HJ (IRAN) AND HT (CAMEROON)

in Country Policy Information Notes
on Sexual Orientation, Gender Identity and Gender Expression

December 2019

Introduction

The CPIN *Sri Lanka: Sexual orientation and gender identity and expression*, October 2018 (Version 3.0), contains a section entitled 'Assessment of Risk: General Points'. A similar section is now included in other SOGIE CPINs. We welcome the decision to include a reminder of the general guidance, based upon the Supreme Court's judgment in *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 32[1], in the country policy information notes on SOGIE. However, we have the following comments to make about this section

The section presently reads as follows:

> *2.4.1 Decision makers must establish whether or not an LGBTI person, if returned to their country of origin, will live freely and openly as such. This involves a wide spectrum of conduct which goes beyond merely attracting partners and maintaining relationships with them. Even if LGBT persons who lived openly would not be generally be at risk, decision makers must consider whether there are reasons why the particular person would be at risk.*
>
> *2.4.2 If it is found that the person will conceal aspects of his or her sexual orientation/identity if returned, decision makers must consider why.*
>
> *2.4.3 If this will simply be in response to social pressures, or for cultural or religious reasons of their own choosing, then they may not have a well-founded fear of persecution.*

[1] http://www.bailii.org/uk/cases/UKSC/2010/31.html

2.4.4 But if a material reason why the person will resort to concealment is that they genuinely fear that they will be persecuted, it will be necessary to consider whether that fear is well-founded.

2.4.5 Decision makers should also consider if there are individual- or country specific factors that could put the person at risk, even if they choose to live discreetly because of social or religious pressures, and/or whether the steps taken by them would be sufficient to avoid the risk of persecution. Some people will not be able to avoid being known or perceived to be LGBT, whilst others will take some steps to conceal but would still be at risk.

We are concerned that the application of this section is likely to lead to confusion and incorrect decisions for the following reasons.

(1) Failure to follow the order of questions set out in *HJ (Iran)*

In the lead case of *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31, Lord Rodger, giving the lead judgment, set out the series of questions which a decision-maker should ask, in order, when a person claims asylum on the basis of sexual orientation or gender identity (see para. 82 of HJ (Iran)). These are, in summary:

1. Is it reasonably likely that X is gay [or LGBT] or will be perceived to be gay [or LGBT]?
2. Is there a **real risk** that gay men [or LGBT people] who lived openly in X's country of nationality would face persecution?
3. Would X in fact live 'openly' (and be exposed to a risk of persecution) if returned to the country of origin? Or would X live 'discreetly' (i.e. take steps to conceal X's sexual orientation or gender identity)?
4. If the answer to question (iii) is that X would conceal X's sexual orientation, **why** would X do so?

In its present version, Paragraph 2.4.1. of the CPIN mixes together questions 2 and 3 and seems to take them in the wrong order. Paragraph 2.4.4 then conflates questions 2 and 4, suggesting that a decision-maker should answer question 2 only after answering question 4.

This is likely to lead to an incorrect approach to the *HJ (Iran)* questions.

In particular, questions 2 and 3 are of a different nature. The former is about the situation in the country of origin and is therefore the kind of question which is suitable for country guidance; the latter is about the behavior of the individual LGBT person ['X'].

Question 2 is a hypothetical question, and is a 'pure' country guidance question. It requires the decision-maker to ask "*would a gay man [or LGBT person] in country Y, who is* ***completely open about his/her sexual orientation or gender identity,*** *face a* ***real risk*** *of persecution?*".

The question is hypothetical for two reasons.

First, in many countries of origin there will be very few people indeed who are in fact *completely open* about their sexual orientation or gender identity.

Secondly, the decision-maker must ask that question *before* going on to decide whether X, as an individual, would in fact be 'completely open' or would conceal some or all aspects of their sexual orientation or gender identity.

Question 3 is not a hypothetical question, but a factual one: "*What will X actually do?*". This is not a pure country guidance question, because it will also depend upon X's own evidence. Country guidance may, however, help in answering that question by providing the context for X's actions. So, for example, the country evidence, showing that most Jamaican lesbians hide their sexual orientation by confirming to a heterosexual narrative, may help in the assessment of how an individual Jamaican lesbian is likely to behave. But in each case the answer to Question 3 will ultimately turn on the individual facts of the specific claimant.

The problem with the muddled order in the CPIN is that the hypothetical and factual questions are likely to get muddled up.

So, a decision-maker is likely to fail to ask the hypothetical question (Question 2) about what would be reasonably likely to happen if X was *completely open* about their sexual orientation or gender identity, and is likely to muddle it with questions about what would be reasonably likely to happen if X decides *not to be completely open* about their sexual orientation or gender identity. That is one of the errors into which the Tribunal had fallen in the *HJ (Iran)* litigation, and which the Supreme Court was required to correct.

(2) Failure to include reminders to decision-makers that the relevant question is what would happen to a person who lived openly

The second danger when this approach is adopted is that the CPIN itself will not seek to provide the answer to Question 2 above.

This leads to two errors.

First, in order to assist with the *HJ (Iran)* questions, the CPIN should help a decision-maker to determine *what would happen if X were completely open about X's sexual orientation or gender identity*. But because that question is not correctly separated out, the CPIN does not attempt to answer it.

Nowhere in the Sri Lanka CPIN is there an answer to the question "*what would happen to an LGBT person **who lives completely openly** in Sri Lanka*"? The CPIN does not enable a decision-maker to answer *HJ (Iran)* Question 2.

Secondly, the guidance section of the CPIN does not provide adequate reminders of the fact that the evidence about what happens to LGBT people in Sri Lanka is not derived from the experiences of people who live openly. Rather, it is based on the

experiences of people who mostly attempt to *conceal* some or all of their sexual orientation or gender identity. So, for example, para. 2.4.7 reads:

> *Although consensual same-sex sexual activity is criminalised in Sri Lanka, sources report that cases are rarely prosecuted. No laws specifically criminalise transgender or intersex people in Sri Lanka. However, there are reports of the police using other laws to criminalise and harass LGBTI persons, particularly transgender women and men who have sex with men involved in sex work (see Legal context and State attitudes and treatment).*

There is a real danger that a decision-maker would read this as meaning that there is no risk to *openly* LGBT people. This would be wrong. The paragraph could more correctly read:

> *Although consensual same-sex sexual activity is criminalised in Sri Lanka, sources report that cases are rarely prosecuted* ***(but it must be remembered that most LGBTI people do not live openly, and it might be expected that, if they did, there would be more prosecutions)****. No laws specifically criminalise transgender or intersex people in Sri Lanka. However,* ***even though most LGBTI people do not live openly,*** *there are reports of the police using other laws to criminalise and harass LGBTI persons, particularly transgender women and men who have sex with men involved in sex work (see Legal context and State attitudes and treatment).*

Without the correct ordering of the *HJ (Iran)* questions, and without the adequate reminders about the basis of the evidence presently available about Sri Lanka, a decision-maker following the CPIN will almost inevitably mix up the questions *'what would happen if X were completely open in Sri Lanka?'* with '*What will happen if X returns to Sri Lanka and does not live completely openly?*'. That mix-up is again precisely the error which the Supreme Court judgment aimed to avoid.

(3) General and individual risk

(i) Different risks to different individuals if they lived openly

We welcome the fact that the CPIN goes on to explain (in Paragraphs 2.4.1) that "*[e]ven if LGBT persons who lived openly would not be generally be at risk, decision makers must consider whether there are reasons why the particular person would be at risk*".

That is an important point. The Supreme Court did not need to consider it directly in *HJ (Iran)*. That is because it was common ground that the *general* situation for openly gay men in both Iran and Cameroon was sufficiently serious to give rise to a real risk of persecution.

This will be true of many countries of origin of LGBT claimants when the correct question is asked: "*is there a* ***real risk*** *of persecution for* ***completely open*** *LGBT people*".

But there may be some other countries (such as currently Brazil or South Korea), where for example the *average* openly gay man may not face a real risk of persecution, but there would be a real risk to some LGBT people if they lived completely openly (depending on personal history, or family circumstances, or socioeconomic status, or region, or other factors such as political activism, race or religious belief).

We welcome the reminder that if the country is not one where all openly LGBT people would be at risk, it is necessary to ask whether *this* LGBT person would be at risk if they lived completely openly.

Again, however, it is very important that the decision-maker is reminded of the correct question: not *'would this person be at risk on return'* but rather '*would this person be at risk if they lived* ***completely openly*** *on return*?'

We therefore suggest that, in order to ensure legally correct decision-making, the last sentence of paragraph 2.4.1 should read: "*[e]ven if LGBT persons who lived openly would not be generally be at risk, decision makers must consider whether there are reasons why the particular person would be at risk* ***if they lived openly****".*

(ii) Will the individual's attempts to conceal their identity be incomplete or unsuccessful?

We also welcome the fact that the CPIN reminds decision-makers (in Paragraph 2.4.5) to consider *"whether the steps taken by them [i.e. the individual concerned] would be sufficient to avoid the risk of persecution*" and that *"Some people will not be able to avoid being known or perceived to be LGBT, whilst others will take some steps to conceal but would still be at risk.*"

We consider that guidance to be very important.

First, it reflects the fact that living openly, as per the Refugee Convention, means living *completely* openly, and that an individual who takes *some steps* to conceal their sexual orientation or gender identity is *not* living openly for the purposes of Question 3. That is consistent with Lord Rodger's memorable descriptions of the variety of actions which may need to be suppressed in order to conceal a person's sexual orientation or gender identity (see paras 77 and 78 of *HJ (Iran))*.

Secondly, it reflects the fact that individual people may not be successful in concealing their sexual orientation or gender identity. That may be because they are unable to, or because they are already known to be LGBT, or because the '*steps*' they take to conceal their identity will not be sufficient in fact to conceal it.

In those circumstances, they should be treated for the purposes of *HJ (Iran)* Question 3, as people who do *not* live 'discreetly', but rather as people who live openly.

That is entirely consistent with the guidance given in the present CPIN para. 2.4.5. We believe however that the legal significance of the issue (to Question 3) would be clearer if the CPIN guidance set out the *HJ (Iran)* questions in order.

(4) ‘Generally’ and ‘real risk’

Our final concern about the CPIN is that the use of the word “*generally*” may distract from the correct legal test for risk in an asylum context. In *HJ (Iran)*, both Lord Rodger and Lord Walker emphasise that an openly LGBT person would face a “*real risk*” of persecution. See for example Lord Rodger in para. 82 of *HJ (Iran)*: “*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*”.

The Supreme Court does not use the word “*generally*” to refer to the real risk which openly LGBT people would face.

On the contrary, Lord Walker specifically approves (para. 91) an earlier judgment of the Court of Appeal which had explained that a “*real risk*” may exist even where something does not “*generally*” happen.

We are concerned that the use of the word ‘generally’ may give the impression that a person must show that openly LGBT people would *always*, or *usually*, or *probably* face persecution.

That would be a serious legal error.

All that a LGBT claimant X must show is that “*if X were completely open about X’s sexual orientation or gender identity, X would face* ***a real risk of persecution*****”.**

In order to make this clear, and avoid a serious error in the approach to the standard of proof, we suggest that the phrase “*would not be generally at risk*” should be replaced by “*would not face a real risk of persecution*” or “*would not generally face a real risk of persecution*”.