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Sexual diversity and the Nationality and Borders Act 2022

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Abstract
In this short piece we focus on two of the main changes brought in by the recent Nationality and Borders Act 2022 with a focus on sexually diverse claimants: inadmissibility and the increased standard of proof. The recent changes have a negative impact on all asylum seekers but we highlight that they have a particularly adverse impact on sexually diverse claimants because their diverse backgrounds have not been appropriately considered. The problematic provisions on inadmissibility on the basis of mode of entry and removal to a 'third safe country' pose particular risks for sexual minorities. Additionally, the increased standard of proof exaggerates issues already faced by sexually diverse claimants in relation to objective evidence gathering and decision-makers using guidance riddled with stereotypical understandings about sexual minorities.

Keywords: migration and asylum law; Nationality and Borders Act 2022; sexual diversity

Introduction

Refugee law in the UK is subject to constant change. The 2010 UK Supreme Court decision in *HJ (Iran)*[1] brought an end to asylum refusals based on discretion reasoning. Discretion reasoning enabled decision-makers to determine that claimants would not have a well-founded fear of persecution provided they acted in a discreet manner. This form of reasoning saw decision-makers refuse sexually diverse claimants on the basis that they could simply conceal their sexual diversity. Prior to *HJ (Iran)*, claimants had been faced with a de facto catch-all excuse for rejection in the form of discretion reasoning.[2] At this time, the UK Lesbian and Gay Immigration Group[3] estimated a 98–99% rejection rate for claims based on sexual diversity.[4] Scholarship has firmly established that the ending of discretion resulted in a switch in focus, with Home Office decision-makers increasingly rejecting asylum claims on the basis that the claimant in question was not sexually diverse and would not be perceived

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[1]*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

[2]See M Dustin 'Many rivers to cross: the recognition of LGBTQI asylum in the UK' (2018) 30(1) International Journal of Refugee Law 104.

[3]Now known as Rainbow Migration.

[4]UKLGIG 'Missing the mark: decision making on lesbian, gay (bisexual, trans and intersex) asylum claims' (September 2013), available at https://www.rainbowmigration.org.uk/publications/.

as being so.[5] At present, the main issue facing sexually diverse refugees is proving that they are or would be perceived as sexually diverse.[6]

As the above suggests, sexually diverse people have generally faced greater difficulties in making their asylum claims than other groups who require protection. However, in 2022, the UK made further fundamental changes to refugee law, the effects of which are only now beginning to become clear. More specifically, the UK has legislated, in the form of the Nationality and Borders Act 2022 (NBA 2022), to create a number of new barriers which must be navigated when claiming asylum. This move, accompanied by the Memorandum of Understanding (MoU) between the UK and Rwanda, can be seen as having dramatic consequences on the ability of those who have entered the UK, having transited through another country, to claim asylum. In this short piece, we explore the implications of the NBA 2022 for sexually diverse asylum seekers.

1. Inadmissibility

The NBA 2022 provides, under sections 15 and 16, for asylum claims made by those who have entered the UK unlawfully to be determined to be inadmissible by the Secretary of State for the Home Department (SSHD). Where a claim has been determined to be inadmissible, the claimant is barred from making their asylum claim in the UK and can, instead, be transferred to a 'third safe country'. It is under this framework that the MoU with Rwanda is implemented, with the intention that a claim, having been determined to be inadmissible in the UK, is then transferred to Rwanda for processing.

The UK government claims that the above measures are necessary to prevent people-trafficking. This is dependent on the idea that the prospect of being removed to Rwanda will 'deter' asylum seekers from coming to the UK from other 'safe countries', a highly questionable conclusion given the substantial evidence that little note is paid to such 'pull factors' when asylum seekers decide on where they will seek refuge.[7] Further note should be taken that the Refugee Convention – to which the UK remains a signatory – has clear provisions against punishing asylum seekers based on their mode of entry.[8]

Turning to the specifics of the legislation, section 15(1) amends the Nationality, Immigration and Asylum Act 2002 to stipulate that the 'The Secretary of State must declare an asylum claim made by a person who is a national of a member state inadmissible.'[9] While section 15(4) provides that this need not apply if the SSHD considers that exceptional circumstances are present, such as a derogation from the European Convention on Human Rights, note should be taken that the Refugee Convention anticipates the evaluation of individual claims, not the blanket outlawing of applications from groups of countries. However, countries which are 'safe' for most people may not be safe for sexually diverse people. For example, it is arguable that the treatment of sexually diverse people in Hungary could, in some cases, reach the level of persecution. This is concerning, given that the wording of section 15(4) – which reads 'exceptional circumstances as a result of which the SSHD considers that the claim ought to be considered' – would appear to provide a discretionary power on the SSHD to derogate from a presumption of inadmissibility, rather than a duty on the SSHD to order that such claims be considered. As such, questions may rightly be raised over the ability of a European national facing persecution in some future context to rely on the UK honouring its obligations under the Refugee Convention even if the terms of section 15(4) had been met.

[5]See J Millbank 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391; S Chelvan 'Put your hands up (if you feel love)' (2011) 25 Immigration, Asylum and Nationality Law 56.

[6]A Powell '"Sexuality" through the kaleidoscope: sexual orientation, identity, and behaviour in asylum claims in the United Kingdom' (2021) 10(4) Laws 90.

[7]L Mayblin 'Complexity reduction and policy consensus: asylum seekers, the right to work, and the "pull factor" thesis in the UK context' (2016) 18(4) The British Journal of Politics and International Relations 812.

[8]Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 31.

[9]The reference to Member State here is in terms of membership of the European Union.

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The above is, of course, complicated. The UK was previously a signatory to the Dublin Regulations.[10] As such, the UK, during its time as a member of the European Union (EU), was already not required to consider asylum claims from other member states. Nonetheless, taking section 15(1) alongside section 15(4), the UK is effectively moving from a system of asylum premised on the individual evaluation of the asylum claim of any and all claimants who arrive in the UK, to a system premised on the refugee status determination process being open only to certain claimants with access mediated by, amongst other things, discretionary decisions made by the SSHD.

While section 15 may, in effect, mirror restrictions that already, in another form, existed when the UK was a member of the EU, section 16 vastly expands the limitations on who is able to claim asylum in the UK. Indeed, it is section 16 which has perhaps the most pernicious and concerning effect on asylum seekers who are seeking to claim protection in the UK. Specifically, section 16 amends Part 4A of the Nationality, Immigration and Asylum Act 2002 to provide that the SSHD 'may' declare asylum claims made by anyone with a 'connection' to a third safe country inadmissible. It is worth noting that while section 15 stipulates that the SSHD 'must' declare claims related to EU states inadmissible, section 16 only states that they may be so declared, conferring a discretionary power rather than an obligation. However, given the present political context, it is highly likely that this discretionary power will be widely used.

Where the power given at section 16(1) is utilised, section 16(2) sets out that the claimant will not be able to bring a claim for asylum under the immigration rules. Further, section 16(3) outlines that a declaration of inadmissibility is not a refusal. As such, it is not possible for a claimant to bring an appeal to tribunal on the basis that their asylum claim has been determined to be inadmissible. Thus, whilst a claimant issued with a notice that their asylum claim had been determined to be inadmissible would certainly have a right to bring a judicial review on standard judicial review grounds, the material effects of section 16 will be to substantially limit the ability of many claimants to rely on refugee protection in the UK.[11] In this regard, note should also be taken that, in limiting access to the Tribunal, the NBA 2022 is dramatically reducing the ability of those subject to the decisions of the SSHD to challenge exercises in executive power. The power of the SSHD can only be applied where certain conditions are in place. First, there are conditions with regard to the purported 'safe country': these are set out at section 16(4)(a)–(c). In principle, these criteria should assist in the protection of sexually diverse claimants from being sent to countries which are not a safe environment for sexually diverse people. However, at present, given the lack of any framework of secondary legislation, it is not clear how the question of whether or not a country is safe for a given claimant will be addressed. As was stressed in the recent *AAA* decision,[12] the implementation of elements of the NBA 2022 needs to be undertaken in a manner that retains the central role of individual assessment. This judgment is currently under appeal. Nonetheless, it strongly suggests that a process able to determine whether a proposed reception country is safe for the given claimant, including fully considering matters relating to sexual diversity, is required. This suggests that some parts of the present asylum system will probably have to be duplicated or replaced at the point of determining inadmissibility and removal. As such, the UK government should urgently provide details of how processes of individual assessment, such as those required to be undertaken before any prospective claimant might be transferred to Rwanda under the MoU between the UK and Rwanda, will be undertaken. This raises broader questions about how appropriate and lawful blanket approaches, such as safe countries, are even under the new framework.

[10]Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ 2 180/31.

[11]See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[12]*AAA v SSHD* [2022] EWHC 3230 (Admin).

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2. Standard of proof and burden of proof

Alongside the above, the NBA 2022 increases the standard of proof for asylum claims. Specifically, prior to the 2022 Act, asylum seekers were required to prove their claims to 'a reasonable degree of likelihood'. This relatively low standard of proof was established in *Sivakumaran*[13] because, as was accepted by the Home Office, 'what is potentially at stake – the individual's life or liberty – and because asylum seekers are unlikely to compile and carry dossiers of evidence out of the country of persecution'.[14] However, in practice, it has been found that the standard of proof applied was much higher than a reasonable degree of likelihood.[15] Nonetheless, following the NBA 2022, asylum seekers are now required to discharge the civil standard of proof, 'on a balance of probabilities'.[16] The NBA 2022 is seemingly a missed opportunity to resolve other issues with the standard of proof, namely, how it is tangled with credibility assessments – which are used to determine the validity a claimants' evidence – leading to a lack of clarity for decision-makers and thereby allowing for inaccurate decisions to be made.

The increased standard of proof is problematic for all asylum seekers, given the well-established impact of trauma on memory,[17] the limitations on the ability of many claimants to procure objective evidence from their country of origin, and barriers faced whilst attempting to gather evidence in the UK.[18] However, the literature points out numerous evidentiary barriers that have a particularly pernicious effect on sexually diverse claimants.[19] In this context, it is argued that increasing the standard of proof poses particular problems for sexually diverse claimants, especially given that the burden of proof lies with the claimant.

In particular, the nature of sexually diverse claims means that claimants often have very limited access to the 'objective' tangible evidence expected by the Home Office. This results in their claim heavily relying on their oral testimony and narrative during their substantive asylum interview. The centrality of narrative evidence to asylum claims is why it is so important that there is a low standard of proof that is analytically separate from the assessment of credibility. This, in the context of the post-*HJ (Iran)*[20] landscape where there has been a switch from 'discretion' to disbelief, acts as the main barrier for claimants attempting to seek asylum on the basis of their sexual diversity.[21] Indeed, recent Home Office 'experimental statistics' suggest that evidentiary barriers continue to constitute a real issue for sexually diverse claimants.[22] Additionally, the Home Office's Asylum Policy Instructions guide decision-makers to seek stereotypical and linear narratives from sexually diverse asylum seekers. These narratives are problematic given the diverse cultures and experiences of claimants. This issue is also well borne out in the literature. For example, in their 2018 report, Rainbow Migration recounted that the focus on sexual identity within Asylum Policy Instructions had seen some decision-makers using an 'excessive focus on claimants being able to articulate

[13] *R v Sivakumaran* [1988] AC 958.

[14] Asylum Policy Instruction 2015, 11.

[15] UKLGIG 'Still falling short' (July 2018), available at https://www.rainbowmigration.org.uk/publications/.

[16] NBA 2022, s 32.

[17] See B Graham et al 'Overgeneral memory in asylum seekers and refugees' (2014) Journal of Behavior Therapy and Experimental Psychiatry 375.

[18] See for example C Bennett 'Lesbian and United Kingdom asylum law: evidence and existence' in E Arbel et al (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014).

[19] See Bennett, above n 18; S Singer '"How much of a lesbian are you?' Experiences of LGBT asylum seekers in immigration detention in the UK' in RCM Mole (ed) *Queer Migration in Europe* (UCL Press, 2021); C Danisi et al *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity* (Springer, 2021).

[20] *HJ (Iran)*, above n 1.

[21] J Millbank 'From discretion to disbelief: recent trends in refugee determination on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 International Journal of Human Rights 391.

[22] Home Office 'Immigration statistics: experimental statistics: asylum claims on the basis of sexual orientation 2021' (updated 23 September 2022) https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/asylum-claims-on-the-basis-of-sexual-orientation-2021--2.

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sophisticated accounts of self-realisation (stories of recognizing one's identity), searching for evidence of a particular account of development of identity'.[23] These problems with Home Office decision-making are an ongoing issue and adding to them with a heightened standard of proof is unlikely to result in improved decision-making.[24]

Given the highlighted issues that sexually diverse asylum seekers already face, the authors suggest that changes to the standard of proof may have a disproportionate impact on sexually diverse asylum claimants. In particular, we are concerned that the raising of the standard of proof will contribute to the wider masculine way in which refugee status is understood, a framework able to comprehend the claims of those who are engaged in public actions which are self-evidently political, but largely unable to comprehend those whose persecution or nexus grounds occur in private or outside of public view.[25]

Conclusions

In this commentary, we have explored two of the main changes made by the NBA 2022: inadmissibility and the increased standard of proof. Through this exploration, we have sought to identify the particular risks that these changes pose to sexually diverse claimants. In particular, we have focused on the issues that render an asylum claim inadmissible causes for claimants, such as the need for particular attention to be paid to the background of an asylum claimant when determining if any given third country is safe, and the additional barriers that an increased standard of proof poses for all asylum seekers, but particularly for those whose claims hinge on being a sexually diverse person.

The authors are concerned that this legislative measure has been brought into effect without a proper regime of secondary legislation, or an appropriate update of decision-maker guidance being offered. Given this, the authors wish to express their dismay at the production of legislation which appears to owe more to political convenience than to the goals of creating workable systems for refugee status determination. We would, in this regard, encourage the UK government to remain cognisant of its international obligations under the Refugee Convention of 1951 and its 1967 Protocol. This cognisance should include consideration of whether the repeal of sections passed under this act is necessary.

At the time of writing this commentary, the UK government announced the Illegal Migration Bill. The authors wish to particularly note their concern about the pace of change in relation to immigration law, especially as the provisions laid out in the latest Bill are repetitious of the NBA 2022. It is notable that the proclaimed goals of the Illegal Migration Bill almost precisely mirror what the government claims were the intentions of the NBA 2022. As such, it would seem that the NBA 2022 has not achieved its purported goals. This could potentially be due to rushed, poor, or politicised drafting. As pointed out by the Law Commission in their 2019 report,[26] frequent legal change is not conducive to fair and effective decision-making and has a deleterious effect on legal certainty. This, particularly in the context of limited legal aid, repeated attempts to limit the role of courts, and impose retroactive effects, alongside the complexity of the immigration rules, leads the authors to have concerns about the regard in which the Rule of Law is held by ministers and parliamentarians working in the context of immigration and asylum law.

[23]UKLGIG, above n 15, pp 23–26.

[24]Powell, above n 6; A Powell *Developed: Administrative Violence in Sexual Diversity Asylum Claims at the Home Office in Gender and Sexuality in a Multidisciplinary Approach to the SDGs* (London, Palgrave Macmillan, 2023).

[25]See N Honkala '"She, of course, holds no political opinions": gendered political opinion ground in women's forced marriage asylum claims' (2017) 26(2) Social and Legal Studies 166.

[26]Law Commission *Simplification of the Immigration Rules: Report* (Law Com No 388).

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