

**Title:** Braverman's 'crisis', LGBTQIA+ refugees, and the mischaracterisation of law

**About the author:**

Dr Raawiyah Rifath is a lecturer at the University of Exeter and specialises in International Refugee Law and policy. Raawiyah uses a transdisciplinary approach of law and psychology to scrutinise refugee laws and policies for people who base their asylum claims on their sexual orientation.

The UK Home Secretary's recent narrative relating to asylum seekers is harmful, concerning, and could be another attempt (following the Illegal Migration Act 2023 (IMA 2023)) to foreground intentions to justify circumventing or undermining obligations under the Refugee Convention.

The current UK Home Secretary, Suella Braverman, recently delivered a [speech](#) to US-based think-tank American Enterprise Institute in Washington on Tuesday 26<sup>th</sup> September 2023. In it Braverman stated that fearing discrimination on the basis of being gay should not be enough to qualify for international refugee protection. Notwithstanding the toxicity of this narrative, it is peddling incorrect information to serve that narrative and does not fully reflect the current asylum regime for people who are applying for refugee protection on the basis of their sexual orientation in the UK. To note, [in 2022 only 2% of asylum claims were made on the basis of sexual orientation](#). Braverman's shocking comments also come just over 2 weeks after [Rima al-Badi, a queer Omani woman in the UK took her own life whilst waiting for her asylum claim decision](#).

Braverman's differential treatment for those whom she believes are deserving enough of protection is discriminatory and is precisely why refugee protections exist.<sup>1</sup> It appears that this is another concerted effort to push a harmful fear-mongering narrative in order to justify further attempts to circumvent obligations under the Refugee Convention. This echoes Braverman's use of de-humanising language like referring to a refugee '[invasion](#)' to justify damaging refugee policies. It could be said that Braverman's use of this language is to create a crisis to fear-monger and increase public anxieties to then justify new legislation to tackle this manufactured crisis as a form of posturing.

Braverman suggests that there has been an interpretive shift in case law away from 'persecution' towards 'discrimination' as well as a similar shift away from a 'well-founded fear toward' a 'plausible fear'. It is unclear which cases the Home Secretary is referring to in this instance given that Braverman is correct to say that 'fearing discrimination' is not enough to qualify for refugee protections. The [Refugee Convention's definition of a refugee is that someone must have 'a well-founded fear of being persecuted'](#) so fearing 'discrimination' has never been enough to qualify for refugee protections. Additionally, having a well-founded fear of being persecuted on its own is not enough for refugee protection – this fear must be linked to one of five grounds as stipulated by the Refugee Convention. Namely persecution based on: race, religion, nationality, membership of a particular social group or political opinion.

Braverman went on to say that 'the practical consequence of (these shifts in interpretation) has been to expand the number of those who may qualify for asylum, and to lower the threshold for doing so.' This seems to be at best, confused and, at worst, intentionally misleading as it is at odds with the

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<sup>1</sup> For example, those who arrive 'legally' to claim asylum despite there being no safe legal routes to the UK for the purposes of claiming asylum.

reality of the asylum regime in the UK. Braverman's ill-informed comments come after the recent [increase in standard of proof in determining the 'well-founded fear' in asylum claims by the Nationality and Borders Act 2022 \(NBA 2022\)](#).<sup>2</sup> Specifically it has been raised from a 'reasonable degree of likelihood' described as a '10 percent chance of being shot, tortured or otherwise persecuted.'<sup>3</sup> This previous standard was relatively low because of - as accepted by the UK 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'](#).

Following the NBA 2022, applicants must now reach the much higher civil standard of proof, ['on a balance of probabilities'](#), to prove a well-founded fear of being persecuted. The goal of this higher standard of proof seemed to be to better reflect practice. This at least indicates that in practice, when evaluating asylum claims, [a higher standard was already being used than should have been](#). The increased standard of proof has indeed amplified the well-documented difficulties and barriers faced by applicants who base their asylum claims on their sexual orientation.

In the UK, [sexual orientation has been an accepted basis of applying for asylum since 1999](#). According to UK Home Office statistics, [the top three nationalities applying for asylum in the UK in 2022, where sexual orientation formed part of the basis of the application, were Pakistani, Nigerian and Bangladeshi](#). In all three countries, Pakistan,<sup>4</sup> Nigeria<sup>5</sup> and Bangladesh,<sup>6</sup> being a member of a sexual minority could lead to lengthy terms of imprisonment. Despite these laws persecuting people who are a sexual minority in their countries of origin, this is not enough to qualify for refugee protections. As per the CJEU in *X, Y, Z*, criminalisation of same-sex acts in an applicant's country of origin per se does not constitute as an act of persecution.<sup>7</sup> This demonstrates the level of 'well-founded fear of persecution' on the basis of sexual orientation required to qualify for refugee protection.

In both Pakistan's and Bangladesh's penal codes, the same section, s.377, is used. This section was undemocratically imposed by British colonialism. Nigeria's sodomy laws are also inherited versions of British laws, including s.377. The fact that people may be seeking asylum in the UK on the basis of these inherited laws as a result of colonialism is noteworthy here.<sup>8</sup> People are being persecuted in countries on the basis of imposed colonial laws but the current Home Secretary is suggesting that they *should not* be given refugee protections to address that threat of persecution.

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<sup>2</sup> Whilst Priti Patel was Home Secretary.

<sup>3</sup> *R. v Secretary of State for the Home Department Ex p. Sivakumaran* [1988] AC 958, para 453.

<sup>4</sup> Pakistan's Penal Code 1860, s377 stipulates 'whoever voluntarily has carnal intercourse against the order of nature' can be punished with 2 years to life imprisonment.

<sup>5</sup> Nigeria's Criminal Code 1990, s214 states 'any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order or nature...is liable to imprisonment for fourteen years.' Though this law does not explicitly penalise sexual minorities it is noted that laws of this nature disproportionately affect sexual minorities.

<sup>6</sup> Bangladesh's Penal Code 1860, 377 punishes those guilty of committing 'unnatural offences' with life imprisonment. Unnatural offences are defined as 'those who voluntarily have carnal intercourse against the order of nature.'

<sup>7</sup> *Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12) and Z v Minister voor Immigratie en Asiel (C-201/12)* [2013] ECR I-0000, para 61. This decision has been adopted into UK domestic law and policy.

<sup>8</sup> For more information, see Human Rights Watch, 'This alien legacy: the origins of 'sodomy' laws in British colonialism' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth* (University of London Press, Institute of Commonwealth Studies 2013).

The terminology used by the Home Secretary is also cause for concern. Simply referring to a singular category of sexual orientation: 'gay' suggests that the Home Secretary does not appreciate nor understand [sexual diversity](#). This is especially concerning given the difficulties faced by people who are sexual minorities navigating the asylum process. For example, barriers faced when attempting to collate tangible evidence resulting in the reliance on consistent oral testimony when it is known [inconsistencies and difficulties in memory recall may arise as a result of experiences of trauma](#). Additionally, suggesting that 'discrimination' is not enough to warrant protection sends a harmful message to the LGBTQIA+ community in the UK. The Home Secretary's lack of understanding, whilst damaging, is still less so than the misinformed and wilful peddling of a narrative intended to be divisive and which can do nothing positive, only perpetuate deep discrimination against some of the most marginalised and vulnerable people in our society.