ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

24 September 2010

By email:

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Dear Bill,

Re: Asylum Instruction on Sexual Orientation and Gender Identity in the Asylum Claim

Thank you for the opportunity to consider and make comments on this guidance in draft.

We welcome the decision to produce guidance on this subject. We have a number of comments on the text, which are set out below under subheadings which correlate to the headings or subheadings in the current draft. These are set out in the second section of this response (entitled 'Specific Observations on the Text'). However, while we consider that the guidance can be a positive development, there are, as we are sure you will recognise, several other steps necessary to improve the competence of decision-makers and quality of decision-making when dealing with asylum claims made by lesbian, gay, bi-sexual and transgender people. Before setting out our comments on the text of the draft guidance, we make a number of observations concerning certain other matters that we consider necessary to ensure the introduction of guidance on this subject fully contributes to the aim of improved decision-making. These observations are set out in the first section of this response (entitled 'General Observations'). Some 'Final Observations' follow these two sections.

GENERAL OBSERVATIONS:

In this section we make a number of observations under discrete subheadings, which relate to the draft guidance but with wider implications.

Implementing the Supreme Court judgment

We have previously raised with the UK Border Agency the need for guidance to staff who may be responsible for handling cases of persons whose asylum

claim has been refused prior to the judgment given by the Supreme Court in *HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. We are not aware of any specific measures the UK Border Agency has taken to ensure that those whose claims have been refused on grounds that are now shown to be wrong in law are not *refouled*. We recognise that the situation is less straightforward than, for example, where the understanding of a particular country situation has changed (e.g. as arose out of the Zimbabwe country guidance litigation). We expect that the cases, in which the judgment of the Supreme Court will be relevant, will not be readily identifiable without consideration of the case papers and, in particular, the relevant decisions that have been made by the Secretary of State and immigration judiciary and judiciary. However, this means that it is all the more important that thought is given to how UK Border Agency staff, including enforcement staff, should approach their work so as to avoid unlawful *refoulement*. Implementing the means by which *refoulement* is avoided in these circumstances also appears to us to be central to the Government's public commitment that:

> "*We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution.*"[1]

UKLGIG and Stonewall reports and recommendations

We are aware that the UK Border Agency has been working with the UK Lesbian and Gay Immigration Group (UKLGIG) and Stonewall in response to their respective reports and recommendations. We welcome that, and simply note our general support for the recommendations that they have made and observe that without action and improvement in respect of country of origin information, Operational Guidance Notes, training and other operational matters, the impact of guidance in this area is likely to be far less than what it could, and should, be.

Other general guidance – particularly that on credibility

We also highlight that while specific measures such as the introduction of guidance and development of training in this area are necessary, other generic aspects of guidance, training and working practices inevitably have an impact on the effectiveness of specific measures. This guidance will be one item in a set of guidance documents each playing a part in how decision-makers (and other staff) handle these cases. Of particular concern in this regard is the new Asylum Instruction on Considering the Protection (Asylum) Claim and Assessing Credibility ("the new guidance"). While there have been certain improvements made by the introduction of this new guidance, there remain profound problems. We highlight the following (the list is not comprehensive):

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[1] See full coalition agreement (Equalities section) at http://programmeforgovernment.hmg.gov.uk/

(i) The new guidance incorrectly presents the judgment of the Court of Appeal in *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878 in relation to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The guidance states, correctly but inadequately, that the section does not require the decision-maker to apportion any particular degree of damage to credibility in the circumstances prescribed by section 8. However, it is not merely that the decision-maker is to decide as to the degree of damage. The Court of Appeal, in suggesting the need to read in the word 'potentially' into the section, indicated that the decision-maker is also to decide whether any damage to credibility is caused at all[2]. The new guidance should be revised to make clear to decision-makers that section 8 does not require them to consider that the credibility of a person seeking asylum has been damaged. Indeed, in respect of at least one aspect of section 8, Sedley LJ has elsewhere[3] indicated that there may be circumstances where the relevant behaviour has no logical connection with the claimant's general credibility.

(ii) The new guidance includes a lengthy section on section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The length and content of this section wrongly emphasises the importance of the section. It ought to be clear by now that the section is unhelpful in that it appears inappropriately to direct the decision-maker as to how he or she ought to decide the individual case. It is clear from judicial comments that decision-makers have struggled with this section[4]. We would strongly recommend that section 8 is repealed. In the meantime, guidance ought to be consistent with the judicial guidance that the section provides nothing more than a number of factors for consideration, which in any individual case may have little or no or even a positive bearing on the decision[5]. The new guidance elevates, or appears to elevate, the importance of section 8 far beyond this, and accordingly needs to be revised.

(iii) The new guidance exaggerates an error made in the transposition of Article 4(5) of the Qualification Directive[6] by paragraph 339L of the Immigration Rules. The Rules have

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[2] See also *XY (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 211, paragraphs 24-25 where Sedley LJ expressly endorsed an approach by the IAT whereby a relevant 'behaviour' for the purposes of section 8 was concluded to have no impact at all on the claimant's credibility.

[3] *ST (Libya) v Secretary of State for the Home Department* [2007] EWCA Civ 24.

[4] See e.g. *ST (Libya)* (paragraph 7) *op cit*, in addition to *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878.

[5] Cf. *Salim v Secretary of State for the Home Department* (IATRF 1999/0993/C, 14 April 2000) *per* Hale LJ: "*Between the Secretary of State's decision and the hearing of the appeal to the adjudicator, the appellant made another application for asylum under a false name and pretending to be Somali. That, it must be said, cuts both ways: either as an indicator of his willingness to lie or of his desperation not to return. It is of no significance for the present appeal.*"

[6] Council Directive 2004/83/EC of 29 April 2004.

transposed the relevant Article by merely lifting the text into the Rules. However, as the House of Lords highlighted in *Fornah & Anor v Secretary of State for the Home Department*, in relation to Article 10(1)(d)[7], doing this can, in the context of English law, incorrectly elevate the importance of the word 'and'. The result in the Rules is to suggest that corroboration is, in law, required unless each of the five criterion set out in paragraph 339L are met. The guidance adds additional emphasis by expressly requiring that 'all' be met (indeed the word 'all' is in bold in the guidance). This is neither rational nor lawful. If, for example, the account given is plausible and coherent and does not run counter to any general or specific relevant information, why should there be a further obligation for corroborative evidence unless other factors are shown to be met? The approach is unduly sceptical. The guidance emphasises this scepticism. While it is appropriate for decision-makers to give careful consideration to the question of credibility, undue emphasis on that and excessively detailed or mechanistic instructions as to how such consideration is to be carried out can only give the impression that the decision-maker is expected to be especially, unnecessarily and dangerously sceptical about asylum claims. We understand that the UK Border Agency is generally concerned to improve decision-making,[8] and in particular to address longstanding concerns as to a culture of disbelief in decision-making. We support that concern, but guidance such as that described here runs in the opposite direction.

(iv) The new guidance makes several references to the need or opportunity to refer matters to a senior caseworker. While a case owner should speak to his or her line manager if presented with any difficulty in carrying out his or her role, we consider that this is generally a matter of ordinary working practice and we are surprised to see such frequent references in guidance. We are concerned that these references in the guidance could have the effect of making caseowners less likely to rely on their own judgement and to be willing to take responsibility for their decisions. We are concerned that the way the guidance is written may undermine other efforts to improve the quality of decision-making since good training and guidance is unlikely to have the intended impact if the decision-maker does not have, or does not feel he or she has, the authority and confidence to act on it. We suggest that the references to senior case workers in this guidance are reconsidered.

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[7] [2006] UKHL 46; see paragraph 16 *per* Lord Bingham, and see also paragraph 99 *per* Lady Hale and paragraph 118 *per* Lord Brown.

[8] The need to improve the quality of decision-making was a key point made by Damian Green MP, Minister for Immigration, at the National Asylum Stakeholder Forum (NASF) meeting on 29 July 2010 in connection with the ongoing Asylum Improvement Project. In connection with that he specifically highlighted *inter alia* the need to focus on asylum interviews and reasons given in refusal letters. A significant aspect of that need concerns the general approach to credibility and the role of enquiry into and evaluation of the asylum claim.

'Safe country' certification

ILPA has long-held and frequently expressed reservations about the use of 'safe country' presumptions in the asylum process. However, while the Agency continues to use them, we should urge that reconsideration be given to the continued use of such presumptions in relation to countries in which there is a well-documented general or widespread hostility towards lesbian, gay, bi-sexual and/or transgender people.

SPECIFIC COMMENTS ON THE TEXT:

Comments are made in this section under subheadings correlating to the headings and subheadings used in the draft guidance, and in the order in which these appear in the draft guidance.

Title

We support the position advanced by UKLGIG that the term 'sexual identity' substituted for 'sexual orientation' (and throughout the draft guidance).

Introduction

We do not consider it is useful or appropriate to make statements that the guidance has "*due regard to*" a judgment or other matter or jurisprudence. Such a statement is either wrong or redundant. We agreed that it would be useful to highlight the Supreme Court judgment by making some reference to it in the introduction, but we suggest this style of guidance should not be maintained.

Application of this Instruction in Respect of Children and those with Children

The statement included under this subheading appears in various pieces of guidance. In many instances, as here, it is not helpful. It provides no guidance on how the statutory duty may apply in the context of the subject matter of the draft guidance. This risks giving the impression that the UK Border Agency is concerned to simply play lip service to what is a highly important statutory duty[9]. Instead, thought should be given each and every time guidance is drafted to how the statutory duty to safeguard and promote the welfare of children may apply in the context of the subject matter of the particular guidance. Where there are particular applications these should be included and expressed specifically, not generally. It may be that this can and should be done in the main body of the guidance at the relevant place or places, rather than by way of a general or introductory remark.

[9] Borders, Citizenship and Immigration Act 2009

A similar concern has been expressed in relation to the draft Asylum Instruction on Gender[10]. Then, representatives of the UK Border Agency indicated a desire that guidance be generally used as a means of reminding case owners and other staff of their statutory duty to safeguard and promote the welfare or children. We support that aim. We have, accordingly, given thought to a form of words that may meet that aim while ensuring that the reminder has particular relevance to this particular guidance without purporting to entail a complete analysis of the relevance or application of the statutory duty:

> "***Application of this Instruction in Respect of Children and those with Children***
>
> *Officers are reminded of their duty to safeguard and promote the welfare of children in carrying out their work, and that applies equally in relation to this instruction. For example, particular care and sensitivity may be required when dealing with asylum claims by or concerning children. A child, whatever his or her sexual or gender identity, may have particular difficulty in talking about this by reason of his or her age and level of maturity. Where a family is concerned, particular caution may be required to ensure that any disclosure as to a person's sexual or gender identity or related experiences, whether of as a adult or a child, is confidential and not disclosed, directly or indirectly, to other family members without express consent. Such disclosure may be particularly damaging to the relationship between a child and his or her parents (or other family members), and in some instances may place a child at risk.*
>
> *General guidance on the statutory duty to safeguard and promote the welfare of children is to be found in the section 55 guidance [include hyperlink here].*"

Glossary

The first paragraph makes reference to "*characteristics*". While it states that the characteristics are outlined, it is not clear from the text what is referred to by 'characteristics'. If is intended to refer to 'lesbian, gay, bi-sexual or transgender', while we recognise that it is possible that a person may be said to have more than one of these characteristics, it is not possible that he or she can have all four. The text, accordingly, needs to be revised.

Sexual behaviour

Here, and elsewhere in this draft guidance, there is reference to previous engagement in conduct out of line with a person's sexual identity. The use of the past tense, and its emphasise by the word "*previously*" is inappropriate since it fails to recognise that such conduct may be recent or ongoing – e.g. a

[10] It was raised at the Charter/UKBA meeting on Monday, 20th September 2010 at 2 Marsham Street attended by representatives of Asylum Aid, UNHCR and ILPA to discuss *inter alia* the draft Asylum Instructions on Gender Issues in the Asylum Claim.

lesbian or gay person may be in a heterosexual relationship, including in a marriage with children. The reasons for that may be various, but the fact of the relationship is not inconsistent with the fact of his or her sexual or gender identity. It is vital that decision-makers do not simply conclude from a past or current heterosexual relationship that a person is necessarily not of the sexual or gender identity which he or she claims, and the use only of the past tense in this regards runs the risk of supporting such an incorrect approach – e.g. because the decision-maker draws from such guidance the inappropriate inference that, for the claim to a particular sexual or gender identity to be credible any such sexual behaviour or relationship must necessarily have passed, or even be long passed.

Here, the draft guidance correctly and usefully draws attention to circumstances where there may be same sex sexual contact by someone who is heterosexual. It may be helpful (and this is something that may also be helpful elsewhere) to provide some more concrete examples. Where examples are used, it is vital that it is clear that these are no more than examples. However, we suggest that 'such as male rape used as an exertion of power' as substitute for 'as an exertion of power' may be helpful in more firmly addressing the decision-maker's mind to the useful point being made as to same sex sexual contact.

Sexual Orientation, Gender Identity and Persecution

In the first paragraph, we suggest that 'treated' is preferable to "*seen*". The latter may be read as implying that particular behaviour is witnessed whereas the former is more neutral as to whether any treatment is based on something that is witnessed or assumed.

In the second paragraph, there is reference to "*notably political opinion and religion*". There is a danger in elevating two examples in this way that the decision-maker wrongly implies that what is being said is that these are the two other Convention grounds to which such claims may be linked. We suggest that it would be better to provide a couple of concrete examples, making clear that these are examples, in place of this reference. We also suggest that express reference is made here to the possibility that one or more Convention reason (including that of membership of a particular social group) made be connected to either or both of the feared persecution and the unavailability of state protection. See, e.g. Hale LJ, drawing upon the opinion of Lord Hoffmann in *Islam and Shah*[11]:

> "*Thirdly, it is crucial that the persecution be discriminatory: that is, that the maltreatment is meted out to particular types of citizens defined by race, religion etc. The necessary discriminatory element may be supplied either by the non state agents who perpetrate the maltreatment or it may be supplied by the state which fails to protect the victims. This seems to follow directly from the approach of the House of Lords in Islam's case. The domestic violence perpetrated by husbands upon their wives would not have amounted to persecution on*

[11] *Islam & Anor v Secretary of State for the Home Department and Immigration Appeal Tribunal* [1997] UKHL 20

its own; nor would a generalised inadequacy in the protection offered by the state of Pakistan against violence; it was the fact that the state was discriminatory in the protection it afforded to a particular group of its citizens, namely women, which turned those women into refugees within the definition. Lord Hoffman (at p 1035) posited this example from Nazi Germany:

> *'A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash up his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race.'* "[12]

In the third paragraph, there is reference to the Qualification Directive. Article 10(d) of that Directive has previously been wrongly understood by the UK Border Agency as requiring that both of the bulleted criteria be satisfied in order to establish membership of a particular social group. The House of Lords in *Fornah*[13] has shown this to be incorrect. The guidance needs to address this (see our comments under **Membership of a Particular Social Group (PSG)** below).

In the fourth paragraph, 'for example an assault' should be substituted for "*for example a sexual assault*". The word 'sexual' in the text adds nothing, and limits the scope of the example given. Given that the draft guidance is so closely related to sexual matters, this is particularly unhelpful and likely to confuse.

The following formulation taken from the draft Asylum Instruction on Gender (2.2 Forums of gender-related persecution)[14] may be usefully included here (examples may be included):

> "*Sexual or gender identity may be relevant in assessing persecution when:*
> *(i) the form of persecution experienced is specific to sexual or gender identity; and/or*
> *(ii) the reason for persecution is based on sexual or gender identity.*
>
> *The ways in which sexual or gender identity may be relevant to a claimant's experience or fear of persecution include:*

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[12] *Horvath v Secretary of State for the Home Department* [1999] EWCA Civ 1999 (paragraph 11 of judgment of Hale LJ)
[13] *Op cit*
[14] See draft of this instruction as at 20th September 2010 when discussed at the Charter/UKBA meeting *op cit*

(i) *persecution in a form related to sexual or gender identity but for reasons unrelated to sexual or gender identity;*
(ii) *persecution in a form unrelated to sexual or gender identity but for reasons related to sexual or gender identity;*
(iii) *persecution in a form related to a person's sexual or gender identity for reasons related to sexual or gender identity.*"

In the first of the two bullet examples in the draft guidance concerning lesbian women there are assertions as to the increased probability of something being experienced by a lesbian woman than a gay man. While these assertions may be correct, there is a danger in assertions as to what the 'more often' situation that this engenders or confirms scepticism about the 'less often' counterpart. It may be better to avoid such assertions as to probability, while providing the same examples and highlighting that in relation to lesbian women there is the additional or compounding concern that they may face marginalisation by reason of their gender (which we note is highlighted in the first sentence of this bullet). Also it is unclear what is meant by "*informal protection systems*".

The final paragraph in this section starts with the sentence: "*The fact that hostility towards LGBT persons is common, widespread and culturally accepted in a particular society is not relevant in assessing whether the harm amounts to persecution*". We understand the intention is to stress that hostility towards lesbian, gay, bi-sexual or transgender people is not to be treated by decision-makers as acceptable simply because it is common or culturally accepted, and that harms that are common, widespread or culturally accepted can constitute persecution. However, in stating that the fact that hostility is common, widespread or culturally accepted is irrelevant, the draft guidance risks error. This fact may be of significance to the assessment of whether there is a sufficiency of protection in the country of origin, whether internal relocation is a realistic expectation and whether the Convention ground of membership of a particular social group. In much of the jurisprudence, the term 'persecution' is understood to mean more than the nature or degree of harm and to include questions of protection and Convention reason. As such, the draft guidance needs to be revised. We suggest replacing the first sentence in this paragraph with:

> '*The fact that hostility towards LGBT persons is common, widespread and culturally accepted in a particular society does not render the harm caused any less serious. While such a fact is not relevant to an assessment of whether any harm reaches the threshold of persecution, it may be relevant to consideration of whether state protection can be expected to be available or effective, whether internal relocation can reasonably be expected and whether the victim or potential victim is a member of a particular social group.*'

Non-state Agents of Persecution and the Failure of State Protection

In the third paragraph, it may be useful to include notification to case owners that they may make case-specific research requests to the Country of Origin Service.

The series of bullets to the concluding paragraph in this section seem neither appropriate nor accurate. They do not appear to be examples of the correct and useful proposition advanced: "*The existence of particular laws, social policies or practices (including traditions and cultural practices) or the manner in which they are implemented may themselves constitute or involve a failure of protection.*"

This section is concerned with persecution by non-state agents and failure of state protection in relation to that. As such, guidance in this section as to when particular laws may be persecutory is inapt. Each of the four bullets is concerned with this issue (save as to the final bullet). By contrast, the issue here, for which examples may usefully be given, is how such laws (or social policies or practices, traditions and cultural practices) may inhibit, deny or preclude the provision of state protection, not whether such laws are themselves persecutory. The latter would be a matter for the section on 'Sexual Orientation, Gender Identity and Persecution' and/or 'Discrimination'.

As regards the content of the four bullets, the reference to *OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department*[15] is inaccurate insofar as it appears to suggest that where such laws are not enforced these may be considered irrelevant. That is the obverse of the point being made in this section, that such laws may be relevant or determinative as to the question of state protection. The Court of Appeal in *OO (Sudan)* decided that the mere presence of such laws, if not enforced, did not amount to persecution, but there is nothing in the judgment to suggest that such laws was not relevant to an assessment of the risk of persecution from non-state agents and/or the availability of state protection against such persecution.

Internal Relocation

The example given in the second paragraph concerning "*a large city*" is speculative, and we do not consider it to be helpful.

Generally, we consider that it would be helpful to make clear that where the country of origin information indicates general or widespread hostility towards lesbian, gay, bi-sexual or transgender people, this will ordinarily indicate that internal relocation will not be a reasonable expectation.

Additionally, we note that the draft Asylum Instruction on Gender[16] includes consideration of particular difficulties which women may face, and specifically notes possible difficulty for "*divorced women, unmarried women, widows or single parents, especially in countries where women are expected to have male protection...*". Such considerations would apply equally well to lesbian women. In any event, this and other observations highlight the need in some cases concerning to lesbian, gay, bi-sexual and transgender people to consider additional guidance such as that on gender.

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[15] [2009] EWCA Civ 1432
[16] *Op cit*

In relation to the last paragraph, we make the same observation concerning requests to the Country of Origin Service as is made above in relation to the section on 'Non-state Agents of Persecution and the Failure of State Protection'.

Membership of a Particular Social Group (PSG)

We note that this draft guidance draws upon the Refugee or Persons in Need of International (Qualification) Regulations 2006, SI 2006/2525 whereas the current draft[17] of the Asylum Instructions on Gender Issues in the Asylum Claim, in relation to the same point, draw directly upon the Qualification Directive (2004/83/EC).

In any event, as we have raised in relation to the latter draft guidance[18], the UK Border Agency position is not in line with the opinion of the House of Lords in *Fornah*[19]. In that matter, their Lordships were required to consider whether a family could constitute a particular social group for the purposes of the Convention, and whether females (women and girls) in Sierra Leone (or a smaller subset of this group) constituted such a group in relation to a claim based upon the risk of FGM. We note that three of their Lordships expressly gave the view that the two bullets (as set out from the Regulations in this draft guidance) were not cumulative as opposed to alternative requirements[20]. Moreover, the relevance of this may be seen from the differing cases before the House of Lords since membership of a family (for certain, non-blood relatives) is not an innate characteristic whereas a person's gender (or in combination with their tribal and cultural affiliation) is such a characteristic (whether or not persons of that gender are identifiable by being distinctly perceived by surrounding society). We understand that UK Border Agency legal advice is that the opinion of their Lordships on this matter was *obiter*. We do not accept that having regard to the nature of the distinct groups which were (as briefly described here) the subject of consideration. Moreover, that the UK Border Agency takes the view that the opinion of their Lordships on this matter was *obiter*, is no answer of itself as to the point in issue. The opinion was plainly consistent with (we say necessary to) the resolution of the question raised as to whether the distinct groups under consideration fell within the ambit of the Convention reason. As was expressly considered by their Lordships, UNHCR has offered valuable guidance on this point. Why does the UK Border Agency maintain a position contrary to their Lordships and contrary to UNHCR guidance?[21] Doing so merely creates the risk of more appeals to correct the view of a caseowner that membership of a particular social group may be discounted if both criteria are not fulfilled; and

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[17] As at Monday, 20th September 2010

[18] Most recently the meeting on Monday, 20th September 2010 *op cit*

[19] *Op cit*

[20] See fn. 7

[21] We might add that we have previously been given to understand that the UK Border Agency position was that membership of particular social group does not require satisfaction of both bulleted requirements. This was reflected in paragraph 18 of our August 2006 response to the Home Office consultation on implementation of the refugee definition directive (Qualification Directive): "*We understand from the meeting at the Home Office that it is intended to set out in the API that societal recognition may help establish the group but is not a pre-requisite, so that the UK continues to apply* Shah and Islam *[1999] INLR 144, HL..*."

ultimately that the matter may be re-litigated up to the Supreme Court. We question the need for this and the propriety of incurring such costs in addition to the legality of the UK Border Agency's position.

The observation as to the content of regulation 6(e) is correct though the regulation is incorrectly identified (the correct subparagraph is (e) not (i)). However, we question the legality of what is said at regulation 6(e). The criminalisation of any particular acts cannot determine the meaning of the Refugee Convention. Whereas there may, in particular cases, be issues as to the application of Article 33(2) in cases where criminal conduct on the part of a claimant may exclude him of here from the non-*refoulement* protection provision in the Convention, that provides no basis for the assertion that criminality in UK law is a defining feature of membership of a particular social group for the purposes of the Refugee Convention.

As regards the final paragraph in this subsection, we consider the draft guidance would be improved by the substitution of 'will be required' for "*must be prepared*". Any such explanation should not merely be available to the decision-maker but, by its inclusion in any reasons for refusal letter, available to the claimant, his or her legal advisers and any court or tribunal that may come to consider the refusal.

Race

The example given of "*'purging' the group of perceived 'impure' elements*" may be a useful one for inclusion in this draft guidance. However, it is not an example of how racial identity may affect the "*form*" that persecution takes as opposed to an example of how racial identity may a contributing causative factor of persecution (which may take various forms).

Religion

We suggest that 'such as' is inserted between "*asylum claims*" and "*where to attitude*" so as to be clear that the useful examples given here is not elevated beyond mere examples.

Nationality

The example given in relation to nationality appears not to be distinct from the Convention ground of 'race'. An example that may be useful, for being unique to the Convention ground of 'nationality' would be where the person's stateless status (i.e. lack of or deprivation of nationality) was the contributing factor which made him or her more vulnerable to persecution by reason of his sexual or gender identity.

Political Opinion

While it is correct that 'political opinion' "*should be understood in the broad sense*" the definition which follows this observation is too restrictive. The Immigration and Asylum Tribunal in *Gomez v Secretary of State* [2000] UKIAT

00007 (starred)[22] concluded that 'political opinion' relates to major power transactions in the particular society in question. Such transactions may not necessarily be matters within the machinery of state or government. The reference to "*society or policy*" is inadequate insofar as it fails to make clear that such machinery or power transactions as may be in question may not relate to the or any state machinery or power transactions in the country in question.

Interviewing and Assessment of Credibility

The penultimate paragraph in this section again refers to "*previous*" relationships. Please see observations above in relation to the subsection on 'Sexual behaviour'.

We consider that particular attention should be drawn to the fact that lesbian, gay, bi-sexual or transgender people who have been compelled to be discreet in their country of origin are, by that reason, likely to be particularly cautious before disclosing their sexual or gender identity or experiences. Decision-makers need to be aware of and sensitive to this possibility.

The fourth paragraph is not in line with the relevant part of the draft Asylum Instruction on Gender[23]. It should be, and we suggest that the following paragraph from that draft guidance is substituted: "*Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter that is made in advance of an interview. Requests made on the day of an interview for a male or female interviewer or interpreter should be met as far as is operationally possible.*"

Deciding the Claim

The second paragraph includes the assertion that: "*The absence of objective information to corroborate a claimant's account will be an important factor...*". The absence of such information may be important, but it may not. Assertions such as these are generally unnecessary and unhelpful – here by directing the mind of the decision-maker to requiring corroboration in circumstances where that may be neither possible nor reasonable.

Discretion

By situating the analysis of the judgment in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 in this section, it is unhelpfully divorced from the previous sections concerning persecution where it is most relevant. If it is considered that the judgment requires a distinct section or subsection, which may well be useful (particularly at this time), we consider it would be more sensible to move the discussion of this

[22] The IAT's approach in *Gomez* was considered in *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722; and the decision in *Montoya v Secretary of State for the Home Department* [2002] EWCA Civ 620 where the Court of Appeal upheld the reasoning in an IAT determination raising the same point (and on which panel the author of the starred determination also sat).
[23] *Op cit.*

key judgment of the Supreme Court to an early part of the draft guidance and to make appropriate cross referencing to it elsewhere in the draft guidance (e.g. in the 'Introduction' where the judgment is first mentioned, and in the sections on 'Sexual Orientation, Gender Identity and Persecution', 'Discrimination' and 'Non-state Agents of Persecution...').

In the second paragraph substitute 'should' for 'could' in the sentence: "*Applications should therefore not be approached from the assumption that individuals could exercise discretion...*" (our underlining).

As regards the summary of the Supreme Court judgment (while recognising that some of the text is lifted, without quotation marks or citation, from the judgment), there is a danger that the fourth bullet (d) of steps to be followed, coupled with the paragraphs which follow, lead the decision-maker to neglect to consider that a person may have mixed reasons for living discreetly – some of which may not indicate persecution (avoiding embarrassment to family) and others of which may indicate persecution (fear of serious harm). If so, persecution will be made out. Moreover, these two distinct features may, in some cases, be closely related since the embarrassment a family may feel may cause the family to cause, directly or indirectly, serious harm to the claimant; or a feature of the fear of causing embarrassment to the family may be the harms that may lead to directed at the family (and the individual).

Persecution

Persecution is dealt with earlier in the short draft guidance. This subsection, in attempting a very much shortened form of guidance on persecution is unhelpful since it does not and cannot capture what has gone before but offers an inadequate substitute for what has gone before.

Country of Origin Information

We would suggest the substitution of 'for example' for 'in particular; in the sentence: "*The absence of specific legislation on lesbian women in particular may be an extension of the general marginalisation of women*" (our underlining).

Sufficiency of Protection

We consider the observation above in relation to the subsection on 'Persecution' applies equally to this subsection.

FINAL OBSERVATIONS:

Whereas it is not relevant to this particular draft guidance, we note that the Court of Appeal has recently make clear that the Supreme Court judgment in *HJ (Iran)* in relation to behaving discreetly has applications beyond the asylum

claims of lesbian, gay, bi-sexual and transgender people[24]. We draw this to your attention as this matter may usefully be addressed in other instructions/guidance and in training.

Yours sincerely

Sophie Barrett-Brown
Chair
ILPA

[24] See *TM (Zimbabwe) & Ors v Secretary of State for the Home Department* [2010] EWCA Civ 916, paragraph 38.