

Immigration refugee, asylum, and humanitarian protection

This is a short paper outlining the position of the Government of Jersey to asylum seekers and persons seeking humanitarian protection. This has been prompted by the case of A (an LGBTQ+) person legally residing in Jersey requiring humanitarian protection.

The focus of this paper is on policy and practicalities, though it necessarily touches, but does not go into significant detail, on Immigration Laws and Rules. These law and rules are voluminous, complex, and very difficult to navigate. The note has been kept deliberately brief.

Jersey's Position

One would be forgiven for believing that Jersey has no provision for refugees/asylum seekers/those seeking international protection and has not signed up to relevant international conventions. This would be a wrong assumption.

In fact, Jersey is bound by the 1951 Refugee Convention and the 1967 Protocol as the UK ratification of the Convention was extended to Jersey as early as 1954 and in 1996 with respect to the Protocol.

The UK ratification of the European Convention on Human Rights (ECHR) has been extended to Jersey and is contained in domestic legislation. A raft of UK Immigration provisions relating to asylum seekers, refugees, those claiming humanitarian protection, and rights of migrant workers has been extended (with amendments) into Jersey Law in 1993 and 2021.

There are differences between “a refugee”, “asylum seeker”, and “humanitarian protection”. The media, public and politicians often conflate these terms, and are criticised for doing so. Whilst these terms can be important, the term “protection claim” is helpful as it covers an asylum claim and a claim for humanitarian protection. It is defined and means “a claim made by a person (“P”) that removal of P from Jersey –

- (a) Would breach obligations by which Jersey is bound under the Refugee Convention, or
- (b) Would breach obligations by which Jersey is bound in relation to persons eligible for a grant of humanitarian protection.”

A refugee is a person who has made a successful asylum claim.

This begs some questions. If Jersey signed up to the Refugee Convention, Protocol, ECHR, and has detailed laws and rules (together, rules), why do many believe that Jersey is not a jurisdiction that can accommodate refugees or those deserving of humanitarian protection? If Jersey has signed up to these rules, why are there articles like the BBC Article 7 September 2021, entitled “Jersey law review call so refugees can be accepted”? Why did Senator Ian Gorst say, ‘it was “very unlikely” the Island would be able to accept refugees due to “legal barriers”, when Jersey had long since signed up to the relevant international conventions?

The answer, it is suggested, is quite simple. The legal barriers are in part based on UK rules and in part rules self-imposed by Jersey. The effect of these rules is to make it almost impossible for anyone, no matter how deserving, to make a successful protective claim in

Jersey. There are very few cases on protective claims in Jersey, although there were two appeal cases in 2019. They both failed.¹

One might be forgiven for concluding that Jersey's commitment to international rules to protect vulnerable persons is form over substance and thus illusory. Sadly, Jersey is not alone with a number of similar island territories adopting the same illusory approach.

In the same BBC article (above), a Jersey Law Commissioner is quoted as saying, in essence, that there are many complex laws to house refugees, but *"if"* [emphasis added] five or six experts could get together and work through the complexities they should "get to the end of that discussion." It is not clear whether these discussions took place or led to the 2021 Order to extend a raft of UK legislation to Jersey. These changes added to the complexity, but did not remove or change the legal barriers imposed here. From a review, there has been no meaningful change to the rules to make the provision of international protection a reality in Jersey.

The biggest barrier is that a senior immigration officer or above can without any substantive review of the merits of a protection claim, reject an application on the following grounds:-

- (a) The applicant travelled to Jersey via a 'safe' third country where the applicant could have made an application but did not; or
- (b) The applicant is from an EU jurisdiction; or
- (c) The fear or threat of persecution or harm relates to a region in the country of nationality but not the entire country.

Grounds (b) and (c) would apply to applications in the UK. Jersey and similar jurisdictions have added ground (a). Given Jersey's geography, it is almost impossible for an applicant to travel to Jersey without passing through an EU territory. EU countries are listed as safe countries. Thus, many claims in Jersey are doomed to fail at the outset.

Further to the rules above, there are detailed rules which can cause an applicant to have their claim denied on credibility grounds. Whilst a number of these are understandable, one relates to the timing of an application - an application must be made at the first opportunity. This rule is important when we consider the case of A.

The Case of A

A is a member of the LGBTQ+ community and of African descent. A was legally in Jersey under a work permit. Whilst working in Jersey photographic evidence of a same sex relationship was taken (without A's knowledge or consent) and sent to people in A's home community. LGBTQ+ people are criminalised in A's home country and are subject to persecution and inhumane practices. Person A feared the same persecution if they returned home and sought protection under international laws. Person A worked in Jersey and was offered further work and accommodation.

Having considered the options and taking specialist legal advice, which was available in the UK, but not in Jersey, it was recommended that A should enter the UK legally and make her claim under the UK system.

The reasons for choosing the UK over Jersey were:

- (a) Jersey's reputation and poor track record on providing for refugees and those seeking international protection (see BBC article above).

¹ X v Minister for Home Affairs 2019 JRC 132, and unrelated, X v Minister for Home Affairs [2019] JRC206

- (b) Despite a call for change, little or nothing has been done to enable Jersey to accept refugees and those requiring international protection.
- (c) A genuine concern that there is little understanding of the persecution and criminalisation of members of the LGBTQ+ communities in their home state. This was borne out when one senior interviewer asked how other members of the LGBTQ+ community lived in the home state, whether there were 'safer' areas within country and what A could do to protect themselves in their home state. The UK has a greater understanding of the issues facing LGBTQ+ members in various countries both in terms of illegality provisions and persecution suffered at the hands of locals with little and often no protection from local law enforcement.
- (d) The eligibility of legal aid and/or availability of pro bono lawyers in Jersey, is at best, not clear.
- (e) Decisions can be made (in an array of situations) without substantive review. In discussion with A, the senior immigration officer focused on the delay of a couple of months between the photographic disclosure and the protective claim in the UK. There was a greater certainty that A would have a full review and receive legal support.
- (f) The financial support for a claimant during the period of their claim is clear in the UK and very unclear in Jersey.

The Result

The consequence for A, who had friends and a further job offer in Jersey with accommodation, was that A had to leave Jersey for the UK and rely on state aid. Person A is now being housed in a hotel, on their own, at UK Government expense. Jersey has lost a member of the workforce who could be contributing to island life whilst waiting for their asylum claim to be heard.

Testimony provided by LGBTQ+ asylum seekers in the BBC Radio 4 program 'Burden of Proof' (26 May 2023) reports that, whilst the UK's handling of LGBTQ+ asylum cases has improved, it still requires a person claiming asylum on these grounds to prove they are LGBTQ+. For people coming from a country where they have never been 'out' because it is unsafe, the line of questioning pursued by UK officers is confronting and means that the claimant does not answer as expected to Eurocentric assumptions of 'gayness'. Have you been to gay bars? Have you watched gay movies? Have you been to Pride? The answer to these questions is likely to be 'no' because the LGBTQ+ claimant has, by necessity, had to remain 'closeted' in their home country, a habit they are unlikely to have broken easily in the UK/Jersey. So, claimants are stuck in a no-man's land of being too gay for their home country, but not queer enough to build a life in the UK.

LGBTQ+ asylum claims are 1% of all UK cases. In 2021 64% of LGBTQ+ claims were approved, but 73% of non-LGBTQ+ claims were approved.

At some point A will be called for a 'reporting event' with the Home Office. At that meeting they can be detained without notice. People are held in detention whilst the Home Office decide whether to deport them or not. Detainees lose any legal support they had. Detention is prison. Detainees are locked up by guards with keys, there are high fences, and you have no release date or time limit to the detention. The detainees can make no plans for their future.

Unsurprisingly, homophobic attacks happen in detention. The officers running these facilities do not report these incidents to the police. If they did, it would prove the claimant's LGBTQ+ status, and that would mean granting refugee status.

If A is not granted refugee status, they will be returned to their country and told by the Home Office to 'live with discretion'. Their paperwork, showing the grounds on which asylum was claimed, will be returned with them. If they do not get arrested on arrival, then they will have to run the gamut of a society in which openly LGBTQ+ people are routinely attacked and/or killed.

A review of countries where Jersey workers come from shows the following penalties for LGBTQ+ people –

Nigeria	Death by stoning
Zambia	Life imprisonment
Uganda	Life imprisonment
Kenya	14 years imprisonment
Zimbabwe	1 year imprisonment & fine

Person A can appeal the result of their claim, but this can take years. One BBC interviewee had been in limbo for eight and a half years and had appealed seven times. He had no right to work or vote and was living on an allowance of £35 per week.

Recommendations

It is understood that Jersey is a small island community, but it is a wealthy one. It has signed up to human rights legislation and implemented rules, but shows no signs of making that protection available. We submit that Jersey needs to:

- (a) Permit asylum seekers to remain in Jersey, working on a special visa, whilst waiting for their claim to be heard.
- (b) Make changes to legislation to remove unnecessary legal barriers.
- (c) Ensure a substantive review of an applicant's claim.
- (d) Provide legal aid or duty solicitor to help a claimant make a claim and be present at any interviews.
- (e) Provide a simple guide for claimants.
- (f) Provide training to immigration officers to gain an in-depth understanding of the issues facing claimants.
- (g) Amend interview techniques to gather the whole picture, to act with compassion and understanding and to focus on whether and how a person can be helped and supported, rather than on focusing on finding any reason to deny the application.

Appendix

Refugee Convention

[Jersey shall not]

Art 33(1) “expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

A refugee is defined as any person who ‘..owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; “

Likewise Jersey is bound by the European Convention on Human Rights (ECHR), the extension of the UK ratification is implemented into Jersey Law with the Human Rights Jersey Law (2000), which provides that it is unlawful for a public authority to act in a manner that is incompatible with ECHR. ECHR provides that ***everyone’s right to life is protected by law (art 1); and no one shall be subject to inhumane or degrading treatment or punishment (art 2).***