

UK Lesbian & Gay
Immigration Group



**APPLYING HJ (IRAN) AND HT (CAMEROON)
TO ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION**

CONTENTS

OVERVIEW	3
INTRODUCTION TO THE JUDGMENT	4
QUESTION 1	5
QUESTION 2	7
QUESTION 3	9
CHOICE OF VOCABULARY: 'DISCRETION' OR 'CONCEALMENT' / 'DECEIT'	12
QUESTION 4	14
RECOMMENDATIONS	17
ANNEX: PARAGRAPH 82 OF <i>HJ (IRAN)</i>	18

OVERVIEW

1. *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31 is the lead case in the UK about claims for asylum based on sexual orientation. In this case, the Supreme Court gave detailed guidance on questions which had posed real problems to decision-makers and courts. While HJ and HT are gay men, the guidance given is directly relevant to all claims based on sexual orientation. Eight years on, it is still important to go back to the Supreme Court's judgment to ensure that the correct approach is taken to claims based on sexual orientation. We will refer to the Supreme Court's judgment as '*HJ (Iran)*' throughout this paper.
2. The key conclusion reached by the Supreme Court is that no one can be expected, still less required, to conceal who they are in order to avoid persecution.
3. The judgment also gives important broader guidance on how to decide asylum claims based on sexual orientation, and sets out a framework (at paragraph 82 of the Judgment) for decision-making. This briefing paper aims to summarise this important judgment as it stands. Where it gives rise to other questions, and the law may be further developing in the 8 years since *HJ (Iran)* was decided, we have tried to identify this. The issue of potential application of *HJ (Iran)* to claims relating to gender identity lies outside of the scope of this briefing paper.

INTRODUCTION TO THE JUDGMENT

4. *HJ (Iran)* was decided by an extremely experienced panel of the Supreme Court. All 5 judges gave judgments. The lead Judgment is given by Lord Rodger and may be found at paragraphs 40-85. Lords Walker, Collins and Dyson agreed with Lord Rodger, and made short, but important, further observations of their own (paragraphs 86-132).
5. The core of the Judgment is paragraph 82, which is entitled “*The approach to be followed by Tribunals*”. It explains how a decision-maker should decide whether a person is entitled to asylum on the basis of their sexual orientation. The guidance also applies to Home Office decision-makers: “*The Secretary of State should, of course, apply the same approach when considering applications of this type*” (para. 83).
6. A decision-maker deciding whether a person [‘X’] is entitled to asylum on the basis of sexual orientation should ask four questions. These are:
 - (i) Is it reasonably likely that X is gay [or LGBQ] or will be perceived to be gay [or LGBQ]?
 - (ii) Is there a real risk that gay men [or LGBQ people] would face persecution if they lived openly in X’s country of origin?
 - (iii) Would X in fact live ‘openly’ (or would X conceal X’s sexual orientation) if returned to the country of origin?
 - (iv) If the answer to question (iii) is that X would conceal X’s sexual orientation, *why* would X do so?
7. We will deal with these questions in turn. It is important to approach them in the correct order. It is likely to lead to real confusion if questions (iii) and (iv) are taken out of order.

The Home Office should update its policy documents, including the Asylum Policy Instruction on Sexual Orientation and Country Policy Information Notes, to give separate summary guidance for each of the four questions in *HJ (Iran)* in the order in which they arise.

8. Para. 82 of *HJ (Iran)*, with numbers added for ease of reference, is attached as an annex to this paper.

QUESTION 1: IS THE PERSON GAY [OR LGBTQ]?

“The evidence for whether a person is, in fact, LGBTQ may be highly variable”.

9. The first question which the decision-maker must ask is whether X is gay (or LGBTQ as the case may be). In fact, Lord Rodger puts it like this: “*is [the tribunal] satisfied on the evidence that [X] is gay, or that he would be treated as gay by potential persecutors in his country of nationality*”.
10. There are a few points to make about this.
 - (i) As in all questions about the risk of persecution, the standard of proof is that of ‘reasonable degree of likelihood’ or ‘real risk’, which is less than the balance of probabilities. X must only show that there is a ‘real risk’ or ‘reasonable degree of likelihood’ that X is LGBTQ. Home Office caseworkers sometimes apply a standard of proof that is too high¹.

The Home Office guidance should emphasise that the standard of proof in asylum claims is a ‘reasonable degree of likelihood’ or ‘real risk’.

- (ii) Secondly, whether or not X is gay, X may also succeed if X “*would be treated as gay by potential persecutors*”. This may be a very important. For example (i) X may not be clear about X’s own sexual orientation; or (ii) for example, if X is bisexual or pansexual, there may be good evidence, or it may be reasonable to infer, that they may be treated as gay or lesbian by potential persecutors in the particular country of origin.
11. The other important point is that the decision whether a person is, in fact, LGBTQ has to be taken ‘on the evidence’. This evidence may be highly variable. So, for example:
 - (i) Some people may very strongly associate their sexual orientation with sexual acts;

¹ Asylum Aid (2011). *Unsustainable: the quality of initial decision-making in women’s asylum claims*. Asylum Aid (2013). *Right First Time*. UKLGIG (forthcoming). *Still Falling Short*. UNHCR (2010). *Quality Integration Project: Key Observations and Recommendations* (page 2). UNHCR (2013). *Untold Stories...Families in the Asylum Process*. See also Henderson and Pickup (2014). *Best Practice Guide to Asylum and Human Rights Appeals* (Chapter 1). Available at <https://www.ein.org.uk/bpg/chapter/1#toc2>

- (ii) For some people, sexual orientation may be far more associated with their feelings about themselves, their own identity, their emotions, and/or a sense of being 'different' or a sense of shame.
- (iii) For some people, sexual orientation may be strongly associated with their feelings towards specific other people (a present or former partner; or a person that X has had a 'crush' on).
- (iv) For some people, sexual orientation may be strongly associated with their social interactions (who they have spent time with; how they present socially – their clothes, habits and so on).
- (v) For some people, their experience of their sexual orientation may consist of some or all of the above, at the same time or at different times in their development.
- (vi) Some people may find it easy to talk about these things; others may find it very difficult; and some may never have thought of themselves as LGBTQ, and may find it difficult to express their identity in words which a decision-maker in the UK would expect. Some people will have a 'coming out' story, of the kind that people in the UK are now used to, whereas others will have completely different experiences.

12. The Court of Justice ruled in *A, B and C*² that the decision-maker must not rely solely on stereotypes when deciding on a person's sexual orientation. Some common stereotypes include the notion that all gay men are promiscuous³, or that all lesbians are *not* promiscuous⁴. It is always more important to examine the evidence of the individual claimant. On the other hand, some questions based on stereotypes may be a useful tool for decision-makers, provided that they form only part of the assessment, and are applied by reference to "*the individual situation and personal circumstances of the applicant for asylum concerned*" (*A, B and C* §62).

13. In some cases, stereotyped notions may also be important when assessing how a person is *likely to be perceived*. For example, an overtly 'camp' man may be perceived as gay, or a 'butch' woman may be perceived as a lesbian⁵. It may be important to look at evidence about the country of origin to determine this, and also to consider the person's account. If a person gives a credible account of having been targeted as LGBTQ because of their appearance or associations, then this should be given significant weight even if there is no direct country evidence on this point.

² Joined Cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014

³ E.g., *Kornienko v. Canada (Citizenship and Immigration)*, cited above, where the Federal Court of Canada set aside the original rejection on the basis that "the Board believed that gay men are promiscuous and that anyone who is not sexually active is unlikely to be 'truly gay'."

⁴ *Missing the Mark - Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*, UK Lesbian & Gay Immigration Group (UKLGIG), September 2013, p. 18 (hereafter: the Missing the Mark report).

⁵ For a good example in the context of Jamaica, see *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011, headnote.

QUESTION 2: WOULD GAY [OR LGBTQ] PEOPLE WHO LIVED OPENLY BE LIABLE TO PERSECUTION IN THE PERSON'S COUNTRY OF NATIONALITY?

“In many cases, a person will be able to show that they would be at risk if they were openly LGBTQ, even though that could not be said of every LGBTQ person in the country.”

14. The next question for the decision-maker is whether they are “*satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality*”.
15. There are three points to make about this.
16. First, it is important to be clear about what ‘*lived openly*’ means. People who live ‘*openly*’ do not lie or hide anything about themselves to anyone. They will be free to form any relationship and to talk about it to anyone, to wear what they want, and to describe themselves as they want to be described. They will not lie, for example, about their reasons for not being married, or about their feelings, or about their sexual history. UKLGIG is aware that there is evidence, from some countries, that some individuals find it possible to live ‘*discreetly*’ in big cities: they may, for example, be able to afford to live in relatively private accommodation, away from close family; but this is not ‘*living openly*’.
17. Secondly, the decision must be taken ‘on the available evidence’. In fact, there may be very little evidence about the treatment of LGBTQ people in the country of origin; or there may be less evidence about certain categories of LGBTQ people, such as women. In many countries where homophobia and biphobia are deeply embedded, it is likely that there will be little or no evidence of the State refusing to provide protection, because few people, if any, would consider seeking such protection in the first place. In fact, the greater the risk of persecution on the grounds of sexual orientation, the more difficult it may prove to obtain such evidence.
18. Decision-makers should be strongly encouraged to draw reasonable inferences from the evidence which is available about the country of origin, always bearing in mind that (i) the crucial question is how a person will be *perceived* by potential persecutors; and (ii) evidence about the treatment of other non-heteronormative sexual identities and/or evidence about the treatment of people adopting non-standard lifestyles may be a strong indicator. For example, evidence that gay men are liable to persecution may be a strong indicator that lesbian women or

other sexual minorities are at similar risk. Similarly, evidence of strict regulation of sexual behaviour (including evidence of strict regulation of non-marital relationships, or evidence that women or men are strongly expected to marry and have children) may be strong evidence upon which to base a finding that they will be persecuted if they are *perceived* to be gay or lesbian.

19. Thirdly, the relevance of this question is not confined to cases where every person who is openly LGBTQ in the country of origin would face a real risk of persecution. In many cases, a person will be able to show that they would be at risk if they were openly LGBTQ, even though that could not be said of every LGBTQ person in the country. A good example might be if a person is from a particularly religious or a particularly 'respected' family, which would be particularly anxious to ensure that it was not associated with an openly LGBTQ family member. Another example might be a person who combines their LGBTQ identity with actual or perceived political activism. Another example will be a person who has given a credible account of having been persecuted in the past, or of having received direct threats of persecution⁶. It is always necessary to determine whether the particular claimant would face a real risk of persecution, and the particular facts of the case must be taken into account when answering Question 2.

20. On the facts of *HJ (Iran)*, any gay man who lived openly in either Iran or Cameroon would be at risk of persecution. There are numerous countries where it is the case that any LGBTQ people living 'openly' would be at risk. For countries where *not all* LGBTQ people living openly would be at risk, it may well be possible to show exactly the same type of risk to the individual claimant. Exactly the same analysis would then apply: a person may fall into a particular subcategory of people whose sexual orientation would lead to persecution, or may show a specific risk, because of evidence of past or possible specific targeting.

⁶ See paragraph 339K of the Immigration Rules: "339K. *The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.*"

QUESTION 3: WHAT WOULD THE PERSON DO IF THEY WERE RETURNED TO THAT COUNTRY?

“If a person *will* take steps to conceal their sexual orientation, the decision-maker must next decide whether these steps are likely to reduce the risk of persecution to below the threshold of real risk”.

21. The decision-maker must then ask “*what the individual applicant would do if [they] were returned to that country*”?
22. The Supreme Court gives two possibilities: the individual might “*live openly and thereby be exposed to a real risk of persecution*”, or they might “*live discreetly and avoid persecution*”.
23. If the former, then that is the end of the story: the person has a well-founded fear of persecution. Of course there are many people (such as politicians, religious believers, or activists) who are prepared to be ‘martyrs’ rather than to suppress things which are very important to them. There will also be LGBTQ people who will ultimately prefer to face a risk of persecution rather than to deny who they are.
24. There are three important points to bear in mind before concluding that a person would not be “*gay, or [...] treated as gay*” if returned to their home country.
25. First, many people will simply not be *able* to avoid being “*treated as gay*”, whether they would like to or not. This may be because of something about them, such as their appearance, their presentation, their lifestyle, or their relationships. It may also simply be because they are *already* known to be LGBTQ by their potential persecutors. So, if a gay man fears his family, and has already been ‘outed’ to them, the question of being ‘discreet’ simply does not arise: a person cannot make a persecuting agent ‘forget’ what they already know. X has no choice about ‘concealment’ or ‘discretion’ if the potential persecutor already knows or ‘perceives’ X to be LGBTQ. This is particularly relevant if a person has already been subjected to persecution or threats of persecution on the basis of actual or perceived sexual orientation. In this case, para. 339K of the Immigration Rules will again be relevant⁷, as there is a presumed risk of a repeat of past persecution, or past serious threats of persecution, unless there is a good reason to believe that circumstances have changed.

⁷ See footnote 6.

26. Secondly, the decision-maker cannot say that ‘X *should think about avoiding the risk by living ‘discreetly’*’. In other words, the decision-maker can never suggest that X could avoid persecution by amending their behaviour to avoid risk of persecution. However unreasonable it may appear that a person would not take steps to avoid persecution, they can *never* be required to do so by concealing elements of their identity (*HJ (Iran)* paras 64-65).
27. Thirdly, the more repressive a country is, the more strictly controlled sexual and social behaviour is, and the stronger the social pressures to conform, the less likely it is that a person will be able to conceal their sexual orientation. For example, in a country where extended families are expected to protect their honour, where Western notions of ‘privacy’ do not apply, and where there are provisions in the criminal code criminalising same sex relations, it may be extremely difficult for someone who is LGBQ to sink ‘below the radar’. A person who might ‘get away with’ simply being ‘very private’ in the UK would be likely to take much more active steps to avoid being perceived as LGBQ, such as getting married and adopting a positively ‘heterosexual narrative’.

If a decision-maker concludes that a person *will* take steps to conceal their sexual orientation, the decision-maker must therefore next decide whether these steps are likely to reduce the risk of persecution to below the threshold of real risk.

28. Finally, it is important to emphasise one again that the standard of proof is no more than that it is ‘reasonably likely’ that X will be unable to avoid being ‘treated as’ LGBQ.
29. It is extremely important that Lord Rodger, giving the lead judgment of the Court, considered that a person who is forced to “*form [...] relationships only within a circle of [trusted] acquaintance*”, is being ‘discreet’ and therefore may be entitled to international protection. The fact that X chooses only to express their sexual orientation to people who can be trusted ‘*not to reveal*’ it ‘*to others*’ is enough to trigger the potential protection of the Refugee Convention.
30. **Decision-makers must take care not to reject claims on the basis that a person can reasonably be expected only to tell a few ‘trusted’ friends or relations that they are LGBQ.**

This is an important part of the *HJ (Iran)* Judgment which is often overlooked by decision-makers.

31. It is necessary, instead, to look at the practical ways in which a person prevents their sexual orientation becoming more widely known. The person may be forced to actively lie. The person may have to pretend to have a relationship with someone of the opposite sex or may actually have to enter into a relationship; or a person may have to lie when asked about their partner. Each of these is a

deformation of behaviour in order to conceal who the person is. It is very important that the Supreme Court did not distinguish between different degrees of concealment: any degree of concealment is relevant.

32. The Court of Appeal recently recognised this in *LC (Albania) v SSHD* [2017] EWCA Civ 351: “[B]ehaviour [from which others recognise or perceive a particular sexual orientation] [...] is not restricted to acts which **overtly** indicate or suggest a particular sexual orientation: and it may include negative behaviour. **For example, in some societies, young women may be perceived as lesbian, and consequently persecuted, unless they positively establish a heterosexual narrative**” [emphasis added]. As such, ‘behaviour’ is given a very broad meaning.

A decision-maker who is considering whether a person would be ‘discreet’ should always ask the question “*what would person X have to do to ‘establish a heterosexual narrative?’*”

Would the person have to lie, refuse to answer questions honestly or pretend to be in a relationship with someone else? Any of these forms of action will amount to deceit or concealment, and a person cannot be expected to behave in this way to avoid persecution.

CHOICE OF VOCABULARY: 'DISCRETION' OR 'CONCEALMENT' / 'DECEIT'

The use of the words 'discreet' or 'discretion' is in itself problematic. These terms should be avoided and decision-makers should focus instead on the concept of X being required to 'conceal' or be 'deceitful' about their sexual orientation.

This is consistent with the approach taken by the Court in *HJ (Iran)*. The reality is that people will be required to "hide", "deny" or "restrain" their identity in the course of being "discreet". It is helpful to look at the reasons given by the individual judges for avoiding the term 'discretion'.

- (i) Lord Hope considered (§22) that it is a "euphemistic expression" which "does not tell the whole truth".
- (ii) Lord Collins held (§101) that "the use of the words "discretion" and "discreetly" tends to obscure the point that what is really involved is **concealment** of sexual orientation" [emphasis added].
- (iii) Lord Walker cited with approval a passage from an article by Australian academic Jenni Millbank,⁸ in which the 'discretion approach' was rejected:

*[a]t its baldest, discretion reasoning entailed a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection', by exercising 'self-restraint' such as **avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a 'flatmate'; or indeed remaining celibate.** This approach subverted the aim of the Refugees Convention – [...] by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. [...] The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterised as 'flaunting', 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution). [...] [emphasis added]*

⁸ Jenni Millbank, "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom", *International Journal of Human Rights*, Vol. 13, No. 2/3, 2009, pp. 2-4

Lord Rodger identifies a further reason why 'discretion' is an unhelpful concept (although he does himself use it as a '*convenient*' shorthand). A person's 'sexual identity' covers a wide range of their behaviours and characteristics; the word 'discretion' tends to imply that concealment is just about a choice not to perform a positive act (e.g., not to have sex in bushes, or to kiss in public etc). But a person may be required to do far more than that in order to conceal their sexual orientation:

63. It is convenient to use a phrase such as "acting" or "behaving" "discreetly" to describe what the applicant would do to avoid persecution. But in truth he could do various things. To take a few examples. At the most extreme, the applicant might live a life of complete celibacy. Alternatively, he might form relationships only within a circle of acquaintances whom he could trust not to reveal to others that he had gay relationships. Or, he might have a gay partner, but never live with him or have him to stay overnight or indulge in any display of affection in public. Or the applicant might have only fleeting anonymous sexual contacts, as a safe opportunity presented itself. The gradations are infinite.

QUESTION 4: WHY WOULD X CONCEAL THEIR SEXUAL ORIENTATION?

“All that is necessary is that one reason for concealment is that X fears persecution”.

33. If the answer to Question 3 is that X will ‘live discreetly and avoid persecution’, then the decision-maker needs to go on to answer Question 4: the decision-maker must “ask itself **why** [X] would do so”.
34. The Supreme Court goes on to give two possible answers. Answer (a) is that X chooses to conceal their sexual orientation *only* [‘simply’] because of social pressure or personal choice. Answer (b) is “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” [emphasis added].
35. This is one the aspect of the *HJ (Iran)* judgment which has been most misunderstood. It is not necessary that X conceals sexual orientation solely in order to avoid persecution, or even that this *the main*, or one of the main reasons, why X conceals their identity. All that is necessary is that *one reason* for concealment is that X fears persecution.
36. On the other hand, if the *only* reason why X would hide or lie about their identity is to avoid harming relationships with family, friends and colleagues, then X is not entitled to asylum on that basis⁹.
37. Lord Rodger makes this clear slightly earlier in his Judgment, in paragraph 62 [emphasis added].
- 62. Having examined the relevant evidence, the Secretary of State or the tribunal may conclude [...] that **the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. [...]*** [emphasis added]
38. So what X needs to show, in order to succeed on Question 4, is that *there is a real risk that **one*** of the reasons why they would lie about or conceal their sexual

⁹ There may of course be other reasons why X is entitled to asylum, for example if in reality X would be unable to sustain the concealment or deceit for an extended period.

orientation in their country of origin would be to avoid persecution. There is no requirement that it should be the only, or even the main, reason. Decision-makers sometimes fail to appreciate this.

The Home Office should update its policy guidance, including the Asylum Policy Instruction on Sexual Orientation and Country Policy Information Notes, to consistently ask the correct fourth question: whether there is a real risk that *one* of the reasons why a person would lie about or conceal their sexual orientation in the country of origin would be to avoid persecution.

The fact that there may be other reasons (such as to avoid discrimination or embarrassment, or to avoid upsetting family) is irrelevant and is *not* a reason for refusing an asylum claim.

39. In approaching Question 4, one should take as a starting point the claimant's own evidence, and must ensure that claimants understand that they are being asked to give *all* of the reasons why they would hide some or all aspects of their sexual orientation.
40. **It is very important that decision-makers should not focus exclusively on the way in which a person is behaving in the UK.**

The Home Office asylum policy instruction on sexual orientation makes this point clearly, but decision-makers do not always follow this guidance. The reasons why a person may hide their identity in one place may be different from the reasons why they may hide it in another.

41. We can illustrate this with a simple example. Imagine a 21-year-old gay man from a small town in the UK in the 1980s. He has not told any of his friends or family that he is gay. He does not usually form relationships with other men. When he has had casual sex, he has done it in private and never told any of his friends or family about it. That is because he does not want to upset his parents; he is scared that his close male friends will reject him; and he cannot face the thought that people will make fun of him behind his back. So, in his small town in the UK, he plays rugby, goes to the pub with his straight friends, and pretends to be attracted to girls. Imagine that he goes to work for 6 months in Iran. In Iran, just as in the United Kingdom, he does not tell any of his friends or family that he is gay, he does not form relationships with other men, and he has sex in secret. His behaviour is very similar to his behaviour in the UK, but there is quite obviously an additional reason why he is 'discreet' in Iran. In addition to not wanting to upset his family etc, he also fears that he will be rounded up or beaten up by the police, or subjected to punishment by the state authorities, if he is open about being gay.

42. Now imagine that he was Iranian rather than British. Exactly the same reasoning would apply. The fact that he would behave in a similar way in the UK and Iran does *not* defeat his asylum claim.
43. An important effect of all of this is that it greatly reduces the importance of the question whether a person will, in fact, succeed in concealing their sexual orientation. Some claimants may be adamant that they will not conceal it. If a decision-maker does not believe this, (if a decision-maker believes that they would, in fact, do all that they could to conceal their sexual orientation, when faced with the harsh reality of circumstances in their home country), then the decision-maker must still go on to consider *why* they would in fact do so. The decision-maker should direct itself in accordance with the robust views expressed by the Supreme Court in *HJ (Iran)* that a person faced with possible persecution may have little choice. Lord Dyson said (§123): “*Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly.*” The Supreme Court identified a strong presumption that a person faced with a choice between persecution and concealment would at least try concealment.
44. The point potentially arose in *LC (Albania) v SSHD* [2017] EWCA Civ 351, where the UNHCR argued that these comments in *HJ (Iran)* should lead to a legal presumption that, where the evidence showed that openly LGBTQ people in a particular country had a well-founded fear of persecution, anyone who concealed their identity did so at least in part in order to avoid that persecution. That seems a sensible proposition, and it is likely to require determination in a case where it directly arises. The Court of Appeal in *LC* did not determine the point because it had not been formally pleaded. But it certainly did not reject the argument that the existence of general persecution of openly LGBTQ people is likely to be a very relevant factor in determining the reasons for their concealment of their identity. UKLGIG considers that, on the basis of the Judgments in *HJ (Iran)* and as a matter of common sense, it can safely be said that the stronger the evidence of persecution of people who are open about their sexual orientation, the stronger the likelihood that their decision to conceal that identity is materially influenced by a desire to avoid persecution. The point is illustrated by the example above of the English man who travels to work in Iran.
45. Decision-makers should address that human reality when deciding on the answer to Question 4 of *HJ (Iran)*.

RECOMMENDATIONS

- A. The Home Office should update its policy documents, including the Asylum Policy Instruction on Sexual Orientation and Country Policy Information Notes, to give separate summary guidance for each of the four questions in *HJ (Iran)* in the order in which they arise.
- B. Home Office guidance should emphasise that the standard of proof in asylum claims is a ‘reasonable degree of likelihood’ or ‘real risk’.
- C. If a decision-maker concludes that a person *will* take steps to conceal their sexual orientation, the decision-maker must next decide whether these steps are likely to reduce the risk of persecution to below the threshold of real risk.
- D. Decision-makers must take care not to reject claims on the basis that a person can reasonably be expected only to tell a few ‘trusted’ friends or relations that they are LGBTQ. Telling only a few ‘trusted’ people amounts to concealment.
- E. A decision-maker who is considering whether a person would be ‘discreet’ should always ask the question “*what would person X have to do to ‘establish a heterosexual narrative?’*”. Would the person have to lie, refuse to answer questions honestly or pretend to be in a relationship with someone else? Any of these forms of action will amount to deceit or concealment, and a person cannot be expected to behave in this way to avoid persecution.
- F. The term ‘discretion’ should be avoided. Focus should instead be put on ‘concealment’ or ‘being deceitful’ about sexual orientation.
- G. The Home Office should update its policy guidance, including the Asylum Policy Instruction on Sexual Orientation and Country Policy Information Notes, to consistently ask the correct fourth question: whether there is a real risk that *one* of the reasons why a person would lie about or conceal their sexual orientation in the country of origin would be to avoid persecution.
- H. Decision-makers should not focus exclusively on the way in which a person is behaving in the UK. The reasons why a person may hide their identity in one place may be different from the reasons why they will hide it in another.

ANNEX: PARAGRAPH 82 OF HJ (IRAN)

Numbers in square brackets are provided for ease of reference.

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must

[1] first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must

[2] then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so,

[3] the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

[4] If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

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. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.