

Asylum and Humanitarian Protection for Lesbian, Gay and Bisexual (LGB) People



A guide designed to provide an overview of asylum law and humanitarian protection for lesbian, gay and bisexual people.



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The information provided in this guide is designed to provide an overview of asylum law and humanitarian protection for lesbian, gay and bisexual people. It is not intended to be an exhaustive statement of the law nor a substitute for seeking legal advice on your own circumstances. Neither Stonewall nor City University Law School accepts any liability for the information given. If you would like further advice, you might find it helpful to refer to page nine for suggested sources of information and support, or search for a service on Stonewall's website, at www.stonewall.org.uk/whatsinmyarea.

1. Asylum



An asylum-seeker is someone of any age who has fled his or her home country to find a safe place elsewhere. A refugee is someone whose asylum application is successful.

A. Legal Basis for Asylum: the UN Refugee Convention

The UK is a signatory of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol which **guarantees the right of a person who is a 'refugee' not to be returned to a country or territory where they are at risk of persecution.**

To qualify for refugee status an applicant must satisfy the following criteria:

- be outside of their own country
- have a well-founded fear of persecution
- have experienced persecution for one or more of the particular reasons outlined in the Convention (race, religion, nationality, membership of a particular social group or political opinion)
- be unable (or unwilling) to obtain the protection in their own country.

These criteria must all be satisfied in order to qualify for refugee status. The burden is on the person applying to put forward a strong case, supported by evidence, but the Home Office must properly investigate all the cases put to it. The key elements of these criteria are discussed below.

(a) A well-founded fear

An applicant for asylum in the UK must show that their fear of being persecuted in the home country is justified. This is usually based upon showing that they have been persecuted in the past. However it may be possible to show that an applicant has escaped before actually experiencing persecution but there is real danger to them if they go back home.

(b) Persecution

For a person to fear what the law considers to be 'persecution' he or she must face really serious harm. Usually this will be in the form of physical danger such as beatings, torture, death or detention and long-term imprisonment. In rare and extreme cases, denial of access to employment, housing, social security or other necessities of life may also amount to persecution.

The persecution can come from 'non-state agents' that is, threats or violence from citizens or groups such as religious organisations can also count, (as in the case of *Horvath v SSHD* (Slovakia) [1999]). For example, British judges have granted asylum, in certain circumstances, to lesbian, gay and bisexual people from Jamaica on the grounds that they would face persecution from their fellow citizens.

The fact that there is some intolerance by other people, including derogatory comments and stigmatization, will not amount to persecution. The fact that a person will be able to live a much more sexually open life in the UK as a lesbian, gay or bisexual person does not in itself qualify them for refugee status.

The fact that **all or certain kinds of homosexual activity are illegal in the home country** also does not necessarily mean that a lesbian, gay or bisexual person will qualify for refugee status. The law might not actually be enforced in the country so that gay people are not under any real threat of prosecution (case of XY (Iran) [2008]). If however the law is enforced and the punishments are serious, then a person who is at a real risk of being so punished does face persecution.

Unfortunately refugee law is not yet completely clear on how far lesbian, gay and bisexual people can or should be secretive about their sexual orientation to avoid punishment. The Refugee Convention aims to protect individual freedom so in principle it should provide protection for people who are restricted from expressing their sexual orientation openly. However outcomes from previous cases suggest that if a person can avoid punishment by being secretive then the key question will be what effects a life of secrecy will have on them. The judgements suggest some individuals might be more harmed than others by the same treatment. At present this is an unclear legal position and hopefully will be clarified by future cases.

Case study on the criminal punishment of gay people: Iran

The difficulties illustrated by these cases are generally applicable beyond just Iranian cases.

In Iran, homosexuality is illegal. If gay people come to the attention of the authorities they risk suffering punishment that may amount to cruel and inhuman treatment or worse, such as torture.

The cases below concern young gay men attempting to claim asylum in the UK owing to persecution they said that they faced in Iran if their sexual orientation was discovered.

The case of J [2006]

Here the court decided that the question to be asked in such cases was whether the applicant could reasonably be expected to tolerate having to conduct his sexual life in secret if he returned to Iran. The judgement decided that even if an applicant can avoid actual persecution by keeping their sexual orientation hidden and secret, he or she may still qualify as a refugee if living such a life could not reasonably be tolerated by that person.

Result: Asylum granted

The case of XY (Iran) [2008]

Here the court looked at when an active Iranian gay person might be able to be **safely discreet without serious harm to their personal identity if returned to their country**. In looking at this the court considered how the person had been able to live in their country previously. It suggested that where a person had been able to have a long-term partner, tell some family and friends about their sexual orientation, engage in some sexual activity and where they did not apparently live in a state of constant fear of being discovered, then it would be reasonably tolerable for them to go back to that situation.

Result: Asylum denied

For details of the legal status of homosexuality in other countries, see http://www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233.

(c) Persecution Based on Sexuality

The UK courts have decided that lesbian, gay and bisexual people can be a 'social group' for the purposes of the Refugee Convention (case of *Z v SSHD* [2004]). This depends on conditions in their home country. Where there is sufficient evidence of discrimination against lesbian, gay or bisexual people in that country then they may be considered a social group. This means that a person who is persecuted in their home country because of their sexuality may be classed as a 'refugee' for that reason.

However, the persecution must be because they are part of this 'social group' (i.e. homosexuality) rather than for any other, personal reason relating to their individual circumstances (case of *Shah and Islam* (Pakistan) [2000]).

(d) A Failure of Protection

Finally, an applicant must show that there is no protection against persecution in their own country. The first way of seeking protection is to approach the police. The police must however offer real protection against the danger they face and take reasonable steps to punish those that seek to persecute gay people. Of course if the police are the persecutor then they may not be expected to offer protection.

For example, in Jamaica the police have, in certain circumstances, been found to not offer protection against hostile members of the public and in fact have sometimes joined in the persecution of gay people.

The second way of seeking protection is to move. A person may have suffered persecution in their local area but if they can get protection by moving to another place in their home country they will usually not qualify as a refugee. Only if it would be unduly harsh to expect them to move because of conditions in their home country will they qualify as a refugee.

B: 'Humanitarian Protection'

If the applicant does not qualify under the Refugee Convention he or she may succeed in being granted humanitarian protection (HP) or discretionary leave to remain (DL) instead. HP may be granted where there is a human rights claim to be made, for example, under the European Convention on Human Rights (ECHR). When an asylum claim is submitted the Home Office will consider the case for HP and DL automatically at the same time. Any appeal will likewise tend to consider all the issues together.

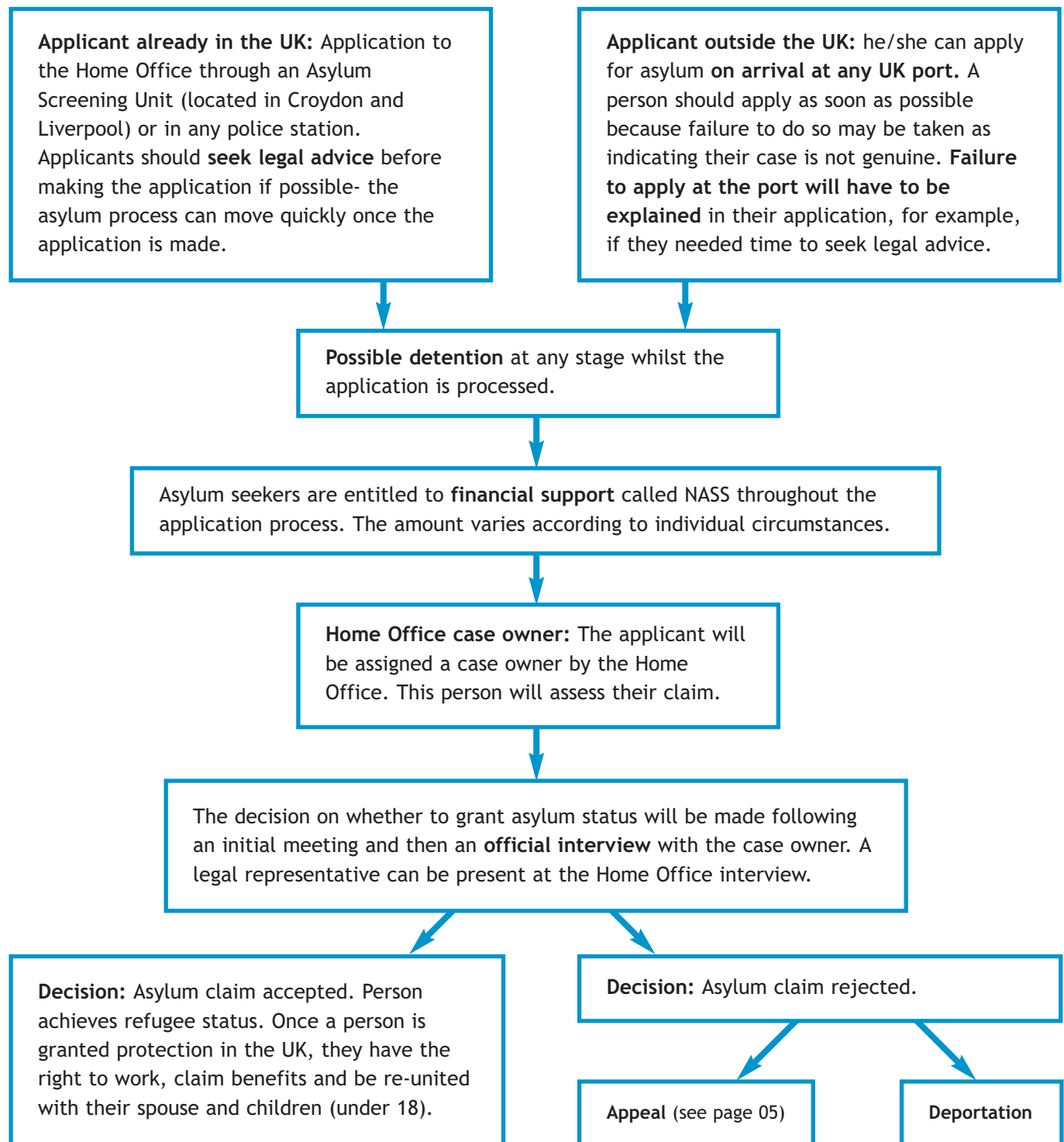
Some common examples of when Humanitarian Protection or Discretionary Leave might be granted:

- If a person does not show they are a refugee but their country is one in which there is widespread fighting or unrest which threatens large sections of the population, then they may qualify for HP or DL.
- If a person cannot satisfy the immigration rules for same-sex partners, they may be able to establish a right to come to or stay in the UK under Article 8 of the European Convention on Human Rights - 'the right to respect for family life'. This does not give all couples a right to live in the UK but may benefit applicants who can show that they are unable to establish their family life elsewhere perhaps because they face legal or other restrictions on gay relationships.
- Sexual orientation is an aspect of private life which is also protected under Article 8 of the ECHR. Restrictions placed upon a person's right to express their sexual orientation and ill-treatment because of it in a person's country of origin may form a basis for staying in the UK. However to qualify for HP on this basis a person would have to face very severe hardship in their country of origin, (see the discussion of 'persecution' above).
- Persons suffering serious medical problems such as HIV/AIDs may also qualify for DL or HP but only in special circumstances and on a case-by-case basis. The fact that a person's own country does not have a high level of medical care (less medical care than UK standards) is not enough. The legal position is quite strict and only where it would be inhuman and degrading (in breach of Article 3 of the ECHR) to return a person will they be allowed to stay. For example, a person who was dying from an AIDS-related illness and for whom there was no care in his home country could not be returned (case of *D v UK* (St. Kitts) [1997]). By contrast, a person who was in relatively good health but would not have access to HIV anti-retroviral medication in her home country could be removed (case of *N v UK* (Uganda) [2008]). Medical evidence should be obtained in all such cases and detailed submissions made to the authorities.

2. Procedure: Applying for Asylum

The Home Office aims to conclude asylum applications within six months. Applicants generally should not work during this time, but may be permitted to if the application process lasts longer than 12 months.

A: Applying for Asylum



For further details of the process see the links and organisations listed at the end of this guide.



B: Appealing against a Home Office decision on asylum

There is an appeals process for asylum claims, using a tribunal. The person appealing the decision (and their legal representative) will have to persuade the tribunal that the refusal of asylum is:

- in breach of the UK's obligations under the Refugee Convention because the asylum-seeker will be at real risk of persecution for their sexual orientation if removed

and/or

- in breach of Article 8 of the European Convention on Human Rights because the asylum-seeker's right to private/family life will be endangered if they are forced to return to their country

and/or

- unlawful for some other reason (for example, it is against stated Home Office policy).

- The appeal will take place in the Asylum and Immigration Tribunal (AIT). The Home Office may take months, or even years, to transfer the appeal to the tribunal.
- It is very important that an appeal be lodged correctly, with the help of a legal representative, as the Home Office may otherwise claim that the appeal is not valid.
- The appeal may be listed in a hearing centre far from the appellant, witnesses, and legal representative. If this will cause unfairness, the legal representative can apply for a change of venue.
- It is possible to appeal the judgement made by the **Asylum and Immigration Tribunal**. To do this, the asylum seeker must apply for a reconsideration of their appeal decision. The Home Office can also appeal against a tribunal decision.

3. Asylum: Practical Considerations



A: In general

- Where at all possible, the applicant should seek legal advice and representation in the UK. He or she may qualify for legal aid, free legal advice paid for by the state.
- The asylum process does differ slightly for minors. The Home Office has special procedures for dealing with applications from those aged under 18 years old.
- It is very important that, throughout the process, the applicant gives their legal representative up-to-date contact details, and tells them as soon as possible if any of the details change. The representative may receive vital information on the asylum-seeker's behalf and will want to pass it on to them as soon as possible.
- The asylum-seeker should not normally have to be interviewed by the legal representative in front of their friends or family. If a legal representative wants to interview the applicant in this way, then the applicant should feel free to ask for the interview to take place privately, without friends and family present.
- The applicant must tell their legal representative or any interviewing Home Office official which language they are **most fluent and comfortable using**. A translator for the interview and/or appeal can then be arranged. The applicant should let the representative know if either the language or the dialect used by the translator are not right. The legal advisor has a duty of confidentiality to their client.

B: Documentary evidence

This is important both for the asylum application stage and the appeal (if one is possible). Applicants must always put forward the best case they can at the earliest stage.

Evidence is often crucial to the success of the appeal. It should address the issues of law set out in section 2 above. Such documents could include those from:

- The applicant must give a **detailed** and **comprehensive** witness statement giving all the circumstances of their life in their home country, their escape and their life in the UK. It must cover the incidents of **persecution, why they cannot find protection and why they have suffered serious detriment in hiding their sexuality to avoid harm both in the past and if returned**. They must show that they will be directly harmed or can't reasonably tolerate returning to their former situation.
- Any lawyer who represented the applicant in their home country.
- A medical expert if the applicant has suffered mental or physical injury.
- An expert on the applicant's home country to consider the risks that lesbian, gay and bisexual people face there.
- Human rights reports for example, from Amnesty International, Human Rights Watch or the US State Department on the position of lesbian, gay and bisexual people in the country concerned.
- The archives of news organizations showing the treatment of gay people in the country concerned.
- Letters or statements from friends, relatives or countrymen addressing the issues set out below under 'witnesses'.

C: Witnesses

- Witnesses to support the applicant's story may be crucial to the success of the appeal.
- The applicant's case may be helped by witnesses of the persecution in their home country. Such witnesses can give evidence at the appeal hearing.
- If the witness is a member of the applicant's close family their evidence may be challenged because they are so close to the asylum-seeker. Such evidence may still be valuable and the tribunal cannot dismiss such evidence simply because it is made by such a person.
- The evidence of someone already recognised as a refugee can be very valuable.

4. Immigration



There are extensive rights to come and reside with same-sex partners in the UK contained in the immigration rules. The exact rules vary depending upon the status of the person who wants their partner to come to the UK (permanent resident or student, for example) and also the nationality of those involved. European Economic Area (EEA) and Swiss nationals are treated differently to partners from countries outside the EEA (the EEA encompasses member states of the EU, plus Iceland, Lichtenstein and Norway). This guide does not attempt to cover this information as this is different to seeking asylum. Further details can be found using the links and organisations at the end of this guide.

5. Where to go for further help and advice



Stonewall

08000 50 20 20 (freephone)
www.stonewall.org.uk/info

UK Lesbian and Gay Immigration Group (for further info, meetings and support)

Telephone: 0207 922 7811
<http://www.uklgig.org.uk/>

The Refugee Council

www.refugeecouncil.org.uk

Immigration Law Practitioners' Association

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

Home Office UK Border Agency (for detailed info on all aspects of immigration and asylum)

<http://www.ukba.homeoffice.gov.uk/>

For the Immigration rules:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part9/>

Asylum Law, online tools and information

www.asylumlaw.org

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Please note: Stonewall do not run drop-in advice sessions.

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