



Conversations:

Exchanges between academics, activists and policy makers

Centre for Law, Gender and Sexuality

University of Westminster

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GENDER, SEX AND ASYLUM

**With S. Chelvan, N0 5 Chambers and UK Lesbian and Gay Immigration Group
[UKLGIG]; Sarah Keenan, Oxford Brookes University; Nat Miles, Stonewall; Dr Oliver
Phillips, University of Westminster**

Facilitated by Harriet Samuels, University of Westminster

Please note the ‘transcript’ provides a largely verbatim account of the discussion. But in some places a summary of the answers to the questions is given. For the full answers please go to the recording.

Please also note that the full case references can be found at the end of the transcript.

Introduction by Harriet Samuels

Welcome everybody to the University of Westminster and to the Centre for Law, Gender and Sexuality and the seventh conversation in our conversation series. This conversation is on gender, sexuality and asylum, and the participants in our conversation this evening are Nathanael Miles [Nat] who is a policy officer at Stonewall. He is author of *No Going Back: Lesbian and Gay People and the Asylum System*, Stonewall, 2010

http://www.stonewall.org.uk/what_we_do/research_and_policy/2874.asp so welcome Nat; and Sarah Keenan, who is a lecturer at Oxford Brookes University and who is also a PhD student at the University of Kent on law and space, which she'll tell us more about; and S. Chelvan who is a barrister at Mitre House Chambers [Now at No 5 chambers] and is also a vice chair of the UK Lesbian and Gay Immigration Group and he has a practice in public law specialising in asylum and is also a PhD student at King's College in this area of gender, sexuality and asylum. Also with us and going to participate in the discussion is Dr Oliver Phillips who is a reader at the School of Law at the University of Westminster, and is here with his class on human rights and sexuality, so welcome to the LLM class as well, who are going to be our audience this evening and there will be an opportunity for them to ask questions at the end. I should also say that Oliver has some experience in asylum law and he does provide expert reports on Zimbabwe in asylum cases. So welcome everybody and I'll go straight to our first question of the evening: I'm going to ask our participants to introduce themselves, to say a little bit about their work, their organisation and what motivated them to work in the area. So would you like to start Chelvan?

S.Chelvan

Well I don't want to fill the full hour, so I will try and summarise. My name is Chelvan, I'm a barrister, I've been a barrister since 1999 and I came to the bar to empower myself as a gay man – that was my whole reason for coming to the bar because I felt what political scientists call an active citizen – if I wanted to change the world I had a duty to do something about it. I didn't trust politicians so instead of politics, I wanted to go into law: specifically in relation to lesbian, gay, bisexual, trans and intersex asylum. I'm also a first generation immigrant, I was born in Sri Lanka and I'm actually a Tamil by ethnic origin and I came over to the UK when I was four years old because of anti-Tamil riots in Colombo and rather than come as a refugee, I was luckily able to come as part of the immigration family with my mother who was

already here as a doctor working with the NHS in the late 70s. So we got in through that way, and lucky we did because of course, in 1983 was a huge persecution of Tamils in Colombo, which caused the sizeable amount of immigration law in the mid 80s and 90s and the noughts. So by going to LGBT asylum I was marrying both, as a gay man and as an immigrant and what motivates my work is my selfish reason to empower myself as a human being.

HS – OK, Sarah would you like to introduce yourself?

Sarah Keenan

Yep, I'm Sarah Keenan, I'm a lecturer in the law school at Oxford Brookes University. But my research is in law and political theory. As Harriet said, I look at theories of law and space and legal geography as an alternative way of framing questions that are usually seen in terms of identity politics. And one of those questions specifically, that I look at is the issue of asylum claims based on sexuality persecution. I have a particular interest in those claims made by women. It's hard to identify exactly what motivated me to work in this area: I worked briefly as a lawyer, I am a member of the queer community and am engaged in anti racist politics, and I guess I saw during my time in the courts – and I never did a lot of asylum work but I assisted some barristers in the areas of refugees - and I felt a real frustration with the way the entire system worked, and I felt that the focus on the individual could actually attract attention away from the structural systemic problems that were causing particular people from particular areas to need to move and to be prevented from moving whereas other citizens were allowed to move through the world quite freely. So I guess my work is more of a step back from the direct work that I know both Nat and Chelvan engage in, to think about how refugee law itself is part of the structure of, I guess, a global migration system that essentially prevents people from moving and how that can be rethought and how it's part of a global, geopolitical landscape.

Nat Miles

I'm Nat Miles I'm a policy officer at Stonewall. Stonewall is an organisation that has campaigned for equality for lesbian, gay and bisexual people in the UK for the past 20 years. The reason why we wanted to do a piece of work on this particular area was that there had been a few high profile cases where it seemed very clear that lesbian and gay asylum seekers were not given fair treatment by our asylum system. And also it was something that our board and our members – we have friends and close friends who donate money to Stonewall to help us continue our campaigning activities - it was something that they were very keen for us to look into as well so we wanted to find out what was actually going on,

because there were a lot of people saying 'you know, this is an issue that needs to be looked at', but there wasn't a lot of clarity about what actually was happening to lesbian and gay asylum seekers when they actually came to seek asylum in our system.

Oliver Phillips

Just very briefly, I'm Oliver Phillips and as most of you know, I teach here at Westminster. I'd like to correct Harriet – I know very little about asylum law, but I do get asked frequently to do expert reports on Zimbabwe on behalf of asylum seekers claiming asylum on the grounds of sexual orientation from Zimbabwe, and the reason for that is because having grown up in South Africa and in Zimbabwe, my research on sexuality, gender and the law, is focused on Zimbabwe: my PhD research was on sexual offences and the law in Zimbabwe and the research projects I've been doing ever since then and the publications I've been doing since then are all about sexuality and the law in Southern Africa. And so my experience of this is really, simply as an observer in many ways: providing the court with as much material rebutting the Home Office reasons for refusal, which are often unbelievably specious and often of course, not, grounded but often unbelievably specious. So I would like to say now that I won't be participating as a full discussant, answering each of these questions, but rather only where I feel I can add something meaningful.

HS – That would be very welcome

OP- Thank you Harriet

HS – **So thanks to everybody for introducing themselves and explaining their experience and work in the area. So we've obviously got quite a rich and diverse group of people here who've all got a common interest in the subject. We're going to focus on the UK asylum system, but I think broader issues will probably emerge as we go through. So I'd like to start off by asking the first question which is about what countries do those seeking asylum on the grounds of their sexuality tend to come from and have these countries changed over the years and if so why?**

SC – Well currently there are no public statistics from the UK Border Agency (UKBA) regarding those who claim asylum on the grounds of sexual or gender identity. However from the 7th July following the Supreme Court *Case HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 [Hereafter *HJ Iran*], UKBA has issued internal guidance to be able to monitor cases specifically where discretion or sexual identity claims arise. That would be brilliant, because, of course the only country at the

moment which does record statistics is Belgium, so it's about time we have statistics to be able to direct resources. In relation to which countries, well, we do have a link with the Commonwealth and as an English speaking nation, a lot of individuals who come from English speaking nations come to the UK. But that doesn't mean it's only English speaking nations because *HT (Cameroon)* of course was from Cameroon rather than from an Anglophone nation. If countries have changed over the years - I think what happens is there are patterns, because there are a lot of LGBTI asylum seekers who come to the UK and don't claim asylum, they go underground. And that's because they fear being discovered and sent back home. What does happen, I found in my practice over the past ten years, is that when there's a groundbreaking case, suddenly there'll be a multitude of individuals who claim asylum. For example in 2005 in November, what was then the Asylum and Immigration tribunal, promulgated the country guidance case on gay men from Jamaica, called *DW (Jamaica) V Secretary of State for the Home Department* [2005] UKAIT 00168 and suddenly there was a huge rise in the number of claims of gay men from Jamaica and also a lot of claimants who pretended to be gay from Jamaica, and we should remember that – that there are a lot of people who will use the system, and hence why the UKBA does recognise this fact and is slightly unsympathetic to these sort of manner of claims. *HJ (Iran)* and *HT (Cameroon)*: rise in Cameroon gay and lesbian cases, rise in Iranian cases, now a rise in sexual identity claims per se. And anecdotally, I've noticed, after the discretion argument is now, not totally dead – we have to realise that there is still a lacuna in the reasoning of the Supreme Court case and we will come to that later – that there has been a lot of grants of asylum to lesbian, gay and bisexual asylum claimants because the old arguments can no longer survive. So at the moment, to answer your question, we don't have the statistics. The UK Lesbian and Gay Immigration group, the 500-odd cases we have got on our database, we have a top 20 countries, and in that, Jamaica, Iran, Cameroon come within that sort of catchment area, Nigeria as well. But in relation to nationally, unfortunately we don't yet have statistics, but patterns do emerge when there are trends in the case law.

NM - Anecdotally we know Uganda as well, quite a lot come from Uganda. And in some countries – Uganda is a good example - you can sort of see that the situation for lesbian and gay people in that country has actually become manifestly worse in recent years, and so you would expect to see perhaps an increase in applicants from those countries as a result.

SC – What's quite strange or funny is that the Asylum and Immigration Tribunal in late 2008 promulgated a Country Guidance case on Uganda and said there's no evidence of any arrest or risk to Ugandan gay men and lesbians, and that went to the Court of Appeal last November and they said 'nothing wrong with that decision'. Of course, the month before

that Court of Appeal case was the anti-homosexuality bill in the Ugandan Parliament, introduced as a private member's bill. And then in February 2010, three months later the High Court said 'well you've got evidence of arrests and persecution of gay men and lesbians'. And the lesbian client in that case – *SB (Uganda) v Secretary of State for the Home Department [2010] EWHC 338 (Admin)* herself, was found to have been arrested and detained on account of her sexuality – this was in 2003 and 2004 and that completely undermined the Country Guidance case, but unfortunately in that space between September-November 2008 to February 2010, Ugandan lesbians and gay men were sent back to a life of possible future fear and persecution.

SK- Yeah, I guess taking a step back from the individual countries, I think it's fair to say to that most – I mean most refugees overwhelmingly are from the Global South, are from ex-colonial countries and there's no exception for the refugees or asylum seekers based on sexuality. There is a difference I think because usually the overall picture that we have of refugee law is of refugees moving from the Global South to the Global North, if we look generally at refugee law not based on sexuality, the overwhelming majority of refugees are received also by countries in the Global South, so people are moving, sort of, a short distance, whereas because of the very few countries that actually recognise refugee status on the basis of sexuality, with this area we do see people moving from the Global South to the Global North and to Britain specifically. And I guess what I want to point out with that is, many of these countries are ex-colonial countries and it was Britain in many cases that introduced the laws that were against homosexuality and they continue to be British laws that are in place in those countries.

NM - And I suppose if you think that there's over 80 countries in the world where same-sex relationships are against the law, six countries in the world where that's punishable by death, you know it's not a surprise that asylum seekers seeking asylum on these grounds can come from a wide spread of countries.

HS – OK so we've got a sense of the pattern or the geography or the lack of pattern actually, I think in where asylum seekers come from and I think I'd like to go on and have a look and what problems do LGBT asylum seekers have in negotiating the asylum system generally and more specifically in the UK and especially if you have examples from any case work that you might have been involved in. And are there any particular difficulties that are faced, for example by lesbians that don't apply to gay men, or vice versa?

SC – Well, I think that there are two issues, first of all in relation to the actual claim, but more importantly before the claim, access routes into the system. And the main problem LGBT asylum seekers have is access to legal aid and provision of representation which is going to get even worse with more and more cuts, even though the Green Paper which is recently published says that asylum is going to be ring-fenced, because immigration is not going to be ring-fenced, the number of legal aid firms is going to cut even further and therefore charities such as UKLGIG are going to have even more problems trying to get legal aid representations for asylum seekers. So a lot of people just fall off the radar, do not get access to the system, live underground, are forced into – for example one of my clients was forced into prostitution. All these sorts of issues occur because you're marginalised. And unlike a lot of asylum communities which can fall back on their ethnic community to provide them the support, LGBT asylum seekers don't actually have that, because they will face the homophobia engrained in that community, even if it's in the UK, even if it's not through a fear of persecution. So there's a marginalisation in relation to access into the system.

I'll very quickly deal with this because the major problem now of course, since the Supreme Court Case *HJ Iran*, is proving that you are lesbian or gay or bi or trans. And if you've just arrived in the airport, having claimed asylum and you are a Jamaican man there's a 99% chance that you'll be detained and put through what is called the fast track process, which means that you have no time to go to the bars in Soho and find your potential boyfriend who will come to your appeal hearing to provide evidence to prove that you're gay. So therefore that's going to be the major battleground: proving that that individual is lesbian, gay or bisexual. Thereafter, of course, the next battleground is to prove that you are going to face not persecution but discrimination – that's what the Home Office will say: yes you may be marginalised but it doesn't meet the high threshold of persecution. Then the next hurdle of course, following *HJ Iran*, is to show that one of your fears for your conduct on return, if it is concealment, formerly known as discretion, is because of your fear of persecution, well founded in your country of origin, and there is a lacuna in the reasoning of the Supreme Court which says, well if it's not believed that any of your discretion would be linked to this well founded fear of persecution, you're not a refugee. So those are the current legal hurdles facing LGBT asylum seekers.

NM- And they obviously feel a great deal of shame and stigma about their identity as well: they may never have spoken openly about being gay, they may not even know that that's how they define themselves, they may just know that they're different somehow and they needed to get away from that country because in that country being different in that way was something that was dangerous. So they're then expected to kind of talk about their identity,

right from the start – to come out and be open and say ‘yes, I’m a gay man, or I’m a lesbian and I’m seeking asylum for these reasons’. They may come from a culture where there’s no actual word to describe that, or if there is words, certainly they’re not nice words. You know, I interviewed Nigerian asylum seekers for the research that we produced and they told me that there’s no word for gay in Nigeria, the only word is demon or devil. So to expect them to then be able to present a case to say, you know ‘this is who I am, this is my identity’, that’s very difficult, and they struggle with that. They may feel that their identity as being someone who’s different has been the cause and the result of the persecution that they’ve experienced as well. They’re certainly going to be afraid of authority figures and the people interviewing them are very much authority figures in their eyes: they don’t know that in our culture we don’t discriminate - well, we still do discriminate against gay people - but they don’t know that we wouldn’t be officially, or we shouldn’t be officially doing that so to expect them to kind of talk about that stuff upfront is difficult and a real challenge.

SC- And the statistics are pretty bad – UKLGIG did a report called ‘Failing the Grade’ this April and we found out of the refusal decisions of the Home Office, nationally, in relation to non-LGBT asylum claims, they’re supposed to be at about 73% but with lesbian, gay and bisexual claims which we analysed, 98-99% of claims of initial decisions by the Home Office were refusals in these claims. Now this was before *HJ Iran* so that shows the culture in relation to disbelief – what I refer to as the cancer of disbelief - there really is that ingrained in UKBA. Now I’m not commenting on that – I’m just saying that that’s how I view it: that there is this school of ‘well, we just don’t believe you’.

NM – And certainly there are issues for lesbians particularly. Often the approach seems to be to look at what is the legal context in the country they are coming from – is it against the law to be gay? Now often the laws in these countries don’t specifically include women, they’re very much focused on men, so the approach of the Border Agency and sometimes the judiciary is to say that ‘well, it’s not against the law to be a lesbian in your country.’ But we know that the law doesn’t accurately describe how persecution really results in those countries. Persecution is much more likely to result from being perceived as someone who is different, it doesn’t have to be against the law. Also many women will turn up with – they may have a husband, they may have children – and again that’s taken in a very simplistic way as evidence - ‘you’re saying you’re a lesbian, but you’ve got a husband, how can you be a lesbian if you’ve got a husband?’ Very simplistic kind of understanding of what it is like to be a lesbian or a gay man in these countries and sort of overly simplistic focus on sexual activity and behaviour rather than identity, not understanding that it is the identity, the difference, that is what results in persecution.

SC - I mean the invisibility of lesbians is something which is very important to be able to attack and address and we've been doing a lot of work with the Country of Origin Information Service and I know that Nat's been at those meetings as well, where we're getting academic research on the point to show that if there is evidence of persecution of gay men, it's pretty bloody obvious that lesbians are not going to be not at risk, because it's a non conformity issue and it's all about perception. And dealing with the identity point, and current identity, the Court of Appeal, last July in a case called *NR (Jamaica) V Secretary of State for the Home Department* [2009] EWCA which I worked on, accepted that sexual identity is identity at the date of hearing, so history of previous heterosexual experimentation is not determinative. Which you know, that's 2009, in 2002, I remember being, what is called a baby barrister, a pupil barrister, listening to a Senior Presenting Officer in a Mongolian lesbian case - and it wasn't a case I was involved in, I was actually there on a Zimbabwe case, on what's called a Liberty Party, which existed then - but she was saying, 'oh she can't be a lesbian because she's been married and had a child.' As the judges left the room to deliberate, I just went for the jugular of the Senior Presenting Officer, saying 'how can you say that? How can you say that just because someone's been married and in a heterosexual relationship and had a child that they are not a lesbian?' And I can tell you that the Senior Presenting Officer has never said anything akin to what she said there and then. It's important to be able to identify that people like Oscar Wilde - he was married, had children, does that not mean that he's a gay icon and was a gay man, which caused his imprisonment, so it's very important to use those sort of examples to show that sexual identity is very much a personal manifestation. And when it comes to lesbians, there's a case on Egyptian lesbians that I'm dealing with at the moment - and the bar code of conduct allows me to talk about cases I'm currently involved in if it's for an educational purpose, so I'm going to use it - and the Home Office is saying: 'no problem with lesbians, no evidence of persecution.' What *HJIran* says quite clearly is that you as an individual person will suffer persecution all you need to show is that those who live openly and freely in that country of origin will be persecuted on the grounds of their sexual identity, but what's clear in Egypt, is that if any woman, be her straight or a lesbian, shows non-conformity with the heterosexual male stereotype of how a woman should conduct herself, you're lynched, you know, forget about the police dragging you into the detention cell, your neighbours will try and kill you. So that's what you have to look at, you have to look at not how this individual would actually act, but how women expressing their sexual identity, in this case as a lesbian woman, would be subjected to ill treatment, on return to their country of origin. And I think it's a huge positive step and UKLGIG had been lobbying for this for some time - to realise that if the background country of origin information is silent on the ill treatment of lesbians, that does not mean that

lesbians are not a risk group, and COI – the Country of Origin Information report people are starting to listen, so we're going to see a change in that, hopefully.

SK – I think what you're speaking about in terms of expressing a lesbian identity, that being something that, as a woman you are not conforming, this sort of intersection of different identities of gender and sexuality, is something that the law, the courts have struggled with. To sort of understand that it's not just that I'm a lesbian, it's that I'm a woman, and I don't fit into the gender categories that these things are related and this is something that doesn't fit with the law's kind of, 'are you this box, or are you this box? Which way are you being? On what grounds are you being persecuted?' And I guess I'd just add as well, in many countries it is only, as Nat said, male homosexual intercourse that is outlawed and so that leads to an invisibility of lesbian criminality. There's also, I guess, the problem of lesbian cultural invisibility, I think both in the countries of origin, but also here, as problematic as it is, there are certain stereotypes that I think judges seem to be able to at least require of gay men, when they're dealing with lesbians, they're not quite sure what to look for – I mean there are Australian cases where the refugee tribunals are saying 'well, you don't look like a lesbian' and I mean – what does a lesbian look like? Yeah, and I know we'll speak about this in the questions later and, as Nat was saying before, sexuality is something fluid – I might look like a lesbian today and have sexual partners who are men as well as women, and that's something that the courts really struggle with. Refugee law as its set up is not channelled to be able to deal with the realities and fluidity of sexual identity in particular.

SC - Well, I would say that before July, but since July, I mean *HJ Iran* is such an amazing case, and even the academic Jenni Millbank who's written a lot on this – especially on a case called *S395 (S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473*, which is the most important case in 2003, regarding two Bangladeshi gay men in Australia, which then started to ignite the case law in the UK from 2004 onwards. She says about *HJ Iran* is *S395 plus* - it goes further than *S395* because for the first time, we're not just talking about gay men.

SK - Do you want to explain about *S395*?

SC - Sorry, yes, 395 was the case of two Bangladeshi gay men, where the refugee tribunal accepted that they were gay men, and accepted that there was country evidence of persecution of gay men in Bangladesh, but said that when they went back to Bangladesh, they would be discrete and in a 4-3 majority, the High Court of Australia there were two pairs of judges – Kirby and McHugh, Gummow and Hayne, yes, were talking about: 'well, look,

how can you start dissecting groups into discrete and non-discrete and aren't we forgetting what it means about persecution and those subject to persecution.' Now within that – paragraph 41-43, the High Court was looking at, was it reasonably tolerable in terms of discretion and duration, and because of that one paragraph, that was jettisoned into UK Court of Appeal, sorry, English and Wales Court of Appeal case law, in a case called *Z*, [*Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578] which was a Zimbabwe gay man in 2004 saying, 'if they were discrete, why were they discrete?' Well, so far so good, in relation to S395, and unfortunately *Z* had not provided evidence before the first tribunal saying why he was discrete in Zimbabwe so he lost. And then there was *Amare*, the Ethiopian lesbian in November 2005, where, well, forget about discretion, she's only worrying about 'social discrimination – a bit of verbal abuse' so she's not really persecution. There was also an interesting academic debate about a human rights approach to refugee law in *Amare*, (*Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600), which is not relevant in this part of the discussion. And then there was a case called *RG (Colombia)* (*RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57) in January 2006, which I was involved in, where they accepted that, my client was a gay man from Columbia and was going to be subjected, if he was open, to vigilante death squads in Columbia, which the Home Office also accepted. But because he was able to be discrete for 13 years whilst in Columbia, he could go back and be discrete for the rest of his life. And the Court of Appeal said, you know, 'there's no error of law', even though there was evidence before the tribunal that part of this concealment was due to his fear of the vigilante death squads. The Court of Appeal said that that wasn't his primary fear – he actually came here because he was HIV positive and needed medication. Now everybody agrees in commentary that *RG (Columbia)* was a very troubling decision because there was evidence in relation to clear well founded fear of persecution from vigilante death squads and there was evidence that part of his discretion was due to that fear. Then of course, in July 2006, comes the case of *J*, where the Court of Appeal in relation to a gay man from Iran said, 'well, what the tribunal needs to do, is say well if he is discrete', and when it comes to discretion, if its voluntary discretion – it can't be forced onto an individual, but if they are discrete, is that discretion reasonably tolerable? So all tribunals will have to assess whether the discretion employed by the individual was reasonably tolerable and the problem with that is how do you measure it? Now the problem I have as an advocate is, well, the last thing I want to do is haul my client in front of a psychiatrist – you know - are you mentally ill? Are you going to have suicidal ideations because you're going to be discrete? Now we all know the very bad history in relation to psychiatrists and sexual identity, throughout the modern age in relation to identifying sexuality with psychiatric illnesses, and that is inherently wrong. And also what happened was a lot of these individuals were going to the Court of Appeal and the Court of

Appeal said, 'yes but you didn't say why discretion wouldn't be reasonably tolerable.' In a case called *XY (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 911 in 2008, the barrister on behalf of this gay man from Iran said, 'yes but he's going to have to have sex with his boyfriend in secret and also go to public bathhouses to have sex', and the Court of Appeal said, 'so what?' And it's quite troubling that that sort of submission is made to a Court of Appeal, about why that individual could not be discrete – because he'll only be able to have sex in public bathhouses.

OP – In *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, did the High Court not have the most extraordinary rationality that they were monogamous – they were both from Bulawayo, they were long term partners, in a monogamous relationship, and as one of them had the right to be in Britain, but the other was claiming asylum, because they were in a monogamous long term relationship, if they sent Z back to Zimbabwe, he wouldn't therefore be breaking the law, or actively homosexual, because of course, his long term monogamous partner was in Britain.

SC- That was the obiter issue, but the point implying S395 was what was the conduct driven analysis? Why was he discrete in the past? Because S395 was saying if that was through a fear of persecution, there's a causal nexus, and the causation point is established. So what the Court of appeal was saying, was well, Nicholas Blake QC, now president of the Upper Tribunal was told, 'well, go away, you can say whatever you want to as the advocates for Z in the Court of Appeal, but as he never said that initially in his tribunal, you lose.' So there's been lots of lacunas or gaps in the evidential reasoning of all these cases because even though the Court of Appeal in *J* said, the tribunal must ask itself the question, and I was of the opinion, well, the tribunal has to ask itself the question and therefore proactively ask, as if you've got an unrepresented client, how are they going to know that they need to fill the *J* test? So a lot of these cases were defeated on that basis.

HS – So perhaps we should move on to the Supreme Court ruling on *HJ (Iran)*

NM – Can I just say one thing? We've been talking about this area a lot, we've been approaching it very much from the side of the asylum seekers, but I think its more, sort of valuable to look at it from the side of the people in the Home Office or the judiciary that are doing the interviews. I think that that what the report that we produced, that I wrote identified, from the interviews with the Home Office staff, it was quite clear that they didn't really know what were the right questions to ask of gay asylum seekers, that's really where the problems stem from - they didn't know how to ask questions that gave them the opportunity to explain

why they feared persecution, what it was they were actually afraid of, if returned to their country. So that's something that we've been trying to work with them to improve. They had no guidance on approaching lesbian and gay cases, their training didn't really include any particular examples of how to approach the interview questions, so you would look at transcripts and it would be, third question in, they would say, 'when did you realise you were a lesbian?' you know, and it was stuff like that. And our approach, trying to work with them has been very much about getting them to approach it from 'a difference' rather than there was a sudden, 'yes it was Dec 4th 1983, I suddenly woke up and realised I was a lesbian' – it's not like that, and some of the things which came through those interviews – I had cases where case workers said to me, 'I tried to see whether they'd explore their sexual orientation in a cultural context by reading the books of Oscar Wilde', now, most gay people I know in the UK haven't read the books of Oscar Wilde, so to expect someone – you know, to expect a lesbian from Afghanistan to have been thumbing through here well thumbed copy of Oscar Wilde. It's just not – it is ridiculous, and we can all see it's ridiculous sitting here now, but in the absence of any kind of structure and in the absence of any kind of guidance, and you know, these guys, I have a lot of sympathy for the Home Office staff, because it's not an easy job basically deciding who qualifies for asylum, and they weren't given any steer - any guidance on how to go about it so they did end up asking these ridiculous questions. They did tell me things like, 'well, you know, if I get a Jamaican case, I just automatically refuse them because they're too complicated and we'll leave it to a judge to decide.' Stuff like that. So there was a real gap, a knowledge gap that needed to be filled.

HS – So lack of training of the officers?

NM – So training and guidance, and those are two things which we recommended and we've now been working with the Border Agency to address.

SC – Sometimes ignorance implodes into quite horrific questions, for example, proving you're a gay man through medical evidence. You know, I had this in an Iranian gay case in 2007, where the Presenting Officer said, 'your client says he's passive, get the evidence. Where's the medical evidence to show he's passive.' Or that lesbians must be virgins because of course they could never have been penetrated, now of course I didn't want to go into a discussion of objects, which you know, that some of my lesbian friends use in their sex play which will mean they will not be a virgin, but you know its an automatic assumption that they would not have any penetrative experience at all, and it's a high level of complete stupidity and ignorance and homophobia all mixed into one which really colours the system.

OP – It also reminds me of – I meant to say earlier - when you were talking about assumptions or stereotypes of what it means to be a lesbian, or how people define themselves as such, certainly I've come across in my research, instances where in very heteronormative societies, or societies where marriage is compulsory, people do get married and their lesbian existence has nothing to do with the fact that they might be married, or certainly a gay man's existence might have nothing to do with the fact that he might have three wives, there are very deep cultural assumptions at play that apparently, certainly from what you're saying get carried through the whole process. Because I wanted to know, how is it then, I've actually seen a film – a fictional film, but nevertheless I think it was very effectively done - where the questioning, you can see the UK Border Agency interviewer trying to get the man to say, 'I left because I'm gay', and in fact he doesn't have those words he doesn't have that language, and she's almost pleading with him to say it, and he just doesn't think of it that way. So how do you then get round that problem? And it's all very well to say training, but it strikes me that it's a deeper problem than that isn't it?

NM – Well, I think that one of the things we've been trying to stress in our conversations with the Border Agency that just focusing on what you've done – what you may or may not have done - is not really the right approach. It's about giving them the chance to build a story, about them growing up, about their experiences in their home country, about the reasons why they left, about what life has been like for them here in the UK, about what they're afraid of returning to. And you know people's routes into being an asylum seeker – they're not all a case of someone fled because they were afraid of being raped or tortured, it may be that they felt that they were different and they didn't really know why. So they came here on a student visa because they wanted to be in society that gave them a chance to be that different person that they felt that they were but they didn't really know and at that point they may have come to the realisation that they were in fact gay and then their case could struggle, because the approach, that very kind of basic approach may be, 'well why didn't you claim asylum when you first arrived?' and they will say 'well, I didn't even know, but I know now that I can't go back there'. And for a lot of the guys that I interviewed who were asylum seekers, this concept of being discrete, when they've been in the UK and lived in an open society and had that relationship for the first time, and had that self realisation, to then be told, 'well you were discrete in your home country, why can't you just go back and be discrete again?' I mean, these people, you can't even imagine what being told that would do to you. And to be fair to the guys in the Home Office, some of them found that very difficult as well, and not only the ones who were gay themselves, to be saying to these people, 'you will go back and be discrete because that's how you behaved before', 'well, yeah, but I've

been living in the UK for 5 years as an out, openly gay individual, you know things have changed.'

HS – Refugee law creates very strict categories doesn't it? And it's very hard for the fluidity of people's identities and life experiences to fit into those quite rigid categories.

SC – I think the category we're looking for in refugee claims on sexual identity, is what is called particular social group. Its one of the five convention reasons in relation to the Refugee Convention of 1951 and the 67 Protocol, but aligned to the specific classes of the convention reason is what is called the imputed Convention reason, and that's very helpful in relation to trying to fill this gap with respect to whether an individual can prove they're lesbian or gay or bisexual. What I refer to, what is called the perception test, which the Upper Tribunal is going to rule on in the next couple of weeks in relation to lesbians from Jamaica – if you're not behaving in a certain way which fits with the heteronorm model imposed by straight men on straight women, they you'll automatically be assumed to be lesbian and in countries such as Jamaica and in Zimbabwe, you have curative rape and this is quite clearly documented in the country background material. So even if you're a straight woman, you know, and completely straight, because you have no man with you and when men in the neighbourhood start calling, and start what they call, 'visiting', and you show no interest, well clearly you're what they call a sodomite, which is the word for a lesbian in Jamaica, and you could have the real risk of being raped. And that is a defence of the Refugee Convention, the Refugee Convention says that you don't have to fit in what is called the expressed or actual Convention reason, you can also come within the imputed Convention reason, and I think that Sarah will be able to say more about this than I can, but when we talk about identity, and some academics when I've spoken about it say, 'oh, that's so ten years ago', we now call about agency, and you know, that's very much not how we express ourselves, but how we are viewed, and that fits hand in glove with what I've been litigating in relation to the perception test.

HS – So can we just bring the discussion back to the *HJ Iran* case, I would just really like to focus on that before we move on. Because I think it was such a very important decision, I think you described it as an extraordinary decision. I just wondered if our panel might be able to explain a little bit about the case for the people listening so they can have a real understanding of the impact it made. So essentially the Supreme Court in the *HJ (Iran)* case held that the reasonably tolerable test which we've been talking about was an inappropriate measure to decide whether there was a well

founded fear of persecution so in other words, asylum claims should no longer be rejected on the basis that claimants could avoid persecution on the grounds of their sexuality if they live discretely, which is what we've already talked about a bit, and avoid displaying their sexual preferences. So I wanted you to talk a bit about the background to the case and the decision and its significance and whether it has made a difference to your work or to how you see your work, Chelvan would you like to start?

SC – I was actually, I mean UKLGIG was approached by HT (Cameroon) when he'd lost all hope in the summer of 2008. Basically HT (Cameroon) was a gay man from Cameroon who was found kissing his boyfriend in his back garden one night by a neighbour, now instead of just scolding him, what the neighbour then did was start spreading the word in his community, and therefore in July 2007 when he was walking home from church, the mob set on him and started beating and punching him to the ground. One of the mob pulled out a knife and tried to cut off his penis and he was able to stop that by putting his hand in front of the knife to be able to stop such torture. The police heard this commotion came around and said, 'what's going on here?' and when the mob told the police, 'we are beating a homosexual', instead of protecting HT, the police joined in the beating of HT. He was hospitalised for two months and due to a friend, he managed to escape Cameroon. The tribunal in Glasgow, sitting in 2007, accepted all the medical evidence about what happened to him in Cameroon, totally accepted that this beating occurred not only by what are called non state agents – the mob, but when you should have been protected by the state, the state joined in the beating. But what the Glasgow tribunal decided to do is say, 'but you can go and live elsewhere and be discrete, and live in Cameroon for the rest of your life hiding who you are.' Now what happened then unfortunately, or fortunately, is there was a tribunal hearing where the judge was sitting in London and the lawyers were sitting in Glasgow, which helped us in the end, where the tribunal said there was no error of law regarding this case. HT was then detained in Dungavel, a detention centre in Scotland, and then managed to be released, but then found himself south of the border, in England. And his Scottish lawyer said, 'we can't help you anymore, forget it' and then when he went to his English lawyer, they said, 'it's too complicated.' Fortunately he had a very good friend who contacted UKGLIG and in the Summer of 2008 I was rung up saying Chelvan can you look at this, and I thought, this is ridiculous, this guy has been persecuted for his sexuality, and they're saying you can go and live elsewhere, and why should he hide? So myself and Russell Blakely from Wilson and Co. had to put an application to the Court of Appeal in London, three months out of time to say, this case should clearly be litigated and one of the obstacles we had was should we be North of the border in Scotland because of the way jurisdictions work, or in England and Wales? And luckily because we argued the appeal was

actually heard in London, because the judge was sitting in London, we managed to get it here in England and the Court of Appeal agreed to join us with a case called HJ (Iran) – which used to be J – they keep on being having these initials, so J, which set the reasonable tolerability test was joined with that and another case of mine called AM (Syria), which eventually got consented out.

Now with HJ, he's an Iranian gay man in his late 40s, it was accepted that he had some problems at school, but then all his other evidence regarding ill treatment in Iran as a gay man was completely disbelieved and part of the evidence which was accepted by the tribunal was that he had a boyfriend in Iran which his mother and sibling knew about, and they were able to have barbecues in his back garden, so therefore clearly he had no fear of persecution in Iran. Hence why it's called the barbecues case. And therefore in 2001 when he arrived, he said, 'well even though there's a criminal law, I would have my private life, I will form relationships, I will have a boyfriend, that's what I will do.' Of course he didn't know he had to talk about his fear of persecution, he was talking about, 'whatever happens I will explore my sexuality and I have a right to do that.' But the 2007 tribunal used that against him and said, 'wait a minute, because you have no fear of the criminal law, you can go back' – in 2008 this was the tribunal deciding – 'and go back to Iran and live the life you lived in 2001.' Even though there's a statement in 2007 which says, 'I now know about the criminal law and I know what could happen and I fear that.'

Now, for me as a lawyer and as a gay man, it was like, well, 2001 and 2008, he's not the same gay man, he's a different human being, and to ignore the fact of the developing of his sexual identity – his coming out, his ability to breathe and live as a human being regarding his sexuality – ignored that point. So both of those cases went to the Court of Appeal in February 2009 and the Court of Appeal, led by Lord Justice Pill, said, 'well both those cases lose, HT loses because he doesn't say why the discretion wouldn't be reasonably tolerable, because the Glasgow lawyer didn't prepare the case in that way, and HJ loses because no material error of law in the tribunal's reasoning.' One very nasty part of that judgment was what is called the cultural relativism test: what the Court of Appeal said in that case is that, when you look at the culture whether discretion is reasonably tolerable; there should be some deference to the cultural and religious norms of that society. So Roman Catholic Cameroon and Islamic Iran, their social attitudes should also be put into the formula of whether something is reasonably tolerable. And that was just horrific for us, because you know, that just undermines the whole Refugee Convention. And the case went to the Supreme Court in May 2010, heard over three days from the 10th to the 12th of May, why are those important dates? Because on the 12th May we had a new government. The Con Lib-

Dem coalition, and we were looking at the barristers from the Home Office saying, 'well, you know, do you have new instructions here, because the LibDems are not for this whole discretion thing', but unfortunately we still had a Conservative Home Secretary so there's nothing we could do. So, three days, it was an amazing case to hear, I was there as an observer, in relation to my PhD. The UNHCR sent interveners and so did the Equalities and Human Rights Commission, it was amazing to see the types of discussions used. The Home Office even said, and the example is used of Anne Frank – let's say that Anne Frank escapes the attic in WWII, escapes the Nazis in the Netherlands and comes to the UK and says, 'I want to claim asylum' well the Home Office position is, 'well she managed to evade persecution by escaping and she was able to hide in that attic' and what the Home Office said is that unless she suffered persecution because of the hiding she was not a refugee. And the Supreme Court flatly refused it.

Before I go on to the judgment, what's interesting of course is that the coalition provided the Equalities Manifesto, which said quite clearly that we will never deport somebody who faces ill treatment or persecution or execution on the grounds of their sexual orientation. Well, that's not a newsflash people, this has been the law since 1999, and for a politician to try and use that as a wonderful statement of fact is just plainly ridiculous. And then of course, what happened was, Theresa May said when the judgment came, 'well, this is now in line with our new policy', well if it is in line with your new policy then you should have told the Supreme Court between the 12th May and the decision on the 7th July – they never changed their instructions. But we are very much grateful for the fact that since then, on the 6th October, UKBA published what is called an asylum instruction on sexual orientation and gender identity, which UKLGIG has been lobbying for, for the past two years and we've spent a lot of work on that instruction. It's not perfect, but it's a bloody good first step, so we're very proud of that.

If we look at the judgment, there are several areas where I want to applaud the Supreme Court, and it's an amazing judgment, because in 2005, in a case called *M v Secretary of State for Work and Pensions* [2006] UKHL 11 we had the House of Lords as they then were, saying after the Civil Partnership Act, 'well it's too soon for society to be rushed through', so we weren't looking forward to what the Supreme Court were going to say, and *M* is currently before the Strasbourg Court in relation to child benefits. But what this Court did is several things: first of all, one of the things we wanted to do is get rid of the term homosexual, because it's purely conduct based and persecutory based and it makes lesbians invisible. So what was clear in the skeleton argument for HT (Cameroon) is, you know, it's like using, in a claim involving a black person, the N word - it's not acceptable, Stonewall is a gay and

lesbian lobbying group, my organisation is the UK lesbian and gay immigration group, not the UK homosexual immigration group. We're 41 years after Stonewall, it's about time people. So even UKBA in 2005 started using lesbian, gay, bisexual and transgender, so let's start with the courts. So that's the most important thing, there's references to homosexual but more references to gay men, lesbians and for the first time, bisexuals, the first time an asylum decision refers to bisexuals being at risk, so that's very important. In relation to the reasonable tolerability test, I mean, this is something which I raised in a Court of Appeal case called *JM (Uganda) and OO (Sudan) v Secretary of State for the Home Department*[2009] EWCA Civ 1432, is that when you're looking at intensity and duration, we're not talking about one day, we're not talking about one week, we're talking about the rest of your life. And that's exactly what the Supreme Court accepted. Lord Rodger said in paragraph 75, 'to act discretely and conceal his sexuality indefinitely, to avoiding suffering serious harm' – for the rest of your life. And where is the yardstick, how do you measure this reasonable tolerability? And more importantly, this is the first time we've had reference in an asylum case to a straight person, so no straight person, would find that acceptable. So here we are, five Supreme Court justices in 2010, getting with the lingo at last. And it's a very important reference point so whenever judges refer to a homosexual, I raise my hand and say, 'look if the Supreme Court gets the terminology right, it's very important, and it's very important in relation to identity rather than pure conduct.' Of course then we have the Kylie Minogue paragraph, and gay rumour has it that before Kylie was inserted, it was Barbara Streisand and the Supreme Court justice had to be updated in relation to gay icons, and there was a huge debate as to whether it was Kyle Minogue or just Kylie, so Kylie won the day. To give that wonderful example. And it wasn't homophobic, some of the gay press and straight press said that it was a homophobic remark. So what did he say? That straight men are able to go out with their straight mates, watch rugby, drink beer and talk about women, so gay men should be able to go out with their female friends, drink exotically coloured cocktails and go to Kylie Minogue concerts. I mean, it's wonderful, and all of us I think were at the Greenwich conference on the 7th July and the whole room roared with laughter. It was a brilliant example of saying, well, when you're able to live openly and freely as a straight person, it doesn't mean that you live in the same way, and that's a very important indicator for asylum claims. And also what's very helpful of course, is the Strasbourg Court on the 24th June this year in *Schalk and Kopf and Austria* (Schalk v Austria (30141/04) Unreported June 3, 2010 (ECHR), which is the gay marriage case, also said that same sex couples come under the definition of family. So we've got these two developments in the summer of 2010, which said that we are family and we are also able to live openly and freely as human beings. So the comparators change automatically. When the comparators used to be, well as a gay person, how is a straight person in Iran treated? Well, no, I'm not going to be

treated as a straight single person, I'm going to be treated as a gay person or lesbian person who wants to form a family, and will I be able to form that family in Iran? No way. And what will happen if I live together as a family with my same sex partner? I'll be persecuted. So the Supreme Court, in the end of paragraph 82 of the judgment, provided the guidelines, there are 4 steps and I'll summarise these quickly because of the time: first one, proving that you're lesbian, gay or bisexual, and please note, trans people are not included in this judgment, and there's lots of commentary saying it's LGBT friendly, and it's not. There are only 2 reported cases in the court of appeal regarding trans asylum cases, one doesn't actually deal with substantive trans identity, however in the next six months I'm involved in a country guidance case on gender identity which will be the first case to look at that. So *HJ (Iran)* and *HT (Cameroon)* doesn't deal with trans. But if you're L, G, or B or perceived to be lesbian, gay or bisexual, that's the first limb. The second limb, are people who live openly as L,G,B are persecuted. The third limb is would that individual be open, if they are open about their sexual identity on return, then they are refugee, they win, however unreasonable that is. If they are voluntarily discreet, why is that conduct driven? Is it due to, just - oh the family will shout at me and kick me out? You lose is it because of societal discrimination? You lose. Or is there a reason, with all those reasons, which includes a fear of persecution? Then you win. But what those guidelines miss, is when the tribunal says, that you may say that you'll face fear, persecution and that's why you'll be discrete but I don't believe you, well then, that's where the perception test will come in and hopefully, fill in that gap – the decision is not perfect.

SK – So is what you're saying that, if the courts are saying that you're voluntarily discrete..?

SC – If you're voluntarily discrete and the reason for that voluntary discretion has nothing to do with the fear of persecution, you lose. And what I say, to fill in that gap, ok you might live in this bubble, and having worked with LGBT asylum seekers for 10 years I've never had a claimant who has ever said that they don't fear persecution, is that when you're going into the legal space, and the tribunal says, 'well no I don't believe you in relation to what you say about your fear', then I say, 'well forget about that, you have an individual you accept is a lesbian or gay man, or perceived to be a lesbian or gay man, therefore, when they go into the new community' – 'who's that stranger?' and what I call the politics of gossip: 'who are you? What are you doing here? What is your family background?'

OP - Why aren't you married?

SC– Exactly. And when you can't answer those questions, then it comes to identification of difference, and when it comes to the sexual sphere, if you're different, and therefore not straight, you must be lesbian, gay or bisexual. And that's what will fill the lacuna in *HJ Iran* and HT, depending on how the tribunal views it.

NM – And that's why it's really important that we encourage the judges and the Home Office officials to ask the next question – it's about the next question. So, if you say, 'why don't you want to be returned to your country, you're afraid of bringing shame on your family? And they say 'yes, that's what they're telling you – I'm afraid of bringing shame on my family', then it's like, the question is, 'and what will happen if you bring shame on your family?' because I think what we know anecdotally, and what I know from interviewing a lot of gay asylum seekers, is that shame on your family, the concept of that in the UK – it might be, 'yeah, I brought shame on my family. Oh well, I probably won't be seeing them for Christmas dinner.' It's a bit different if you live in a culture where, you know, actually, it's often family members who lead the persecution against. So to stop at that point and say, 'oh well the reason they are going to be discrete is because they don't want to bring shame on their family', is not enough, you haven't explored that issue enough. You have to say, 'and why? And why? And why?' And eventually you get to the point where you're saying, 'and what is it that you're afraid of?' and what you're afraid of is persecution.

SK – But is being discrete because you fear bringing shame on your family, is that, does that count as voluntary discretion?

SC – Yes – voluntary because – forced modification is in relation to the UK forcing modification, so if the court says, 'I expect you to be discrete' or 'I tell you to be discrete', or the Home Office says, 'you will be discrete because I tell you you'll be discrete', then, that's unlawful. If it's conduct driven modification which is – I know voluntary is a wrong term for it - because what *HJ Iran* does is say it's not really voluntary because there's fear of persecution, because there's a fear of persecution then you are a refugee. What's interesting though is that the Refugee Convention is amazing for this now, because under ECHR jurisprudence, you actually have to suffer the Article 3 ill treatment, there's a case recently in the Court of Appeal where they told me, 'look, we're going to open the door for Refugee Convention, but we don't think you can get further with Article 3.' But here, it says, look, you don't have to actually prove that you've been ill treated, but your mere membership of a group where the evidence shows that those who are open – so maybe 0.1% of lesbians in Egypt are open but if that 0.1% of those who are open are persecuted, you win. That's what's so great about *HJ Iran* and HT.

NM – I wanted to say, for us, the way in which it was sort of portrayed in the media, the angle for a lot of the press was ‘special treatment for gay people’. The Daily Mail, they like to have headlines that say ‘Now...’, they sometimes say now for a good thing or now for a bad thing and you can normally work out what the angle is. But it was ‘Now, asylum if you’re gay’ and I think the point to make about this is that actually it wasn’t about special treatment, it was about equal treatment, it was about restoring something which had been eroded and lost. So the Convention exists to protect people who fear persecution, right? It’s not about, ‘you fear persecution, but, oh, you can avoid persecution’, that’s not what it says. And somehow, something had happened and people had found some work grounds and, the process had shifted away from that focus, and what this judgment was about doing was about putting it back and saying. And there was a misperception that there was some kind of special treatment. ‘Oh, gay people are going to get asylum – well whatever next!’ Well gay people who are being persecuted or who fear persecution should be given asylum, it’s as simple as that, but obviously that’s not how it was portrayed. But I think that’s the really important point: that it wasn’t about special treatment and it never was, it’s about equal treatment and it’s about restoring that treatment that everyone has the right to.

SC – I mean that came from a case in 2000 called *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 which was about skinhead persecution of Roma in what was then Czechoslovakia, and that’s where the dictum in relation to all human beings able to live freely and openly. And that’s what is so wonderful about being a lawyer, I would say that to anybody, it’s a wonderful profession because we have a Supreme Court which states the blindingly obvious, and in such simple language, which makes us celebrate British justice – very much, you know, it was a phenomenal decision. But what’s interesting – I can’t remember his name from Migration Watch – went on one of the TV programmes - and I think Ben was on that programme that following morning – and saying, ‘well anybody who’s gay or lesbian who comes from a country where it’s illegal, is a refugee’, and I was, you know, shouting at the TV screen as I was watching this, saying, well actually the Court of Appeal said no to me in November because they actually said it has to be enforced. So you have these headlines, you know – the law is there to have high thresholds and strict boundaries, and it’s important to note that there isn’t a floodgates argument, because it’s very difficult to be able to be open about your sexuality, even in the UK – and we all know that – you know, even with some oldie like me, even coming out to a group of strangers, it’s like, ‘Oh my god, I’m going to have to do all this again and tell my life story’ and it’s bizarre, because you know, straight people don’t have a badge, and unless you have gaydar, you’re very lucky. So, it’s a huge struggle and a huge journey for an individual to go through that narrative to say why

they've come here – because they've left everything, and this is what, you know, London black cabbie drivers and Daily Mail readers need to know, that we're actually talking about real human beings. And legal aid lawyers – I'm not allowed to represent somebody unless they've got a 50% chance of success, so I don't deal with those people who are lying, because they don't come near the 50% for me. So to say there's a lot of bogus asylum seekers, well, they should really come and watch the work we do, as activists, as academics, as advocates, to show, you know, the real, genuine people who are out there, who sometimes get lost in the system – RG is still in the UK, but still in the system, but he should have won in 2006, that was a travesty of justice, he should really have won because he is a refugee under the guidance of *HJ Iran* and HT.

NM – The thing most interesting now to see is how, how that sort of ruling is filtered down, whether the training and the guidance that the Home Office staff are using is having some sort of effect, and what we know is that in other countries where the discretion argument as a reason for refusing asylum was overturned, what happened was that then, the reason for refusal of lesbian and gay applicants went to other areas – so as Chelvan said earlier, the distinction between what is discrimination and what is actually persecution, where do you draw that line, what's the threshold, and you might find that more gay cases are now refused because the case owners or the judges are saying, 'well yeah that does sound tough, but I don't think it's persecution. I think that's just a bad case of discrimination.' And the other, what was the other area – I've lost my train of thought -

SC – Proving that you're gay

NM – Yeah – just proving that you're gay again, that becomes the battleground again. So the focus shifts to saying, 'well I don't believe that you're gay' – so credibility, and credibility is always a major issue in refusing cases, but it's going to be even more of a battleground now.

SC –For example S395, that Bangladeshi case in Australia, when it was referred back to the refugee tribunal, the tribunal saw the initial application form, and they ticked the box for married, so the tribunal made a finding that they're not gay anymore, they were actually lying about being gay, and that involved further judicial review proceedings in the Australian courts, and the Australian courts said that the refugee tribunal was acting in bad faith because they couldn't revisit this point. But anecdotally, post *HJ Iran*, there's an immigration judge in London who turned around to a gay asylum seeker and asked him, 'when did you first engage in buggery?' You know, this is 2010 and that's subject to an appeal at the

moment. These are the words - a Home Office interviewer in relation to lesbian asylum claims, it was almost pornographic, when you read the interview records, the detail that that individual and the Home Office went into regarding her sex life. You know, was that for pure titillation on his part? How do we know? That was in the last month that UKLGIG has read that. So these are the types of examples which are happening, which shows that the battleground is still very much there, and I'm very happy that there are battlegrounds for us to fight because that creates better understanding of the law. Adversely, of course, yes I want UKBA to have better decision making processes, but we also need to advance the law as well, and those sort of cases do advance the law because they're so horrific, in being able to highlight the homophobia which is very much part of the human condition outside UKBA and outside the tribunals and outside the decision making process, which of course flows within the individuals who are in the system as well.

HS – So the Supreme Court decision has obviously removed a major obstacle and I think we've already talked about some of the obstacles that still remain, which are largely around training of the officials, including the judges within the system and their homophobic attitudes.

SC – But also around lack of access, because the problem is, with the legal aid budget at the moment, you should never go to an interview unless you have a very detailed statement drafted for you, because when you're describing difference - how I felt different, it could happen at school – now you're six or seven you don't have any sexual feelings, but you realize as a young boy, you like playing with girls rather than with boys, and you suddenly realize you're different and that grows into a different narrative, and you're looking at 30-40 pages of a detailed statement. Legal aid lawyers are only paid for a short period of consultation by the Legal Services Commission, to deal with the pre-interview screening, you can't draft a statement, you can barely get their name and the reason for claiming asylum but that is the current limits of funding by the Legal Services Commission. So lesbian, gay and bisexual asylum seekers are sent to the Home Office on that basis. Unless, of course, they have a dedicated legal aid lawyer, who will say, 'well that's how much I'm going to be paid, but I need to make sure that we go through the statement beforehand and prepare your case' because if you're off the radar and you're an overstayer, you are highly likely to be detained in the fast track procedure, which means you'll be interviewed within three days, refused on that day and have your appeal in two days time. And the problem is, is that the system predicates itself on using the good faith of those of us working in the system to either continue the fire in our bellies to represent LGBT asylum seekers or say, 'I'm giving this up, I'm not going to be doing this, why should I be doing this? I've got a mortgage to pay, I've

got bills to pay. I'm not going to be paid anything for this, I might as well give this up and become a commercial lawyer.' Not that I'd ever do that. But you know, the point is, it's very important that anybody who listens to this podcast is that while we're looking at academic views, we're talking about lives of human beings and the government and this government as well – and you can see this will immigration and statistics – 'we want to reduce net migration.' And even the Labour government, I remember being on a TV show 2003 and John Denham saying, 'we want to stop the number of successful appeals.' Sorry? I just nearly, I mean, my God, this used to be my Southampton Itchen MP when I was a student at Southampton. I thought, my own former MP is saying we want to stop the number of *successful* asylum appeals, you know, the UK's got international treaty obligations – if somebody is a refugee, they are given safe harbour. Not: 'we will try and make sure that less people are successful', and one very easy way of making sure that less people are successful, is stop effective representation. And that's what happened.

SK – And as you said that's going to get worse.

SC – It's going to get worse.

SK – I mean, as there's a demonstration, as we all know, happening right now about austerity measures, and I think we need to see the austerity measures, that they've come hand in hand with restrictions on migration as well. And that both of those are, you know, involved in a political process of sort of, creating a false side of blame and an ineffective measure of redress for socioeconomic crises that we're having.

SC – We could speak all night about that, I mean...

HS – On that note - obviously, the problems around the provision of legal aid in such an area that is so fact sensitive is obviously going to have a massive impact. But just perhaps moving the discussion on to a slightly more general level, I wanted to ask our participants about the human rights discourse that's being used to hang a lot of the refugee law issues around gender and asylum on. And also to ask a more specific question about identity which is, does the requirement to establish one's sexual orientation as gay or lesbian oblige asylum seekers to tailor their behaviour and expression, to fit the presumptions of the UK Border Agency, and does it mean that the asylum system is engaged in promoting a particular notion of sexual identity, so alternatives become subordinated to Western notions of what gay and lesbian identity are, and does that limit the scope for recognizing the needs of bisexuals and

transgendered claimants? So I realized as I was speaking that's rather a long question, but, I think it's about this issue of, well, it raises several issues, one is around the issue of human rights, which is a huge issue, one is around the issue of categorization that we've already touched on – that we try to put people into categories into which they simply don't fit. And I'm also going to ask what was our last question at this point as well, because I think it will also arise in the discussion – which is something that troubles me and many people, which is, how do we as activist lawyers and how do courts and adjudicators avoid the colonial overtones that pervade asylum law, so how can we avoid what is sometimes called the white saviour discourse when we're working in this area? So I know there are three different issues, one was more around human rights, one more around fitting people in to identities that they don't fit into or categories they don't fit into and then one's more about cultural relativism and universalism and the idea of saving people, so when we're talking about, you know, is it right to acknowledge different cultures and defer to those cultures? And how do we integrate all this to come up with a humane asylum process? Ok so, I'm going to throw it open, who would like to start?

NM – In answer to the last question first, Stonewall are a lobbying and campaigning organisation based in the UK, so I think we neatly sidestep the danger of any white saviour discourse by focusing our efforts on the situation on the ground here in the UK. I know that the current government has said that they want to lead from the front in terms of encouraging and sort of, nudging other nations into changing their sort of approach in this area – the way lesbian and gay people are treated, but our focus has been very much on the asylum system of the UK, and how we can improve that, because what our report was all about was about identifying that there was clear discrimination and bad practice going on, which was exposed eventually to be not only bad practice but also against the law. So our focus is very much on what's happening here. So if we were internationally working, I think we would do it through working in partnership, we certainly wouldn't be going into countries and saying, 'we know best', we would be looking to partner with organisations in those countries, who knew what the situation on the ground was and were expert in that area, and I think that's probably the model that's most effective for getting traction and actually achieving results and achieving, as you say, the danger of that saviour discourse.

HS – Sarah did you want to...?

SK – Sure, yeah, with the white saviour discourse, I think it's really difficult: the refugee system as it's set up, you have to prove that you fear persecution and that persecution has,

you know, evidential grounds, and I mean a lot of campaign material that I've seen that is around fighting for a gay or lesbian refugee to be allowed to stay here, it demonises their home culture in ways that are hugely problematic, and simplistic, but, I mean, the refugee system encourages that. So I think it's difficult, I think it's necessary, to a certain extent, for the individual claimant. I think practitioners and activists in the field are in a very difficult position and that all they can do is present the fact as sensitively as possible and I guess to raise issues such as the colonial legacies of the anti-gay laws of many of these countries, and I guess as well to, as Nat says, and as Stonewall does, to recognise that gay and lesbian equality or freedom is far from being achieved in this country either.

SC – OK, well where do we start? The Human Rights discourse on the equality agenda – the Court of Appeal in 2006 in *Amare*, the lesbian case from Ethiopia, rejected the human rights approach to asylum law. It rejected the notion following the New Zealand case of *76445/03*, an Iranian gay case. And of course all the human rights cases, *Dudgeon*, *Norris*, Ireland on Article 8, were all provided to the Court of Appeal and Lord Justice Laws said forget it, because that's enlarging the scope of the conventions beyond what was agreed by the contracting parties. Now, this was revisited by the Supreme Court this year in *HJ Iran* in what's called the Core Rights Approach, which was provided by the New Zealand case. And luckily at that time, *HJ Iran* had not been decided on the Core Rights Approach, it was decided on those guidelines in paragraph 82 regarding the ability to live openly and freely, on convention reason grounds. But what, *HJ Iran* does do is open the door again to a human rights approach which is very important. Now following *HJ Iran* there was a case called *TM (Zimbabwe) v Secretary of State for the Home Department* [2010] EWCA Civ 916 on the 30th of July, which regarded political opinion and Zanu PF loyalists, or those who weren't Zanu PF loyalists, being at risk of persecution in Zimbabwe, following the country guidance case of *RN (RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083), and Lord Justice Elias said in that case, 'well, you know there's some obiter comments in the Supreme Court in *HJ Iran* about Core Rights and we don't think it's a Core Rights approach, and forget about it.' Lucky those were obiter to comments also from Elias LJ, in *TM (Zimbabwe)*, and when the whole application of *HJ Iran* – which is also broad, it's not just

sexual identity claims, it's for any convention reason – was decided on political opinion at the end of November, in a case called *RT (Zimbabwe) v Secretary of State for the Home Department* ([2010] EWCA Civ 1285), they did not follow the Core Rights approach as well. So that's important – it leaves the door open. Why is it important? Because James Hathaway, who I think is one of the godfathers of asylum law, when you look at definitions of persecution, the ordinary definition of persecution is violation of first category rights – that's torture and ill treatment, but also, there's indefensible violation of second category rights and third category rights – third category rights being social and economic rights, second category rights being right to privacy, freedom of expression, liberty. And I argued in the Court of Appeal, last November in *OO (Sudan)*, that following the Dudgeon principle, we had an indefensible violation of a gay man's right to a private life, which amounted to persecution. Now, being a young boy, my Hindu mother always used to say, 'God says three things: yes, no or later.' And I always believe that in relation to the Court of Appeal. So when they said 'no' to me in November, I do really believe that's 'come back later.' So we'll have to wait and see what happens there. But, you know, Jenni Millbank's also written a lot about the human rights approach to asylum and I very much approach gay and lesbian cases from a human rights approach – because we're talking about the inability to live a private life in the outside world, i.e. being able to be open about your sexuality, being able to freely express your sexuality. And that's how you get judges to understand, because there's a great paragraph in an article by Millbank and Dauvergne where they ask, 'What is a normal life?' (Dauvergne and Millbank, in "Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh" (2003) 25 *Sydney Law Review* 97, at 107)

Would a straight person find it's a normal life where in every area of their lives they would have to pretend to be gay, and when you give that to judges they all say, 'Oh – that's what it's about.' The penny drops. And that's from a human rights discourse. So, I still think that there's a battleground out there for human rights into the Refugee Convention. With the footnote of course that the Refugee Convention seems to give greater protection than the ECHR in relation to actual ill treatment.

Ok, that's part one, part two— you can see why I'm doing a PhD on this – part two in relation to presumptions of UKBA, well, this is what it's all about – the question of the judge, you know, when did you first engage in buggery? Where's the medical evidence in relation to the passive partner? I mean all these sorts of questions. But I think it's presumptions about anybody, you know, what I try and concentrate is not on the sexual act – there's a great line in *DW (Jamaica)* saying 'sexual identity is more than just conduct.' *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG [2005] UKAIT 00168* And conduct's got something to do with it unsurprisingly, it's you know, sex is an enjoyable thing, it's part of our identity, of course conduct's got something to do with it, but to try and show that it's more than just sex is very important. Does it subordinate to white western notions of gay or lesbian identity? I think I'll go through the third question which I'll come back to in a minute, I don't think it limits the scope in relation to recognising bisexual claims because the Supreme Court now says quite clearly, you know, anything which does not conform – if you're perceived to be lesbian, gay or bisexual. And in relation to trans claims as I said, the reason why *HJ Iran* didn't really go on to trans claims is that because when trans individuals and intersex individuals, well trans individuals are a very good example, go transitioning, go through transitioning, its because, they may elect to have surgery or they may not, through dress or attire or behaviour, they are clearly not able to be discrete, so that's why the discretion argument didn't directly relate to trans claims, and that's the on thing that is very important in relation to trans claims, that they didn't fall under the trap of discretion.

Ok, how do activists, lawyers, courts and adjudicators avoid the trap of colonial overtones that pervade asylum law? You know, I actually don't think that's a bad thing in one way, because it's saying – you can come here and be free, and be safe. Because the cultural relativism test introduced in the Court of Appeal was saying, 'you must have regard to the Global South attitudes in relation to Islamic Iran, and Roman Catholic Cameroon' and so the white saviour in a way is truly a white saviour, even though, I'm clearly not white, so I smiled when I read this part of the question. It's about saying, 'you have the ability to be able to be who you are as a human being', and if that's a white saviour discourse then I applaud it. But, on the point of colonial overtones, well, 2nd July 2009, the Delhi High Court handed down the *Naz* decision, (*Naz Foundation v Government of NCT of Dehli*, 2nd July 2009 available at http://www.nazindia.org/judgement_377.pdf) and Justice Shah – as he now is, he was Chief Justice, he's now retired, was in London on the 30th November, at the Commonwealth HIV association, and the one thing I said to him in questions was, 'this is brilliant, it's your decision for the first time, which struck down section 377 of the Indian penal code which was the anti-sodomy statute, showed the world that this was not a white man's disease.' And in

the judgment of Chief Justice Shah – and I would recommend everybody to read it, he said ‘we’re looking at this as an Indian approach, you know, Nehru talked about diversity and difference, and if you do not recognise and protect that difference, you’re not being Indian.’ So I use that case as a great example of showing that there’s no such thing as colonial overtones in relation to refugee law, because we can now look at decisions such as the South African Constitutional Court in the National Coalition cases in the 90s, we can now look at India saying it is un-Indian to be homophobic and trans phobic, and the great thing about the third part of Justice Shah’s judgment, it says that even having the criminal legislation is contrary to constitutional rights in India, and I was saying, ‘you know, I wish the Courts of Appeal had read his judgment last November.’

HS- Is this the Indian Supreme Court?

SC – Indian Delhi High Court decision. But because it was a federal constituted court, it affects all of India, but it’s currently being appealed to the Supreme Court in India, not by the government, but by religious right groups. The government are actually saying, ‘no they’re not going to appeal it.’ But they’re waiting for the Supreme Court to make a decision on this, and then they can say, ‘the law has to be changed rather than a vote in the Indian legislature.’ So I’d recommend that case very much because it completely undermines the colonial approach to this. Sexual identity is not a white man’s disease, what has been the white man’s disease has been the persecution through legislation, in countries where people flee, so, there we are.

OP – I think you’re right that the *Naz* case is really important at rebutting the argument that unfortunately fuels so much of the stuff in Africa. I mean obviously Roman Catholicism and the growth of religion generally, particularly in central and Eastern Africa has a lot to do with current events there, but whether you’re looking at Uganda, or Senegal, or Zimbabwe, or Malawi, you know, all of their situations, there is a very strong, if not predominant, anti-imperialist kind of rhetoric, that fuels it. And it’s often actually more about the anti-imperialism than it is about the homophobia, and the kind of homosexuality just caught up in it. So I agree that *Naz* is a wonderful decision in helping combat that, except unfortunately it doesn’t take away the fact that there does seem to be this resurgence of this rhetoric that, in the 90s you saw with Mugabe, and then seemed to be relatively – perhaps because of the South African situation – seemed to kind of help contain it a bit, but what we’ve seen in the last couple of years is I think a worrying resurgence of that, so there is a sense – much as I’d like to buy into your optimistic take on the white saviour thing, I’m concerned that actually it’s only going to become more so. Because what we’re going to see, despite the problems with

legal aid, but what we are going to see is more claims for asylum coming from those countries in the next year or two. Unless, I mean there are some more positive dynamics happening in Kenya, it's like two steps forward, one step back the whole time, but I think that the idea of this, of a sort of safe haven, shall we say and one place, the glorification of a metropolitan culture safe haven, and a front line - which you talked about – the sort of demonization of that frontline culture, is only going to become more, how can you say it? It's going to feed into that whole politics I think even more.

SK – Yeah, and related to that, and going to another part of your three point question, I guess is just the reality of the refugee system. When you ask, 'is an evidential requirement proving that you're gay and lesbian, is that promulgating a Western version?' Well yes, absolutely it is, that's all the courts have, is a western version – like Nat said before, people arrive in the UK, they don't have the word for gay, of course we're asking them to perform a Western notion of homosexuality or lesbianism. And I mean, are there problems in, or colonial overtones, or sort of white saviour problems with asking someone from a country in the global south to perform their identity in a way that conforms to our understanding of homosexuality in a white western culture? Well yes, yes there are.

SC – There is case law, which doesn't involve sexual identity, which says that it is an error of law to try to import how, to put yourself in the shoes of how from a western viewpoint, a view of what should happen, so its very important there to look at the country background evidence.

SK – Sure, but I guess, wouldn't you agree, in just the case law I've looked at, the more that the asylum seeker has engaged in the very public, commercial,

SC – Gay pride, that sort of thing,

SK – Gay pride, there's a Canadian case where a lesbian, to prove her lesbian identity was showing receipts from the gay village. It's very, which is another problem for lesbians and you know, that invisibility of lesbian culture as opposed to gay male culture, as well as all the general problems of the differences in economic statuses, women and men in the first place. But yes, is it promoting, as a by-product of, you know - what is a liberal human rights kind of cause - is it promoting a kind of good gay citizen, that is based on a white western and because of the evidentiary requirements, quite commercial public view of being homosexual?

OP – I think beyond that, its not just about evidentiary, its about organisations, because if you look at local organisations, like GALZ, for example, in Zimbabwe, when they're asked to comment on people claiming asylum, they're very reluctant to, because they want people to stay in Zimbabwe, they don't want gays and lesbians to flee they want them to stay and fight the battle there. So there's a sense in which the more polarized the situations appear to be, the harder it is to kind of contain that flight; and yet, the more demonized the front line and the more glorified the nice safe metropole, then the harder it gets to persuade people to stay there, and the less you get them to stay there; the worse the situation's going to become".

SC – What is very important is that the Supreme Court itself said in paragraph 2 or 3 of the judgment is that it's now up to our own government, as a key player, to try and change the situation in those countries of origin. And that was very, very important, because the Foreign and Commonwealth office in December 2009, introduced what is called an LGBT Toolkit, which was issued to all High Commissions and British Embassies the world over to try and say, 'you have a duty to promote LGBT rights.'

OP – Which simply plays further then, into the anti-imperialist rhetoric, that this is an identity produced and imported by the whites. But you end up being caught in this catch 22 position. But I agree, you just have to plough on through – to say, 'well to hell with that.'

HS – Thank you then, to our audience, and thank you very much indeed to our participants, I think these conversations do produce a completely different discourse than if we just had an academic forum or we just had a practitioner forum. The format of the conversation has produced so many different and interesting views. So I hope people enjoy listening to the recording. And thanks again to everybody here.

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