

**UNITED NATIONS**

**HIGH COMMISSIONER  
FOR REFUGEES**

*Regional Representation  
in Japan*



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## ADVISORY OPINION BY UNHCR TO THE TOKYO BAR ASSOCIATION

1. On 30 July 2004, the Tokyo Bar Association requested UNHCR to provide additional information concerning the following issues:
  - (i) whether a claim based on sexual orientation can satisfy one of the grounds enumerated in Article 1A (2) of the 1951 Convention relating to the Status of Refugees (hereinafter “the 1951 Convention”);
  - (ii) whether there is a real chance of being persecuted for that reason.
2. UNHCR has a direct interest in the application of the 1951 Convention on the basis of its responsibility for providing international protection to refugees worldwide and for seeking permanent solutions for them.<sup>1</sup> Furthermore, under Article 35 of the 1951 Convention, UNHCR has a duty to supervise the application of the provisions of the 1951 Convention. UNHCR thus welcomes the opportunity to assist the Tokyo Bar Association with its comments regarding the principles to be applied in relation to the issues mentioned in paragraph 1 above.

### **Sexual orientation and the refugee definition**

3. Although the 1951 Convention does not specifically refer to gender or sexual orientation, it is an established principle that the refugee definition must be given a gender-sensitive interpretation.<sup>2</sup> However, this does not mean that all persons with a certain sexual orientation (for example, homosexuals) are automatically entitled to refugee status. Refugee claims based on differing sexual orientation may only be justified where the claimant has been or may be subject to persecutory action on account of one or more Convention grounds.
4. Where the penalty or punishment is disproportionately severe and is for a reason mentioned in the definition, it may in itself amount to persecution.<sup>3</sup> Likewise, where homosexuality is illegal in a particular society, the imposition of severe criminal penalties may amount to persecution. Furthermore, a law can be persecutory in itself.<sup>4</sup> This is especially true when the law in question emanates from religious or cultural norms not necessarily in conformity with international human rights standards. In addition, whether the harm feared amounts to persecution must be assessed against the core human rights entitlements recognized by the international community, and may not be justified by cultural relativism.

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<sup>1</sup> See the Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950.

<sup>2</sup> See UNHCR, “*Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*” (April 2001) paragraphs 2 to 6. See also Executive Conclusion No.87(1999) para.(n)

<sup>3</sup> See, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook - re-edited January 1992)*, paragraphs 56-57.

<sup>4</sup> However, in all cases, a claimant must establish that the persecutory law continues to exist and is enforced.

5. The well-founded fear of persecution must also be related to one or more of the 1951 Convention grounds which are not mutually exclusive. For example, the transgression of social or religious norms, such as homosexuality, may be analysed in terms of political opinion, or membership of a particular social group. This opinion may be also be imputed or attributed to the claimant by the authorities or the non-state agent of persecution. Paragraph 82 of the Handbook on Procedures and Criteria for Determining Refugee Status provides useful guidance in this regard:

*Persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reason of political opinion;*

6. For the purpose of the Convention, the term “political opinion” should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.<sup>5</sup> This may include an opinion as to gender roles, including an opinion related to differing sexual orientation. UNHCR notes that especially in countries which holds up the Islamic principals and norms, claims related to differing sexual orientations are not tolerated by the authorities as contrary to the core of the country policy. In that case, UNHCR considers that opinions related to sexual orientation will be encompassed by the notion of ‘political opinion’ under the 1951 Convention, as a ground of persecution and that homosexuals in Iran can also establish a valid claim based on this ground.
7. Claims based on sexual orientation may also be analysed within the parameters of the “membership of a particular social group”. For the purpose of the 1951 Convention, the term is defined as follows:

*a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human right<sup>6</sup>.*

8. Sexual orientation is also now generally understood as an innate and unchangeable characteristic or so fundamental to identity or human dignity that change should not be compelled. There is no requirement that the group be “cohesive”, that is, an applicant need not show that the members of a particular group know each other or associate with each other as a group. The relevant inquiry is whether there is a common element that group members share. It is also not necessary either, to demonstrate that all members of the putative group are at risk of persecution in order to establish the existence of a particular social group. Taking these elements in consideration, in UNHCR’s view, homosexuals can be within the ambit of a social group category, either as a group sharing a common characteristic or because they are perceived as a cognizable group in the society.<sup>7</sup> This is widely accepted in practice of various jurisdictions.<sup>8</sup>

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<sup>5</sup> See UNHCR Guidelines on International Protection: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002 (HCR/GIP/02/01), in particular paragraph 32. See, also, Guy S Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed), Clarendon Press, 1996, at p.49 and James C Hathaway, *The Law of Refugee Status*, Butterworths, 1991 at p.149.

<sup>6</sup> See UNHCR Guidelines on International Protection: “*Membership of a particular social group*” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002 (HCR/GIP/02/02).

<sup>7</sup> See footnote 6. See, also, Heaven Crawley and Trine Lester, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, EPAU/2004/05, May 2004.

## Country of origin information

9. As regard the question whether homosexuals may face persecution in Iran, several sources confirm that homosexuality is punished by Islamic law and that sodomy is a capital crime.<sup>9</sup> Punishments against homosexuals are based on the “Sharia” and inform the application of the Islamic Punishment Act of Iran.<sup>10</sup>
10. As to the application of the law in practice, UNHCR noted that there are external sources indicating that homosexuality does not seem to be penalised in practice in Iran.<sup>11</sup> In UNHCR’s view, this information should be treated with caution and must be read in light of all elements in the specific context of Iran. Furthermore, a single source of information should not be considered as conclusive as to the merits of a particular asylum claim. In addition, while available country of origin information from public sources (there could individual cases penalised to the extent of being persecutory but which remain unknown to the public.) does not seem to refer to any specific example of the enforcement of the death penalty solely on the grounds of homosexual relations, it would be inappropriate to completely disregard the existence of the death sentence on the basis of sources indicating a relative tolerance or the fact that there is no systematic effort to prosecute homosexuals in Iran. The absence of a specific example on the enforcement of the death penalty does not reasonably negate its possible imposition or occurrence in all cases and at all times. Neither does it preclude reasonable substantiation of a well-founded fear of persecution on cumulative grounds.<sup>12</sup> The merits of an individual asylum claim will ultimately have to be assessed on the basis of its subjective and objective (including country of origin information) elements.<sup>13</sup>
11. In addition, homosexuals can be subject to persecution by means which do not necessarily involve criminal penalties. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unwilling or unable to protect effectively the claimant against harm. Although persecution is normally related to action by the authorities of the country, it may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.<sup>14</sup>

## Other relevant considerations

12. When assessing a claim based on differing sexual orientation, UNHCR examines whether the

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<sup>8</sup> See Section II of the annexed overview *Extracts of relevant national jurisprudence*.

<sup>9</sup> See relevant extracts of country of origin information in Annex. In particular, UNHCR Centre for documentation and research, *Background Paper on Refugees and Asylum Seekers from the Islamic Republic of Iran*, January 2001, Immigration and nationality directorate, Home Office, United Kingdom, *Iran Country Report April 2004*, and United Nations High Commissioner for Refugees (UNHCR)/ and Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD). 11 June 2001. Presentation by Drewery Dyke, with additional remarks from Bernard Quah to the 7th European Country of Origin Information Seminar Berlin, 11-12 June 2001. "Iran: Country Report." Available at <http://www.ecoi.net>.

<sup>10</sup> According to Article 4 of the Constitution, all of the laws of the country should be compatible with Islamic law.

<sup>11</sup> 'Iran: Update to IRN28636.E of 11 February 1998 concerning information on the situation of homosexuals and whether legal penalties against homosexuality are applied in practice' by Research Directorate, Immigration and Refugee Board, Ottawa (20 January 2003).

<sup>12</sup> See paragraph 54 and 55 of the Handbook on Procedures and Criteria for Determining Refugee Status.

<sup>13</sup> See paragraphs 40 and 42 of the Handbook.

<sup>14</sup> See paragraph 65 of the Handbook.

claim concerning the applicant's sexual orientation is credible. There is no requirement of past persecution, and the fact that the applicant was never actually prosecuted for his/her sexual practice does not exclude the refugee from having a well-founded fear of persecution. Other elements may be relevant in determining the validity of the refugee claim. For example, the applicant's own actions in the country of asylum can be decisive, such as, the public expression of opinions that claim the freedom and the equality for homosexuals and the abolition of provisions on sodomy, through the applicant's activities in publication and participation in various demonstrations. In such cases, UNHCR examines whether the applicant's activities are known to the authorities of the country of origin, and whether this may lead to a likelihood of persecution taking into consideration the situation in the country of origin.

13. UNHCR trusts that these comments will be useful to the Tokyo Bar Association.

UNHCR  
3 September 2004

Enclosure in annex:

1. UNHCR's Standards/Guidelines and other relevant research papers
2. Extracts of relevant national jurisprudence
3. Relevant Country of Origin Information
4. Other relevant information on State practice

## ANNEX

### I. UNHCR's Standards/Guidelines and other relevant research papers

- **UNHCR Handbook on procedures and criteria for determining refugee status (Japanese version)**

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin –while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

#### *(c) Discrimination*

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

#### *(d) Punishment*

56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim-or potential victim-of injustice, not a fugitive from justice.

57. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of "illegal religious instruction given to a child) may in itself amount to persecution.

#### *(g) Agents of persecution*

65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

*(f) Political opinion*

82. As indicated above, persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

83. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant’s true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugee “*sur place*”.

- **Guidelines on International Protection Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002 (HCR/GIP/02/01) (Japanese version)**

See, in particular, paragraphs 16-17.

(Quotations)

16. Refugee claims based on differing sexual orientation contain a gender element. A claimant’s sexuality or sexual practices may be relevant to a refugee claim where he or she been subject to persecutory (including discriminately) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.
17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.

- **Guidelines on International Protection:” Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002 (HCR/GIP/02/02) (Japanese version)**
- **Background Paper for “Track Two” of the Global Consultations on International Protection, Alexander Aleinikoff ”Membership in a particular social group” : Analysis and proposed conclusions’, published in: Refugee Protection in International Law,**

2003.

- **Heaven Crawley and Trine Lester, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, May 2004 (study commissioned by UNHCR Evaluation and Policy Analysis Unit, Department of International Protection, and Regional Bureau for Europe).**
- **Rodger Haines, “Gender-Related Persecution”, published in: *Refugee Protection in International Law*, 2003.**

## II. Extracts of relevant national jurisprudence

### **Australia**

#### Refugee Review Tribunal

##### 1. N01/37352(24 April 2001)

The Tribunal has considered whether homosexual men in Iran constitute a particular social group within the meaning of the Convention. Whether a group is a particular social group in the relevant sense in a particular society depends on the circumstances. The Tribunal notes that homosexuals are recognised in law in Iran and that independent evidence cited above refers to the existence of homosexuals in Iran. On the basis of this evidence, the Tribunal finds that homosexuals in Iran can be considered a cognisable group within Iranian society.

The Tribunal accepts the independent evidence that notwithstanding the fact that homosexual activity is not uncommon in Iran, the law condemns homosexuality. The Tribunal is of the opinion that even though there may be no organised gay movement in Iran, homosexuals in Iran are perceived to have attributes that unite them as a group and distinguish them from society as a whole. On the basis of the independent evidence, the Tribunal is satisfied that homosexuals are a cognisable group in Iranian society and constitute a particular social group for the purposes of the Convention.

The Tribunal accepts that the applicant would need to be discreet if he wished to have homosexual relationships in Iran. The Tribunal also accepts that in some circumstances the need to be discreet would support a conclusion that the applicant had a well-founded fear of persecution. (See *Woudneh v Inder & MILGEA*, unreported, Federal Court, Gray J, 16 September 1988 at 18-19, also *Applicant A* per McHugh J at 359-360 and Kirby J at 388).

##### 2. N01/37891(16 October 2001)

The Tribunal accepts that “male homosexuals in Iran” constitute a “particular social group” in that country. As the report from Canada’s IRDB observes, the term “homosexuality” may well not have currency in Iran or have the same meaning in Iran as it does in the West, but there are several Iranian terms addressing sexual relations between men, and even one simply describing emotional attraction to people of the same sex, a state that can surely exist without equations with “sodomy”. The Tribunal accepts that “male homosexuals in Iran” are not an amorphous group, even though, as the IRDB observes, there may be many different kinds of homosexuals in Iran.

Although they generally remain “invisible” as a sector of the population, the Tribunal accepts that “male homosexuals in Iran” constitute a “particular social group” in that country because, as the IRDB report also observes, they are discussed in society as a group and not necessarily defined by individual acts, but rather, or at least also, by preoccupations attributed to them and by their perceived potential to disrupt family and social order, not just as individuals, but as a perceived group.

## Australia Federal Court

### 1. *Singh v. Minister for Immigration and Multicultural Affairs* (27 November 2001)

9 The Tribunal accepted that the applicant's homosexuality meant that he was a member of a particular social group within the meaning of Article 1A(2) of the Convention. That has been accepted by the Court on a number of occasions: *Minister for Immigration and Multicultural Affairs v Gui* [1999] FCA 1496 ("Gui"); "*Applicant LSLs*" v *Minister for Immigration and Multicultural Affairs* [2000] FCA 211 ("*Applicant LSLs*"); *Minister for Immigration and Multicultural Affairs v "B"* [2000] FCA 930 ("*B*"); *Minister for Immigration and Multicultural Affairs v Guan* [2000] FCA 1033 ("*Guan*"); and *MMM v Minister for Immigration and Multicultural Affairs* [1998] 90 FCR 324 ("*MMM*"). The High Court (McHugh and Kirby JJ) also indicated acceptance of that proposition in *Guo Ping Gui v Minister for Immigration and Multicultural Affairs* (2000) 21(11 LegRep SL3b, when refusing special leave to appeal from the Full Court of the Federal Court in *Gui*.

### 2. *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (9 December 2003)

43. The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group.

49 . Thus, the issues were whether there was a real chance of the appellant being prosecuted for homosexuality and, if so, whether the prosecution and any potential penalty were so inappropriately adapted to achieving a legitimate object of Iranian society as to amount to persecution. The reasonableness of the appellant's conduct was not relevant to either issue. In determining whether the appellant faced a real chance of prosecution, the Tribunal was entitled to consider not only the prosecuting policies of the Iranian authorities, but also the likelihood that inadvertently or deliberately the appellant might attract their attention. But the reasonableness of his conduct did not bear on the issue.

50. In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.

## High Court of Australia

*S 395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S* [2003] HCA 71 (9 December 2003)

### Living openly as a **homosexual**

41. The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can



eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.

42. History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention. As Simon Brown LJ stated in *Secretary of State for the Home Department v Ahmed*[\[14\]](#):

"It is one thing to say ... that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would *not* refrain from such activities - if, in other words, it is established that he would in fact act unreasonably - he is not entitled to refugee status." (original emphasis)

43. Simon Brown LJ went on to say:

"[I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable."

44. The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether

the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.

45. Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law. Subject to the law of the society in which they live, homosexuals, as well as heterosexuals are free to associate with such persons as they wish and to live as they please.

## Canada

### Supreme Court

*Canada (Attorney General) v Ward* [1993] 2 SCR 689

(Quotations)

- (a) persecution and state complicity

716-717

The international community was meant to be a forum of second resort for the persecuted, a "surrogate", approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is, of [\*48] course, comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on [\*\*717] one of the enumerated grounds constitutes failure of local protection.

I, therefore, conclude that persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens.

- (b) Persecution

733-734

Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:

*CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.*

This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway, *supra*, at p. 108, thus explains the impact of this general tone of the treaty on refugee law:

The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.

This theme sets the boundaries for many of the elements of the definition of "Convention refugee".

"Persecution", for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state

protection"; see Hathaway, *supra*, at pp. 104-105. So too Goodwin-Gill, *supra*, at p. 38, observes that "comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field

(c) particular social group

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'we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. \*snip\* whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

## New Zealand

1. Refugee Status Appeals Authority, *Refugee Appeal No.74665/03* (7 July 2004)

(Quotations)

(p.14)

[26] The evidence as to the application of the law in practice is at times ambiguous and in need of careful interpretation. Some evidence asserts non-penalization of homosexuality. Such assertions cannot always be taken at face value and must be read in context. Too narrow a conception of human rights must be avoided. Homosexuals can be persecuted by means which do not necessarily involve criminal penalties. \*snip\*

[27] The statement that the Research Directorate could not find reports of persons being penalized for homosexuality cannot be taken at face value as it stands in stark contrast with the information contained in the *Update*. The fact that homosexuals are repressed by their family and relatives and that they are portrayed by the media as rapists and paedophiles underlines the point. \*snip\*

2. Refugee Status Appeals Authority, *Refugee Appeal No.1312/93 RE GJ* (30 August 1995)

(p.57-58)

We are satisfied, on the evidence received, that homosexuals in Iran are a cognizable social group united by a shared internal characteristic namely, their social orientation. We also find that homosexuality is either an innate or unchangeable characteristic, or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.

(...)there is a real chance of persecution were the appellant to return to Iran, the expert evidence establishes that the situation for homosexuals in Iran is a particularly dangerous one. They have been singled out by Khomeini and others as a corrupt and dangerous manifestation of "Westification". The pervasive influence of Ayatollah Khomeini's writings coupled with the express provisions of the Iranian Penal Code lead almost inevitably to the conclusion that the agents of state in Iran perceive homosexuals as persons who must be eliminated because they are parasites and corruptors of the nation. The real chance test is accordingly satisfied.

It might be said that the appellant could avoid persecution by being careful to live a hidden, inconspicuous life, never revealing his sexual orientation. Having seen and heard the appellant, we are of the conclusion that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable.

## United Kingdom

House of Lords, *Shah and Islam v. Secretary of State for the Home Department* (25 March 1999)

LORD MILLETT

I would accept that homosexuals form a distinct social group. In a society which subjected practising homosexuals but not non-practising homosexuals to persecution the relevant social group would still consist of homosexuals, not of the subset practising homosexuals. A non-practising homosexual would have no difficulty in establishing that he was a member of a persecuted group. His only difficulty would be in establishing that his fear of persecution was well founded, having regard to the fact that he was not a practising homosexual. This would be a matter of evidence, but given the hostility encountered by all homosexuals in such a society and the obvious problems the applicant would have in satisfying his tormentors of his own sexual abstinence, I doubt that the difficulty would be a real one.

### **III. Relevant Country of Origin Information**

#### **1. Immigration and nationality directorate, Home Office, United Kingdom, *Iran Country Report April 2004***

(Quotations)

Homosexuals/ Transsexuals

6.186. From a legal point of view it is important to take a look at Iranian law particularly the Islamic Punishment Act, which carries the following provisions for homosexual acts:

Art. 110: The prescribed punishment for homosexual relations in case of intercourse is execution and the mode of the execution is at the discretion of the religious judge.

Art. 111: Homosexual intercourse leads to execution provided that both the active and passive party are of age, sane and consenting.

Art. 112: Where a person of age commits homosexual intercourse with an adolescent, the active party shall be executed and the passive party, if he has not been reluctant, shall receive a flogging of up to 74 lashes.

Art. 113: Where an adolescent commits homosexual intercourse with another adolescent, they shall receive a flogging of up to 74 strokes of the whip unless one of them has been reluctant.

Art. 114 to 126 establish how to prove homosexual intercourse.

Art. 127 to 134 relate to lesbian sexual relations. Punishment for sexual intercourse among lesbians is 100 lashes. If the offence is then repeated 3 times - the punishment is execution.

6.188. Last year there were reports that a man accused of sodomising and then murdering his nephew was to be thrown over a cliff in a sack. This was given widespread publicity by the Iranian opposition in the UK and was taken up by other wires, but we have heard no reports that the sentence was ever carried out.

6.189. However, jurisprudence, burden of proof notwithstanding, certainly has used accusations of homosexuality. Furthermore, it does happen that homosexuality is mentioned as one of the accusations amongst other offences held against the defendant. For instance, accusations of homosexuality have been used in unfair trials, such as the case of a Sunni leader in Shiraz in

1996/97, who was clearly prosecuted for political reasons. There have also been other political cases, although not in the recent past.

6.190. According to the Ta'azirat of November 1983 (valid to June 1996) sentences of imprisonment for between 1 and 10 years and up to 74 lashes are possible. The death penalty may also be incurred if the act is deemed to be an "Act against God and corruption on earth". Since June 1996 the revised Ta'azirat omits direct threat of lashes or the death penalty. The penalties of lashing and of death are, however, still judicial options, even though they are not mentioned within the revised Ta'azirat. Reports suggest that since 1996 they have rarely been used. The most recent report of execution is of the death by stoning of a man dating from 1995, on charges of repeated acts of "adultery and sodomy". Reports of use of the death penalty in cases where the only offence is sodomy/execution are extremely difficult to substantiate, and are held to be an unlikely sentence. More usually lashing is the punishment.

**2. Research Directorate, Immigration and Refugee Board, Ottawa, 'Iran 20 January 2003: Update to IRN28636.E of 11 February 1998 concerning information on the situation of homosexuals and whether legal penalties against homosexuality are applied in practice'. (Japanese version)**

(Quotations)

Homosexuality continues to be illegal and punishable by death in Iran (ILGA 10 Oct. 1999; BBC 19 July 2002; The Irish Times 23 June 2001; AFP 20 June 2001; *ibid.* 25 Mar. 2001). However, reports of persons being penalized for homosexuality could not be found among the sources consulted by the Research Directorate.

(...)

Engaging in sodomy with a minor is also prohibited and punishable by 74 lashes (*ibid.*; AFP 20 June 2001). In July 2002, BBC reported that, according to an Iranian newspaper, a man who was convicted of raping and killing his 16-year-old nephew was sentenced to death "by being thrown off a cliff in a sack" (19 July 2002). The article went on to state that "[i]t is thought that if the man survives the fall down a rocky precipice, he will be hanged" (*ibid.*). The man had 20 days to appeal the sentence (*ibid.*).

The BBC article also indicated that, according to some activists, "the media in Iran tend to portray homosexuals who have been arrested as rapists and paedophiles" and that societal ignorance towards homosexuality is prevalent (19 July 2002). The article also pointed out that homosexuals "are repressed by their family and relatives" (BBC 19 July 2002).

During a United Nations General Assembly Special Session on HIV/AIDS, which was held in New York in June 2001, delegates from Iran were among those who criticized "any recognition of sexual minorities" (HRW 2002). The final document adopted by the General Assembly "did not include any explicit reference to lesbian, gay, bisexual, and transgender people despite the fact that sexual minorities were at increased risk of HIV infection in many countries" (*ibid.*).

In November 2001, the Swedish Aliens' Appeals Board decided to issue a residence permit to a homosexual Iranian teenager, who alleged the ill treatment of homosexuals in Iran (AP 14 Nov. 2001). According to the Board, "gay men and lesbians are not persecuted in Iran but criticizing the Islamic country for its treatment of homosexuals is a political act that may lead to persecution" (*ibid.*). Specifically, the spokesman for the Board stated that "'a homosexual person (in Iran) does not risk persecution only because he is homosexual ... but he or she risks hard punishment, even the death penalty, if he or she conducts homosexual acts'" (*ibid.*).

**3. United Nations High Commissioner for Refugees (UNHCR)/ and Austrian Centre for**

**Country of Origin and Asylum Research and Documentation (ACCORD) 11 June 2001. Presentation by Drewery Dyke, with additional remarks from Bernard Quah to the 7th European Country of Origin Information Seminar Berlin, 11-12 June 2001. "Iran: Country Report." Available at <http://www.ecoi.net>**

(Quotations)

However, jurisprudence, burden of proof notwithstanding, certainly has used accusations of homosexuality. Furthermore, it does happen that homosexuality is mentioned as one of the accusations amongst other offences held against the defendant. For instance, accusations of homosexuality have been used in unfair trials, such as the case of a Sunni leader in Shiraz in 1996/97, who was clearly prosecuted for politically [sic] reasons. There have also been other political cases, although not in the recent past.

(...)

With regard to eligibility and claims based on persecution on grounds of homosexuality the following elements need to be taken into account:

The fact that, irrespective of the standard/burden of proof, the sentence for homosexuality is death is a very important element in any assessment. It would be inappropriate to water down the existence of the death sentence with arguments of a high burden of proof, relative tolerance or the fact that there is no systematic effort to prosecute homosexuals.

The subjective element is essential. One should consider on a case by case basis how intolerable it is for the asylum seeker not to be able to openly express his/her sexual orientation, not only because of the social context but also because it is considered to be against the law and punishable by death.

One should make a distinction between those who claim to have been active homosexuals in Iran or have stated being active after their arrival in a host country. The principle of refugee sur place should still apply, if the person determining eligibility does not have a problem with the credibility of the asylum seeker.

If one were to recognize refugee claims of asylum seekers claiming persecution on grounds of their sexual orientation, this would be for fear of persecution owing to membership in a particular social group.

**4. UNHCR Centre for documentation and research, 'Background Paper on Refugees and Asylum Seekers from the Islamic Republic of Iran', January 2001**

(Quotation)

(p.35)

**4.5 Homosexuals**

The Islamic Penal Law of Iran deals extensively with sodomy, lesbianism and pimping. Homosexuality is forbidden by Islamic law, and will be punished. Sodomy, defined as "sexual intercourse with a male", is punishable by death if both parties "are mature, of sound mind and have free will".<sup>310</sup> It must be proven by either four confessions from the accused, the testimony of four "righteous men" who witnessed the act, or through the knowledge of a Shari'a judge "derived through customary methods". If the accused repents before the witnesses testify, the penalty "will be quashed".

According to the Ta'azirat of November 1983 (valid to June 1996) sentences of imprisonment for between one and 10 years and up to 74 lashes are possible. The death penalty may also be incurred if the act is deemed "Act against God and corruption on earth".<sup>313</sup> Since June 1996, the revised Ta'azirat omits direct threat of lashes or the death penalty, but may impose closure of

premises where the act took place. Lesbianism, defined as “homosexuality for women by genitals”, is punishable by hundred lashes for each party, and by death on the fourth offence. The most recent report of execution is of the death by stoning of a man in 1995, on charges of repeated acts of “adultery and sodomy”.

#### IV. Other relevant information on State practice

#### **Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Replies to the questionnaire on gay and lesbian asylum seekers, 2001***

(Quotations)

Country: Canada

3. In Canada, is persecution of homosexuals regarded as persecution on grounds of membership of a particular social group under Article 1.A of the Geneva Convention?

Yes. The basic principles governing the application of the Convention refugee definition to matters of sexual orientation stem from the 1993 decision of the Supreme Court of Canada in Canada (Attorney General) v. Ward. In Ward, the Supreme Court of Canada pronounced on the meaning to be ascribed to the term "particular social group". The Court stated as follows:

The meaning assigned to “particular social group” in the (Immigration) Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.

The Court went on to identify three possible categories of particular social groups:

- a. groups defined by an innate or unchangeable characteristic;
- b. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- c. groups associated by a former voluntary status, unalterable due to its historical permanence.

The Court then stated that:

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation.

As a result of this decision of the Supreme Court of Canada, it is not questioned that gays, lesbians, and bisexuals may form a particular social group for the purposes of the Convention refugee definition.

4. Where there is persecution for reason of a person’s (actual or presumed) sexual orientation would Canada’s authorities grant refugee status or some form of subsidiary protection? What considerations are applied?

Where the Refugee Division determines that there is a “well-founded fear of being persecuted” for reason of sexual orientation, the claimant is granted refugee status. The person is thereby entitled to apply for permanent residence in Canada. If the person is denied refugee status, but

nevertheless fears risks upon return (risk for life, of inhumane treatment or extreme sanctions), he/she may apply for a post-determination review which is conducted by officials of Citizenship and Immigration Canada. If the person is found at risk, he/she is entitled to apply for permanent residence. In the event that the person is not found at risk, as a last recourse he/she could apply for landing from within Canada based on compassionate and humanitarian grounds.

5. Is there any caselaw on issues concerning persecution for reason of a person's (actual or presumed) sexual orientation? If so, please give details, s.v.p.

Yes. We have started to develop caselaw during the 1990's, including decisions of the Supreme Court of Canada and the Federal Court of Canada.

In *Ward*, the Supreme Court of Canada pronounced on the definition of a "particular social group", but also on the meaning given to the term "persecution". The Court relied on the interpretative framework of international human rights law, and rejected the view that "persecution" requires an element of state complicity. As a result of this decision, the important issue in claims where the persecutor is a non-state actor is the availability of meaningful state protection. As with all claims, cases involving homosexuality must be analyzed on their individual merits.

Discrimination amounting / not amounting to persecution

Owing to the nature of claims based on sexual orientation, a distinction is often made between persecution and discrimination not amounting to persecution. The discrimination has to be persistent, systematic or repetitive so as to amount to persecution. For instance, well-founded fear of persecution has been recognized in a country where homosexuality is still considered a mental illness and societal discrimination exists on a very large scale. (...)

Persecution and State Protection/Complicity

Where homosexuality is illegal and punishable, with penalties such as imprisonment, the Refugee Division tends to determine that claimants have a well-founded fear of persecution. The Board needs to examine the existence of state protection. In *Ward*, the Supreme court of Canada held that "[t]he claimant must provide clear and convincing confirmation of a state's inability to protect [him]". A claimant who is subjected to degrading and violent treatment and who has little or no redress if he attempts to implicate police officials or politicians may be found refugee if the Refugee Division considers this equivalent to State complicity. Human rights abuses towards sexual minorities, committed by members of the police or the military (arbitrary arrest and detention, torture and murder) provide an objective basis for recognition of a claimant's fear of persecution. Conversely, for a country where homosexuality is not illegal, where tolerance appears to be emerging and documentary evidence indicates that there are known gay communities in many large cities, the Refugee Division would be inclined to conclude that the claimant could face discrimination, but not a serious possibility of persecution.