2016]

Quite apart from that, an Algerian man who has a settled preference for same sex relationships may well continue to entertain doubts as to his sexuality and not to regard himself as a gay man, in any event.

OO (Gay Men) Algeria (CG) [2016]

Because there is general adherence to strict Islamic doctrine, which includes a similar intolerance to extra-marital sexual relations, young unmarried men do not have access to women and so may have resort to same-sex liaisons. This is not seen as homosexual conduct but pragmatism in achieving sexual gratification. Indeed, there is some evidence that where one of the same sex partners is perceived to be "dominant" he will be admired as virile and masculine - § 174

Another dose of marginalisation

Determination of a Uganda lesbian

All this evidence indicates that the Appellant has chosen to live a very private and discreet life ...in the UK. She has done so though she could have lived more openly and even though she could have revealed her feelings to friends...This was her choice about the way she wanted to live in the UK. If she chose to live in such a way in an open society where she is not at risk, she would live the same way in Uganda and I find she would live discreetly there.

•

Ugandan lesbian

The fact that she chooses to live privately and discreetly in the UK where she is not at risk leads me to find that not only would she live the same way in Uganda but her reasons for doing so relate to her personality rather than to any real fear of her father or the authorities. I find that her way of life would be same even if Uganda became a more tolerant society towards the LGBT community.

Multi-layer marginalisation

- She is gay
- She is a woman
- She is a a person of colour
- Without status in the UK and therefore no access to job / benefits;
- She lived by necessity within the Ugandan community and was afraid to reveal her sexuality;
- She was refused refugee status because she was marginalised

Jamaican Gay man

- Brought to the UK as a child by his mother
- Mother suspected he is gay and would insult him for not being 'manly' enough. Aged 15 would buy him condoms to have sex with girls.
- Threw him out of home aged 16
- Lived with foster parents.

Multi-Layer Marginalisation

- He is gay
- He is a person of colour
- He had no legal status
- His mother rejected him for not conforming to her idea of masculinity
- He was in foster care
- He had no way of looking after himself and later had to fend for himself as a very young man

He is just a private person

“His delay in claiming asylum and raising the issue of his sexuality very much ties in with the evidence before me pointing to the Appellant being an extremely private person loathed to discuss and or publicise his private affairs and reticent about disclosing his sexuality”. [§ 24]

He is not out and proud

“I find nothing in the evidence before me to point to his involvement with the LGBT community in the UK and or to show his having made friends within that community and to show him in any way publicly identifying himself as a gay man”.

“The evidence demonstrated the Appellant has himself chosen to live a discrete gay life here and conduct his affair with discretion and privacy. I find that this would be his position in Jamaica”.

Pakistani gay man

- Was married in Pakistan
- Only 'came out' when in the UK in his 30s
- Struggled with his sexuality and suffered from depression and was an alcoholic

Multi-layer marginalisation

- He is gay
- He is a person of colour
- He was rejected by his family
- He has no legal status
- He suffers from depression
- He is an alcoholic

And so the judge concludes....

“My conclusion for all this has to be that A is a naturally reserved person. He is not needlessly open about his sexuality and will only reveal it in place and with people within whom he feels at home and supported, such as in night clubs, grounds or on one occasion London Pride”

Refused asylum because he was marginalised

Although accepting he had sex with men, the Judge found he is not gay as he only had sex with men:

- Because of his depression; or
- Because he is an alcoholic; or
- Because he is lonely; and
- He 'repented'.

If you want to know more...

- *Refugee Status Claims Based on Sexual Orientation and Gender Identity* (International Commission of Jurists)
- *THE RECOGNITION OF REFUGEES BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN THE UK: AN OVERVIEW OF LAW AND PROCEDURE* (Birkbeck law review)
- *Back in the closet* (Louise Hooper)
- *Still Falling Short* (UKLGIG)
- *APPLYING HJ (IRAN) AND HT (CAMEROON) TO ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION* (UKLGIG)



ONE PUMP COURT