Refugee Status Claims Based on Sexual Orientation and Gender Identity

A Practitioners' Guide

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Practitioners' Guide No. 11

This practitioners' guide is dedicated to the memory of the late Professor Nicole LaViolette, Faculty of Law, University of Ottawa, Canada, who inspired and assisted the authors.

Acknowledgments

This practitioners' guide was researched and written by Louise Hooper, Barrister, Garden Court Chambers, London, and Livio Zilli, Senior Legal Adviser & UN Representative at the International Commission of Jurists (ICJ), Geneva.

Jill Heine, Senior Legal and Policy Adviser at the ICJ, provided law and policy review and guidance. Laurens Hueting, ICJ's Legal Adviser, and Briony Potts, ICJ's Programme Officer, provided additional editorial and research support.

The ICJ is grateful to Professor Deborah Anker, Bojana Asanovic, Professor Hemme Battjes, Judge Lars Bay Larsen, Hilkka Becker, Samuel Boutruche, Michelle Brewer, David Cantor, S Chelvan, David Chirico, Jonathan Cooper, Kathryn Cronin, Matthew Davies, Alice Edwards, Neil Grungras, Paul Harvey, Professor James C. Hathaway, Sabine Jansen, Professor Nicole LaViolette, David Loveday, Louis Middelkoop, Nuala Mole, Violeta Moreno-Lax, Jason Pobjoy, Joe Tan and Professor Jens Vedsted-Hansen, who, among others, participated in either of the two expert roundtables on asylum claims based on sexual orientation and gender identity that the organization convened in 2014. Their contributions, along with those of asylum judges and lawyers, officials from national refugee status determination authorities, the Office of the UN High Commissioner for Refugees and the Office of the UN High Commissioner for Human Rights, asylum academics, staff members from a number of non-governmental organizations, and those of refugees themselves, have informed the contents of this guide.

Many of the refugee cases cited in this practitioners' guide are featured in "*Canadian Appellate Level Decisions Dealing with Refugee Claims Based on Sexual Orientation and Gender Identity*", 1 April 2015, compiled by Professor Nicole LaViolette with the assistance of Derek Bondt, J.D. Candidate, Faculty of Law, University of Ottawa.

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Foreword

Dr Alice Edwards[*]

That refugee status is to be accorded to individuals on the basis of a fear of persecution related to their sexual orientation and/or gender identity is now an accepted principle of international refugee law. Yet such claims continue to raise a number of fundamental challenges for practitioners and adjudicators alike. Questions have been raised regarding how to assess the credibility of statements as to one's sexuality, such as how practitioners ought to respond to questioning by officials regarding sexual conduct and whether this is ever appropriate, or whether practitioners may adduce video or medical evidence of sexuality and/or sexual conduct. A second major issue that has preoccupied courts in many jurisdictions is whether a claimant can be asked about, and/or expected to conceal or be discreet about his or her sexual orientation and/or sexual practices so as to avoid persecution if returned. A third issue that has been the subject of much conjecture and disagreement between advocates relates to the weight to be given to the existence of national criminal laws that prohibit and punish same sex relations. I am very pleased that these and other issues are reflected in and carefully argued in the International Commission of Jurists' superb *Practitioners' Guide on Refugee Status Claims Based on Sexual Orientation and Gender Identity*.

In relation to asking intrusive questions about a claimant's sexual conduct, I was pleased to read that the Practitioners' Guide rightly notes that such questioning, based on stereotyped understandings of what it means to be lesbian, gay, bisexual, transgender or intersex, has no real place in refugee status interviews. The Dutch Council of State's referral to the Court of Justice of the European Union (CJEU) in *A, B and C* is an important case on this

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point, where not only was intrusive questioning of sexual practices at issue, but also medical or pseudo-scientific testing of one's sexuality, as well as the probity of video evidence produced by applicants of themselves engaging in same sexual relations. Thankfully, in my view, rational heads prevailed in the CJEU's judgment, holding that such practices are inappropriate, by their nature they are not compatible with human rights norms and they offer very limited probative value as to one's sexual orientation.[1] The Practitioners' Guide does not take this judgment at face value however, but compels the practitioner to think about how to handle some possible exceptions to this strict rule taken by the Court, such as whether pre-existing video evidence not filmed with the purpose of substantiating a claim to refugee status should also be disqualified. While such particular situations may be worthy of a possible future reference to the CJEU for clarification, as a matter of evidence it is my view that such videos can only reflect what is presented in the video, and they do not and cannot alone represent the individual's sexual orientation and/or gender identity overall.

Perhaps the most significant challenge to refugee claims based on sexual orientation and/or gender identity and one that continues to exercise the minds of practitioners and adjudicators alike is that of discretion/concealment, although we are slowly moving towards some agreed understandings. Although the general legal principle – that requiring a claimant to hide, change or renounce his or her identity or fundamental beliefs would be at odds with the very object and purpose of the 1951 Convention, i.e. to protect persons who have a well-founded fear of being persecuted for who they are, or for their beliefs of views – claimants raising sexual orientation and/or gender identity continue to be asked about what they intend to do upon return. Regardless of whether a refugee claim is based on

[1] See, the judgment of the Grand Chamber of the Court of Justice of the European Union of 2 December 2014 in the Joined Cases C-148/13 to C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie.*

sexual orientation and/or gender identity, or any other of the grounds for refugee status in the 1951 Convention, the general principle remains the same. This needs to be reconfirmed by practitioners to ensure case consistency.

Yet, is it appropriate to ask a claimant about their future intentions and actions? Claimants based on political opinion are not generally asked whether they intend to be politically active upon return, or whether a religious claimant will give up his or her religion to avoid persecution. In fact, a claimant need not even belong to the particular religion or hold the political opinions at the base of their claim, what is at issue in such cases is whether such an identity or views are or are likely to be attributed to the applicant such as to attract persecutory treatment. It is my view that the CJEU in *X, Y and Z* is correct on this point and clear: 'When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.'[2] The Australian High Court and the UK Supreme Court also endorse the same general principle.[3] However, I am also aware that despite what for me is clear, some jurisdictions have continued to import the so-called 'if' and 'why' test developed in the United Kingdom's Supreme Court judgment in *HJ (Iran), HT (Cameroon)*. *HJ, HT* suggested that one should ask: If he is likely to exercise restraint, why would he do so? The CJEU's judgment did not endorse, nor suggest that adjudicators need to ask, the 'if' and 'why' test from *HJ, HT*. The CJEU stated instead that 'the fact that he could avoid the risk by exercising greater restraint … is *not*

[2] Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, Court of Justice of the European Union, Fourth Chamber, 7 November 2013, para. 76,

[3]Australia: *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003; United Kingdom: *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, 7 July 2010.

to be taken into account [my emphasis].'[4] If it is not to be taken into account, how is it lawful to ask such questions? In fact, concealment is acknowledged by the UK Supreme Court as a typical response to a fear of persecution.[5]

UNHCR's Guidelines do not advocate for the 'if and why' questions to be asked, as such questions are ultimately misleading and tell an adjudicator very little about the risk of persecution. In effect, they take the adjudicator into theoretical terrain. Does the asylum-seeker even know definitively how they would act in the future, or which acts would attract persecutory treatment. If their desire to refrain from being open about their sexuality would be in part influenced by their desire to avoid harmful treatment that may be visited upon them, we are in the same position as if we had relied on other evidence. I have had a number of judges share with me that when they have posed these questions, some claimants have expressly stated that they found them unfair, because they could not possibly answer them with any degree of certainty, as it will all depend on the risk they face. This is why the UNHCR's approach is the correct one, namely that adjudicators need to look at the overall predicament and risk of persecution regardless of concealment, discretion or restraint. UNHCR also notes in this regard that the risk of persecution in such cases is rarely solely confined to the claimants' own actions, because, for example, their circumstances may change over time, or they may risk discovery through the actions of others, by accident, rumours, or growing suspicion.[6]

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[4] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 75.
[5] On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, Lord Rodger, para. 59.
[6] UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines), para. 32.

Finally, in relation to the issue of criminalization, the starting point is the generally accepted human rights position that laws that criminalize same-sex relations or conduct are inherently discriminatory and thus violate human rights norms. However, this is not the end of the analysis. UNHCR's view is that the existence of such laws does not – *per se* – constitute the basis for refugee status. UNHCR's view is that for such laws to give rise to refugee status they need to be applied in practice and that the consequences of such laws need to meet the threshold of persecution. By way of example, UNHCR's Guidelines No. 9 on sexual orientation and gender identity provide that:

> [w]here persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.[7]

UNHCR's position is also the position adopted by the CJEU in *X, Y and Z*:

> Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.[8]

Although I am aware that this more conservative approach is not a view shared by all practitioners nor activists, who would rather that the existence of such laws *per se* be considered to amount to persecution, this is not so far accepted as a matter of refugee law. Consistency in how all

[7] The UNHCR SOGI Guidelines, para. 26.
[8] *X, Y and Z v. Minister voor Immigratie en Asiel*, paras 61 and 79(2).

claims, whether based on sexual orientation or any other basis, guided UNHCR's approach to this question. UNHCR's Guidelines No. 1 on Gender-Related Persecution likewise note that in claims raised by women, even inherently persecutory laws need to be enforced, they cannot be dormant.[9]

That said, UNHCR's Guidelines No. 9 go further than looking only at the implementation of laws (or their lack of implementation), but also at the impact of such laws on the situation of the applicant. Practitioners are encouraged to understand such laws in the overall country context and how they can create or contribute to 'an oppressive atmosphere of intolerance and generate a threat of persecution…'.[10] While the CJEU in *X, Y and Z* did not go as far as accepting this aspect of UNHCR's position, it is in my view wrong to read too much into this omission. Practitioners would be advised to argue instead that these broader considerations were not before the CJEU in that case and thus they remain open to argumentation pursuant to a future reference to the Court.[11] The International Commission of Jurists Practitioners' Guide sets out the general position very clearly, and notes, too, the scope for further litigation in relation to the effect of such laws.

The documentation of these and other challenges in the International Commission of Jurists Practitioners' Guide makes it not only a very timely initiative, but also an excellent resource to support practitioners in being able to advocate more effectively for their clients. The guide is easy-to-read, conveniently structured around the elements

[9] The UNHCR Guidelines on International Protection No. 1.: 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, HCR/GIP/02/01, 7 May 2002, para. 10.
[10] The UNHCR SOGI Guidelines, para. 27.
[11] See, Alice Edwards, *'X, Y and Z: The "A, B, C" of Claims based on Sexual Orientation and/or Gender Identity?'*, presentation to the International Commission of Jurists' Expert Roundtable on asylum claims based on sexual orientation or gender identity or expression, Brussels, 27 June 2014.

of the 1951 Convention refugee definition and draws on a wide range of case law from multiple jurisdictions. Most importantly, though, it tackles without bias a wide number of legal issues, providing insights and tips for practitioners seeking to challenge the exact parameters or applicability of existing legal precedents or to finally settle some still unresolved legal questions. I believe the International Commission of Jurists and the authors, Louise Hooper and Livio Zilli, have achieved the ambitious objective of the Guide of providing 'enduring legal and practical advice', notwithstanding that the field is 'fast moving and constantly evolving'. I would recommend the Guide as essential reading for all refugee law practitioners.

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[*] The views expressed in this Foreword are the personal views of the author and do not necessarily represent those of the United Nations or the UNHCR.

Introduction

This is a practitioners' guide to claims to refugee status for reasons of sexual orientation and/or gender identity in the context of the refugee definition in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees.[12]

The role of the UN High Commissioner for Refugees

Pursuant to its 1950 Statute, the UN High Commissioner for Refugees (UNHCR) has a role in the supervision of the application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees.[13] The UNHCR's supervisory responsibility is also reflected in the preamble to and in Article 35 of the Refugee Convention, and in Article II of its 1967 Protocol. While not explicitly elaborated in the Statute, the UNHCR has an implied competence to define and adopt the measures that are reasonably necessary to achieve the purpose of the international legal framework governing the protection of persons of concern to the UNHCR.[14] In the exercise of its

[12] The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention or the Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: the Protocol or 1967 Protocol).

[13] See UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), Annex, para. 8(a).

[14] See, Volker Türk, then UNHCR Director of International Protection, *UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate*, Keynote address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto, Canada, 17-20 May 2010, p. 5.

supervisory mandate, in 2012 the UNHCR published the "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", a set of guidelines on claims to refugee status based on sexual orientation and/or gender identity under the Refugee Convention.[15] Like other UNHCR's guidelines on international protection, the UNHCR SOGI Guidelines provide authoritative guidance on substance and procedure "with a view to ensuring a proper and harmonized interpretation of the refugee definition" in the Refugee Convention,[16] and "are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination under its mandate".[17]

As the UN High Commissioner for Refugees notes: "[r]efugee claims based on sexual orientation and/or gender identity often emanate from members of specific sub-groups, that is, lesbian, gay, bisexual, transgender, intersex and queer individuals".[18]

Terminology

Article 1A(2) of the Refugee Convention defines a refugee for the purposes of the instrument as someone, who, among other things, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

[15] See the UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines).
[16] The UNHCR SOGI Guidelines, para. 4.
[17] The UNHCR SOGI Guidelines, cover page.
[18] The UNHCR SOGI Guidelines, para. 10.

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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This practitioners' guide uses the concepts of sexual orientation and gender identity (hereafter: SOGI) as described in the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity.[19]

[19] The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was The Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply. The Yogyakarta Principles describe sexual orientation and gender identity, respectively, as follows: "(s)exual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender"; "(g)ender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms". Both UN Treaty Bodies and the Special Procedures of the UN Human Rights Council have referred to the Yogyakarta Principles; see, e.g., the UN Committee against Torture's Concluding Observations, CAT/C/FIN/CO/5-6, 29 June

This guide also adopts the definition of the terms lesbian, gay, bisexual and transgender outlined in the UNHCR SOGI Guidelines.[20]

It also adopts the definition of intersex used by the Office of the UN High Commissioner for Human Rights.[21]

2011: Finland, para. 24; the Interim report of the Special Rapporteur on torture, A/68/295, 9 August 2013, para. 70.

[20] "A *lesbian* is a woman whose enduring physical, romantic and/or emotional attraction is to other women. Lesbians often suffer multiple discrimination due to their gender, their often inferior social and/or economic status, coupled with their sexual orientation"; "*Gay* is often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be used to describe both gay men and women (lesbians)"; "*Bisexual* describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes"; "*Transgender* describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual", NB: the "term [transgender] may include, but is not limited to, transsexuals (an older term which originated in the medical and psychological communities), cross-dressers and other gender-variant people", see the UNHCR SOGI Guidelines, para. 10.

[21] The guide uses the terms intersex, intersex persons, intersex traits, sex characteristics, and uses the UN OHCHR's definition of intersex: "[i]ntersex people are born with sex characteristics that do not fit the typical definition of male or female, including sexual anatomy, reproductive organs and/or chromosome patterns. Intersex is an umbrella term used to describe a wide range of natural bodily variations in sex characteristics. Some persons, including those with intersex traits, use other terms. In medical contexts, the term 'disorders of sex development', also abbreviated as DSD, is also frequently used, by medical professionals as well as by parents of intersex persons and some intersex persons themselves. This term is objected to by many intersex persons and organizations as inaccurate since intersex people may not have health issues or pathological disorders and

While this practitioners' guide refers to lesbian, gay, bisexual, transgender and intersex (LGBTI) people, it should also be read to refer to other people who face persecution on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics, including those who may identify with other terms.

The International Commission of Jurists has decided to publish a practitioners' guide to claims to refugee status for reasons of sexual orientation and/or gender identity under the Refugee Convention for a number of reasons.

First, the persecution of individuals motivated in whole or in part by ignorance of, prejudice and hatred against their real or imputed SOGI is rife in all regions of the world. As recently documented by the 2015 Report of the Office of the UN High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity,[22] serious and widespread human rights abuses continue to be perpetrated against people based on their real or imputed SOGI, too often with complete impunity. For example, the same report notes that, since 2011, hundreds of people have been killed[23] and thousands more injured in brutal,[24]

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as pathologising, stigmatising and encouraging medically unnecessary surgeries and treatment on the sex characteristics of intersex children/adults. The word 'hermaphrodite' is used by some intersex persons, though rejected by others as offensive and inaccurate. Some persons refer to their specific diagnostic or chromosomal label for their variation and may or may not use the term intersex as well. The terms intersexual and intersexuality are sometimes used, particularly in other languages, though they are rejected by many intersex organizations as feeding the misconception that intersex refers to sexual orientation rather than biological and/or physical characteristics."

[22] Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, 4 May 2015, (hereafter: the 2015 OHCHR SOGI Report), para. 5.

[23] The 2015 OHCHR SOGI Report, paras 26-30.

violent homophobic, biphobic and transphobic attacks in all regions of the world. Specifically with respect to the use of the criminal law as a tool of persecution, many African, Caribbean, and South East Asian States retain colonial-era laws criminalizing consensual same-sex relationships, and the same behaviour also entails criminal liability throughout much of the Middle East and North African region.

Moreover, in nine countries where consensual same-sex sexual conduct is criminalized, convictions could lead to the imposition of capital punishment. Executions following the imposition of the death penalty in those circumstances have been reported in certain countries. Other documented abuses include torture, arbitrary detention, denial of rights to assembly, opinion and expression, and discrimination in health care, education, employment and housing.

Secondly, refugee claims based on a well-founded fear of persecution for reasons of real or imputed SOGI are unfortunately likely to increase in all regions, given that around the world, lesbian, gay, bisexual, transgender and intersex individuals continue to be targeted for egregious human rights abuses, paradoxically, in part, because they have become more visible by asserting their existence, rights and agency outside the relative safety of "the closet".[25] While in certain regions the trend may show an

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[24] "Violence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes. Violent acts include deep knife cuts, anal rape and genital mutilation, as well as stoning and dismemberment," the 2015 OHCHR SOGI Report, para. 23, footnotes in the original omitted.

[25] On this point, for example, see Lord Hope's speech in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom Supreme Court, 7 July 2010, at paras 2-3: "[....] More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian

increase in rights protection for LGBTI people, in other regions, importantly those from which refugees are fleeing, the trend has been in precisely the opposite direction.

The third main reason for publishing a practitioners' guide on SOGI-based asylum claims is that, as the UNHCR recognizes, while the persecution of individuals motivated in whole or in part by ignorance of, prejudice and hatred against their real or imputed sexual orientation, gender identity or expression is not a new phenomenon, in many asylum countries there is a greater awareness that people fleeing persecution for those reasons are entitled to be recognized as refugees under the refugee definition in Article 1A(2) of the Convention.[26] Nonetheless, as the UNHCR also acknowledges, this is an area of refugee law where the application of the refugee definition remains inconsistent,[27] as it is complex and fraught with both substantive and procedural challenges.

The International Commission of Jurists' aspiration and ultimate aim in producing this practitioners' guide is to

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churches indulge in throughout much of Sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years' imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they had committed a crime against the country's culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief [....] The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time ..... the problem ... seems likely to grow and to remain with us for many years. **In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries** [....]", (**emphasis added**).

[26] See the UNHCR SOGI Guidelines, para. 1.

[27] See the UNHCR SOGI Guidelines, para. 1.

provide enduring legal and practical advice on the interpretation of the refugee definition under Article 1A(2) of the Refugee Convention in respect of claims to refugee status based on sexual orientation and/or gender identity notwithstanding the fact that this is an area where the law of refugee status is particularly fast-moving and is constantly evolving.

This practitioners' guide describes in turn each element of the refugee definition in the context of asylum claims based on sexual orientation and/or gender identity. After discussing how to establish refugee claimants' credibility with respect to SOGI in Chapter One, the structure of this guide follows the elements of the refugee definition in Article 1A(2) of the Convention, namely: *well-founded fear* in Chapter Two; *persecution* in Chapter Three; *for reasons of* in Chapter Four; *membership of a particular social group* in Chapter Five; and *failure of State protection* in Chapter Six. Chapter Seven and Chapter Eight respectively address the concepts of internal flight/relocation alternative and *sur place* refugee claims, which, while not expressly mentioned in Article 1A(2) of the Refugee Convention are increasingly critical to refugee claims for reasons of sexual orientation and/or gender identity.

Each Chapter is intended as a stand-alone document; inevitably, this has resulted in a degree of repetition. Elements of the refugee definition that did not appear to the International Commission of Jurists to be relevant or to have a particular specificity to claims to refugee status for reasons of sexual orientation and/or gender identity have not been covered (e.g. alienage and the exclusion clauses).

This practitioners' guide describes both in general and specific terms each element of the refugee definition that is critical to understanding and doing justice to claims based on sexual orientation and/or gender identity.

As far as possible this practitioners' guide reflects recent legal developments relevant to claims to refugee status under the Convention for reasons of sexual orientation

and/or gender identity. Progressive developments in this area of the law of refugee status have come about because of the on-going commitment world-wide of practitioners, refugee status decision-makers, academics, NGOs, the UNHCR, other UN and regional bodies, law and policy makers and refugees themselves to making refugee law more responsive to the predicament of those who are forced to flee their home country as a result of a well-founded fear of persecution for reasons of their real or imputed sexual orientation and/or gender identity.

This practitioners' guide is intended to provide both legal and practical interpretative guidance on those types of refugee claims to:

- legal practitioners representing individuals with claims to refugee status for reasons of sexual orientation and/or gender identity;
- other people who assist refugee claimants, whether in a professional or voluntary capacity, including members of non-governmental organizations (NGOs);
- decision-makers within refugee status determination authorities;
- officials within government departments issuing asylum policy guidance and instructions;
- officials of the UNHCR who carry out refugee status determination under the agency's Statute;
- the Division of International Protection at the UNHCR;
- decision-makers, including members of the judiciary presiding over claims to refugee status; and
- refugee claimants themselves.

Ultimately, the International Commission of Jurists hopes that this practitioners' guide will assist in ensuring that people entitled to international protection for reasons of real or imputed sexual orientation and/or gender identity be recognized as refugees under the Convention.

As Lord Hope in the United Kingdom noted:

[i]t is crucially important that they are provided with the protection that they are entitled to under the Convention – no more, if I may be permitted to coin a well known phrase, but certainly no less."[28]

[28] Lord Hope's speech in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, para. 3.

Chapter One: establishing sexual orientation and gender identity

Introduction

This chapter discusses, in particular, how to establish refugee claimants' credibility with respect to their sexual orientation and/or gender identity. It highlights some questions/issues that practitioners may wish to specifically explore when taking their clients' instructions and testimony in the context of SOGI-based claims under the Refugee Convention.[29] It does not purport to be exhaustive and practitioners are directed to the bibliography for additional sources.

Establishing SOGI

Long-held stereotypes have frequently led to inappropriate, intrusive and often abusive questioning by asylum interviewers and refugee status decision-makers and have been used to dismiss asylum claims based on SOGI (see section below entitled: 'stereotyping').

Conversely, the recognition that SOGI is not necessarily or simply about sexual practices or proclivities has been a welcome development in this area of the law of refugee status. This has led to an understanding that SOGI and matters flowing from and relevant to SOGI are complex issues that may manifest themselves differently for each individual and require sensitive handling that respects human rights, including, in particular, the right to respect

[29] The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention or the Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: the Protocol or 1967 Protocol).

for human dignity, the right to private and family life,[30] and the principle of non-discrimination.

The UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees clarify that:

"[s]exual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex. Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one's sexual orientation is determined by, *inter alia*, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation. While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person's lifetime. Different people realize at different points in their lives that they are LGBTI

[30] See, e.g., the Judgment of the Grand Chamber of the Court of Justice of the European Union of 2 December 2014 in the Joined Cases C-148/13 to C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie* (hereafter: *A, B and C*), para. 53. The judgment arose from a Dutch Council of State's request for a preliminary ruling in cases referred to as A, B and C, which, in turn, arose from three applications for asylum in the Netherlands by three men claiming a well-founded fear of persecution in their countries of origin based on their declared same-sex sexual orientation. The Dutch authorities rejected each asylum claim on the basis that each applicant had failed to prove his same-sex sexual orientation.

and their sexual and gender expressions may vary with age, and other social and cultural determinants."[31]

Claims to refugee status under the Refugee Convention involving actual or imputed SOGI may include applicants who:

- identify as gay, lesbian or bisexual;
- have a SOGI imputed to them regardless of whether they possess that characteristic and whether the persecutor or society involved distinguishes between sexual orientation, gender identity and sex;
- are transgender, including when the transgender applicant identifies as heterosexual but he or she may be perceived as gay or lesbian;
- are 'closeted';
- test positive for HIV regardless of their sexual orientation;
- are viewed as 'effeminate' or 'masculine' but identify as heterosexual; and
- are ostracized by society because they are intersex.[32]

The UNHCR SOGI Guidelines clarify that:

"[a]scertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of

[31] The UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines), para. 9.

[32] U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, Combined Training Course, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, training module, RAIO Template Rev. 11/16/2011, 3.1.1 Possession or Imputed Possession of a Protected Characteristic, p. 15.

credibility in such cases needs to be undertaken in an individualised and sensitive way."[33]

Of particular relevance in SOGI-based refugee claims is an understanding that the applicant's testimony may be the only evidence available to establish his or her SOGI. The level of detail and specificity of the applicant's account are relevant not only to establish what has happened to the individual concerned but also, for example, to ascertain whether the individual concerned identifies as LGBTI and, if so, when and how s/he realized this, something that s/he may not have been able to acknowledge whether openly or at all in her or his home country.

Emotional trauma, stigma, internalized homophobia, fear and/or mistrust of authorities, feelings of shame, cultural implications, age, level of education, personal awareness and many other factors could lead to a level of inconsistency in the account and/or explain the person's inability to provide detail.[34]

Current SOGI identity

For the purposes of determining a SOGI-based asylum claim under the Refugee Convention, as with any claim under the Convention, the relevant time to assess whether the applicant has a well-founded fear of persecution[35] is the time at which the refugee status determination takes place,[36] which is also when the refugee applicant's SOGI

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[33] The UNHCR SOGI Guidelines, para. 62.

[34] Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0, 11 February 2015, United Kingdom, Home Office, 5.1 Credibility - consideration of the claim, p. 24.

[35] For the concepts of *well-foundedness* and *persecution*, see Chapter Two: well-founded fear and Chapter Three: persecution, respectively.

[36] See, *inter alia*, *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, Australia: High Court, 12 September 1989, para. 17; *Senathirajah Ravichandran v. Secretary of State for the*

should be determined. Accordingly, in *NR (Jamaica) v. Secretary of State for the Home Department*, the Court of Appeal of England and Wales held that: "[i]t is of course her sexual orientation at the time of the hearing which is important."[37]

Self-identification

The UNHCR SOGI Guidelines advise that: "[s]elf-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity."[38]

However, "what it means to 'be' L, G, B, T or I is contested, and 'being' L, G, B, T or I has different meanings to different people: it may be about identification, or about feelings of attraction, or about acts, or about any combination of these. In addition, in some countries other identities, such as MSM – men having sex with men – are used precisely in an effort to deal with/evade homophobia by not using a gay identity. The terms lesbian, gay, bisexual, trans and intersex may be terms which are completely alien to an asylum seeker who can only associate her or his identity with negative terms to describe sexual or gender identity."[39]

In any event, "[s]exual orientation and gender identity are a matter of self identification, not a matter of medicine,

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Home Department [1995] EWCA Civ 16, United Kingdom: Court of Appeal (England and Wales), 11 October 1995, speech of Simon Brown LJ.

[37] *NR (Jamaica) v. Secretary of State for the Home Department*, [2009] EWCA Civ 856, United Kingdom: Court of Appeal (England and Wales), 5 August 2009, para. 24; see, also, *Pires Santana v. Canada (Citizenship and Immigration)*, 2007 FC 519, 15 May 2007.

[38] The UNHCR SOGI Guidelines, para. 63.i.

[39] Vrije Universiteit Amsterdam, Sabine Jansen and Thomas Spijkerboer: *Fleeing Homophobia*, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe, September 2011, p. 54 (hereafter: Fleeing Homophobia report).

psychiatry or psychology",[40] and, in fact, "[s]exuality (or consciousness of sexuality) may alter over time and persons may realise that sexuality at different times".[41]

As the UNHCR SOGI Guidelines further advise:

"[t]he expression 'coming out' can mean both an LGBTI person's coming to terms with his or her own LGBTI identity and/or the individual communicating his or her identity to others […] Some people know that they are LGBTI for a long time before, for example, they actually pursue relationships with other people, and/or they express their identity openly. Some, for example, may engage in sexual activity (with same-sex and/or other-sex partners) before assigning a clear label to their sexual orientation."[42]

Self-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity.[43] In her Opinion in the case of *A, B and C* before the Court of Justice of the European Union, Advocate General Sharpston endorsed the UNHCR's authoritative view that, in the context of assessing asylum claims based on a fear of persecution on grounds of sexual orientation, the applicants' own definition of their sexual orientation should form the starting point.[44]

In turn, in its judgment in *A, B and C*, the Court of Justice of the European Union, held that the applicants' declarations as to their sexual orientation constitute "merely the starting point" in the process of assessment of the facts and circumstances of their claims, and that, depending on the circumstances, such statements with

[40] *Fleeing Homophobia* report, p. 9.
[41] *R (AA) v Secretary of State for the Home Department* [2015] EWHC 888 (Admin), 1 April 2015, the High Court of England and Wales, para. 31.
[42] The UNHCR SOGI Guidelines, para. 63 iii.
[43] The UNHCR SOGI Guidelines, para. 63 i.
[44] *Opinion of Advocate General Sharpston*, Joined cases C-148, C149 and C-150/13, *A, B and C*, 17 July 2014, para. 40.

respect to their sexual orientation may require confirmation.[45]

The UNHCR SOGI Guidelines also advise that:

"[n]ot all applicants will self-identify with the LGBTI terminology and constructs […] or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim. For example, bisexuals are often categorized in the adjudication of refugee claims as either gay, lesbian or heterosexual, intersex individuals may not identify as LGBTI at all (they may not see their condition as part of their identity, for example) and men who have sex with men do not always identify as gay. It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and […] present different aspects of the identity of each person."[46]

Practitioners should also note that the *lack* of self-identification should not necessarily be taken as an indicator that the person *does not have* or will *not be perceived as having* a relevant SOGI.[47]

Barriers to self-identification

As it has long been recognized in the medical community, barriers to self-identification such as shame, stigma, internalized homophobia and other factors can lead to individuals refusing to self identify their SOGI.[48] Other

[45] *A, B and C*, paras 48-52.
[46] The UNHCR SOGI Guidelines, para. 11.
[47] See below the sections entitled: "Actual or imputed Convention Ground" and "Imputed membership of a particular social group" in Chapter Four: for reasons of, and Chapter Five: membership of a particular social group, respectively.
[48] "Fear of potential losses (e.g., family, friends, career, spiritual community) as well as vulnerability to harassment, discrimination,

concomitant elements may also constitute barriers to self-identifications.

As the UNHCR SOGI Guidelines advise:

"The social and cultural background of the applicant may affect how the person self-identifies. Some LGB individuals, for example, may harbor deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as LGBTI. This alone should not rule out that the applicant could have a claim based on sexual orientation or gender identity where other indicators are present."[49]

Sexual behaviour v. sexual orientation

A person's sexual orientation is not just about her or his sexual conduct or behaviour or a certain proclivity, nor is specific sexual behaviour required for a person to have a particular sexual orientation. Activities to find and attract partners for physical and emotional intimacy, affection and sexual contact may all form part of a person's sexual orientation.[50]

The following cases illustrate those points.

In *Shameti v. Canada*,[51] the adjudicator did not believe that the claimant, a homosexual man from Albania, was gay. The Federal Court, however, held that the

and violence may contribute to an individual's fear of self-identification as lesbian, gay, or bisexual", *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, American Psychological Association, Guideline 3, p. 14.

[49] The UNHCR SOGI Guidelines, para. 63.i.

[50] See, e.g., the Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual, Volume 2, 2015, p. 64.

[51] *Shameti v. Canada (Citizenship and Immigration)*, 2008 FC 665, 26 May 2008; 168 ACWS (3d) 603.

adjudicator's belief that "in order for a person to prove his or her homosexuality as the basis for a claim of protection, it is necessary for that person to have engaged in homosexual conduct" was a fundamental error and therefore decided to set aside the adjudicator's original decision and remit the case for redetermination.

In *Kornienko v. Canada*,[52] the Immigration and Refugee Board had rejected the applicant's claim because it had not believed that the claimant, a man from Ukraine, was a homosexual on the basis that he had not had any sexual or romantic encounters in several years. Giving judgment in an application for judicial review of the dismissal of Mr. Kornienko's refugee claim, the Federal Court underscored that the Board's belief that "gay men are promiscuous and that anyone who is not sexually active is unlikely to be 'truly gay'" was a form of stereotyping and constituted a reviewable error; it went to the heart of the Board's credibility finding and warranted the setting aside of the Board's decision.

Heterosexual relationships, behaviour, etc. v. having an LGBT identity

The UNHCR SOGI Guidelines advise that, "an applicant may be married, or divorced and/or have children. These factors by themselves do not mean that the applicant is not LGBTI."[53]

Often lesbian and gay applicants will have had heterosexual relationships in their countries of origin. Such

[52] *Kornienko v. Canada (Citizenship and Immigration)*, 2012 FC 1419, 4 December 2012.

[53] The UNHCR SOGI Guidelines, para. 63 vi. See also "[l]esbians may have had heterosexual relationships, often, but not necessarily, because of social pressures to marry and bear children", para. 10, under heading Lesbian; and "[s]ome gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children", para. 10, under heading Gay men.

relationships may have produced children. As it is common in some countries for lesbian and gay people to have heterosexual relationships to hide their sexuality or because they have no real 'choice', such matters are not determinative of their sexual orientation/identity.

In *Leke v. Canada*, [54] for example, the claimant, a homosexual man from Nigeria, had a wife with whom he had two children and was an ordained Christian pastor. He also had relationships with other men. The claimant was caught by his landlord with another man and was beaten. His male partner was arrested. The claimant fled to Canada where he settled in a predominantly gay district of Toronto and joined a community center, which serves members of the LGBTI community in the city. The Immigration and Refugee Board did not find the claimant to be a homosexual on grounds that he had children; it also

[54] *Leke v. Canada (Citizenship and Immigration)* 2007 FC 848, 22 August 2007; 159 ACWS (3d) 866, "[t]he evidence […] established that the applicant led a double life. He lived an openly normal life in the image of his father as an ordained pastor, with a wife and two young sons on the one hand. All the while however, he was carrying on in secret a series of homosexual relationships in Nigeria until caught in the act. And the applicant testified that he led this double life because of his fears of homophobia in Nigeria and that he fled his country only after he was caught and beaten for having sexual relations with a man", para. 18. Notwithstanding the evidence that homosexuals in Nigeria are forced to live double lives for fear of the consequences of living openly in same-sex relationships, the Immigration and Refugee Board had found that "it was highly improbable that a homosexual would father two sons", para. 10. The Federal Court eventually held that: "the Board erred in fact or in law in concluding that the applicant did not establish his sexual orientation and would therefore not be at risk of cruel and unusual treatment or punishment should he return to Nigeria", para. 34. See, also, *Kailiki Eringo v. Canada (Citizenship and Immigration)* 2006 FC 1488, 13 December 2006; 157 ACWS (3d) 813, where the Federal Court held that: "[t]he applicant's testimony regarding his situation is entirely consistent with the documentary evidence demonstrating that homosexuals must hide their situation, often by marrying, to avoid persecution in Kenya", para. 12.

ignored documentary evidence that it is common for homosexuals to lead double lives in Nigeria in order to conceal their sexual orientation. The Federal Court, giving judgment in an application for judicial review of the Board's decision, held that the misapplication of facts and the reliance on homosexual stereotypes were errors that warranted the setting aside of the Board's decision.

Must there be proof of one's SOGI at a particular time in life?

As the UNHCR SOGI Guidelines advise:

"[w]hile for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person's lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants."[55]

People's attraction to and relationship with one another – whether heterosexual, homosexual or bisexual – may occur at any time during one's lifetime.

In light of this, various judgments in Canada, among other authorities, have correctly criticized refugee status decision-makers for taking the view that most people realize or explore their sexual orientation in their teens or early twenties.

In *Dosmakova v. Canada*,[56] the claimant, a fifty-six-year-old woman from Kazakhstan, began an affair with another

[55] The UNHCR SOGI Guidelines, para. 9. See also *Application No. 76175*, No. 76175, New Zealand: Refugee Status Appeals Authority, 30 April 2008, para. 92.

[56] *Dosmakova v. Canada (Citizenship and Immigration)* 2007 FC 1357, 21 December 2007; 168 ACWS 93d) 367, the Federal Court held that the Immigration and Refugee Board's finding that "most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in

woman while being married to a man. She feared reprisal from the negative attitudes towards homosexuality and the law against such relationships. The adjudicator had found it implausible that the claimant was a lesbian as "most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties..." The Federal Court however ruled that implausibility findings must not be made on the basis of stereotypical attitudes.

Adolescence and early adulthood have also often been invoked to reject an applicant's claimed SOGI on the basis that young people's sexuality is not immutable and that same-sex relationships early on in life can be part and parcel of a transient phase. In an Australian case the court commented:

"[t]he Tribunal accepts that the Applicant may have enjoyed sexual play with other males when he was a teenager… However, the Tribunal is not prepared to accept on the evidence before it that this was anything but a transient, youthful phase."[57]

It is equally possible that people who may have 'experimented' in childhood are in fact bisexual or went on to supress their SOGI owing to societal pressure and/or feelings of shame or stigma.

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their teens or early twenties" (para. 11) had been made on the "basis of stereotypical attitudes or projected behavior that is unsupported by the evidence" (para. 12) and was patently unreasonable (para. 13).

[57] *RRTA No. 5/50659* [2005] RRTA 207, 17 May 2005, cited in Phil C.W. Chan, *Protection of Sexual Minorities Since Stonewall: Progress and Stalemate in Developed and Developing Countries*, Routledge, Sep 13, 2013, p. 294.

Is sexual orientation innate or fixed very early in life?

The view that homosexuality is by its nature "innate" is neither verifiable nor quantifiable. In fact, across a wide range of scientific disciplines, including psychology and in the social science fields, there is no consensus that sexual orientation is the exclusive product of social conditions or, conversely, that it is innate or fixed very early in life.[58]

In *Lipdjio v. Canada*,[59] the claimant, a woman from Cameroon, had been raped at age 17 and stated that this trauma led to her lesbian sexual orientation. The Immigration and Refugee Board had not believed that the claimant was a lesbian because she had discovered her sexual orientation following a sexual assault, rather than admitting it was innate. The Federal Court, however, pointed out that the Board's conclusion was neither verifiable nor quantifiable. The Federal Court held that the Board erred when it stated that it had specialized knowledge that: "homosexuality is innate." It concluded that the Board's position on the innate nature of homosexuality directly affected the entire assessment of the claimant's credibility and therefore her claim, and thus could not stand.

Bisexuality v. immutability

Bisexual refugee applicants have experienced specific difficulties establishing their sexual identity/orientation as an innate and immutable characteristic for the purposes of Article 1A(2) of the Refugee Convention due to asylum interviewers' and refugee status decision-makers' often

[58] There is no consensus among scientists about the exact reasons that an individual develops a particular sexual orientation. See, the American Psychological Association, *Sexual Orientation & Homosexuality Answers to Your Questions For a Better Understanding*.

[59] *Lipdjio v. Canada (Citizenship and Immigration)*, 2011 FC 28, 12 January 2011.

stereotypical, exclusively binary understanding of sexual orientation as either heterosexual or homosexual.[60]

Practitioners should also note that, on occasion, refugee status decision-makers have struggled with the idea that bisexuality can be an immutable characteristic on the basis that the concerned individual's sexual orientation is in fact 'flexible and fluid'. [61] With respect to these claims, therefore, practitioners may wish to focus on evidencing the bisexual applicant's well-founded fear of persecution on the grounds of "traditional gender roles and compulsory heterosexuality", rather than concentrating on the refugee claimant's sexual identity.[62]

Same-sex relationships in detention

In the context of establishing sexual orientation, another misconception in refugee status determination that emerges from a number of decisions across different jurisdictions is the tendency to dismiss the applicant's

[60] In *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985, the US Board of Immigration Appeals stated that a particular social group for the purposes of the Refugee Convention was one distinguished by: "an immutable characteristic … [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed." For more information, see section entitled: "The 'protected characteristics' approach" in Chapter Five: membership of a particular social group.

[61] The UNHCR SOGI Guidelines advise that, "[b]isexuality is a unique identity, which requires an examination in its own right. In some countries persecution may be directed expressly at gay or lesbian conduct, but nevertheless encompass acts [against] individuals who identify as bisexual. Bisexuals often describe their sexual orientation as 'fluid' or 'flexible'", para. 10, under the heading: Bisexual.

[62] See, Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, McGill Law Journal, Vol. 53, p. 59, 2008.

same-sex relationship while in detention on the grounds of lack of availability of opposite-sex partners.[63]

For example, in *NR (Jamaica)*, in allowing the refugee claimant's appeal against the UK Asylum and Immigration Tribunal's dismissal of her claim, the Court of Appeal of England and Wales noted that the Tribunal's conclusion that the appellant had no settled lesbian sexual identity was based, *inter alia*, on "the fact that a large proportion of the time in which she had lesbian relationships was spent in an all-women institution [i.e., a young offender institution], where if she wanted to be sexually active, there was no other option".[64]

'Medical testing'

It is important to note that homosexuality is not a medical condition and therefore any 'medical test' cannot achieve the objective of establishing an applicant's credibility with respect to their sexual orientation.[65]

[63] See, e.g., in Australia the *SZJSL*, a case where the applicant was in detention and where the Refugee Review Tribunal stated: "I do not accept that the Applicant is in fact bisexual in sexual orientation as he claims. I consider that his relationship with Mr Lorenzo is simply the product of the situation where only partners of the same sex are available and says nothing about his sexual orientation", *SZJSL v Minister for Immigration & Anor* [2007] FMCA 313 (19 February 2007), citing the original decision of the decision of the Refugee Review Tribunal.

[64] *NR (Jamaica) v. Secretary of State for the Home Department*, para. 23. The Asylum and Immigration Tribunal had concluded that the appellant: "found herself imprisoned in all-female institutions [….] We find that as a healthy, healthy [sic], energetic and engaged young woman in such institutions she had and took the opportunity to continue her experimentations with her sexual identity: indeed, there was no alternative except celibacy", see the judgment of the Court of Appeal, para. 22.

[65] *Opinion of Advocate General Sharpston*, in *A, B and C*, para. 61.

In her opinion in the *A, B and C* case, Advocate General Sharpston of the Court of Justice of the European Union stated:

"[s]ince homosexuality is not a medical condition, any purported medical test applied to determine an applicant's sexual orientation could not, in my view, be considered to be consistent with [the right to the integrity of the person]. It would also fail the proportionality requirement […] in relation to a violation of the right to privacy and family life because, by definition, such a test cannot achieve the objective of establishing an individual's sexual orientation. It follows that medical tests cannot be used for the purpose of establishing an applicant's credibility, as they infringe Articles 3 [the right to the integrity of the person] and 7 [the right to respect for private and family life] of the Charter [of Fundamental Rights of the European Union]."[66]

However, it should be noted that medical evidence may be relevant to refugee claims based on transgender identity or intersex status (see below section entitled: "Medical evidence").

Phallometric testing,[67] which focuses on the subject's physical reaction to pornographic material, alongside being considered a 'pseudo-medical' test and a particularly dubious way of verifying homosexual orientation,[68] has been found to constitute inhuman and degrading treatment[69] and to breach the right to privacy.[70] As a result

[66] *Opinion of Advocate General Sharpston*, in *A, B and C*, para. 61.
[67] *Fleeing Homophobia* report, para. 6.3.5; for further reading see Organization for Refuge, Asylum & Migration (ORAM), *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, December 2011.
[68] *Opinion of Advocate General Sharpston*, in *A, B and C*, para. 62.
[69] *Opinion of Advocate General Sharpston*, in *A, B and C*, para. 62; also contrast with *Toomey v. the UK*, No. 37231/97, (phallometry testing on criminal convict), European Court of Human Rights, admissibility decision, 14 September 1999.
[70] *Opinion of Advocate General Sharpston*, in *A, B and C*, para. 62.

of criticism from the EU's Fundamental Rights Agency, the European Commission, NGOs and the UNHCR, phallometric testing is no longer used in the EU.[71]

The Court of Justice of the European Union in its judgment in the *A, B and C* case held that to allow applicants to submit to possible 'medical tests' in order to 'demonstrate' their homosexuality would necessarily infringe human dignity and any evidence obtained would not necessarily have probative value.[72]

In light of this, the ICJ considers that to require refugee claimants to submit to such 'medical tests' would, *a fortiori*, be an infringement of human dignity and privacy and constitute a form of prohibited ill-treatment.[73]

In addition, if failure to agree to such 'medical tests' would automatically result in the refusal of one's asylum application and thus possible exposure to a real risk of persecution, then, arguably, any 'consent' given by the asylum-seeker concerned to these 'tests' could not be presumed to have been given freely.

Medical evidence

With respect to refugee claims based on transgender identity or intersex status, certain medical evidence may be relevant.

As the UNHCR SOGI Guidelines advise:

"medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of

[71] *Fleeing Homophobia* report.
[72] *A, B and C*, para. 65.
[73] See also below section entitled: "Non-consensual medical or scientific experimentation and other abuses by health providers constituting persecution" in Chapter Three: persecution.

intersex individuals) may corroborate their personal narrative."[74]

The Fleeing Homophobia report noted:

"[t]he reason for the scarcity of credibility issues in trans and intersex cases could be that in practice trans and intersex applicants do submit medical reports. For instance, in a Finnish case of an intersex applicant there were statements by a doctor and by a pediatric endocrinologist. In Ireland, [in] two intersex cases […] the decision-maker accepted medical evidence from the applicants' treating consultant confirming the applicants' condition […] as conclusive proof that the applicants were intersex persons. These medical reports arose in the context of ongoing medical treatment for the applicants - the reports were not required by the decision-maker, but once submitted in support of the asylum application, the reports were accepted."[75]

However, in all cases, the International Commission of Jurists considers that medical evidence should not be required. In any event, whenever the question of medical evidence arises, practitioners should ensure that the applicant gives (or gave) full, free, informed and prior consent.[76]

In intersex cases, it has been recommended that tests be carried out by endocrinologists or other specialists with expertise and understanding of sex variation and that there be no invasive testing.[77]

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[74] The UNHCR SOGI Guidelines, para. 65.
[75] Fleeing Homophobia report, 6.3.4 State practice: Trans and intersex cases, p. 51.
[76] See section entitled: "Non-consensual medical or scientific experimentation and other abuses by health providers constituting persecution" in Chapter Three: Persecution.
[77] *Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims*, Senthorun Sunil Raj (2012 Churchill Fellow), August 2013.

Stereotyping

Practitioners should be particularly alert to the fact that stereotypical reasoning about what it means and what it takes to be LGBTI is very often behind refugee status decision-makers' dismissal of asylum claims based on SOGI.

The examination of the facts is supposed to be undertaken in a spirit of justice and understanding.[78] Refugee status decision-makers must be careful not to let their personal prejudices influence their decision-making. In particular, where decision-makers are assessing the credibility of an applicant's SOGI, they must be careful not to let their own bias deflect them from a rational assessment of the claim.

In terms of assessing whether an applicant is or is not of the claimed SOGI, stereotyping is inherently problematic. For example, stereotyped notions of a gay man in San Francisco are likely to be culturally and socially so far removed from the behaviour and perception of a gay man in Kinshasa as to be of no probative value whatsoever.

The Federal Court of Canada has highlighted the inappropriateness of a certain application of stereotypes.

In *Trembliuk v. Canada*,[79] the judgment of the Federal Court allowing the claimant's application for judicial review of the Refugee Protection Division's (RPD) dismissed of his asylum claim records, "[t]he applicant is a nineteen (19) year old citizen of Ukraine. He testified that at the age of thirteen (13), he became aware that he was

[78] See the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, December 2011, HCR/1P/4/ENG/REV. 3, (hereafter: the UNHCR Handbook), para. 202.

[79] *Trembliuk v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1590 (QL), 30 October 2003, paras 2-8.

> homosexual [….] Young persons in his community became aware of his sexual orientation [….] He testified that he endured death threats, a forceable abduction by three youths and rape by two of them and an alleged attempt of [sic] his life. He further testified that when, on one occasion, he reported violence against him to the police, he received no protective response […] with the support of his mother and his god-mother who lived in Canada, he left for Canada. Upon arrival here, he claimed Convention refugee status […] The RPD found the applicant not to be credible. More particularly, it determined the applicant not to be of homosexual orientation [….] the RPD applied to the applicant a stereotypical view of the life-style and preoccupations of homosexual persons including a view that a person such as the applicant, if he were homosexual, would dissociate himself from the Roman Catholic church and from Roman Catholic schools, despite the fact that he was born Catholic […] The RPD's finding that the applicant was not of homosexual orientation was based on what it determined to be implausibilities regarding not seeking out the homosexual community in Toronto, not knowing much about gay pride day in Toronto and attending a Roman Catholic school and occasionally the Roman Catholic church […] I am satisfied that the inferences drawn by the RPD are so unreasonable as to warrant the intervention of this Court. Those inferences were based on stereotypical profiles that simply cannot be assumed to be appropriate to all persons of homosexual orientation and to all Roman Catholic priests. They ignore the rational and reasonable testimony provided by the applicant in explanation".

Some common stereotypes include the notion that all gay men are promiscuous.[80] It has also been noted that,

[80] E.g., *Kornienko v. Canada (Citizenship and Immigration)*, cited above, where the Federal Court of Canada set aside the original rejection on the basis that "the Board believed that gay men are promiscuous and that anyone who is not sexually active is unlikely to be 'truly gay'."

"[l]esbians on the other hand face other stereotypes, with case workers and judges finding it 'concerning' when lesbians have spoken about one night stands or meeting other lesbians in parties in their countries of origin. Lesbian sexuality is thus treated in a manner either bordering on the pornographic or as invisible."[81]

In its judgment in the case of *A, B and C*, the Court of Justice of the European Union held that, while questions based on stereotyped notions may be a useful element at the disposal of the competent authorities for the purposes of assessing an asylum claim, stereotyped notions associated with homosexuality do not satisfy the requirement to take account of the individual situation and personal circumstances of the asylum applicant concerned.[82]

The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity.[83]

A strong line of case-law in the US has found that stereotyping by the decision-maker precludes meaningful review of credibility findings and evidences bias such that the findings themselves are unsafe. Findings that refugee applicants did not dress or speak like or exhibit the mannerisms of a homosexual,[84] or did not dress in an

[81] *Missing the Mark - Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*, UK Lesbian & Gay Immigration Group (UKLGIG), September 2013, p. 18 (hereafter: the Missing the Mark report).
[82] *A, B and C*, para. 62.
[83] The UNHCR SOGI Guidelines, paras 4, 49, 60.ii.; and *A, B and C*, paras 60-63.
[84] *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007), United States Court of Appeals for the Eighth Circuit, 2 April 2007.

effeminate manner or affect any effeminate mannerisms,[85] have all been overturned.[86]

However, in some cases, stereotyped notions *may* be important when assessing how a person is likely to be perceived. For example, an overtly 'camp' man may be perceived as gay irrespective of his actual sexuality.[87] It has been noted that in Iran transgender people, transwomen in particular, are more likely be targeted and victimized by security forces because they are more easily recognizable.[88]

For example, the UK's Immigration and Asylum Tribunal has found that in Jamaica: "single women with no male partner or children risk being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion" and that a "manly appearance is a risk factor, as is rejection of suitors if a woman does not have a husband, boyfriend or child, or an obvious and credible explanation for their absence".[89]

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[85] *Razkane v. Holder*, Attorney General, No. 08-9519, United States Court of Appeals for the Tenth Circuit, 21 April 2009.

[86] See also *Ali v. Mukasey*, 529 F.3d 478, 485, 491-92 (2d Cir. 2008) where the Court discerned "an impermissible reliance on preconceived assumptions about homosexuality and homosexuals," which along with other negative comments about the petitioner, "result[ed] in the appearance of bias or hostility such that [the court could not] conduct a meaningful review of the decision below"; and *Todorovic v. U.S. Attorney General*, No. 09-11652, United States Court of Appeals for the Eleventh Circuit, 27 September 2010, where the Court found that there had been an "impermissible stereotyping of homosexuals, under the guise of a determination on 'demeanor'".

[87] *DW (Homosexual Men - Persecution - Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 28 November 2005, para. 66.

[88] *"We Are a Buried Generation" Discrimination and Violence against Sexual Minorities in Iran*, Human Rights Watch, December 2010, p. 83.

[89] *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011, headnote.

Delay in disclosing one's SOGI

Adverse judgements should not generally be drawn from someone not having declared their SOGI at the screening phase or in the early stages of their asylum interview.[90]

The Court of Justice of the European Union in *A, B and C* explicitly stated that:

"having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset."[91]

In an application for an injunction relating to a bisexual refugee applicant who had failed to claim asylum for a period of seven years, the High Court of England and Wales recognized that, while there were many instances of evidence that might reasonably have been expected, the medical evidence dealt with torture and gave an explanation for the late disclosure:

"…Dr Cohen also provided an explanation for the fact that somebody who had been through such an experience would not mention it for the length of time that the claimant had remained silent about it".[92]

Where there has been a delay in claiming asylum or raising SOGI in the claim, practitioners should explore the reasons for this with the applicant.

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[90] The UNHCR SOGI Guidelines, para. 59.

[91] *A (C-148/13), B (C-149/13), and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie*, para. 69.

[92] *R. (on the application of Cham) v Secretary of State for the Home Department* [2014] EWHC 4569 (Admin), 11 December 2014, para. 15 (available on Westlaw).

Additionally, where an applicant has had lawful residence in the country of asylum, e.g. as a student, the fact that they did not claim asylum on arrival should not be held against them.[93] As stated in Canada:

"[i]t does seem to me that a desire to emigrate and fear of persecution in one's country [are not] …mutually exclusive. If one can depart the place where one fears persecution by lawful emigration, that would seem an eminently satisfactory resolution. That a person has sought to emigrate strikes me as a feeble basis for questioning the credibility of that person's evidence of fear of persecution at home".[94]

Putting forward evidence of homosexual acts

In the *A, B and C* case, the Court of Justice of the EU held that allowing asylum applicants to perform homosexual acts or permitting them to put forward evidence of such acts (e.g., through the introduction of footage of intimate acts), did not necessarily have probative value and, because of its nature, would infringe human dignity, guaranteed in Article 1 of the Charter of Fundamental Rights of the EU.[95] The Court also expressed concern that authorizing or accepting such evidence would "incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence."[96]

While ultimately evidence of same-sex acts or expressions of affection does not prove one's sexual orientation or identity but simply establishes the mechanics of the acts in question, the experience of many practitioners has been that, where such material has been submitted, it has often been determinative. In light of this, there is real concern among practitioners that the Court of Justice of the EU's

[93] See also Chapter Eight: *sur place* claims.
[94] *Orelien v. Canada (Minister of Employment and Immigration)* [1992] 1 FC 592, para. 611.
[95] *A, B and C*, para. 65.
[96] *A, B and C*, para. 66.

judgment in *A, B and C* is overly prescriptive in that, for example, it would exclude material in existence pre-flight, that had not been produced with a view to supporting an asylum claim, and that was voluntarily and freely submitted. However, many practitioners also recognize that pressure to produce such material has been placed on applicants in clear and flagrant breach of their right to privacy. It may well be that if material has already been published, for example, on the internet, the restriction on its use in the *A, B and C* judgment would not or should not apply, particularly in circumstances where the publication of the material itself is what has led to the individuals concerned having to flee their home country.

In *A, B and C*, the Court of Justice of the EU also held that, "…questions concerning details of the sexual practices of the applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof."[97]

Detailed advice following the *A, B and C* judgment was provided to refugee status decision-makers in the UK that effectively prohibits both sexually explicit questions to be put to refugee claimants and the submission of sexually explicit material.[98] It is hoped that this will put an end to the type of questioning evidenced by the UK Lesbian & Gay Immigration Group (UKLGIG) such as:

- was it loving sex or rough?
- what have you found is the most successful way of pulling men?
- so you had intercourse with him and not just blow jobs?
- how many sexual encounters have you had with your partner?

[97] *A, B and C*, para. 64.
[98] Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0, 11 February 2015, United Kingdom, Home Office, p. 21.

- why did you not have penetrative sex at any time in Nigeria up until December 2009?
- you have never had a relationship with a man. How do you know you are a lesbian?[99]

Taking instructions from applicants about their SOGI

At the outset, practitioners may want to explain to applicants that they have a duty of confidentiality towards them and nothing will be communicated to third parties unless the applicant consents.[100]

Practitioners should also explain: a) the law and what needs to be proved for a claim to succeed; b) the procedure; c) their role as representative of the claimant; and d) the purpose of the representative's interview with the client, so that applicants may better understand why certain questions/issues are being broached.

Practitioners should also explain to their clients that the general approach to assessing a claim is for refugee applicants to provide evidence of their claim either in the form of a statement and/or through completing a questionnaire, which, in turn, is evaluated by the refugee status decision-maker. Practitioners may also wish to advise their clients that an official interview of the applicant is conducted in cases of doubt.

Practitioners should bear in mind that, as applicants are unlikely to know what was in the mind of their persecutor/s, they will often be able to do no more than offer an opinion as to why they were treated in any given way by the State officials or private individuals. An inability to answer such questions should not be taken as indicative of a lack of credibility.

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[99] Missing the Mark report, p. 20.

[100] In a number of jurisdiction, including the UK, there are certain limitations to practitioners' absolute duty of confidentiality toward clients, e.g., with respect to disclosure obligations in connection with terrorism offences.

Practitioners should also explain that the applicant would – and should – ordinarily be given the opportunity to explain any information that appears to be inconsistent or contradictory, as well as any discrepancies, misrepresentation or concealment of material facts. The fact that an untrue statement has been made is not alone a reason for refusal of refugee status.[101]

Practitioners should also be mindful of the fact that the presence of family members, partners, friends, etc. during an interview with an asylum-seeking client, *could* result in the applicant's feeling unable to disclose certain matters that are critical to the claim. In other circumstances, however, the refugee applicant may feel supported by the presence of a loved one, etc.[102] Furthermore, an applicant's request for a relative/loved one to be present at the interview should not necessarily be taken at face value as the applicant may be pressured by that person and fear the consequences of excluding her/him.

To assist the applicant in putting forward a narrative, practitioners should provide an open, non-judgmental atmosphere designed to elicit the most information from their client.[103] Practitioners should also explain to their clients that refugee applicants are required to provide sufficient detail to establish their claim.

In the context of asylum claims based on SOGI, much of the advice addressed to asylum interviewers and refugee status decision-makers applies with equal force to practitioners representing refugee applicants with those

[101] See the UNHCR Handbook, paras 199-200.
[102] U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, Combined Training Course, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, training module, RAIO Template Rev. 11/16/2011, 12/28/2011, 6.1.2 How the Presence of Family and Relatives May Affect the Interview, p. 28.
[103] RAIO Template Rev. 11/16/2011, 6.2.1 Setting the Tone and Putting the Applicant at Ease, p. 29.

types of claims. For instance, the following advice provided within the Guidance for Adjudicating LGBTI Refugee and Asylum Claims of the Refugee, Asylum, and International Operations Directorate (RAIOD) of the U.S. Citizenship and Immigration Services is just as relevant to practitioners taking instructions from their LGBTI clients:

"[y]ou should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness. Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity."[104]

One example of good practice is where an interviewer asked whether the applicant would prefer the term 'gay' or 'homosexual' or something else. [105] Similarly, for transgender applicants practitioners should ask which pronoun the applicant is more comfortable with and if there is a name the applicant prefers using. If a transgender or intersex applicant is required to state their gender it may be better to come back to this question at the end of the interviewing process.[106]

The UNHCR SOGI Guidelines caution that, discrimination, hatred and violence in all its forms can impact detrimentally on the applicants' capacity to present their case. Internalized homophobia, feelings of shame and trauma may also impact on the ability of applicants to present their case.[107]

The Federal Court of Canada has cautioned that: "the acts and behaviours which establish a claimant's homosexuality

[104] RAIO Template Rev. 11/16/2011, p. 29.
[105] Missing the Mark report, p. 19.
[106] RAIO Template Rev. 11/16/2011, p. 29.
[107] The UNHCR SOGI Guidelines, para. 59.

are inherently private."[108] As a result, there are often inherent difficulties in proving that a refugee claimant has engaged in same-sex sexual activities.[109]

In fact, as the UNHCR SOGI Guidelines explain:

"[e]xploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices."[110]

In addition, as the UK Home Office's Asylum Policy Instruction on Sexual Identity Issues in the Asylum Claim notes:

"[a] detailed account of someone's experiences in relation to the development and realisation of their sexual identity can help to establish their credibility by establishing how and when they realised that they were of that identity."[111]

Interpretation issues

The UK Home Office's Asylum Policy Instruction on Sexual Identity Issues in the Asylum Claim notes:

"[w]here it is known that the asylum claim includes sexual identity issues, it will be useful in advance of the interview to establish with the interpreter the available words in the language of origin and whether they have derogatory connotations. This is because the terms 'homosexual' /

[108] *Ogunrinde v. Canada (Public Safety and Emergency Preparedness)* 2012 FC 760, 15 June 2012, para. 42.
[109] *Gergedava v. Canada (Citizenship and Immigration)*, 2012 FC 957, 31 July 2012, para. 10, where the rejection of the applicant's account owing to lack of documentary evidence of claimed sexuality was overturned.
[110] The UNHCR SOGI Guidelines, para. 62.
[111] *Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0*, 11 February 2015, United Kingdom, Home Office, p. 17.

'sexual identity' and 'sexual orientation' may not be used as forms of self-identification by all people (or in particular cultures) and, while the terms may exist in certain cultures, they may have very different and possibly derogatory connotations."[112]

Difficulties in interpretation can lead to a perception of discrepancies. For example, in one Canadian case the interpreter reported that the relevant Chinese characters could mean both 'sodomy' and 'prostitution'. The claimed discrepancy in the applicant's account did not exist when this translation issue was explained.[113]

Some refugee claimants will be reluctant to disclose their sexuality when using an interpreter from the same country/ culture/ethnic/religious background for fear that they will be "outed" within their community. It is important to recognize that even if the country of asylum has a progressive approach to SOGI the applicants themselves may live within a narrow section of that society more reflective of the society they have fled than the asylum country in general.

The gender of the interpreter may be a relevant consideration and it is important not to assume that a man will feel more comfortable with a male interpreter or vice versa.[114]

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[112] *Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0*, 11 February 2015, United Kingdom, Home Office, p. 15.

[113] *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 554, 218 ACWS (3d) 635, 9 May 2012.

[114] *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual, Volume 2*, note that similar considerations apply in respect of the applicant's representative, any interviewer and decision-maker and accommodation should be made of any such request if at all possible.

The "Difference, Shame, Stigma and Harm" model[115] has gained growing acceptance among asylum interviewers and refugee status decision-makers. While the following is not an exhaustive list, exploring the matters set out below may help applicants explain their own understanding of their SOGI:

- recognition that the refugee claimant was not like other 'boys/girls' in childhood and/or adolescence (or like other 'men/women' later in life) with respect to personal sex/gender role development;
- gradual recognition of attraction to members of same-sex/opposite-sex;
- gradual recognition of gender difference in gender identity claims;
- experiences of relationships and emotional ties with someone of the same-sex;
- experiences of same-sex conduct (NB, as noted above, sexually explicit questions are prohibited in EU asylum law[116] and should in any event be avoided);
- experiences of 'difference' setting the claimant apart from heterosexual people;
- any other particular turning point or milestone that led the claimant to realize and understand her/his difference; and
- recognition that the refugee claimant is not living a heterosexual narrative.

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[115] The "Difference, Shame, Stigma and Harm" (DSSH) model provides a framework to understand asylum claims based on SOGI. The DSSH model was developed by S. Chelvan, barrister at No5 Chambers, London, United Kingdom. The DSSH model is explained in detail in Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual, Volume 2, pp. 74-84.

[116] *A, B and C*, where the Grand Chamber held that: "Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter, must be interpreted as precluding, in the context of that assessment [i.e., of asylum claims based on the applicant's same-sex sexual orientation], the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum", para. 72.

Questions/issues to establish LGBTI identity

Issues to be explored with a view to establishing a relevant LGBTI identity include the following (note not all questions will be relevant for all refugee applicants and are reproduced below for general guidance only):

- when/how did you first realize/discover you were LGBTI?
- did you tell anyone?
- why/why not?
- if yes, when?
- how did they react?
- did you feel like (and/or identify) with other boys/girls when growing up?
- how did your sexual/gender identity develop?
- what was your experience of school?
- did you know other LGBTI people in your home country?
- if yes, do you know how they were treated? If not, why not?
- did you hear about other LGBTI people in your home country?
- if yes, do you know how they were treated? If not, why not?
- have you met any other LGBTI people?
- where?
- does your family know and/or understand that you are LGBTI?
- if yes, what was their reaction when you told them/they found out?
- have you ever been in a relationship?
- how did you and your partner meet?
- are you still together/in touch?
- if relevant, what steps did you take to prevent discovery of your LGBTI identity?
- if you were discovered, how did this happen?
- how, if at all, do LGBTI people meet one another in your country?
- were you involved in any LGBTI organizations in your country?

- are you involved in any LGBTI organizations here (i.e. the country of asylum)?
- do you use the internet?
- if yes, what sites do you visit and why?
- do you use social media and dating sites/mobile phone apps?
- did you visit clubs, bars and other social spaces in both the country of origin and country of asylum (this could include specific streets, parks, saunas, cafes, etc.)?
- have you ever experienced negative/discriminatory treatment, including at school; in the course of your employment; seeking employment; accessing social services; accessing health care, including by health service providers (e.g. going to see a medical doctor, at hospital); accessing housing, etc.?
- how has the treatment received made you feel?

Transgender identity

Some transgender people identify with their chosen identity without medical treatment as part of their transition, while others do not have access to such treatment. In addition, for those with access to medical treatment, there can be many reasons why a transgender applicant does not wish to seek sex-reassignment/sex-affirming surgery not least because of the likelihood of sterility and the need to take long-term medication, as well as the costs involved. Thus, while it may be appropriate to ask questions about any steps that a transgender applicant has taken in his or her transition,[117] the fact that a transgender applicant has not undergone any medical treatment or other steps to help his or her outward appearance match the preferred identity should not be taken as evidence that the person is not transgender.

Additional areas to be explored in the context of claims based on gender identity and/or intersex status:

- do you intend to transition?

[117] The UNHCR SOGI Guidelines, para. 63.iv.

- have you taken any steps towards transition?
- if not, why not (this may be more relevant for some transgender cases than others. For example some transgender applicants will not wish to undergo surgery for a variety of reasons, others may wish to but be denied the opportunity)?
- is medical intervention being forced on you to transition?
- for intersex applicants it may be relevant to discuss if any medical intervention/sex assignment took place and what impact it has had.

Country evidence

Objective country evidence is relevant to both the consideration of credibility and the establishment of risk.[118]

In respect of credibility as stated by Sir Thomas Bingham, as he then was, in 1985: "[a]n English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situations which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even – which may be quite – different – in accordance with his concept of what a reasonable man would have done.'"[119]

[118] See section entitled: "Objectively justified" in Chapter Two: well-founded fear.

[119] *The Judge as Juror: the Judicial Determination of Factual Issues*, Sir Thomas Bingham, Current Legal Problems (1985) 38 (1): 1-27; cited, *inter alia*, in *MVN v London Borough of Greenwich* [2015] EWHC 1942 (Admin) (10 July 2015), para. 30; see also *Ye v Canada (Minister of Employment and Immigration)* [1992] FCJ 584 (Can. FCA, Jun 24, 1992).

To this end, it is useful to provide some context to the statements made by applicants that may seem, in the mind of the country of asylum, unlikely or unreasonable, and yet be completely plausible in the country of origin. For example, Iran has a high rate of gender-reassignment surgery not because of an unusually high number of transgender Iranians, but because such surgery is viewed as a 'cure' for homosexuality.

Risk is usually substantiated through provision of background human rights reports relating to the country in question. A list of some sources is provided in the Annex to this guide. However, practitioners are advised to conduct their own up to date Internet searches for material relevant to the country in question.

General reports can assist in demonstrating the legal framework in the country of origin but care should be taken to ensure that the law is not applied in a discriminatory manner. For example, in a Canadian case, [120] a decision was overturned owing to the adjudicator's failure to have regard to whether laws against rape would in fact be enforced when the rape victim was a lesbian, particularly as the country information indicated that: "homosexuality is illegal in Botswana, is considered taboo, and is viewed by the Courts in that country as 'an offence to public morality'."[121]

The more invisible and hidden a persecuted group is in the country of origin, the less likely there will be documented evidence of abuse, as persecuted individuals will be less likely to report to the police the abuse to which they have been subjected and, therefore, fewer reports documenting reported human rights violations are likely to be generated. This was the situation in the UK case of *OO (gay men: risk)*

[120] *Ockhuizen v. Canada (Citizenship and Immigration)*, 2014 FC 401, 30 April 2014.
[121] *Ockhuizen v. Canada (Citizenship and Immigration)*, para. 22.

Algeria v. Secretary of State for the Home Department.[122] In agreeing to set the judgment aside, the UK's Home Secretary recognized that she herself was aware, through other successful claimants, of abuses against gay men in Algeria notwithstanding the lack of documented accounts in the country of origin information.

A lack of country material showing that LGBTI individuals are persecuted is not necessarily indicative of an absence of objective justification for the fear.

If there is a real lack of evidence available in relation to the country of origin, practitioners should consider instructing a country expert to provide a written report. Such reports should be objective and justified with examples and sources where possible. If it is not possible to source the statements made (e.g., where they are in the direct knowledge or experience of the expert) this should be clearly stated.

Country experts should be given significant weight and if the refugee status decision-maker reaches a contrary view in respect of key matters, proper reasons are required.[123]

Evidence produced by LGBTI groups in the country of origin or LGBTI experts have sometimes been considered unreliable by some authorities, on the grounds that the said groups or experts have a particular agenda.

Without more, however, this approach is unsustainable and has been cautioned against in Canada: "[t]he notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly

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[122] *OO (gay men: risk) Algeria v. Secretary of State for the Home Department*, [2013] UKUT 00063 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 28 March 2013, now overturned by consent and awaiting rehearing.

[123] See, e.g., *SI (Expert Evidence - Kurd - SM Confirmed) Iraq v. Secretary of State for the Home Department*, CG [2008] UKAIT 00094, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 15 December 2008, para. 56.

less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration."[124]

In the UK, the Immigration and Asylum Chamber of the Upper Tribunal recently commented that a country expert:

"did not seek to disguise her campaigning agenda, but it is difficult to imagine that there could have been a better informed witness on the subject. We found her to be fair and careful in her oral evidence, speaking to what is very much her area of special knowledge, and willing to qualify her conclusions where appropriate."[125]

It has been pointed out that, tourist guides written with the aim of providing guidance to gay men going on holiday to a location, may not be recommended as source material, as the conditions for and treatment of locals (vs tourists) may vary.[126]

[124] *Ndokwu v. Canada (Citizenship and Immigration)* 2013 FC 22, 10 January 2013, para. 38 (emphasis in the original).
[125] *LH and IP (gay men: risk) Sri Lanka CG v. The Secretary of State for the Home Department*, [2015] UKUT 00073 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 18 February 2015, para. 101.
[126] E.g., *RRT Case No. 071070452*, [2007] RRTA 32, a decision of Australia's Refugee Review Tribunal of 16 February 2007 notes: "Malaysia is described by some gay travel guides as having a 'vibrant gay scene', albeit with cautions for discretion when visiting. It must be noted that these guides are written for foreign travellers who have a degree of immunity to the local laws", p. 11.

Chapter Two: well-founded fear

Introduction

Article 1A(2) of the Refugee Convention, as amended by its 1967 Protocol, defines the term refugee for the purposes of that treaty as someone, who, among other things,

"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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[127] (**emphasis added**)

Thus, in order to meet the refugee definition in Article 1A(2) of the Refugee Convention, a person must, among other things, have a **well-founded fear** of being persecuted.

The test to ascertain whether someone has a well-founded fear of being persecuted for Refugee Convention purposes is forward looking. Namely, the question is: what will happen to the person concerned on return to the country of nationality or former habitual residence?

People who, in the past, have already been persecuted may, *a fortiori*, be fearful about circumstances entailing a

[127] Article 1A(2) of the Refugee Convention refers to refugees' "country of […] nationality […] or […] country of […] former habitual residence", in the case of stateless refugees. The drafters of the Refugee Convention defined the phrase 'country of former habitual residence' as "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned", see the UNHCR Handbook, para. 103. Hereafter, any reference to 'country of nationality' or 'country of origin', unless otherwise indicated, should be read to include also 'the country of former habitual residence' in the case of stateless refugees.

risk of being persecuted in the future.[128] In this context, therefore, absent a change of circumstances, past persecution is a strong indicator of a future risk of persecution,[129] and thus of the well-foundedness of one's fear. However, it is beyond dispute that one's fear of being persecuted and its well-founded nature have to be current.[130]

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[128] Practitioners may want to note that in the United States of America domestic legislation specifically provides that past persecution alone is sufficient to qualify for asylum. This means that those refugee applicants who have been persecuted in the past may be granted asylum in the USA even though they may not presently have a well-founded fear of persecution as required by Article 1A(2) of the Refugee Convention.

[129] For example, Article 4(4) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (hereafter: the Recast Qualification Directive) states, "[t]he fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated." The text of this provision is identical to that of Article 4(4) in the 2004 EU Qualification Directive. The Member States bound by the Recast Qualification Directive were required to bring into force domestic legislation necessary to comply with the Directive by 21 December 2013.

[130] See, e.g., *Secretary of State for the Home Department, Ex parte Adan, R v.* [1998] UKHL 15, House of Lords (Judicial Committee) 2 April 1998, [1999] 1 AC 293, [1999] AC 293; see also the speech of Lady Hale in *In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, United Kingdom, House of Lords (Judicial Committee), 10 March 2005, "[a]n understandable unwillingness to return based upon the continuing effects of past persecution is not enough. There must be a current fear of persecution for a Convention reason upon return […] But of course the persecution suffered in the past is relevant to whether a person has a current well-founded fear of persecution. Generally the past persecution will

Equally, however, refugee claimants who have not been persecuted in the past may apprehend fear about a situation entailing a real risk of being persecuted in the future.[131]

Furthermore, those whose behaviour outside their country of origin may, on return, give rise to a real risk that did not previously exist, may also legitimately have a well-founded fear of persecution.[132]

Practitioners should note that the test to establish whether refugee claimants have a "well-founded fear" of being persecuted generally requires that the person concerned must have a *subjective fear* of being persecuted that is *objectively* justified.[133]

The above-described two-tiered test – i.e., (1) a subjective fear (2) that is objectively justified – to satisfying the well-founded fear criterion of the refugee definition in the Refugee Convention has been criticized [134] on the basis that, if it were to be followed strictly, then even where the fear of persecution were to be well-founded from an objective standpoint, a claim may nevertheless be dismissed on the grounds that either:

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lead to the fear of similar persecution on return but that need not always be the case", para. 29: see also para. 28.

[131] The UNHCR Handbook, para. 45.

[132] See Chapter Eight: *sur place* claims.

[133] The UNHCR Handbook, para. 38 and, more generally, paras 37-50; *Ward v Canada (Attorney General)*, [1993] 2 SCR 689 (Can. SC, Jun. 30, 1993); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987; *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals*, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords (Judicial Committee), 16 December 1987.

[134] For a detailed discussion see Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 2, Well-founded fear, pp. 91-104, in particular.

a) the applicant does not apprehend fear, subjectively, (or lacks the subjective element of fear), for instance when s/he has not referred to it; or
b) because it would potentially disqualify children or others who lack the intellectual wherewithal to apprehend or articulate their fear, or may otherwise be unaware of or unable to articulate it.

Being too focussed on the subjective element of the test also creates difficulties in assessing when a refugee applicant may be deemed sufficiently "fearful" to meet the refugee definition in the Refugee Convention.

Ultimately, the International Commission of Jurists considers that, where it can be objectively shown that a real risk of persecution exists on return, it would be inconsistent with the humanitarian purpose of the Refugee Convention to refuse an application on the basis that the applicant has failed to articulate her/his subjective fear or because s/he did not subjectively apprehend fear.[135]

In SOGI-based refugee claims, as with any other refugee claims, an applicant may have experienced torture, arrest, prosecution, imprisonment, beatings or other forms of harm, prior to flight (see Chapter Three: persecution).

Equally, however, refugee applicants whose claims are based on SOGI may never have experienced any of these forms of harm[136] because their fear was so great that they

[135] See, *Radivojevic* (13372)(unreported) followed in *Gashi and Nikshiqi v Secretary of State for the Home Department* [1997] INLR 96, IAT. See also http://www.independent.co.uk/news/people/law-report-refugees-fear-of-persecution-need-not-be-current-1272409.html?printService=print.

[136] On this point, the UNHCR SOGI Guidelines state, "[n]ot all LGBTI applicants may have experienced persecution in the past […] Past persecution is not a prerequisite to refugee status and in fact, **the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of**

suppressed and/or otherwise concealed[137] their SOGI or aspects of that identity.

Concealment as evidence of the well-foundedness of SOGI applicants' fear of persecution[138]

In the context described above, concealment[139] entails the suppression of a fundamental aspect of one's identity, such as one's sexual orientation and/or gender identity.[140] In

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origin. The applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin", para. 18, (**emphasis added**) footnotes in the original omitted.

[137] On concealment the UNHCR SOGI Guidelines state, "LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion", para. 30, footnotes in the original omitted.

[138] See also section entitled: "Concealment" in Chapter Three: persecution.

[139] Practitioners should note that courts, refugee-status determination authorities, judges, academics, etc. have used other terms, such as "discretion" or "restraint", to describe concealment in the context of SOGI-based claims. The ICJ considers those other terms to be euphemisms and prefers using the term concealment. Whatever the term employed, the nub of the issue is that concealing requires coerced, self-enforced suppression of one's sexual orientation and/or gender identity.

[140] In its judgment in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*, the Court of Justice of the European Union affirmed that "requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it", Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, Court of Justice of the European Union, Fourth Chamber, 7 November 2013, para. 70 (hereafter: *X, Y and Z v. Minister voor Immigratie en Asiel*, or *X, Y and Z*). Thus, "an applicant for

these circumstances, the self-enforced suppression of one's SOGI, or aspects thereof, is not a course of action undertaken voluntarily, resulting from full, free, informed consent; instead, concealment results from a fear of persecution. In other words, if, owing to a *fear* of being persecuted, applicants are unwilling to return to their country of origin and, if returned, they would attempt to avoid persecution by hiding their SOGI, then their *fear* would still exist. In fact, concealment is a typical response, [141] consistent with the existence of a well-founded fear of being persecuted, and it is evidence of the well-foundedness of an applicant's fear.[142]

In all cases the ultimate question at this stage of the inquiry is whether the *fear* of persecution is well-

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asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution", *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 71.

[141] On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom Supreme Court, 7 July 2010, Lord Rodger noted this effect in practice: "[u]nless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution", para. 59.

[142] In *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, Lord Rodger also noted, "threatened with serious harm if they [i.e. gay men and lesbian women] live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant's country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. **On the contrary, the fact that he would feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly**", para. 65 (**emphasis added**).

founded.[143] This means that if SOGI applicants would *objectively* face a real risk of persecutory harm such as to induce them to seek to conceal or otherwise deny their SOGI identity because to do otherwise would enhance the chances of the persecutory harm occurring, then the fear is "well-founded" and any attempt at concealment of one's SOGI identity is evidence of a *subjective* fear of being persecuted.

Having said that, some refugee applicants whose claims are based on SOGI, e.g. LGBTI human rights defenders, may assert that on return they would not attempt to conceal their SOGI notwithstanding the real risk of persecution they would face. In those circumstances, their fear is as well-founded, *objectively* speaking, as if they had stated that upon return they would attempt to conceal their SOGI.

Similarly, evidence of lack of concealment in the past, does not necessarily imply that the fear of persecution in the future be any less well-founded.

Subjectively justified

For the fear of persecution to be well-founded, there is no requirement for a person to be "singled out" for persecution.[144]

In most cases, an assessment of the subjective element of the well-foundedness of the fear of SOGI applicants requires consideration of their credibility.[145]

Some jurisdictions require certain matters such as failing to claim asylum in a safe third country or delay in claiming

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[143] For the concept of persecution in general see Chapter Three: persecution.
[144] *R v The Secretary of State for the Home Department ex p. Jeyakumaran* [1985] EWHC 1 (Admin) (28 June 1985), "[i]t can be little comfort to a Tamil family to know that they are being persecuted simply as Tamils rather than as individuals."
[145] The UNHCR Handbook, 2011, para. 41.

without good reason to be considered as damaging to credibility in and of themselves.[146] Practitioners should note that while this may be 'damaging' to credibility, it does not automatically mean that where any such matters exist applicants are not telling the truth, still less that their claim must be rejected.

The UNHCR Handbook advises that:

"[v]ery frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account."[147]

Safe third country

Where applicants have travelled through a safe third country but failed to claim asylum this is often relied on to undermine their credibility.[148] The reasoning being that if the individual concerned were genuinely fleeing persecution s/he would claim asylum in the first safe country reached. In a criminal law context, the UK courts considering the interpretation of Article 31 of the Refugee Convention [149] recognized that asylum-seekers have an

[146] See, e.g., section 8 Claimant's credibility in the UK's Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
[147] The UNHCR Handbook, para. 201.
[148] Australia, New Zealand, Canada and some European countries all penalize asylum-seekers in this way.
[149] Article 31(1) of the Refugee Convention reads as follows: "Article 31 - Refugees unlawfully in the country of refuge
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

element of choice as to where they may properly claim asylum.[150] Many asylum-seekers have good reasons for not claiming in a country through which they have travelled (e.g. one Polish Roma stated he did not claim in Germany owing to what had happened to his grandfather during the second world war). While not claiming asylum in a safe third country may indicate a desire to migrate to a country of choice this is not mutually exclusive of a well-founded fear of persecution, nor, particularly if the applicant has never sought to deceive about travel through that country, is it indicative of lying.

Common reasons for disbelieving a subjective fear include:

- pre-flight behaviour, including so-called risky behavior on the part of the applicant;
- failure to leave at the "earliest opportunity";
- failure to claim in a third country;[151]

[150] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 18, accepting the view of the UNHCR, academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis).

[151] In *Nezhalskyi v Canada (Minister of Citizenship and Immigration)* 2015 FC 299, the claimant, a citizen of Ukraine, sought protection as a refugee on the ground of his sexual orientation. The adjudicator found that the claimant was not credible. The adjudicator drew a negative inference with respect to the claimant's subjective fear because he did not make a refugee claim at the earliest opportunity, when he was in the USA in the summer of 2010, and he then returned to Ukraine. The Federal Court confirmed that a delay in making a refugee claim is a relevant consideration that the adjudicator may take into account in assessing both a claimant's credibility and his subjective fear. In Canada delay in claiming is often taken as an indicator of lack of subjective fear. However, in this case it was unreasonable for the adjudicator to expect the claimant to make a claim for asylum in the USA. The claimant explained, under oath, that he was very young at the time (aged 20), that he was not aware that he could claim refugee status in the USA, and that he did not fear for his life because he had not yet been attacked or beaten in the Ukraine. The Federal Court found that this was a

- delay in claiming post-arrival;[152]
- general credibility;[153] and
- post-flight behaviour in the country of asylum, *sur place* claims.[154]

'Risky' behaviour

In respect of matters pertaining to sexuality, people often act impulsively, even when engaging in actions that they know to be 'illegal' or that would otherwise put them at risk. 'Risky' behaviour on the part of refugee applicants with SOGI-based claims should not be presumed *per se* to undermine their credibility and/or the well-foundedness of their fear of being persecuted. For example, it should not be assumed that because refugee claimants may be aware that consensual same-sex sexual acts are criminalized in their country, their awareness would necessarily have

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plausible explanation for the claimant's failure to claim asylum in the USA, and the Adjudicator had not provided a reasonable explanation for rejecting it. See also *Meyer v Canada (Minister of Citizenship and Immigration)*, 2003 FC 878, 124 ACWS (3d) 766.

[152] See section entitled: "Delay in disclosing one's SOGI" in Chapter One: establishing sexual orientation and gender identity. See also, *Herrera v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1272, 157 ACWS (3d) 1022, where the claimant, a homosexual man from Mexico, stated that he had been a victim of physical and mental abuse on numerous occasions, both in his private life and at work on account of his sexual orientation and where the Federal Court held that his credibility had been undermined, *inter alia*, by the fact that he had not applied for refugee protection until a month after his arrival in Canada, and had given no valid explanation for the delay (see para. 21); and *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, 127 ACWS (3d) 329, another case of a gay man from Mexico where the Federal Court confirmed that the applicant's 14-month delay in making a refugee claim in Canada: "demonstrated that he had no fear of serious harm in Mexico and thus 'no subjective basis to his claim'", (para. 20).

[153] See Chapter One: establishing sexual orientation and gender identity.

[154] See Chapter Eight: *sur place* claims.

prevented them from engaging in same-sex relations or conduct.[155]

Grounds on which cases have been rejected have included:[156]

- public displays of affection in homophobic countries;[157]
- stating that, if asked, one would have been truthful about one's sexual orientation;[158]
- remaining in the same house/village after being caught and conducting a new relationship;[159]
- making sexual advances to someone when unsure that the person is gay;[160]
- entering into a homosexual relationship despite knowledge of Sharia law and its consequences;[161] and
- tolerating a level of violence without receiving medical attention.[162]

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[155] Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0, 11 February 2015, United Kingdom, Home Office, 5.1 Credibility - consideration of the claim p.23.

[156] Missing the Mark report, Disbelief That a Person Would Engage in 'Risky' Behaviour, p. 21.

[157] UK Border Agency (UKBA) refusal letter to Nigerian man, February 2011: "[i]t is not accepted that two men would risk being open and publicly affectionate with each other in a pub as claimed by you", cited in Missing the Mark report.

[158] UKBA refusal letter to Ugandan man, February 2011: "[f]urthermore you have stated that whilst you lived in Uganda if someone had asked about your sexuality you would have stated that you were gay is not accepted as credible considering the consequences", cited in Missing the Mark report.

[159] UKBA refusal letter to a Ugandan man, April 2012: "[i]t is not credible that, following the incident with X, the warning from the local council chairman and the death threat from your father, you would expose yourself to such a high risk by remaining in the same house and village and conducting a new relationship in the same manner as you had previously", cited in Missing the Mark report.

[160] UKBA refusal letter to a Cameroonian man, December 2011, cited in Missing the Mark report.

[161] UKBA refusal letter to a Pakistani man, June 2013, cited in Missing the Mark report.

[162] UKBA refusal letter to a Nigerian man, February 2011: "[i]t is not credible that you would have been able to tolerate the

While, on a case by case basis, it may be warranted for applicants to be asked to explain why they took such risks, asylum interviewers, practitioners and refugee status decision-makers should always be aware that in respect of matters pertaining to sexuality people often act impulsively and that this is an "area of life where powerful emotions and physical attraction are involved".[163] It may occasionally be useful to draw an analogy with the kinds of impulsive, risky behaviour engaged in by straight people in the conduct of their private lives to assist the decision-maker to understand: e.g. people having extramarital affairs, visiting prostitutes, sex at work, etc. Additionally, it may not be possible for the applicant to give any expression to their SOGI in their home country without taking a risk.

Involuntary returns to one's country of origin will not negate a refugee claimant's well-founded fear of persecution. In *Kurtkapan v Canada*,[164] for example, the claimant, a homosexual man from Turkey, came out to his family when he was a teenager but was nonetheless forced to marry; shortly thereafter, the marriage ended in divorce. He made refugee claims in both the UK and the Netherlands, both of which were refused. After being deported back to Turkey, the claimant was detained by the police, finger printed, given an identification number and was made to report weekly to a police station, where he was forced to pay money. Subsequently, he managed to leave Turkey again and went to Canada where he applied for asylum. The Canadian adjudicator rejected the claim due to a lack of subjective fear of persecution, finding it implausible that the claimant would return to Turkey after being denied refugee status from two countries. The Federal Court found the adjudicator's decision to be

violence that was inflicted upon you and then taken to the police station where you were then subjected to more beatings without medical attention", cited in Missing the Mark report.

[163] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, para. 77.

[164] *Kurtkapan v Canada (Minister of Citizenship and Immigration)*, 2002 FC 1114, 24 Imm LR (3d) 163.

unreasonable as the claimant's return to Turkey was obviously involuntary.

Objectively justified

Demonstrating that a fear of persecution is objectively well-founded requires consideration of background country material.[165] This would include consideration of the legal framework and efficacy of protection mechanisms in the country of origin.[166] Often relevant objective evidence will not be available owing to lack of reporting. An absence of reported incidents of abuse should not lead to automatic rejection of the claim on the grounds that the SOGI applicant's fear is not *objectively* well-founded. In some of the most repressive states there is little or no information about the human rights abuses to which people are subjected on the grounds of real or imputed SOGI because the situation is so bad that no-one is "out", thus, abuses are not reported, and LGBTI organizations either do not exist publicly or keep a low profile.

Burden and standard of proof[167]

An asylum applicant will often be unable to provide documentary proof of his or her claim and will not have access to the types and forms of evidence that would often be available in a domestic civil law case. Therefore, while refugee claimants must put forward their case and any supporting evidence available to them, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner and in some cases the examiner may be required to use all the means at her

[165] See section entitled: "Country evidence" in Chapter One: establishing sexual orientation and gender identity.
[166] See Chapter Six: failure of State protection.
[167] For a detailed consideration of the burden and standard of proof see Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 2, Well-founded fear, 2.4 Well-founded apprehension of risk: stating the test, pp. 110-115, and 2.4.2 Shared duty of fact-finding, pp. 118-121, respectively.

or his disposal to produce the necessary evidence in support of the application.[168]

The UNHCR SOGI Guidelines advise that, where there is a lack of country of origin information, the refugee status decision-maker will have to rely on the applicant's statements alone.[169]

Within the European Union, this approach has been adopted in the Recast Qualification Directive,[170] and the Canadian courts have routinely accepted that, in the absence of any credibility concerns or doubts about the applicant's story save for the lack of documentary evidence, it is an error to reject an account owing to lack of corroboration.[171]

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[168] The UNHCR Handbook, para. 196.

[169] The UNHCR SOGI Guidelines, para. 64.

[170] Article 4(5) of the EU Recast Qualification Directive explicitly provides for circumstances in which corroboration of an individual's statement will not be required: "[w]here Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established."

[171] *Dayebga v. Canada (Citizenship and Immigration)* 2013 FC 842, 1 August 2013, where a Cameroonian gay man could not provide documentary evidence of his involvement in the LGBT movement in Cameroon; *Nezhalskyi v. Canada (Citizenship and Immigration)* 2015 FC 299, 9 March 2015, where the Federal Court found that it was an error to draw an adverse inference from the lack of sufficient corroborating evidence of the

In addition, some of the statements may not be susceptible to proof and in such circumstances the UNHCR Handbook makes clear that, unless there are good reasons to the contrary, the applicant should be given the benefit of the doubt.[172]

The UNHCR Handbook's guidance on the benefit of the doubt is as follows:

"203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above […] it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."[173]

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applicant's former relationships. In particular, the failure to produce an ex-boyfriend as a witness was not a sound reason for making an adverse credibility finding against the applicant. See also, *Sellamuthu v Minister for Immigration and Multicultural Affairs*, FCA 247, Australia: Federal Court, 19 March 1999: "[i]n many […] cases the sole substantial basis for judging whether a person falls within the Convention criteria for a 'refugee' will be the information as to his/her supposed history and background furnished by an applicant", para. 24.

[172] The UNHCR Handbook, para. 196.

[173] The UK's Upper Tribunal (Immigration and Asylum Chamber), however, has rejected the notion that the 'benefit of the doubt', as discussed in paragraphs 203 and 204 of the UNHCR Handbook, should be regarded as a rule of law in assessing the credibility of an asylum claim, and should instead be considered as a general guideline only. The Upper Tribunal held that "[a]lthough the Handbook confines [the benefit of the doubt] to the end point of a credibility assessment ('After the applicant has made a genuine effort to substantiate his story': paragraph 203), [the benefit of

Because of the relative gravity of the consequences of being wrong and the difficulty in objectively substantiating risk, 'the balance of probabilities' standard of proof has been consistently rejected in common law jurisdictions.

Instead, phrases such as "real and substantial danger",[174] "reasonable degree of likelihood",[175] "real as opposed to fanciful risk",[176] "real chance",[177] and a "real risk"[178] have been adopted.

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the doubt] is not, in fact, so limited. Its potential to be used at earlier stages is not, however, to be understood as requiring [the benefit of the doubt] to be given to each and every item of evidence, in isolation. What is involved is simply no more than an acceptance that in respect of every asserted fact when there is doubt, the lower standard entails that it should not be rejected and should rather continue to be kept in mind as a possibility at least until the end when the question of risk is posed in relation to the evidence in the round", *KS (benefit of the doubt) v. Secretary of State for the Home Department*, [2014] UKUT 00552 (IAC), 10 December 2014.

[174] *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals*, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords (Judicial Committee), 16 December 1987, speech of Lord Templeman.

[175] *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals*, see the speeches of Lord Keith and Lord Goff.

[176] *MH (Iraq) v. Secretary of State for the Home Department*, [2007] EWCA Civ 852, United Kingdom: Court of Appeal (England and Wales), 5 July 2007, para. 22, approved in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, para. 89.

[177] *Chan v. Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 F.C. 89/034, High Court of Australia, 9 December 1989.

[178] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, "[t]he need for the claimant's fear to be well-founded introduces a very important objective element. Different jurisdictions have taken different approaches to evaluating what Professor James C Hathaway has called 'the threshold of concern' (Hathaway, The Law of Refugee Status (1991) pp 75-80). When that work was published the test approved by the House of Lords

In both the USA[179] and the UK, it has been accepted that a "one in ten" chance of being persecuted is enough to meet the standard of proof required by the refugee definition in Article 1A(2) of the Refugee Convention. In this respect, Sedley LJ held that,

"[i]f a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening."[180]

Having considered the approach taken in leading Australian cases, the Court of Appeal in England and Wales concluded: "[t]his approach does not entail the decision-maker (whether the Secretary of State or an adjudicator or the Immigration Appeal Tribunal itself) purporting to find

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in R v Secretary of State for the Home Department Ex p Sivakumaran (and conjoined appeals) [1988] AC 958 was that there should be 'a reasonable degree of likelihood' (Lord Keith at p 994) or 'real and substantial danger' (Lord Templeman at p 996) or a 'real and substantial risk' (Lord Goff at p 1000) of persecution for a Convention reason. This remains the test. The editors of Macdonald, Immigration Law and Practice 7th ed (2008) prefer the expression 'real risk', citing the Court of Appeal in MH (Iraq) v Secretary of State for the Home Department [2007] EWCA Civ 852, 'a real as opposed to a fanciful risk'. 'Risk' is in my view the best word because […] it factors in both the probability of harm and its severity", para. 89.

[179] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, "[l]et us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.' 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966)."

[180] Sedley LJ in *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489, 05 November 2003, [2004] INLR 126, para. 38 (approved by the Supreme Court in *HJ and HT*).

'proved' facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen."[181]

Recommended approach to evidencing the well-foundedness of an applicant's fear

Practitioners should therefore consider:

i. what the person (and/or their friends, family, social group) has experienced in the past;
ii. what they fear might happen in the future (including, for example: death, beating, imprisonment, prosecution, denial of access to services, education, healthcare, employment, inability to live openly and freely, what this means to them, inability to found a family, marry, have or adopt children);
iii. how they personally apprehend fear and their reasons for it;
iv. how their fear makes them behave, what restrictions it would place on their life etc.; and
v. whether, against the background country material, what the person fears is reasonably likely to occur

[181] *Karanakaran v. Secretary of State for the Home Department*, [2000] EWCA Civ. 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000, 3 All ER 449, where one of the Australian cases considered was *Minister for Immigration and Multicultural Affairs v Rajalingam*, FCA 719, Australia: Federal Court, 3 June 1999.

either in fact or would occur if they were to live a free and open life.

Chapter Three: persecution

Introduction

Article 1A(2) of the Refugee Convention, as amended by its 1967 Protocol, defines the term refugee for the purposes of that treaty as someone, who, among other things,

"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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (**emphasis** added)

"There is no universally accepted definition of persecution and various attempts to formulate such a definition have met with little success."[182] A flexible approach to "being persecuted" is required to ensure that the refugee definition is relevant to "new refugee situations" as the 1967 Protocol to the Refugee Convention emphasizes.[183]

Practitioners should also note that, as early as 1960, it was emphasized that, measures "in disregard" of human dignity may, in appropriate cases, constitute persecution",[184] since

[182] The UNHCR Handbook, para. 51.
[183] See Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 3, Serious Harm, p. 182. "The Preamble of the Protocol states that, 'new refugee situations have arisen since the Convention was adopted'" and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951"; the 1967 Protocol relating to the Status of Refugees.
[184] P. Weis, "*The Concept of the Refugee in International Law*", *Journal du Droit International*, (1960), 928, at p. 970. See also Hathaway and Foster, *The Law of Refugee Status*, Second Edition,

this analysis may be particularly relevant to SOGI-based refugee claims.

In addition to deprivation of basic civil and political freedoms, serious social and economic consequences arising as a result of discrimination are acknowledged within the notion of persecution in the Refugee Convention.[185]

The UNHCR Handbook[186] asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugee set out in Article 1A(2) of the Refugee Convention would constitute persecution.

It has been recognized that, "… to constitute 'persecution' the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol."[187]

The Gender Guidelines for the Determination of Asylum Claims in the UK published in July 1988 by the Refugee Women's Legal Group succinctly describe persecution as follows:

"Persecution = Serious Harm + The Failure of State Protection."[188]

Cambridge University Press, 2014, "a variety of measures in disregard of human dignity might constitute persecution", p 183.

[185] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, p. 183.

[186] The UNHCR Handbook, para. 151.

[187] *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, Australia: High Court, 12 September 1989, per McHugh J, at para. 36.

[188] The Gender Guidelines for the Determination of Asylum Claims in the UK published in July 1988 by the Refugee Women's Legal Group, p. 5, available at www.ilpa.org.uk/data/resources/4112/genderguidelines.pdf; they

This chapter covers various forms of harm, which have been considered serious enough, by their nature, to constitute persecution. The issue of failure of state protection is considered in Chapter Six: failure of State protection.

What constitutes serious harm?

At this stage of the enquiry, the focus is on ascertaining whether the harm that the individual fears upon return is serious enough to constitute persecution for the purposes of the Refugee Convention definition of who is a refugee.

Generally speaking, the correct approach to identifying whether something does or does not constitute serious harm – for the purposes of ascertaining, in turn, whether the relevant harm is persecutory in nature – uses international human rights standards as the ultimate framework/benchmark to assess whether what the applicant fears amounts to "being persecuted".

As the UNHCR has clarified, the strong human rights language in the Preamble of the Convention confirms that, "the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Convention, of the provisions of the 1951 Convention."[189]

Reference should thus be had, in particular, to the following human rights instruments among others:

International[190]
Universal Declaration of Human Rights

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were cited by Lord Hoffmann in *R v Immigration Appeal Tribunal and Another; Ex parte Shah*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999) at p. 17.

[189] The UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, para. 4.

[190] Links to the Core International Human Rights Instruments and their monitoring bodies.

International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
International Convention on the Elimination of All Forms of Racial Discrimination
Convention on the Elimination of All Forms of Discrimination against Women
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Convention on the Rights of the Child
International Convention for the Protection of All Persons from Enforced Disappearance
Convention on the Rights of Persons with Disabilities
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
the 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977

Regional
African Charter on Human and Peoples' Rights
American Convention on Human Rights
Arab Charter on Human Rights[191]
Convention for the Protection of Human Rights and Fundamental Freedoms (i.e., the European Convention on Human Rights)

Sub-regional
Charter of Fundamental Rights of the European Union

Within the European Union, an attempt has been made to achieve a standard definition of persecution with Article 9 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for

[191] Arab Charter on Human Rights was adopted by the League of Arab States in 2004 and entered into force in March 2008.

subsidiary protection and for the content of the protection granted (recast),[192] which states:

"*Acts of Persecution*
1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:
(a) acts of physical or mental violence, including acts of sexual violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military

[192] The EU asylum *acquis* is the corpus of law comprising all EU law adopted in the field of international protection claims. See, in particular, the Recast Qualification Directive and its predecessor, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter: the Qualification Directive). The EU asylum *acquis* – while directly applicable in participating EU Member States – constitutes a minimum standard, see Article 3 more favourable standards, Qualification Directive (recast).

service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
(f) acts of a gender-specific or child-specific nature.
3. [requires a nexus between denial of redress under (d) above and 'convention reason']"

The UNHCR Handbook clarifies that it can be inferred that some forms of harm, such as threats to life or freedom and other serious violations of human rights on account of a Convention reason, will always amount to persecution.[193]

However, whether other prejudicial actions or threats would amount to persecution would depend on the circumstances of each case. Regard should be had to the subjective fear of the individuals concerned and their opinions and feelings.[194]

Having said that, practitioners should be aware that assessment and reliance on a claimant's subjective fear have been criticized on the basis that it is insufficiently precise, requires an assessment of the ability of the person to withstand prejudicial actions/threats, leads to a 'near-fixation' with physical harm and to inconsistency depending on the decision-maker.[195]

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[193] The UNHCR Handbook, paras 51-52.
[194] The UNHCR Handbook, para. 52. See also Chapter Two: well-founded fear.
[195] Two alternative approaches, the subjective approach and the literalist approach, have been rejected. The subjective approach concentrated on whether the person concerned was sufficiently subjectively fearful. Assessing the level of fear of an individual is an inherently problematic task particularly when taking into account cultural differences, reliance on demeanour, levels of education and articulacy, internalized fear, etc. A pure application of the subjective approach gives rise to the danger that a person deemed insufficiently fearful could be returned to a situation where, objectively, they will be persecuted. The literalist approach, if directed to a psychological assessment of the applicant's reaction to conditions in country of origin, has been criticized for similar reasons and for failing to consider the objective risk. For a detailed explanation of these arguments see, Hathaway and Foster, *The Law of Refugee Status*, Second Edition,

In a statement extensively adopted in modern jurisprudence, Professor James C. Hathaway described: "being persecuted" as requiring evidence of "a sustained or systemic violation of basic human rights demonstrative of a failure of state protection."[196]

With respect to this, practitioners should note, however, that: "[t]he fear of a single act of harm done for a Convention reason will satisfy the Convention definition of persecution if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person."[197]

Practitioners should note that refugee status decision-makers, including Courts and tribunals, *de facto* appear to find it easier to understand how physical or psychological harm amounts to persecution than the intrinsic damage to one's identity, dignity and integrity as a person as a result of discrimination in respect of human rights. Such a limited understanding of the notion of persecution may fall short of what Article 1A(2) of the Refugee Convention requires.

The International Commission of Jurists considers that, by very definition, it is the sustained or systemic denial of internationally recognized human rights as enshrined in law and standards that constitutes serious harm. In the context of SOGI-based claims, as well as with all claims posited on Refugee Convention grounds, such harm ultimately violates the dignity, personhood, identity and equality of the

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Cambridge University Press, 2014, Chapter 3, 3.2.1 and 3.2.2, pp. 186-193.

[196] Hathaway, *The Law of Refugee Status* (1991), p. 101; see also, Hathaway and Foster, who describe "being persecuted", with a slightly different formulation, as "the sustained or systemic denial of basic human rights demonstrative of a failure of state protection", *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 3, p. 185.

[197] *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, per McHugh J, para. 99, footnote in the original omitted.

person, as well as the right to equality before the law and equal protection of the law.[198]

From the starting point that, "[a]ll human rights are universal, indivisible and interdependent and interrelated", [199] practitioners are advised to adopt a cumulative, integrated approach as the most appropriate to enquiring into whether what the applicant fears on return amounts to "being persecuted".

In a SOGI context, emphasising this cumulative, integrated approach and stressing the artificiality of considering sexual orientation and/or gender identity and/or gender expression issues under the limb of "private life" alone, the Constitutional Court of South Africa, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, assessed the interrelationship between privacy and equality laws when ruling that the anti-sodomy laws (i.e. statutory and common law offences criminalizing anal sex between consenting adult men) were unconstitutional in the following manner:

"[112] I will deal first with the inappropriate separation of rights and sequential ordering, that is with the assumption that, in a case like the present, rights have to be compartmentalised and then ranked in descending order of value. The fact is both from the point of view of the persons affected, as well as that of society as a whole, equality and privacy cannot be separated because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality and become the basis for invasion of privacy. At the same time the negation by the State of different forms of intimate

[198] "The convention aims at the protection of those whose human dignity is imperiled…", *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132, Federal Court, Australia, 23 February 2001.
[199] Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 5.

personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people and not the people the rights. This requires looking at the rights and their violations from a person centred rather than a formula-based position and analysing them contextually rather than abstractly [….]

[114] Conversely a single situation can give rise to multiple overlapping and mutually reinforcing violations of constitutional rights. The case before us is in point. The group in question is discriminated against because of the one characteristic of sexual orientation. The measures that assail their personhood are clustered around this particular personal trait. Yet the impact of these laws on the group is of such a nature that a number of different protected rights are simultaneously infringed. In these circumstances it would be artificial in law as it would be in life to treat the categories as alternative rather than interactive [….] Thus the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of peoples lives [….]

[127] In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.

[128] [….] Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group pressured by a society and the law to remain invisible; their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially

contagious or prone to corrupting others. None of these factors applies to other groups traditionally subject to discrimination, such as people of colour or women, each of whom, of course have had to suffer their own specific forms of oppression…"[200]

Practitioners are advised that a proper understanding of human rights – as the one the above quote describes – is required when considering whether denial of human rights, such as those highlighted below, is capable of amounting to persecution for the purposes of satisfying the refugee definition in Article 1A(2) of the Convention.

Agents of persecution

Persecution is normally related to action by the authorities of the claimant's home country.[201] The UNHCR, Courts, Tribunals and other decision-makers have also held that serious harm at the hands of non-State actors can constitute persecution for the purposes of the Refugee Convention if state authorities knowingly tolerate such acts, or if they refuse to or are unable or unwilling to provide effective protection against them.[202]Within the EU the Recast Qualification Directive, as its predecessor, characterizes non-State actors as agents of persecution in similar circumstances.[203]

Non-State actors could include armed groups, family members, relatives, neighbours, community members, religious leaders/organizations (depending on the relationship with the State), teachers, employers, vigilante

[200] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, per Sachs J. (footnotes in the original omitted), relied on and approved in *Refugee Appeal No. 74665/03*, New Zealand: Refugee Status Appeals Authority, 7 July 2004, para. 106 and following.
[201] The UNHCR Handbook, para. 65.
[202] The UNHCR Handbook, para. 65. See also Chapter Six: failure of State protection.
[203] Recast Qualification Directive, Article 6.

groups, mafia cartels, etc.

Authorities of another country, i.e., other than the claimant's home country, may also be agents of persecution.

Concealment

One of the most critical challenges in the context of SOGI-based refugee claims that have continued to preoccupy practitioners and decision-makers, including judges, is that of discretion/concealment. Because of its ubiquity in the context of this type of refugee claims, concealment is addressed in full here so as to inform the remainder of this chapter. The question of concealment is also considered briefly in the section entitled: "Concealment as evidence of the well-foundedness of SOGI applicants' fear of persecution" in Chapter Two: well-founded fear.

In the context of SOGI-based refugee claims, some courts, refugee-status determination authorities and academics have referred to concealment of one's sexual orientation or gender identity as "discretion" or "restraint".[204] As the

[204] See, e.g., *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, Jenni Millbank, January 19, 2009, International Journal of Human Rights, Vol. 13, No. 2/3, 2009, pp. 2-4, "[a]t its baldest, discretion reasoning entailed a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection', by exercising 'self-restraint' such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a 'flatmate'; or indeed remaining celibate. This approach subverted the aim of the Refugees Convention – that the receiving state provides a surrogate for protection from the home state – by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. The discretion approach also varied the scope of protection afforded in relation to each of the five Convention grounds by, for example, protecting the right to be 'openly' religious but not to be openly gay or in an identifiable same-sex relationship. The appearance of discretion

reality is that people will be required to "hide", "deny" or "restrain" their identity in the course of being "discreet", "discretion" is a euphemistic misnomer to signify what is in fact "concealment", which is therefore the term the International Commission of Jurists prefers to use in this context.

What it means to conceal and what does concealment entail?

Whatever the term employed, the nub of the issue is that concealing requires the suppression of a fundamental aspect of one's identity, such as one's sexual orientation and/or gender identity and its expression or aspects thereof. In these circumstances, the self-enforced suppression of one's SOGI, or aspects thereof, is not a course of action undertaken voluntarily, resulting from full, free and informed consent. Rather, concealment typically results from a fear of adverse consequences, such as physical or psychological harm or both, whether at the hands of State (e.g. by way of prosecution and imprisonment for engagement in consensual same-sex acts) or non-State actors that may amount to persecution.

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reasoning in a decision strongly correlated to failure for lesbian and gay applicants [….] The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterised as 'flaunting', 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution). Thus for example in 2001 the Federal Court of Australia held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did 'place limits' on the applicant's behaviour; the applicant had to 'avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution.' On appeal, the Full Federal Court endorsed the view that 'public manifestation of homosexuality is not an essential part of being homosexual'. The discretion approach thus has had wide-reaching ramifications in terms of framing the human rights of lesbians and gay men to family life, freedom of association and freedom of expression as necessarily lesser in scope than those held by heterosexual people."

Thus, concealing is coerced. In fact, concealment is a typical response,[205] consistent with the existence of a well-founded fear of persecution and, indeed, itself constitutes evidence that an applicant's fear is well-founded.[206]

In the UK Supreme Court case of *HJ (Iran) and HT (Cameroon)*, considering what concealment actually entails, Lord Rodger held: "77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge

[205] On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, Lord Rodger noted this effect in practice: "[u]nless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution", para. 59.

[206] In *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* Lord Rodger also noted, "threatened with serious harm if they [i.e. gay men and lesbian women] live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant's country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. **On the contrary, the fact that he would feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly**", para. 65 (**emphasis added**).

openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable. 78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81: 'Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality'. In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them […] In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution."

Practitioners should be aware of the extent to which LGBTI applicants may be required to conceal aspects of their identity.

Concealment is inconsistent with the Refugee Convention

The rationale of the Refuge Convention is that human beings are entitled to enjoy "fundamental rights and freedoms without discrimination".[207] Therefore, they should be able to live freely and openly without fearing that they may suffer persecution for reasons of a protected characteristic, e.g. their SOGI.

In *HJ (Iran) and HT (Cameroon)* Lord Roger held, "…so far as the social group of gay people is concerned, the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live in that way."[208]

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[207] The preamble to the Refugee Convention identifies the treaty's object and purpose. The first preambular paragraph affirms: "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". The preamble as a whole is based on the notion that refugees are entitled, beyond the Convention, to all those fundamental rights and freedoms that have been proclaimed for all human beings. See, the UNHRC, "The Refugee Convention 1951: The Travaux Préparatoires analysed with a commentary by Dr Paul Weis", pp. 12-32, in particular the "Commentary" on p. 32.

[208] The speech of Lord Rodger in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, para. 65; see also the speech of Sir John Dyson SCJ, "[a]n interpretation of article 1A(2) of the Convention which denies refugee status to gay men who can only avoid persecution in their home country by behaving discreetly (and who say that on return this is what they will do) would frustrate the humanitarian objective of the Convention and deny them the enjoyment of their fundamental rights and freedoms without discrimination. The right to dignity underpins the protections afforded by the Refugee Convention", para. 113; and also, La Forest J in *Canada (AG) v Ward* [1993] 2 SCR 689, p. 733, para. I, citing in turn Prof. James C. Hathaway.

Denying refugee recognition on the basis that the individuals concerned should return to their home country and suppress a fundamental aspect of their identity, such as their religious beliefs,[209] sexual orientation[210] or their political opinion[211] has been held to be inconsistent with

[209] "[R]eligious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution [….] Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions", footnote in the original omitted, the UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004, para. 13.

[210] The UNHCR SOGI Guidelines, paras 30-33; see also, Australia: *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003; Canada: *Fosu Atta v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1135, 8 October 2008; Finland: *Supreme Administrative Court Decision of 13 January 2012, KHO:2012:1*; France: *Cour nationale du droit d'asile, 23 December 2010, Mr. K., n°0801409929*; Germany: Administrative Court Neustadt a.d.W., 8 September 2008, *3 K 753/07.NW*; Administrative Court Frankfurt / Oder, 11 November 2010, *VG 4 K 772/10.A*; Greece: Special Appeal Committee, 22 June 2012, *A.G. v. the General Secretary of the former Ministry of Public Order, Application No. 95/56266*; Ireland: High Court, 12 November 2010, *M.A. v Minister for Justice* [2010] IEHC 519; New Zealand: *Refugee Appeal No. 74665/03* [2005] INLR 68 (7 July 2004); Norway: *A v. The State (Immigration Appeals Board)*, HR-2012-667-A (Case No. 2011/1688), Supreme Court, 29 March 2012; the UK: *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom, Supreme Court, 7 July 2010; the US: *Karouni v. Gonzales*, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005.

[211] *RT (Zimbabwe) and others (Respondents) v Secretary for State for the Home Department (Appellant); KM (Zimbabwe) (FC) (Appellant) v Secretary of State for the Home Department* [2012]

the fundamental tenets of the Refugee Convention. The UK's Supreme Court, for instance, ruled that to hold otherwise it would have countenanced the return of Anne Frank to Nazi-occupied Holland, had she ever managed to escape it, on the basis that she could have hidden in the attic and therefore successfully avoided the possibility of Nazi detection.[212]

Effectively requiring individuals to conceal their SOGI – whether through adoption or manufacture of heterosexual or asexual lifestyles, orientation and/or gender identity, purportedly in order to avoid persecution – is inconsistent with the Refugee Convention's human rights and humanitarian purpose. It is incompatible with respect for human dignity since it negates each person's capacity for, and freedom to develop, an emotional and sexual attraction for other individuals, regardless of gender, and to choose to engage in consensual sexual conduct with them.[213]

On this point, the UNHCR SOGI Guidelines affirm:

UKSC 38, para. 26; *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132.

[212] As held by Lord Collins in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, "[i]t is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution", para. 107. Thus, Anne Frank's well-founded fear of Nazi persecution was not eliminated by her self-enforced confinement in the attic to conceal her identity as a Jew. See also, *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132.

[213] The *2010 Update report of the EU Agency for Fundamental Rights on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity* observes that, "sexual orientation is a personal characteristic protected under the ECHR, not a shameful condition to be hidden. Any failure to appreciate the specific burden of forced invisibility and of the duty to hide a most fundamental aspect of one's personality such as sexual orientation or gender identity, is a severe misconception of the real situation of LGBT people", p. 56.

"[t]hat an applicant may be able to avoid persecution by concealing or by being 'discreet' about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others."[214]

Thus, the fact that LGBTI people have previously concealed their SOGI or intersex status is not a valid reason to refuse them refugee status, nor is the possibility that they could or would suppress their identity/status in the future.[215]

Individuals should not be required to lie or to exercise restraint about their protected characteristics, be it, for example, one's religious beliefs,[216] or, *mutatis mutandis*, their SOGI.

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[214] The UNHCR SOGI Guidelines, para. 31, footnotes in the original omitted

[215] *RRT Case No. 1102877* [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, "[b]ased on the applicant's past conduct, the Tribunal is of the view that he would be able to avoid the harm he fears by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps and modify his conduct to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of the threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct", para. 96; see also *RRT Case No. 071862642* [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

[216] See, e.g., the 5 September 2012 judgment of the Grand Chamber of the Court of Justice of the European Union in the Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* where the Court held that, in determining an application for refugee status the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts in order to avoid exposure to persecution (paras 79-80). Or, *mutatis mutandis*, one's religious conversion,

In its judgment in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*, the Court of Justice of the European Union affirmed that "requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it".[217] Thus, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".[218]

Reasons for concealing

Regrettably, in some countries, refugee status decision-makers, including judges,[219] have held that the reasons

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see the *written submissions on behalf of the AIRE Centre, ECRE and the ICJ* lodged with the Grand Chamber of the European Court of Human Rights on 10 October 2014 in the case of *F.G. v. Sweden*, no. 3611/11. NB judgment in *F.G. v. Sweden* is pending.

[217] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 70.

[218] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 71.

[219] In *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, at para. 82 of the judgment, Lord Rodger set out the step-by-step approach to be followed by the refugee-status determination authorities, including Tribunals, which may be summarised as follows: (1) Is the applicant homosexual? (2) Is the country of nationality one where homosexual people who live openly are liable to persecution? (3) Would this applicant live openly as a homosexual? (4) If the applicant would not live openly, what is the reason? (a) If it is a question of the applicant being naturally discreet or responding to social pressures such as a wish not to embarrass her or his family, that will be insufficient to engage the Refugee Convention or other international protection; but if (b) a material reason for the applicant living discreetly on return would be a fear of the persecution which would follow if they were to live openly as a homosexual, then, other things being equal, the application for refugee status should succeed. Finland and Norway have followed the UK Supreme Court's approach through judgments of their respective Supreme Courts. See, Finland - Supreme Administrative Court, 13 January 2012, (*Korkein Hallinto-Oikeus*) *KHO:2012:1*; and Norway, Norwegian Supreme Court (*Nørges Høyesterett – Dom*), 29 March

behind some applicants' declaration that if forced to return they would conceal their SOGI should be scrutinized. They have held that there may be instances where, a gay man, for example, "would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends." [220] It has been recognized that "in a society where gay men are persecuted it is quite likely that the prevailing culture will be such that some of an applicant's friends, relatives and colleagues would react negatively if they discovered that he was gay."[221] *HJ (Iran) and HT (Cameroon)* and some of the decisions that have been influenced by this judgment of the UK Supreme Court have held that if the *fear* of persecution played no part in someone's decision to conceal, then the applicant is not entitled to recognition as a refugee.

However, rightly in the International Commission of Jurists' view, in *S395*, addressing concealment prior to flight, McHugh and Kirby JJ of the High Court of Australia held: "[i]n 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

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2012. In Sweden the asylum authorities have enshrined the UK Supreme Court's test through the adoption of a specific asylum policy on the issue, see the statement of the Director for Legal Affairs with regard to investigation and assessment for the prospective risks faced by persons invoking grounds for protection based on sexual orientation, (*Rättschefens rättsliga ställningstagande angående metod förutredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskälpå grund av sexuell läggning*), 13 January 2011, RCI 03/2011.

[220] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, speech of Lord Rodger, para. 82.

[221] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, speech of Lord Rodger, para. 61.

serious harm with its menacing implication 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."[222]

In any event, more recently, in *X, Y and Z* the Court of Justice of the European Union has gone as far as to hold that, even if through concealing the applicant may avoid the risk of persecution, "[t]he fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect",[223] and that "[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."[224]

Further, in the case of *MSM (journalists; political opinion; risk) Somalia*, the Immigration and Asylum Chamber of the UK's Upper Tribunal has held: "[i]n our judgement, the only issue on which there is a possible element of dissonance between the decisions of the [UK] Supreme Court and those of the [Court of Justice of the European Union] is whether it is permissible to take into account the avoidance or modification of conduct on the part of the

[222] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, [2003] judgment of the High Court of Australia (9 December 2003), para. 43, p. 14.

[223] *X, Y and Z v. Minister voor Immigratie en Asiel*, paras 72-75; see also the Dissenting Opinion of Judge Power-Forde in *M.E. v. Sweden*, European Court of Human Rights (Fifth Section), Application no. 71398/12, judgment, 26 June 2014, "[t]he fact that the applicant could avoid the risk of persecution in Libya by exercising greater restraint and reserve than a heterosexual in expressing his sexual orientation is not a factor that ought to be taken into account."

[224] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 76.

person concerned which is voluntary. This emerges particularly from the analytical exercise contained in [para. 82] of the opinion of Lord Rodger in HJ (Iran). It may be said that the approach espoused by Lord Hope in [para. 35] is in substance the same. Lord Walker, at [para. 98], concurred with [para. 82] of Lord Rodger's judgment. So too did Lord Collins, at [para. 100] and Lord Dyson, at [para. 132] while, simultaneously, observing in [para. 123] that, in reality, there will be 'no real choice' […] Pausing at this juncture, we consider that the decisions of the United Kingdom Supreme Court, the High Court of Australia and the Court of Justice of the European Union are in alignment with each other. They are united by their common espousal of the dominant principle that the stature of the right and the unbridled freedom to exercise it (subject only to limitations which do not arise in this appeal) rise above and eclipse other considerations […] To the extent that there is any disharmony between the approaches of the Supreme Court and the [Court of Justice of the European Union], we are, by virtue of the principle of supremacy of EU Law, obliged to follow the latter."[225]

Therefore, in light of the Court of Justice of the European Union's judgment in *X, Y and Z*, in particular, practitioners should note that at this stage of the enquiry in the context of SOGI-based asylum claims the ultimate question is whether the individuals concerned would face a real risk of persecution if they chose to live openly on return. Refugee-status determination authorities, including judges, should not seek to go behind this issue by entertaining consideration of "if and why" questions (i.e., 'if he is likely to exercise restraint, why would he do so?').[226] It is now

[225] *MSM (journalists; political opinion; risk) Somalia* [2015] UKUT 413 (IAC), 3 July 2015, paras 46-48.

[226] "Unlike the United Kingdom's Supreme Court judgment in *HJ (Iran) and HT (Cameroon)*, the CJEU did not ask – nor suggest to adjudicators – that they ask the 'if and why' questions. *HT, HJ* suggested that one should ask: If he is likely to exercise restraint, why would he do so? The CJEU states instead that 'the fact that he could avoid the risk of exercising restraint … is not to be taken

clear that where, upon removal, individuals would face a real risk of persecution if their sexual orientation and/or gender identity became known, that is sufficient to warrant recognition of refugee status irrespective of any concealment/modification/avoidance action they could or would take.

The UNHCR's approach to concealment

Indeed, consistent with the principles canvassed above, the UNHCR SOGI Guidelines advise that:

"the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences."[227]

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into account.' In our Guidelines, we did not advocate for the 'if and why' questions, but instead to look at the overall predicament and risk of persecution regardless of concealment, discretion or restraint. The applicant is thus not required to exercise greater restraint than a heterosexual in expressing his sexual orientation, even if that would allow him to avoid the risk of persecution. Hopefully the CJEU's judgment puts to rest the reliance on the *HJ (Iran) and HT (Cameroon)* reasoning", see, *UN High Commissioner for Refugees (UNHCR), International Commission of Jurists: Expert Roundtable on asylum claims based on sexual orientation or gender identity or expression Brussels, 27 June 2014 - X, Y and Z: The "A, B, C" of Claims based on Sexual Orientation and/or Gender Identity?* 27 June 2014, by Dr Alice Edwards, the UNHCR Senior Legal Coordinator and Chief, Protection Policy and Legal Advice Section, footnotes in the original omitted.

[227] The UNHCR SOGI Guidelines, para. 32.

Consequences of concealment and whether concealment in and of itself amounts to persecution

Notwithstanding the doctrinal accuracy of the approach described above,[228] some refugee status decision-makers may require refugee applicants with SOGI-based claims to prove that concealment in and of itself amounts to persecution.

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[228] See, for example, the speech of Lord Walker in *HJ (Iran) and HT (Cameroon)* at para. 96 where he cautioned that, "[i]n the present case Pill LJ referred, at para. 10 of his judgment, to what counsel had described as the Anne Frank principle. That is of course a reference to the Jewish girl who was hidden in an attic in Amsterdam for more than two years, but ultimately discovered by the Nazis and sent to a concentration camp, where she died. The conditions which she had to endure, confined in an attic away from the normal pleasures of childhood and in constant fear of discovery, were certainly severe enough to be described as persecution. **But in the context of a claim to asylum under the Convention this approach may be an unnecessary complication, and lead to confusion. The essential question in these cases is whether the claimant has a well-founded fear of persecution as a gay man if returned to his own country, even if his fear (possibly in conjunction with other reasons such as his family's feelings) would lead him to modify his behaviour so as to reduce the risk.**" (**emphasis added**) See, also, in the same case, the speech of Lords Collins at para. 107 who had this to say about the Secretary of State's submission on this point, "[i]n this case the Secretary of State argued that had Anne Frank escaped to the United Kingdom, and had it been found (improbably, as the Secretary of State recognised) that on return to Holland she would successfully avoid detection by hiding in the attic, then she would not be at real risk of persecution by the Nazis, and the question would be whether permanent enforced confinement in the attic would itself amount to persecution. Simply to re-state the Secretary of State's argument shows that it is not possible to characterise it as anything other than absurd and unreal. **It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution**." (**emphasis added**)

In light of this, practitioners should apprise themselves of the argument that being compelled to abandon or conceal one's real SOGI may, in itself, amount to persecution.[229]

In *Sadeghi-Pari v Canada*, the Federal Court held that being compelled to forsake or conceal one's sexual orientation and gender identity may in and of itself amount to persecution. The Federal Court was clear that requiring a person to conceal or suppress their sexual orientation amounts to persecution: "[c]oncluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution."[230]

On this point the UNHCR SOGI Guidelines affirm:

"[b]eing compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an

[229] See, *mutatis mutandis*, *Fatin v. Immigration and Naturalization Service*, 12 F.3d 1233, United States Court of Appeals for the Third Circuit, 20 December 1993, where the Court stated, "we will assume for the sake of argument that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs. An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance"; see, also, *HJ (Iran) and HT (Cameroon)*, per Lord Walker, para. 96 and per Lord Collins, para. 107 (cited above). See also *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ, para. 43 (cited above).

[230] *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm LR (3d) 150, para. 29.

intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response [to] an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term."[231]

Studies have shown that pervasive discrimination has led, in particular, to mental health problems, feelings of self-denial, anguish, depression, psychosocial and psychological distress, shame, isolation and self hatred.[232] Expert opinion has attested to the severe mental suffering caused by concealing one's SOGI.[233]

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[231] The UNHCR SOGI Guidelines, para. 33, footnotes in the original omitted.

[232] *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, American Psychological Association.

[233] See, e.g., the expert opinion provided by Dr Meyer to the European Court of Human Rights in the case *Bayev v. Russia*, no. 67667/09, case communicated on 16 October 2013 (judgment pending). His area of social epidemiological expertise is the effects of social stress related to prejudice and discrimination on the health of LGB populations. His opinion stated: "[…] concealing one's lesbian or gay identity is itself a significant stressor for at least three reasons. First, people must devote significant psychological resources to successfully conceal their LGB identities. Concealing requires constant monitoring of one's interactions and of what one reveals to others. Keeping track of what one has said and to whom is very demanding and stressful, and it leads to psychological distress. Among the effects of concealing are preoccupation, increased vigilance of stigma discovery, and suspicion, which, in turn, lead to mental health problems […] Second, concealing has harmful health effects by denying the person who conceals his or her lesbian or gay identity the psychological and health benefits that come from free and honest expression of emotions and sharing important aspects of one's life with others […] Third, concealment prevents LGB individuals from connecting with and benefiting from social support networks and specialized services for them. Protective coping processes can counter the stressful experience of stigma […] LGB people who need supportive services, such as competent mental health services, may receive better care from sources in the LGB community […] But individuals who conceal their LGB identities are likely to fear that their sexual identity would be

Under international human rights law, in certain circumstances, psychological, mental harm resulting from fear of exposure to physical harm (i.e. from the apprehension of prospective physical ill-treatment inflicted on oneself or one's loved ones)[234] has been found to

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exposed if they approached such sources […] LGB people who conceal their gay identity have been found to suffer serious health consequences from this concealment", Declaration of Ilan H. Meyer, in *Bayev v. Russia*, May 2014, paras 64-67. Furthermore, in "*Minority Stress and Physical Health Among Sexual Minorities*", David J. Lick, Laura E. Durso and Kerri L. Johnson note, "[…] LGB individuals who live in stigma-rich environments may also face health concerns because they conceal their sexual identity in order to prevent future victimization […] Such concealment […] is associated with a host of psychological consequences in the long-term, including depressive symptoms […] poor self-esteem and elevated psychiatric symptoms […] and psychological strain […] findings from the general population indicate that such heightened distress hinders physical functioning […] In fact, several previous studies uncovered associations between sexual orientation concealment and physical health outcomes among HIV-positive gay men, linking concealment to increased diagnoses of cancer and infectious diseases […] dysregulated [sic] immune function […] and even mortality […] Collectively, these findings suggest that LGB individuals who live in stigmatizing environments may face frequent victimization that leads them to conceal their sexual orientation, with negative implications for longterm health", and "[t]hus, fears of discrimination stemming from previous experiences with antigay stigma may lead LGB adults to avoid healthcare settings or to conceal their sexual orientation from medical providers, resulting in a low standard of care that contributes to long-term physical health problems […]", see Lick et al in *Perspectives on Psychological Science* 2013 8: 521 DOI: 10.1177/1745691613497965, at p. 531 and 533, respectively. Apu Chakraborty *et al* in *Mental health of the non-heterosexual population of England*, British Journal of Psychiatry (2011) 198, 143-134 corroborate international findings that "non-heterosexual individuals are at higher risk of mental disorder, suicidal ideation, substance misuse and self-harm than heterosexual people", p. 147.

[234] E.g., in *Keenan v. the United Kingdom*, the European Court of Human Rights clarified that someone's treatment is capable of engaging Article 3 (prohibiting torture or other ill-treatment) when it is "such as to arouse feelings of fear, anguish and inferiority

constitute cruel, inhuman and degrading treatment.[235] Such findings are consistent with refugee law holding that in some cases psychological harm is persecutory.[236] This is of particular concern in the case of rejected asylum-seekers required to conceal their SOGI on return in an attempt to avoid persecution, since fear of discovery and of the resulting physical ill-treatment by State or non-State actors, imprisonment and, in extreme cases, execution, may hang over them for the rest of their lives.[237]

In this context, practitioners should be aware that refugee status decision-makers may require applicants to prove the relevant level of psychiatric damage. The inherent difficulty with this approach is the fact that it has the potential to

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capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance […] or as driving the victim to act against his will or conscience…", no. 27229/95, judgment, 3 April 2001, para. 110; see, also, *Ireland v. the United Kingdom*, no. 5310/71, judgment, 18 January 1978, para. 167; and *Identoba and Others v. Georgia*, no. 73235/12, judgment, 12 May 2015, paras 68-71 and para. 79.

[235] E.g., the European Court of Human Rights has recognized, including most recently in *Identoba and Others v. Georgia*, that, "Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering", para. 65, paras 70-71; see, also, *Gäfgen v. Germany* [GC], no. 22978/05, judgment, 1 June 2010, para. 103.

[236] See, *Abay v. Ashcroft*, 368 F.3d 634, United States Court of Appeals for the Sixth Circuit, 19 May 2004, where a mother's psychological trauma due to the risk of her child undergoing female genital mutilation was found to constitute persecutory harm and thus enough to entitle her to protection as a refugee. Psychological, mental harm is capable of constituting persecution for the purposes of the Refugee Convention when it results from coercion. US case law also confirms this clearly: *Fisher v I.N.S.*, 37 F.3d 1371 (9th Cir. 1994) "being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one's own…can rise to the level of persecution", para. 45.

[237] See, *inter alia*, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ, cited above, para. 43.

"medicalize" the claim and, in turn, result in a denial of refugee status based on the inability/failure to obtain the required medical evidence.

Ultimately, practitioners are advised to focus on the fact that concealment entails the suppression of one's identity on a daily basis. This can properly be viewed as an affront to human dignity, and data from a multiplicity of authoritative sources demonstrate that concealment can cause serious mental suffering and other types of serious harm.

An alternative approach would be the argument suggested above that the cumulative denial of rights on a discriminatory basis itself amounts to persecution affecting the dignity of individuals in refusing them equality before the law.

Risk of discovery

It must also be remembered that even if the people concerned would attempt to conceal their SOGI, there remains a possibility of discovery against their will,[238] for example by accident, rumours, growing suspicion, the use of social media,[239] assumptions about people who have not married and who do not have children, etc.[240]

In *SW (lesbians - HJ and HT applied) Jamaica CG*, in the context of the successful appeal under the Refugee Convention of a Jamaican lesbian applicant, the Immigration and Asylum Chamber of the UK's Upper Tribunal described the risk of discovery faced by lesbian

[238] See, e.g., *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, paras 56-58.
[239] E.g. the Human Rights Watch report, "*We Are a Buried Generation" Discrimination and Violence against Sexual Minorities in Iran*, 15 December 2010, documenting internet surveillance of gay chat rooms in Iran and the ensuing human rights violations.
[240] The UNHCR SOGI Guidelines, para. 32.

women in Jamaica: "[s]ingle women with no male partner or children risk being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion […] Because the risks arise from perceived as well as actual lesbian sexual orientation, internal relocation does not enhance safety. Newcomers in rural communities will be the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians [….] A manly appearance is a risk factor, as is rejection of suitors if a woman does not have a husband, boyfriend or child, or an obvious and credible explanation for their absence […] In general, younger women who are not yet settled may be at less risk; the risk increases with age. Women are expected to become sexually active early and remain so into their sixties, unless there is an obvious reason why they do not currently have a partner, for example, recent widowhood."[241]

With respect to the risk of discovery, the UNHCR SOGI Guidelines emphasize:

"[i]t is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and

[241] *SW (lesbians - HJ and HT applied) Jamaica CG*, setting out the risk factors for lesbians in the country, including of discovery, cited above in the section entitled: "Rape and other instances of sexual violence of comparable gravity", at para. 107.

having children […]). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm."[242]

Recommended approach to the risk of discovery

The following matters may fall to be considered as flowing from and relevant to sexuality and the risk of discovery:

i) How does the applicant meet prospective partners and develop relationships?

ii) Given the freedom to do so, how would the applicant wish to express their sexuality/gender identity?

iii) Could the applicant live with her/his partner in safety?

iv) Does the applicant require access to her/his 'particular social group'?[243]

v) Are there particular health care needs that could result in disclosure?

vi) Applicants, even if voluntarily choosing to conceal, will have to lie to protect themselves: e.g., they may be asked questions about why they are not married, do not have children, what they did at the weekend. Each response brings with it a risk of involuntary disclosure.

vii) A risk of involuntary disclosure also arises through use of social media, meeting up with potential partners, through gestures, non-conformity with gender stereotypes.

[242] The UNHCR SOGI Guidelines, para. 32 (footnotes in the original omitted).

[243] See, *mutatis mutandis*, the judgment of the Court of Justice of the European Union in the Joined Cases C- 71/11 and C- 99/11, *Bundesrepublik Deutschland v Y and Z*, where, in the context of refugee claims based on religious belief, the Court held that serious acts that interfere with refugee claimants' freedom not only to practise their religious faith in private circles but also to live that faith publicly may constitute persecution (para. 72 of the judgment). For the meaning of 'particular social group', see Chapter Five: membership of a particular social group.

viii) What else might trigger discovery of the SOGI and thus persecution?

A clear distinction should be made between activities that may trigger disclosure of the protected identity and the protected identity itself. For example, in country X "drinking exotically coloured cocktails"[244] or "baileys"[245] may cause a person to be 'outed'; in country Y it could be length of hair; in country Z the way someone walks. Although these may appear trivial matters, it is not the behaviour that is relevant,[246] it is the imputation of SOGI by the persecutor and consequential risk of persecutory treatment. A person could take as many precautionary steps as possible and yet still be labelled and persecuted on the grounds of their SOGI.

Forced adoption of a heterosexual narrative

Forcing people to adopt, and/or conform to, and effectively manufacture, a heterosexual or asexual lifestyle, orientation and identity in order to avoid persecution is inconsistent with one's right to identity and with respect for human dignity and human freedom.

In *Eringo v Canada*,[247] the claimant was a man from Kenya who was 23 when he discovered that he was a

[244] A stereotypical example given by Lord Rodger in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, at para. 78 of his speech.
[245] See the arrest and imprisonment of men in Cameroon for 'drinking baileys' and wearing women's clothes, Amnesty International UK, "*The country where 'looking gay' and drinking Bailey's Irish Cream can get you jailed*", 24 January 2013.
[246] For a different view, see *Queer Cases Make Bad Law* where the authors, James C. Hathaway and Jason Pobjoy, argue that: "some forms of behavior loosely (or stereotypically) associated with homosexuality are not presently protected" under the Refugee Convention (p. 374), New York University Journal of International Law and Politics, pp. 315-389, Vol. 44, No. 2, 2012.
[247] *Eringo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1488, 157 ACWS (3d) 813.

homosexual. He had been married in order to conceal his homosexual sexual orientation, as homosexuality was viewed with hostility and criminalized in Kenya. The adjudicator did not believe that the claimant could discover his sexuality at an age beyond adolescence and ignored the documentary evidence that it is common in Kenya for gay men to marry women in order to hide their sexuality. In allowing the appeal against the adjudicator's decision to deny him international protection, the Federal Court found that the adjudicator applied broad stereotypes of homosexuality in order to discredit the claimant and ignored documentary evidence that supported his claim.

The UNHCR SOGI Guidelines note that, "[s]ome gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children."[248]

In SOGI-based refugee claims, applicants may have fled, for example, because their failure to marry had led to the exposure of their LGBTI status and thus to a real risk of persecution.[249]

Recommended approach to concealment

In the context of SOGI-based asylum claims, practitioners are advised to focus on the following considerations when and if concealment arises as an issue:

i) the predicament applicants would face if they were returned to their home country;[250]
ii) in cases where the LGBTI individual would *in fact* live openly and thus risk persecution, refugee status decision-makers have recognized that this would lead to a recognition of refugee status;

[248] The UNHCR SOGI Guidelines, para. 10 (sub-para. entitled Gay men).
[249] See, e.g., *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011.
[250] The UNHCR SOGI Guidelines, paras 18, 32, 33 and 39.

iii) if LGBTI applicants would in fact conceal their identity, concealment is consistent with a well-founded fear of persecution[251] and/or may in itself constitute persecutory harm and again should lead to recognition;
iv) the risk of discovery; and
v) "if and why" questions (i.e., 'if he is likely to exercise restraint, why would he do so?') in relation to concealment are impermissible and irrelevant.

Risk to life, including capital punishment and death threats

As mentioned above, the UNHCR Handbook posits that, "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution."[252]

A real risk to one's life clearly involves a real risk of serious harm.[253] In this context, therefore, extrajudicial, summary or arbitrary executions motivated wholly or in part by prejudice or hatred against one's real or perceived SOGI or gender expression would clearly amount to persecution if carried out by or on behalf of the State. Serious threats to someone's life by or on behalf of the State would also constitute persecution.

Capital punishment

The retention, imposition and carrying out of capital punishment in connection with real or purported engagement in consensual sexual relations, including

[251] See section entitled "Concealment as evidence of the well-foundedness of SOGI applicants' fear of persecution" in Chapter Two: well-founded fear.
[252] The UNHCR Handbook, para. 51; see also *Minister for Immigration and Citizenship v. SZCWF*, [2007] FCAFC 155, Australia: Federal Court, 27 September 2007, para. 34.
[253] "Put simply, attempted murder is persecution", see. *Ruth S. Sanchez Jimenez v. U.S. Atty. General*, United States Court of Appeal, 11th Cir, 17 July 2007, p. 16.

same-sex sexual relations/acts, and/or for other matters relating to sexual orientation, gender identity or gender expression contravene the right to life and freedom from cruel, inhuman or degrading treatment or punishment on the grounds that they offend against the principle of non-discrimination, equality, including equality before the law and equal protection of the law; as well as the rights to dignity; liberty and security of person; privacy; opinion and expression; association and peaceful assembly and generally impair the exercise of these and other human rights.

While the International Covenant on Civil and Political Rights (ICCPR) does not prohibit the retention, imposition and carrying out of capital punishment, it severely restricts resort to the death penalty by limiting its lawful application to "most serious crimes" only.[254] Following an exhaustive study of the jurisprudence of UN Bodies, in 2007, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions clarified that the meaning of "most serious crimes", in Article 6(2) of the ICCPR, should be understood to mean that crimes punishable by death must be limited to those in which it is proved that "there was an intention to kill and which resulted in the loss of life".[255] The Special Rapporteur on extra judicial executions has further noted that, "death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation."[256]

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[254] Furthermore, under international law, the imposition of the death penalty following an unfair trial violates the right to life and the prohibition of inhuman or degrading treatment or punishment and would thus entail persecutory harm. Similarly, the imposition of the death penalty in connection with charges that violate human rights, such as expression, opinion, assembly and religion would constitute a violation of the right to life and thus entail persecutory harm.

[255] Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20(2007), 29 January 2007, paras 53, 65.

[256] Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2000/3, 25 January 2000, para. 57.

In countries where homosexuality may be punishable by death[257] practitioners will need to consider:

i) the effect of the existence of the law; and
ii) the likelihood of it being applied in a given case.

It is well established that laws criminalizing consensual same-sex conduct are discriminatory and incompatible with human rights standards.[258] Where people face a real risk of capital punishment, corporal punishment, such as flogging, or prison terms,[259] the persecutory character is, according to the UNHCR SOGI Guidelines, "particularly evident."[260]

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly expressed concern about death sentences for consensual adult sexual conduct and confirmed that it is a violation of international law. See UN Doc. CCPR/C/YEM/CO/5, para. 13; and UN Doc. E/C.12/IRN/CO/2, para. 7.

[257] "In the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan and Yemen, and in parts of Nigeria and Somalia, the death penalty may be applied in cases of consensual homosexual conduct. Death is also the prescribed punishment for homosexuality in the revised penal code of Brunei, although relevant provisions have yet to take effect", Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, 4 May 2015, (hereafter: the 2015 OHCHR SOGI Report) para. 46.

[258] E.g., the UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law, Working Group on Arbitrary Detention Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94.

[259] The Court of Justice of the European Union has accepted that the application of a term of imprisonment upon conviction for offences criminalizing consensual homosexual acts would amount to persecution, see *X, Y and Z v. Minister voor Immigratie en Asiel*, where the Court held that: "the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment

However, the general approach taken by asylum Courts, including the Court of Justice of the European Union, has been that the mere existence of a law criminalizing same-sex relations, without "enforcement" or other acts, does not, *per se*, amount to persecution.[261]

In *X, Y and Z v Minister voor Immigratie en Asiel*, the Court of Justice of the European Union held: "[…] the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive."

It is to be noted that in none of the cases considered in *X, Y and Z* was the death sentence the prescribed punishment in the country of origin.

Furthermore, in this context, the Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that, "the mere possibility" that the death sentence can be applied threatens the accused for years and is a form of cruel, inhuman or degrading treatment or punishment. Its status as a law justifies persecution by vigilante groups and invites abuse.[262]

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which is disproportionate or discriminatory and thus constitutes an act of persecution", para. 61.

[260] The UNHCR SOGI Guidelines, para. 26.

[261] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 55.

[262] "Firstly, characterizing adultery and sodomy as capital offences leading to death by stoning is contrary to applicable Nigerian and international law. Neither can be considered to be one of the most serious crimes for which the death penalty may be prescribed. Secondly, even if the sentence is never carried out, the mere possibility that it can threaten the accused for years until overturned or commuted constitutes a form of cruel, inhuman or degrading treatment or punishment. Assurances that an offence which continues to be recognized by the law will never be applied in practice are neither justified nor convincing. The very existence of such laws invites abuse by individuals. This is all the more so in

The existence of legislation criminalizing homosexuality and its relevance to persecution is considered further below entitled: "Criminalization of same-sex relations".

Killings

If the risk to the life of SOGI applicants stems from non-State agents, for example vigilante groups, religious organizations, family members (e.g. killings in the name of "honour")[263] or other non-State actors, it will amount to persecution if SOGI is *the* or *one of the* causative factors or if SOGI is *the* or *one of the* reasons for the state failure to protect.[264]

With respect to killings of people on grounds of their real or imputed SOGI, the 2015 report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity notes the following:

"[h]ate-motivated killings of LGBT individuals have been documented in all regions. The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted 'grotesque homicides' perpetrated with broad impunity, allegedly at times with the 'complicity of investigative authorities' […] Treaty bodies, special procedures and

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a context in which sharia vigilante groups have been formed with strong Government support. The maintenance of such laws on the books is an invitation to arbitrariness and in the case of zina to a campaign of persecution of women", Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Addendum, Mission to Nigeria, E/CN.4/2006/53/Add.4, 7 January 2006, para. 35, footnotes in the original omitted.

[263] See *RRT Case No. 0902671*, [2009] RRTA 1053, Australia: Refugee Review Tribunal, 19 November 2009, (Transsexual, risk of honour killing); see also C. Steinke: *Male asylum applicants who fear becoming the victims of honour killings: the case for gender equality*, Cuny Law Review [Vol. 17:233].

[264] See Chapter Six: failure of State protection and Chapter Four: for reasons of.

United Nations agencies continue to express alarm at such killings and related patterns of violence, including the murder of transsexual women in Uruguay and of Black lesbian women in South Africa. In an assault in Chile, a gay man was beaten and killed by neo-Nazis, who burned him with cigarettes and carved swastikas into his body. […] Data are patchy but, wherever available, suggest alarmingly high rates of homicidal violence. In Brazil, one of relatively few countries where the Government publishes an annual report on homophobic violence, the authorities documented 310 murders in 2012 in which homophobia or transphobia was a motive. The Inter-American Commission on Human Rights reported 594 hate-related killings of LGBT persons in the 25 States members of the Organization of American States between January 2013 and March 2014. [….] Reporting from non-governmental organizations underscores the prevalence of fatal violence. The Trans Murder Monitoring project, which collects reports of homicides of transgender persons in all regions, lists 1,612 murders in 62 countries between 2008 and 2014, equivalent to a killing every two days. The National Coalition of Anti-Violence Programs in the United States of America reported 18 hate violence homicides and 2,001 incidents of anti-LGBT violence in the United States in 2013 […] Terrorist groups may target LGBT persons for punishment, including killings. In February 2015, photos appeared to show several men, allegedly accused of homosexual acts, being pushed off a tower to their deaths by militants of the so-called Islamic State in Iraq and the Levant (ISIL) […] LGBT persons have also been victims of so-called 'honour' killings, carried out against those seen by family or community members to have brought shame on a family, often for transgressing gender norms or for sexual behaviour, including actual or assumed homosexual conduct."[265]

[265] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, paras 26-30, (footnotes in the original omitted).

Death threats

Death threats – whether at the hands of State or non-State actors – can amount to persecution if there is some likelihood of them being carried out;[266] if the person is put in fear as a result of threats and attacks on others[267] or if the purpose is to cause the person to leave or cease their protected acts.[268]

Torture, other ill-treatment and other violations of one's right to mental and physical integrity

Both torture and other ill-treatment are absolutely prohibited under international human rights law. [269] By definition, torture and other ill-treatment are forms of serious harm; they can be inflicted through physical attacks, including through sexual abuse, and psychologically, including through emotional abuse and coercion. Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines the term torture for the purpose of that treaty as involving, among other things, the

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[266] *Muckette v. Minister of Citizenship and Immigration*, 2008 FC 1388, Canada: Federal Court, 17 December 2008, "the cumulative effect of the incidents tipped into the area of persecution when death threats, which had some degree of reality to them, were made", para. 8.

[267] *Baballah v Ashcroft* 367 F. 3 d 1067, U.S COA 9th Circuit 2004, "[v]iolence directed against an applicant's family members provides support for a claim of persecution and in some instances is sufficient to establish persecution because such evidence 'may well show that [an applicant's] fear ... of persecution is well founded'", para. 27.

[268] *Lucreteanu v. Secretary of State for the Home Department*, UK Immigration Appeal Tribunal 1995 1216 (unreported) where threats amounted to harassment and caused the appellant to leave the country.

[269] The term ill-treatment is used here as shorthand to cover both torture and other ill-treatment prohibited by international law, such as cruel, inhuman or degrading treatment or punishment. The legal difference between torture and other forms of ill-treatment lies in the level of severity of pain or suffering imposed.

intentional infliction of severe pain or suffering, whether physical or mental.[270]

In *Identoba and Others v. Georgia,* a case concerning the violent disruption by counter-demonstrators of a peaceful demonstration in Tbilisi in May 2012 to mark the International Day against Homophobia, in the context of discussing the prohibition against torture or other ill-treatment, featured in Article 3 of the European Convention on Human Rights, the European Court of Human Rights recently reaffirmed that, "Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering". [271] Thus, psychological, mental harm may attain such a severity as to fall within the scope of torture or other ill-treatment,[272] thereby entailing harm serious enough to be persecutory in character.

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[270] See Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While the definition of torture in Article 1 of the Convention excludes pain or suffering arising only from or inherent in or incidental to lawful sanctions, care must be taken to determine whether the sanctions themselves are lawful or discriminatory/disproportionate such as to breach international law, c.f., for example, Article 9(2) of the EU Recast Qualification Directive cited above, i.e. "(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory".

[271] *Identoba and Others v. Georgia*, no. 73235/12, judgment, 12 May 2015, para. 65, paras 70-71 and para. 79 where the Court held: "that violence, which consisted mostly of hate speech and serious threats, but also some sporadic physical abuse in illustration of the reality of the threats, rendered the fear, anxiety and insecurity experienced by all thirteen applicants severe enough to reach the relevant threshold under Article 3 read in conjunction with Article 14 of the Convention"; see also, *Gäfgen v. Germany* [GC], no. 22978/05, judgment, 1 June 2010, para. 103.

[272] *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the *Greek* case") nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, paras 116-17, which are authorities for the proposition that for a particular act to constitute torture it is not necessary that physical injury be

Clearly, any act of torture that met the definition in Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for instance severe pain or suffering intentionally inflicted on people by State agents because of their SOGI, would constitute persecution. Likewise, if torture-like harm were inflicted by non-State agents either on SOGI grounds or if the State failed to protect the individuals concerned owing to SOGI factors, then the serious harm involved would constitute persecution for Refugee Convention purposes.

Mental pain or suffering reaching the torture or other ill-treatment threshold may also result from the apprehension of prospective physical ill-treatment. In this context, threats of torture may also lead to psychological harm such that they amount to persecution.[273]

LGBTI individuals can experience physical violence, including from members of their own family,[274] extended

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caused. A mere threat of Article 3 prohibited treatment can itself give rise to a violation of that Article, see *Campbell and Cosans v. the UK*, 25 February 1982, "the Court is of the opinion that, provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 (art. 3) may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'", para. 26; *Gäfgen* para. 108, paras 65-68 and para. 86. See also, *inter alia*, the UN Human Rights Committee's General Comment 20 relating to Article 7 of the International Covenant on Civil and Political Rights which states: "[t]he prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim." U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 5.

[273] See above, the section entitled: "death threats" and also *Pathmakanthan v. Holder, Attorney General of the United States,* Nos. 08-2644 & 08-3777, United States Court of Appeals for the Seventh Circuit, 16 July 2010, where the Court held that "[t]o live, day after day, knowing that government forces might secretly arrest and execute you is itself a form of mental anguish that can constitute persecution", p. 9.

[274] *Ixtlilco-Morales v. Keisler*, Acting Attorney General, 507 F.3d 651, United States Court of Appeals for the Eighth Circuit, 2

periods of detention, medical abuse, threats of harm, including threats of "honour killings", vilification, intimidation, harassment and psychological violence that may rise to the level of inhuman and degrading treatment or even torture in terms of the harm's seriousness.

In *Ixtlilco-Morales v. Keisler*, for example, the United States Court of Appeals for the Eighth Circuit set out the harm that the applicant had suffered at the hands of his family, as follows: "[w]hen he was nine or ten years old, Morales recognized that he was attracted to boys. Around that time, he began, on occasion, dressing in his sisters' clothing and wearing makeup. When Morales's father caught him playing with his sisters or dressing as a female, Morales's father beat him. This occurred weekly or every two weeks. Morales's father also called Morales names and said that he would not accept a homosexual in the family. Morales's mother and a brother also beat him for being a homosexual. On one occasion when Morales was ten years old, Morales's father beat Morales so severely that Morales thought that he would die. Morales's father then threw Morales out of the family house, saying he would never accept a homosexual son and would rather see Morales dead. Morales began working in the produce market in Axochiapan for a woman who allowed Morales to live with her. When Morales would see his father or a brother at the market, he would hide in terror. At eleven years old, Morales left Axochiapan for work in Mexico City. Morales

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November 2007, where ultimately the applicant's claim failed as the Court concluded that "as an adult, Morales would not be subject to the **persecution that he suffered in the past: significant harm inflicted by his family members**", p. 7 (**emphasis added**). However, the significance of the case for present purposes is the fact that it is authority for the proposition that family members were responsible for the persecution that they had inflicted on the applicant in the past. When considering child applicants' claims, practitioners may also want to refer to the UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08.

returned to his family's home on two occasions, but his mother rejected him. Morales attempted suicide when he was twelve years old".[275]

Many LGBTI people are disowned by their families if their SOGI becomes known. Such mistreatment must be considered within the context of the applicant's culture and in particular how it impacts on the concerned individual's ability to survive economically and socially (e.g., access to housing, employment, etc. may depend on family in some countries). Such treatment will only amount to persecution if the home state is unable or unwilling to protect the applicant against it.[276]

Reporting on non-lethal violence against individuals based on their SOGI, the Office of the UN High Commissioner for Human Rights in 2015 highlighted that:

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[275] *Ixtlilco-Morales v. Keisler*, p. 2.

[276] *MMM v Minister for Immigration & Multicultural Affairs* [1998] FCA 1664; 90 FCR 324; 170 ALR 411, Federal Court of Australia, 22 December 1998 – discussing the consequences for the homosexual applicant of familiar rejection as his family would disown him because of his homosexuality and holding that they could not amount to being persecuted even where they could lead to 'utter penury' for the applicant. "There was material before the Tribunal to indicate that the economic consequences of the applicant being discovered by his family, as he feared, might well extend to utter penury" and "[t]he Tribunal seems to have accepted that the applicant's fears were well-founded. For the applicant's family to deny an adult child their support because they would feel shamed by his conduct and would deeply disapprove of it, notwithstanding that his conduct involves matters that, I assume, go to the essence of his being, is apparently not illegal in Bangladesh; nor is it illegal in Australia or, I should think, anywhere else. Nor is it likely that any State would accept the responsibility of affording any person in the applicant's shoes either civil redress against his family or other amelioration of such a personal rift. Accepting the applicant's fears as well founded, he might at worst starve because his family might sever their relations with him."

"United Nations experts continue to express their alarm at non-lethal violence directed at individuals on the grounds of their sexual orientation or gender identity. Examples include cases of gay men who have been kidnapped, beaten and humiliated, with film clips of their abuse shared on social media, and of lesbians assaulted and raped because of their sexual orientation. In the Syrian Arab Republic, there have been reports of rape and torture of men assumed to be gay perpetrated by security agents and by non State armed groups. Concerns have also been expressed about the risk to human rights defenders working to uphold the rights of LGBT persons, some of whom have been subjected to violence, threats and verbal denigration."[277]

Some of the violent acts mentioned in the above excerpt and in the quote that follows here would entail harm serious enough to be persecutory in nature.

In 2001, the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment noted that:

"members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place."[278]

In addition, as the UNHCR SOGI Guidelines note:

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[277] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 31, footnotes in the original omitted.

[278] Interim report to the UN General Assembly by the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, July 2001, para. 19.

"[m]any societies, for example, continue to view homosexuality, bisexuality and/or transgender behaviour or persons, as variously reflecting a disease, a mental illness or moral failing, and they may thus deploy various measures to try to change or alter someone's sexual orientation and/or gender identity. Efforts to change an individual's sexual orientation or gender identity by force or coercion, may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person."[279]

As the Committee against Torture has authoritatively held,[280] States are obliged to protect from torture or other ill-treatment all persons regardless of sexual orientation or gender identity and to prohibit, prevent and provide redress for torture or other ill-treatment in all contexts of State custody or control.[281]

Rape and other instances of sexual violence of comparable gravity

Rape, including marital and "corrective" rape,[282] sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity committed by State or non-State agents inflict harm that is persecutory in nature,[283] and

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[279] The UNHCR SOGI Guidelines, para. 21.

[280] The Committee against Torture (CAT) is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

[281] UN Committee against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, para. 21.

[282] That is, rape committed by the perpetrator with the intention that those subjected to it would become heterosexual and/or to punish them.

[283] See, *inter alia*, the UNHCR Guidelines on International Protection No. 1.: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol

would ordinarily meet the harm threshold required to establish persecution for the purposes of the Refugee Convention.[284]

In *SW (lesbians - HJ and HT applied) Jamaica CG*, in the context of the successful appeal under the Refugee Convention of a Jamaican lesbian applicant, the Immigration and Asylum Chamber of the UK's Upper Tribunal described the predicament of lesbian women in Jamaica, *inter alia*, as follows: "(1) Jamaica is a deeply homophobic society. There is a high level of violence, and where a real risk of persecution or serious harm is established, the Jamaican state offers lesbians no sufficiency of protection. (2) Lesbianism (actual or perceived) brings a risk of violence, up to and including 'corrective' rape and murder [….] Perceived lesbians also risk social exclusion (loss of employment or being driven from their homes)"[285]

Rape and other sexual violence in detention

The rape of individuals in detention, including immigration detention, related to their real or purported SOGI has long been reported.

The Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment warned that:

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relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, "[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors ", para. 9, footnote in the original omitted.

[284] The UNHCR SOGI Guidelines, para. 20.

[285] *SW (lesbians - HJ and HT applied) Jamaica CG*, para. 107. See also, *Brown, R (on the application of) v Secretary of State for Home Department* [2012] EWHC 1660 (Admin), 28 May 2012, para. 16.

"members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons."[286]

The Special Rapporteur on violence against women, its causes and consequences has highlighted instances of women being placed in cells with men if they refused the sexual advances of prison staff and "forced feminization" of female prisoners whom guards viewed as "masculine" in appearance.[287] Transgender prisoners are particularly at risk. In one case in Guatemala a transgender woman was allegedly raped more than 80 times whilst in detention.[288]

In *SB (Uganda) v. Secretary of State for the Home Department*,[289] the High Court of England and Wales highlighted that "lesbians have been arrested on charges of

[286] The report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, para. 23. See also, the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, paras 34-38.
[287] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 36.
[288] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 36.
[289] *SB (Uganda) v. Secretary of State for the Home Department* [2010] EWHC 338 (Admin), United Kingdom: High Court (England and Wales), 24 February 2010.

homosexuality, and certainly detained by the police as a result of their identity; and there are reports of poor and violent treatment during detention including rape of lesbians", and that "[f]or the vast majority of Ugandan homosexuals, the only strategy to avoid ill-treatment by the public and the authorities (including imprisonment and the risk of corrective rape) is to present as heterosexual, i.e. by getting married".[290]

All instances of rape and other forms of sexual abuse of comparable gravity committed against people in detention (as elsewhere) on the grounds of their SOGI would entail harm serious enough to be persecutory in nature.

Forced marriage

Forced marriage has been found to be capable of amounting to persecution. [291] Incidentally, practitioners should note that forced marriage would likely involve marital rape (see above). The UNHCR SOGI Guidelines clarify that forced marriage of LGBTI persons amounts to persecution. They also note that,

"[i]n the context of sexual orientation and/or gender identity cases, such forms of persecution are often used as a means of denial or "correcting" nonconformity. Lesbians,

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[290] *SB (Uganda) v. Secretary of State for the Home Department*, para. 29 and 40, respectively.

[291] "There is general acceptance by refugee determination bodies that the risk of forced marriage amounts to serious harm and persecution", *AB (Malawi)* [2015] NZIPT 800672, New Zealand: Immigration and Protection Tribunal, 21 April 2015, para. 80, citing, in turn, *MZXFJ v Minister for Immigration* [2006] FMCA 1465 (10 October 2006) at para. 42; and *AM v BM (Trafficked Women) Albania CG* [2010] UKUT 80, 18 March 2010. See also, *NS (Social Group - Women - Forced Marriage) Afghanistan v. Secretary of State for the Home Department, CG* [2004] UKIAT 00328, United Kingdom: Asylum and Immigration Tribunal; 30 December 2004; *Vidhani v Canada (Minister of Citizenship and Immigration)* [1995] 3 FC 60 (Can. FCTD, Jun. 8, 1995); *Gao v Gonzales* (2006) 440 F.3d 62 (USCA, 2nd Cir. Mar. 3, 2006).

bisexual women and transgender persons are at particular risk of such harms owing to pervasive gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life."[292]

Non-consensual medical or scientific experimentation and other abuses by health providers constituting persecution

Non-consensual medical or scientific experimentation is explicitly identified and prohibited as a form of torture or other ill-treatment in the ICCPR. Article 7 of the ICCPR states: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". [293] As such, the harm that non-consensual medical or scientific experimentation would entail is serious enough to satisfy the element of "being persecuted" for the purposes of the definition of who is a refugee under the Refugee Convention.

Principle 18 of the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity states:

"[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves medical

[292] The UNHCR SOGI Guidelines, "[o]ther forms of persecution include forced or underage marriage, forced pregnancy and/or marital rape", para. 23, footnotes in the original omitted.
[293] See also, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 8.

conditions and are not to be treated, cured or suppressed."[294]

Documenting the harm inflicted on lesbian, gay, bisexual, transgender and intersex persons, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted: "[t]he Pan American Health Organization (PAHO) has concluded that homophobic ill-treatment on the part of health professionals is unacceptable and should be proscribed and denounced. There is an abundance of accounts and testimonies of persons being denied medical treatment, subjected to verbal abuse and public humiliation, psychiatric evaluation, a variety of forced procedures such as sterilization, State-sponsored forcible anal examinations for the prosecution of suspected homosexual activities, and invasive virginity examinations conducted by health-care providers, hormone therapy and genital-normalizing surgeries under the guise of so called 'reparative therapies'. These procedures are rarely medically necessary, can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticized as being unscientific, potentially harmful and contributing to stigma".[295]

Anal examinations conducted to "prove" homosexuality have been described as "medically worthless" and condemned by the UN Committee against Torture, the UN Special Rapporteur on torture and the UN Working Group on Arbitrary Detention who all have held that the practice

[294] The Yogyakarta Principles, Principle 18: Protection from Medical Abuse.

[295] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/HRC/22/53, 11 February 2013, para. 76. In light of the above the Special Rapporteur has called on states to "repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned", para. 88.

contravenes the prohibition on torture and ill-treatment.[296]

With respect to the harm that transgender people may face in accessing health care, the 2015 report of the Office of the UN High Commissioner for Human Rights records:

"[t]ransgender persons often face particular difficulties in their access to appropriate health care. Health-care professionals may be insensitive to their needs, lack relevant knowledge and treat transgender persons in a discriminatory manner. Gender reassignment therapy, where available, is often prohibitively expensive. In certain situations, it is coerced."[297]

In this context, in 2013 the Special Rapporteur on torture in turn noted that: "[t]he Committee on the Elimination of Discrimination against Women expressed concern about lesbian, bisexual, transgender and intersex women as 'victims of abuses and mistreatment by health service providers' (A/HRC/19/41, para. 56) [….] In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. In Europe, States require sterilization procedures to recognize the legal gender of transgender persons. In 11 States where there is no legislation regulating legal recognition of gender, enforced sterilization is still practised. As at 2008, in the United States of America, 20 states required a transgender person to undergo 'gender-confirming surgery' or 'gender reassignment surgery' before being able to change their legal sex. In Canada, only the province of Ontario does not enforce 'transsexual surgery' in order to rectify the recorded sex on birth certificates. Some domestic courts have found that not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and

[296] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 37.
[297] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 54; see also A/HRC/25/61 Annex II.

reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity. In 2012, the Swedish Administrative Court of Appeals ruled that a forced sterilization requirement to intrude into someone's physical integrity could not be seen as voluntary. In 2011, the Constitutional Court in Germany ruled that the requirement of gender reassignment surgery violated the right to physical integrity and self-determination. In 2009, the Austrian Administrative High Court also held that mandatory gender reassignment, as a condition for legal recognition of gender identity, was unlawful. In 2009, the former Commissioner for Human Rights of the Council of Europe observed that, '[the involuntary sterilization] requirements clearly run counter to the respect for the physical integrity of the person'."[298]

In addition, so-called "conversion therapies" intended to "cure" homosexual attraction have been found to be unethical, unscientific and ineffective [299] – leading to successful legal challenges and bans in several countries.[300] In Ecuador, concerns have been raised about "rehabilitation clinics" where lesbians and transgender youths have been forcibly detained with the collusion of

[298] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/HRC/22/53, 11 February 2013, paras 76 and 78. With respect to this, "United Nations mechanisms have called upon States to legally recognize transgender persons' preferred gender, without abusive requirements, including sterilization, forced medical treatment or divorce." See, the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 17.

[299] The American Psychiatric Association has stated that efforts to "convert" gay people are unethical and ineffective. See, Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement, American Psychiatric Association, March 2000.

[300] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 52. See also, *"Curing homosexuality" found to be a fraudulent business practice* 25 June 2015, which summarizes and provides a commentary about the recent US decision in *Ferguson v. Jonah* (Sup Ct of NJ, Docket No. HUD-L-5473-12, 25 June 2015).

family members and subjected to torture, including sexual abuse.[301]

The 2015 Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity notes: "[t]he medical practices condemned by United Nations mechanisms include so-called 'conversion' therapy, forced genital and anal examinations, forced and otherwise involuntary sterilization".[302]

Such practices when forced or otherwise involuntary breach the prohibition on torture and other ill-treatment.[303] As such, they would also constitute persecution for the purposes of the Refugee Convention.

Other forms of "treatment" that have been found capable of amounting to persecution include: forced sterilization,[304]

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[301] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 57, and therein, CCPR/C/ECU/CO/5 [12], and also "IACHR expresses concern about violence and discrimination against LGBTI persons, particularly youth, in the Americas", press release, 15 August 2013.

[302] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 14.

[303] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 38.

[304] *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593, para. 72; *Jie Hin Shu v Mukasey* (2008) 282 Fed. Appx. 879 (USCA, 2nd Cir., Jun. 27, 2008), see also *VC v. Slovakia* (18968/07)(2014) 59 E. H. R. R. 29, where the European Court of Human Rights found that the sterilization procedure, including the way in which the applicant in the case had been required to agree to it, had aroused in her feelings of fear, anguish and inferiority. The procedure had resulted in lasting suffering and while there had been no intention on the part of the health practitioners to ill-treat her, their gross disregard for her right to autonomy and choice as a patient had subjected her to treatment contrary to Article 3 of the Convention.

forced institutionalization, [305] forced electro-shock therapy,[306] forced sex-reassignment surgery, forced drug injection or hormonal therapy.[307]

Intersex people and medical treatment[308]

The UNHCR SOGI Guidelines record:

"[i]ntersex persons may be subjected to persecution in ways that relate to their atypical anatomy. They may face discrimination and abuse for having a physical disability or medical condition, or for non-conformity with expected bodily appearances of females and males. Some intersex children are not registered at birth by the authorities, which can result in a range of associated risks and denial of their human rights. In some countries, being intersex can be seen as something evil or part of witchcraft and can result in a whole family being targeted for abuse. Similar to transgender individuals, they may risk being harmed during the transition to their chosen gender because, for example, their identification papers do not indicate their chosen gender. People who self-identify as intersex may be viewed by others as transgender, as there may simply be

[305] *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, 95-70887, United States Court of Appeals for the Ninth Circuit, 24 June 1997, a case concerning a lesbian woman where – relying on *Sagermark v. INS*, 767 F.2d 645, 650 (9th Cir. 1985), in turn, suggesting that involuntary and unjust confinement to a mental institution may constitute persecution – forced institutionalization, electroshock treatments, and drug injections were acknowledged as capable of constituting persecution.

[306] *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*.

[307] The UNHCR SOGI Guidelines, para. 21.

[308] Generally, about the human rights situation of intersex people, see *The fundamental rights situation of intersex people*, European Union Agency for Fundamental Rights, April 2015. See also: *An insight into respect for the rights of trans and intersex children in Europe*, Erik Schneider Psychiatrist, psychotherapist Intersex & Transgender Luxembourg a.s.b.l., November 2013.

no understanding of the intersex condition in a given culture."[309]

Medical intervention on intersex children is often undertaken at an early stage and can lead to lifelong problems. The UN Special Rapporteur on Torture has stated: "[c]hildren who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery performed without their informed consent, or that of their parents 'in an attempt to fix their sex' leaving them with permanent, irreversible infertility and causing severe mental suffering."[310]

The 2015 Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity records: "[m]any intersex children, born with atypical sex characteristics, are subjected to medically unnecessary surgery and treatment in an attempt to force their physical appearance to align with binary sex stereotypes. Such procedures are typically irreversible and can cause severe, long-term physical and psychological suffering. Those to have called for an end to the practice include the Committee on the Rights of the Child, the Committee against Torture, the special procedures mandate holders on the right to health and on torture."[311]

Recently, the UN Committee on the Rights of the Child expressed concern about:

"[c]ases of medically unnecessary surgical and other procedures on intersex children, without their informed consent, which often entail irreversible consequences and

[309] The UNHCR SOGI Guidelines, para. 10 under heading Intersex.
[310] UN Special Rapporteur on torture, report, UN Doc. A/HRC/22/53, 11 February 2013, para. 77.
[311] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 53.

can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases."[312] Regard should be had to parental consent, as well as the fact that a growing movement suggests that postponement of any surgery may be in the best interests of the child.[313]

Recommended approach to ascertaining consent to medical treatment

Practitioners dealing with cases involving past or prospective medical intervention on individuals should focus, in particular, on the issues of full, free and informed consent and to medical necessity. Broadly speaking when considering consent, practitioners are advised to address the following:

i) Is the consent valid (consider fear, social pressure, psychological difficulties)?
ii) Does the person have sufficient information?
iii) Does the person have capacity to consent?
iv) Is the consent given truly voluntarily?

With respect to medical intervention in child intersex cases, practitioners are advised to consider the following issues:

i) Is/was it in the child's best interests?
ii) Is/was there a pressing medical requirement/need necessity?

If not, should the procedure be postponed until the child is able to make an informed decision, particularly if the intervention includes irreversible procedures, such as those that may lead to sterility?

[312] The UN Committee on the Rights of the Child, Concluding Observations on the combined second to fourth periodic reports of Switzerland, UN Doc.: CRC/C/CHE/CO/2-4, 26 February 2015, paras 42-43. To similar effect, see the Concluding Observations of the Committee against Torture on the fifth periodic report of Germany, UN Doc.: CAT/C/DEU/CO/5, 12 December 2011, para. 20; as well as the Concluding Observations of the UN Committee against Torture on the seventh periodic report of Switzerland, UN Doc. CAT/C/CHE/CO/7, 7 September 2015, para. 20.

[313] See *MC v Medical University of South Carolina* (case lodged but not determined).

Denial of access to health care as persecution

Where there is sustained or systemic deprivation, withdrawal or denial of critical or essential health care or medical treatment because of a person's SOGI, then persecutory harm may be established.[314]

However, the mere unavailability of medical treatment in and of itself is unlikely to be persecutory. Having said that, the Canadian Federal Court of Appeal has accepted that, "where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify […] for this would be refusal to provide the care and not inability to do so."[315]

[314] See, e.g. "a denial of medical treatment, particularly where the child concerned suffers from a life-threatening illness, may amount to persecution", the UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08,para. 35; Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 3, 3.3.6 Health, p. 236; *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia: High Court, 13 April 2000, where the High Court agreed that: "[o]rdinarily, denial of access to food, shelter, medical treatment…. involve such a significant departure from the standards of the civilized world as to constitute persecution", para. 29; see, also, *A v Staatssecretaris van Justitie*, 200805681/1, May 19, 2009, where the Dutch Council of State held that discriminatory exclusion of necessary medical care leading to serious medical consequences can constitute persecution if it happens for a Convention reason, para. 2.1.2.

[315] *Covarrubias v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2006 FCA 365, [2007] 3 F.C.R. 169, 10 November 2006, para. 39; *E M S -v- Minister for Justice Equality & Law Reform* [2004] IEHC 398 (21 December 2004), where Clarke J. held that, "[w]here there is, therefore, an inappropriately low level of health care given within that country

Furthermore, the European Court of Human Rights has held in the landmark case *D v. The United Kingdom* that the expulsion of a non-national diagnosed in the terminal phase of AIDS would have amounted to inhuman treatment, as he would not have had access to the medical and palliative treatment available in the UK in the receiving country.[316] Nevertheless, the same Court has cautioned that such cases should be viewed as exceptional. The principle "must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."[317]

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to a group who form a social group for the purposes of refugee law and where, having regard to the level of health care provided within that country, the treatment of that group from a health perspective may be regarded as discriminatory to a significant degree, it seems to me to be arguable that same amounts to a sufficient level of discrimination to give rise to a claim for persecution"; see also Kristen L Walker "*Sexuality and Refugee Status in Australia*" (2000) 12(2) International Journal of Refugee Law Volume 12, Issue 2, pp. 175-211, where the author argues that where the failure to adequately resource HIV/AIDS treatment was based on discrimination then inadequacy of treatment ought to amount to persecution.

[316] *D. v. The United Kingdom*, European Court of Human Rights, Application No. 30240/96, Judgment of 2 May 1997, paras 49–54.

[317] *N. v. The United Kingdom*, European Court of Human Rights, GC, Application No. 26565/05, Judgment of 27 May 2008, para. 45; *Ahorugeze v. Sweden*, European Court of Human Rights, paras 88–95; *Nacic and Others v. Sweden*, European Court of Human Rights, Application No. 16567/10, Judgment of 15 May 2012, paras 49–56; *S.H.H. v. The United Kingdom*, European Court of Human Rights, Application No. 60367/10, Judgment of 29 January 2013 (where a case of disability of a returnee to Afghanistan did not meet the threshold of Article 3 ECHR). In *Yoh-Ekale Mwanje v. Belgium*, European Court of Human Rights, Application No. 10486/10, 20 December 2011, paras 82–86, a majority of the judges appended a partially concurring opinion stating that, "*un seuil de gravité aussi extrême—être quasi-mourant—est difficilement compatible avec la lettre et l'esprit de*

Denial of access to hormone treatment to "transsexuals" in prison has been found to cause physical and psychological harm amounting to torture. In *Andrea Fields v. Judy Smith*, U.S. Court of Appeals for the Seventh Circuit upheld the district court's invalidation of a Wisconsin state statute prohibiting the Wisconsin Department of Corrections from providing transgender inmates with certain medical treatments, including hormonal therapy and sexual reassignment surgery. The district court had concluded that this ban violated the Federal Constitution's prohibition on cruel and unusual punishment and guarantee of equal protection. The Court ultimately held that, "[r]efusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."[318]

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l'article 3, un droit absolu qui fait partie des droits les plus fondamentaux de la Convention et qui concerne l'intégrité et la dignité de la personne. A cet égard, la difference entre une personne qui est sur son lit de mort ou dont on sait qu'elle est condamnée à bref délai nous paraît infime en termes d'humanité. Nous espérons que la Cour puisse un jour revoir sa jurisprudence sur ce point", partially concurring opinion, para. 6. See also the recent dissenting opinion of Judge Pinto de Albuquerque appended to the Grand Chamber striking out judgment in *S.J. v. Belgium*, Application no. 70055/10, 19 March 2015. Finally, see also, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2, UN Doc.: CMW/C/GC/2, 28 August 2013, para. 50: "[i]n the view of the Committee, this principle [i.e., the *non-refoulement* principle] covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life."

[318] *Andrea Fields v. Judy Smith*, U.S. Court of Appeals for the Seventh Circuit (5 August 2011), p. 11. The lawsuit was brought as a class action by a number of inmates. The district court had denied class certification but permitted the case to proceed to trial on the individual claims of three plaintiffs. Andrea Fields, Matthew Davison and Vanemah Moatan were all male-to-female "transsexuals" and had each been diagnosed with Gender Identity Disorder, which was classified as a psychiatric disorder in the

In light of the above, the International Commission of Jurists considers that a deliberate failure, on discriminatory grounds, to allocate sufficient resources to medically necessary health care for transgender people may amount to persecution.

Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The issue for the Court's determination was whether to uphold the district court's grant of injunctive relief. In its ruling the Court held that prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display deliberate indifference to serious medical needs of prisoners. The district court had found that the plaintiffs suffered from a serious medical need, namely GID, and that they knew of the serious medical need but refused to provide hormone therapy. The defendants argued that the state legislature had the power to prohibit certain medical treatments when other treatment options were available and that the Act was justified by a legitimate need to ensure security in state prisons. Witnesses for the plaintiffs repeatedly made the point that hormone therapy "is the only treatment that reduces dysphoria and can prevent the severe emotional and physical harms associated with it." The Court observed that it was well established that the Constitution's ban on cruel and unusual punishment did not permit a state to deny effective treatment for the serious medical needs of prisoners. The Court stated: "[s]urely, had the Wisconsin legislature passed a law that DOC [i.e., department of correction] inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture." In this case, the Act provided plaintiffs with some treatment but not with hormone therapy. Yet evidence at trial had indicated that the plaintiffs could not be effectively treated without hormones. Because the Court of Appeals found that the district court properly held that the Act violated the Eighth Amendment, it did not address the alternate holding that the law violated the Equal Protection Clause.

Detention and detention conditions

Arbitrary detention is prohibited under international law.[319] The UN Working Group on Arbitrary Detention has concluded that the detention of individuals under laws criminalizing consensual same-sex sexual activity in private constitutes arbitrary detention (see also below under section entitled: "Criminalization of same-sex relations").[320]

The UNHCR SOGI Guidelines affirm that, "[d]etention, including in psychological or medical institutions, on the sole basis of sexual orientation and/or gender identity is considered in breach of the international prohibition against the arbitrary deprivation of liberty and would normally constitute persecution."[321]

Moreover, detention conditions that, in and of themselves, amount to cruel, inhuman or degrading treatment and that

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[319] See, *inter alia*, Article 9(1) of the ICCPR; the prohibition of arbitrary detention is a norm of customary international law. It cannot be the subject of treaty reservations and must be respected at all times, including in time of war or other public emergency (see also Human Rights Committee, General Comment 24, para. 8 and General Comment 29, para. 11). The UN Working Group on Arbitrary Detention has affirmed that the prohibition constitutes a peremptory norm of international law (see WGAD Deliberation No.9, UN Doc. A/HRC/22/44 (2012) paras 37-75). Furthermore, under customary international humanitarian law, arbitrary detention is prohibited in both international and non-international armed conflict, see, International Committee of the Red Cross, *Customary International Humanitarian Law Volume I: Rules*, Cambridge University Press, 2009, Rule 99 (Deprivation of Liberty).

[320] WGAD Opinion 7/2002 (Egypt) UN Doc. E/CN.4/2003/8/Add.1 (2002) pp. 68-73, Opinion 22/2006 (Cameroon), UN Doc. A/HRC/4/40/Add.1 (2007) pp. 91-94.

[321] The UNHCR SOGI Guidelines, para. 23, footnotes in the original omitted. See also *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, cited above in the section entitled "Non-consensual medical or scientific experimentation and other abuses by health providers constituting persecution".

are imposed on the basis of SOGI would constitute persecution.

The administrative segregation or solitary confinement solely on SOGI grounds can result in severe psychological harm, including harm serious enough to constitute prohibited ill-treatment. In the case of *X. v. Turkey*, for example, which concerned a homosexual prisoner who, after complaining about acts of intimidation and bullying by his fellow inmates, was placed in solitary confinement for over 8 months in total, the European Court of Human Rights took the view that these detention conditions had caused the applicant mental and physical suffering, together with a feeling that he had been stripped of his dignity, thus they constituted "inhuman or degrading treatment" in breach of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights. [322] In light of this, the International Commission of Jurists considers that detention in those circumstances would amount to persecution.

When assessing detention conditions, account must be taken of their cumulative effect on the detainee.[323] The UN Special Rapporteur on torture has noted that there is usually a strict hierarchy in detention facilities and those at

[322] *X. v. Turkey*, European Court of Human Rights, Application no. 24626/09, judgment, 9 October 2012. The Court further found that the main reason for the applicant's solitary confinement had not been his protection but rather his sexual orientation. It thus concluded that there had been discriminatory treatment in breach of Article 14 (prohibition of discrimination) of the Convention.

[323] See, *inter alia*, *Dougoz v Greece,* European Court of Human Rights, Application no. 40907/98, judgment, 6 March 2001, "[w]hen assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant" (para. 46) and "the Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3", para. 48.

the bottom, such as LGBTI detainees, often suffer multiple discrimination. [324] Transgender persons, in particular, especially male-to-female "inmates are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons."[325]

In light of the above, aside from detention solely on SOGI grounds, practitioners should consider whether an LGBTI person detained for other reasons, including non-political offences, may experience discrimination or other treatment of sufficient severity to reach the threshold of inhuman and degrading treatment, thus amounting to persecution for the purposes of the Refugee Convention.

Criminalization of same-sex relations

The 2015 Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity notes:

"[a]t least 76 States retain laws that are used to criminalize and harass people on the basis of sexual orientation and gender identity or expression, including laws criminalizing consensual, adult same-sex relationships. Sometimes inherited as colonial-era legislation, these laws typically prohibit certain types of sexual activity or any intimacy between persons of the same sex. Cross-dressing or 'imitating the opposite sex' is also sometimes penalized. Wording often refers to vague and undefined concepts, such as 'crimes against the order of nature' or 'morality', 'debauchery', 'indecent acts' or

[324] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/HRC/13/39/Add.5, 5 February 2010, paras 231 and 257; see also, the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 35.

[325] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, para. 23.

'grave scandal'. Penalties include lashings, life imprisonment and the death penalty".[326]

Often such laws criminalize all sex outside of marriage, certain types of sexual activity or any intimacy or sexual activity between persons of the same sex, which may include mixed-sex partnerships in which one partner is transgender where their status is not recognized. Other offences may be vague and less well defined such as "public scandal" or laws pertaining to physical appearance. For example, in Malaysia transgender women have been sentenced to fines and jail terms under a law prohibiting a "male person posing as a woman."[327] In Sudan, laws prohibiting indecent or immoral dress have been used to punish men who wear women's clothes as well as women who wear trousers and male models who wear make-up.[328] In Nigeria, laws on "indecent dress" have been used to fine and imprison cross-dressing men.[329]

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[326] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 44, footnotes omitted. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reported in 2015 that 75 countries worldwide retain laws that are used to criminalize people on the basis of sexual orientation or gender identity. ILGA publishes an annual world report and a map on legislation criminalizing or protecting people on the basis of their sexual orientation or recognizing their relationships. See, "*State Sponsored homophobia 2015*" ILGA, 13 May 2015, p. 28 and following.

[327] "*Malaysia: Court convicts 9 transgender women*", Human Rights Watch, 22 June 2015. Contemporary sumptuary laws, known as cross-dressing laws, have been used to target individuals who transgress gender roles, whether they are gay, lesbian, bisexual, transgender or heterosexual.

[328] See, "*Cross-dressing men flogged in Sudan for being 'womanly'*", BBC News, 4 August 2010); "*Sudan male models fined for make-up 'indecency'*", BBC News, 8 December 2010; "*Sudan: Abolish the Flogging of Women*", Amnesty International, February 2010.

[329] "*Nigeria transvestite handed fine*", BBC News, 15 February 2005; "*Cross-dresser jailed in Nigeria*", BBC News, 4 March 2008; "'Cross-dressers' in Nigeria court", BBC News, 15 February 2008.

The UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law.[330] The same conclusion would apply to vague and less well defined offences such as "crimes against the order of nature", "immorality", "debauchery", "public scandal" or laws pertaining to physical appearance when they are used to target people solely because of their real or purported SOGI, expression or intersex status.

However, practitioners should note that criminalization of some forms of sexual conduct is not inconsistent with human rights law, e.g. non-consensual sexual activity, criminalization of sexual acts in public. Having said that, it is critical that the relevant criminal provisions be non-discriminatory and be applied in a non-discriminatory fashion, i.e. they would apply irrespective of SOGI. While differences in the age of consent have previously been accepted as justified, the common position now is that such differences are discriminatory.[331]

Additionally, prosecution may amount to persecution if the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner.[332] Therefore, if an LGBTI person is more likely to be prosecuted for offences connected with 'morality', for example, this may be sufficient to amount to persecution.

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[330] WGAD Opinion 7/2002 (Egypt) UN Doc. E/CN.4/2003/8/Add.1 (2002) pp. 68-73, Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94, Opinion 42/2008 (Egypt), UN Doc. A/HRC/13/30/Add.1, adopted (2008) pp. 195-201.

[331] *Sutherland v. the United Kingdom* [GC], European Court of Human Rights, 27 March 2001, Application No. 25186/94; *L. and V. v. Austria*, European Court of Human Rights, 9 January 2003, Application nos. 39392/98 and 39829/98; and *S.L. v. Austria*, European Court of Human Rights, 9 January 2003, Application No. 45330/99.

[332] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 3, 3.4.2 Prosecution, pp. 245-246.

Similarly, if prosecutions are undertaken without adhering to basic standards of procedural fairness or due process in order to achieve a prohibited aim (discrimination against or suppression of homosexuality, for example) the risk of conviction and any subsequent penalty may constitute serious harm.[333]

It is well established that if the enforcement of laws criminalizing consensual same-sex sexual activity in private can result in the imposition of the death penalty or lead to torture or inhuman/degrading treatment, they will, in turn, entail a real risk of persecution.[334] More recently, the Court of Justice of the European Union has accepted that the application of a term of imprisonment upon conviction for offences criminalizing consensual homosexual acts would also amount to persecution.[335]

However, many Courts and other refugee-status decision-makers have concluded that the mere existence of laws criminalizing people on grounds of their SOGI, without more (i.e. without proof of the laws' "enforcement") does not constitute persecution.

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[333] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 3 3.4.2, p. 246; *Khan v Secretary of State for the Home Department* [2003] EWCA Civ 530.

[334] See, e.g., *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*; and *X, Y and Z v. Minister voor Immigratie en Asiel*.

[335] See, *X, Y and Z v. Minister voor Immigratie en Asiel*, where the Court of Justice of the European Union held that: "the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution", para. 61.

For example, in *Tchernilevski v Canada*,[336] the claimant was active politically in his native Moldova and a recognized figure in the media. He kept his sexuality a secret, as he was married. After entering politics, the claimant received threats to expose his sexuality. He feared persecution under the Moldovan penal code, which made homosexuality an illegal act. The Federal Court concluded that the evidence showed that the penal code, which criminalized homosexuality, was no longer being enforced and was actually slated for repeal. It held that the sole existence of a law criminalizing homosexuality does not rise to the level of persecution.

In *Birsan v Canada*,[337] the claimant was a homosexual man from Romania who claimed to have a well-founded fear of persecution. The adjudicator relied on documentary evidence stating that no Romanian prisons were holding anyone who was charged under the then relatively new Romanian law criminalizing only homosexual acts that took place in public. The Federal Court stated that, "[i]t is certainly not unreasonable to conclude that the mere existence of a law prohibiting homosexuality in public cannot prove, if it is not enforced, that homosexuals are persecuted."

In *Zakka v Canada*,[338] the claimant arrived in Canada from Nigeria and claimed protection based on a fear of persecution by reason of his sexual orientation. The Federal Court stated that a claimant could not simply rely on the existence of a law proscribing homosexual acts to demonstrate risk. The claimant must produce evidence that similarly situated persons were subjected to arbitrary harassment and detention under the law.

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[336] *Tchernilevski v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm LR (2d) 67, 56 ACWS (3d) 377.
[337] *Birsan v. Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1861, 23 December 1998, 86 ACWS (3d) 400.
[338] *Zakka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1434, 24 October 2005; 143 ACWS (3d) 336.

In *Oviawe v Canada*,[339] the Federal Court held that the absence of persuasive evidence regarding the manner and frequency with which section 214 of the Nigerian Criminal Code, which rendered sodomy punishable by up to 14 years' imprisonment, supported the conclusion that the claimant did not face persecution.

Opinion among academics is divided on whether the mere existence of laws criminalizing consensual same-sex acts, without evidence of their "enforcement", could *per se* satisfy the objective limb of the "well-founded fear" test in Article 1A(2) of the Refugee Convention. In addition, Courts have not definitively considered whether the mere existence of these laws (i.e. without proof of the laws' "enforcement") may constitute persecution where the punishment provided is death or inhuman treatment.

In fact, save for the above-mentioned decision of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, neither has there been much analysis of the impact on the dignity and integrity of the individuals affected resulting from the criminalization of one's SOGI or aspects thereof, i.e., deeming of essential aspect/s of one's identity "criminal".[340]

Historically, issues arising as a result of the criminalization of SOGI have been considered under the ambit of "private life", rather than under the rubric of non-discrimination, integrity and/or dignity. The European Court of Human Rights, for example, has consistently found that laws criminalizing consensual same-sex activity amount to an

[339] *Oviawe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1114, 25 September 2006; 152 ACWS (3d) 128.

[340] Note that in the context of determining whether the US Constitution permitted discriminatory marriage laws, US Supreme Court in *Obergefell v Hodges* (26 June 2015) also chose to base its analysis on the concept of dignity and autonomy, see in particular p. 10 and p. 28.

unjustifiable interference with an individual's right to private life, including in circumstances where in practice the law was not applied.[341]

The UNHCR's view is that laws that criminalize SOGI violate international human rights norms and are discriminatory.

"Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection."[342]

Recent Belgian and Italian superior courts' reported decisions have found in favour of Senegalese homosexual applicants based on, *inter alia*, the risk to the individuals concerned arising from Senegal's criminalization of consensual same-sex relations and of becoming victims of homophobic crimes, including at the hands of family

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[341] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

[342] The UNHCR SOGI Guidelines, para. 27; "Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution", the UNHCR SOGI Guidelines, para. 29 (footnotes omitted); see *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, paras 89, 96; and *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

members, from which there is no effective state protection.[343]

In Italy, for instance, the Supreme Court of Cassation considered whether the existence of laws criminalizing homosexuality in Senegal was a valid reason for granting international protection. In its judgment, the Court reasoned that the fact that the Senegalese Penal Code criminalizes homosexual acts with penalties of up to five years' imprisonment constituted *per se* a deprivation of the fundamental right to live freely one's sexual and emotional life. Consequently, homosexuals were forced to violate the Senegalese criminal law, exposing themselves to severe penalties if they wanted to live their emotional and sexual life freely. The Court held that this was a violation of the right to private life, embedded in the Italian Constitution, the European Convention on Human Rights and the EU Charter on Fundamental Rights. The criminal law placed homosexuals in a situation of objective persecution, and this justified the granting of protection. The criminalization of consensual same-sex sexual conduct in Senegal was *per se* considered to be a serious and unlawful interference with private life and deemed to severely compromise individual freedom. It placed the homosexual asylum-seeker in an objective situation of persecution, which justified granting protection.[344]

In the wake of the European Court of Human Rights' ruling in *Dudgeon v the United Kingdom*, recognizing the harm

[343] Belgium: Judgment *No. 36 527* of 22 December 2009, concerning case X / V, rendered by the *Conseil du Contentieux des Etrangers*; Judgment *No. 50 967* of 9 November 2010, concerning case X / I rendered by the *Conseil du Contentieux des Etrangers*; Judgment *No. 50 966* of 9 November 2010, concerning X / I rendered by the *Conseil du Contentieux des Etrangers*; and Judgment No. 134 833 of 9 December 2014, concerning case X / I, rendered by the *Conseil du Contentieux des Etrangers*; Italy: Court of Cassation, *prima sezione civile*, *Sentenza n.16417/2007*, 25 July 2007; and Court of Cassation, *sesta sezione civile, Sentenza n. 15981/12*, 20 September 2012.

[344] Order *n. 15981/12*, Supreme Court of Cassation.

caused by the mere existence of the criminalization of consensual same-sex sexual conduct, UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.[345] Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.[346]

Laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights

[345] E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992). The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, notes: "States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called upon States to fulfil these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity, including laws criminalizing homosexuality and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals. States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity" and that "States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called 'public scandal' – are discriminatory and arbitrary", para. 15 and para. 43, respectively (footnotes in the original omitted).

[346] E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, para. 20 and, generally, paras 18-25.

violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation and/or gender identity with impunity.[347] As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to "prove" their same-sex sexual orientation. As mentioned above, the use of non-consensual anal examinations, often used to determine criminal liability against men suspected of homosexuality, contravenes the prohibition of torture and other ill-treatment.[348]

The European Court of Human Rights, for example, has found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not enforced at the time – or that were implemented in a discriminatory manner, violated the European Convention and caused their victims to experience fear and distress.[349]

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[347] As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: "sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals," A/HRC/14/20, para. 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity", A/57/138, para. 37.

[348] UN human rights bodies have long held that such acts are in violation of the prohibition of torture and other ill-treatment. See A/HRC/16/47/Add.1, opinion No. 25/2009 (Egypt), paras 24, 28-29; Concluding Observations of the Committee against Torture on Egypt (CAT/C/CR/29/4), paras 5(e) and 6(k). See also A/56/156, para. 24; A/HRC/4/33/Add.1, p. 316, para. 317; A/HRC/10/44/Add.4, pp. 86-87, para. 61; and A/HRC/16/52/Add.1, p. 276, para. 131.

[349] See, *Dudgeon v. the United Kingdom*, no. 7525/76, judgment, 22 October 1981, paras 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, paras 38 and 46 to 47;

This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors' abuses, against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,[350] instead of, or at times in addition to, prosecution.

Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions.

Modinos v. Cyprus, no. 15070/89, judgment, 22 April 1993, paras 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, paras 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission's report of 3 December 1997, unpublished.

[350] See the European Commission's report in *Dudgeon*, cited in the Court's judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant's allegations, the Commission had noted that, "**the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals** […] **the existence of the law prohibiting consensual and private homosexual acts** […] **provides opportunities for blackmail** […] and may put a strain upon young men […] who fear prosecution for their homosexual activities". **They reached this conclusion despite their finding that the number of prosecutions in such cases** […] **was so small "that the law has in effect ceased to operate**". **It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him**", Commission's report, para. 94, (**emphasis added**).

Indeed, in light of the jurisprudence mentioned above,[351] the mere existence of laws criminalizing consensual same-sex sexual orientation or conduct, including in countries where they have not been recently enforced, may give rise to a real risk that they may be enforced in the future.[352]

Recent country examples demonstrate that a lack of implementation of domestic criminal law does not guarantee that enforcement of the relevant criminal provisions will not resume in future. For example, according to sections 155 and 157 of the Zambian Penal Code Act of 1995, Chapter 87, same-sex sexual activity is illegal in Zambia. Until 2013 the law had however been largely unenforced. In May 2013 police in Kapiri Mposhi arrested Phil Mubiana and James Mwansa, both aged 21,

[351] It is the European Court of Human Rights' settled case-law that the criminalization of consensual same-sex conduct *per se* — even in the absence of an actual record of enforcement through an active prosecution policy — violates the Convention. See, in particular, *Modinos v. Cyprus* and *Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity. See, also, the UNHCR SOGI Guidelines, paras 27, 29.

[352] In *Dudgeon v. the United Kingdom*, the European Court of Human Rights observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (para. 41 of the Court's judgment). In *Modinos v. Cyprus*, the European Court of Human Rights reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, **the said policy provided "no guarantee that action will not be taken by a future Attorney-General to enforce the law**, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force", *Modinos*, judgment of the Court, para. 23 (**emphasis added**).

on charges of having sex "against the order of nature". The arrest of the two men took place just weeks after a human rights activist was arrested in the capital, Lusaka, after he appeared on television supporting LGBTI rights. The arrests appeared to be a direct response to increasingly homophobic statements made by political and religious leaders since the election of President Michael Sata in September 2011.

Malawi is another example where an apparent practice of non-enforcement of criminal provisions was abruptly reversed. In January 2010, Steven Monjeza and Tiwonge Chimbalanga were prosecuted for holding a wedding ceremony in December 2009. The two individuals were reportedly subjected to torture and other ill-treatment while in custody. They were later sentenced to 14 years' hard labour for "gross indecency", though subsequently pardoned following engagement of officials of the United Nations with the then Malawian president. Prior to this case, there had been no recent reports of prosecutions using the colonial era law banning same-sex sexual activity.[353]

Furthermore, the 2015 Report of the Office of the UN High Commissioner for Human Rights has noted that, "[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders. The Special Rapporteur on freedom of religion or belief has noted that these laws may give a pretext to

[353] For more information, see *Observations by Amnesty International and the International Commission of Jurists on the case X, Y and Z v Minister voor Immigratie, Integratie en Asiel (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013*, 2 October 2013.

vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence".[354]

In *Peiris v Canada*,[355] the claimant, a homosexual man from Sri Lanka was forced out of his home after coming out to his family. He founded an association that aimed to educate others about homosexuality. The group was the target of an attack where members were beaten and threatened. After reporting the incident, the police threatened to imprison the claimant and the other members of the association under Sri Lankan anti-sodomy laws. The adjudicator found that the claimant's family rejection and police harassment due to his "lifestyle choice" did not amount to persecution. However, the Federal Court found that there was a direct link between the police persecution and the claimant's sexual orientation. Even though the State law banning sodomy was rarely enforced, evidence showed that authorities often used it to blackmail homosexuals.

As mentioned above, in its judgment in the case of *X, Y and Z v. Minister voor Immigratie en Asiel*, the Court of Justice of the European Union held that:

"the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution".[356]

Disappointingly, in the same case, the Court of Justice of the European Union went on to hold that the 'mere existence' of a law criminalizing consensual same-sex

[354] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 45.
[355] *Peiris v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1251, 134 ACWS (3d) 137, Federal Court, 15 September 2004.
[356] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 61.

sexual conduct would not necessarily reach the level of seriousness required to constitute persecution and relied in particular on the fact that derogation from the right to respect for private life is permissible under international law.[357] While the Court referred to "fundamental rights specifically linked to sexual orientation", it did not go on to identify what those rights were or how they could be impacted by the existence of a criminal law. By way of example, the Court identified only the right to respect for private and family life, as one of the rights "specifically linked to sexual orientation".[358]

However, as a facet of anyone's identity, sexual orientation (like gender identity) is linked with many other human rights, including the right to non-discrimination;[359] the right to human dignity;[360] the right to equality before the law;[361] the right to life;[362] the right to liberty and security of person;[363] the right to be free from torture or other ill-treatment;[364] the rights to freedom of opinion, expression and association;[365] and the rights to work and to education,[366] among others.[367]

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[357] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 54.
[358] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 54.
[359] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 21.
[360] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 1.
[361] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 20.
[362] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 2.
[363] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 6.
[364] See, *inter alia*, Charter of Fundamental Rights of the European Union, Article 4.
[365] See, *inter alia*, Charter of Fundamental Rights of the European Union, Articles 11 and 12.
[366] See, *inter alia*, Charter of Fundamental Rights of the European Union, Articles 15 and 14.
[367] Also see: The Yogyakarta Principles; International Commission of Jurists: *Practitioners Guide No. 4: Sexual Orientation, Gender Identity and International Human Rights Law* (2009);

Without referring to any of these other "fundamental rights specifically linked to sexual orientation", the Court of Justice of the European Union proceeded on the basis of a narrow compartmentalization of human rights and was quick to conclude that these elusive "fundamental rights specifically linked to sexual orientation" are not among those from which no derogation is possible. The Court concluded that, since the right to private and family life is one from which derogation is possible under Article 15(2) of the European Convention on Human Rights, then

"[i]n those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive."[368]

However, the concept of persecution calls for an analysis of the seriousness/severity of the violation of the rights that it

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International Commission of Jurists: *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (2011); and *Sexual orientation and gender identity in international human rights law: The ICJ UN compilation*, 2013 Fifth updated edition. See also, *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012.

[368] *X, Y and Z v. Minister voor Immigratie en Asiel*, paras 54-55. With respect to this, it should be noted that the capacity of a State to derogate from a human rights obligation, whether under the European Convention on Human Rights or the International Covenant on Civil and Political Rights, depends on the existence of a public emergency threatening the life of the nation. The grounds for designating certain rights non-derogable are not necessarily because they are more important or "fundamental" than other rights (see, e.g., the bar on non-retroactivity of criminal punishment under Article 7 European Convention on Human Rights). In addition, when a State derogates from its obligations concerning a certain right, the full scope of applicability of the right may be narrowed, proportionately and only in a manner strictly required by the exigencies of the situation. However, the right is never obliterated.

entails. The focus of enquiry of the Court of Justice of the European Union was on whether criminalization of consensual same-sex conduct constituted persecution and not on its lawfulness as a measure derogating from certain rights under the European Convention on Human Rights, such as the right to private and family life. In addition, it should be noted that, in any event, any such derogation would be hardly likely to be lawful under the European Convention on Human Rights.

The International Commission of Jurists has published a detailed critique of the judgment of the Court of Justice of the European Union in the *X, Y and Z* case.[369] In particular, practitioners are advised to note that the ruling of the Court, ultimately, was directed to the construction of one of the limbs of Article 9 of the 2004 Qualification Directive.[370]

In its judgment in *X, Y and Z* the Court of Justice of the European Union left it to the national authorities to "undertake, in the course of their assessments of the facts and circumstances…an examination of all the relevant facts

[369] *'X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel'*, International Commission of Jurists, Geneva, 3 June 2014.

[370] Had the Court reformulated the question to look beyond Article 9(2)(c), it could have addressed persecution stemming from the existence of laws criminalizing consensual sexual conduct or same-sex sexual orientation by reference to Article 9(2)(b) of the Qualification Directive, i.e.: "legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner" whether or not there is a recent record of enforcement in the sense of imprisonment resulting from the application of the relevant provisions. This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors against whom the State does not offer effective protection.

concerning that country of origin, including its laws and regulations and the manner in which they are applied…"[371]

In addition, the Court left open the question of whether other lesser punishments would or could amount to persecution either by their nature or repetition. With respect to this, however, practitioners should be aware that in some jurisdictions penalties not amounting to imprisonment (such as a fine) have been assessed as insufficiently serious to amount to persecution.[372]

Ultimately, the International Commission of Jurists' view is that the correct approach is to consider the existence of laws criminalizing consensual same-sex sexual conduct as disclosing dispositive evidence of a real risk of persecution thereby satisfying the objective limb of the "well-founded fear" test in Article 1A(2) of the Refugee Convention.[373] In the alternative, practitioners should seek to persuade refugee status decision-makers that there is a strong presumption that such laws engender a real risk of persecution and, therefore, the burden is on the State to rebut that presumption by proving conclusively the absence of such a risk.

An assessment of all the relevant facts and circumstances must be undertaken in the context of the human rights framework as a whole, including the effect on dignity and equality and the potential for enduring psychological harm

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[371] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 58.

[372] "In order for the presence of criminal sanctions against homosexual acts to amount to persecution (or to a threat of persecution), the sanctions must be at a certain level of severity – namely imprisonment rather than simply a fine – and these sanctions must be applied in practice", see in the UK the *Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0*, p.10.

[373] See, the International Commission of Jurists' *Written Submissions in the case of A.N. v. France* (Application no. 12956/15) before the European Court of Human Rights, 8 July 2015, section C, paras 13-18. NB: the judgment of the European Court of Human Rights in the case is pending.

of LGBTI asylum claimants as a result of an essential aspect of their identity being considered criminal.[374] In this context, consideration should be given to the *impact* such laws have in general and on the individual in particular.[375]

In a non-SOGI context, it has been recognized that a conscientious objector's successive criminal convictions and liability to prosecution for refusing to wear a uniform on account of his philosophical beliefs had placed him in a situation of humiliation. This period of constantly being caught between prosecution and conviction with the possibility that the situation could be lifelong was held to be disproportionate to the aim of ensuring he performed military service and aimed at repressing his intellectual personality, inspiring in him feelings of fear, anguish, vulnerability capable of humiliating and debasing him and breaking his resistance and will.[376] Taken as a whole and with regard to the gravity and repetitive nature of what had happened to the applicant the European Court of Human Rights found that the prohibition on inhuman and degrading treatment had been breached.[377] While the court in that case was looking at matters from a historical perspective, arguably if someone risks repeat arrests and penalties including short of imprisonment, on account of his or her sexuality or gender identity, then the same rationale should apply (perhaps with more force given the special status attached to discrimination on the grounds of SOGI).

Particular attention should be paid to the lack of equality before the law and equal protection of the law, as well as

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[374] As required by the Refugee Convention and the Qualification Directive Article 9, see also the above-mentioned decision of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.
[375] See the UNHCR SOGI Guidelines, para. 27.
[376] *Ülke v. Turkey*, no. 39437/98, judgment, 24 January 2006, para. 60.
[377] *Ülke v. Turkey*, para. 63.

access to justice, including to an effective remedy,[378] arising as a consequence of criminalization. As an example, if LGBTI persons are being threatened or attacked by their neighbours, dismissed from work, denied access to education and/or health care, etc. how can they seek an effective remedy and redress if the basis for these harms is legitimized in law by the existence of legislative provisions criminalizing consensual same-sex relations?

'Core rights/areas'

For a long time, when considering matters arising from sexual orientation and/or gender identity in the context of SOGI-based asylum claims, asylum interviewers and refugee-status decision-makers, including Judges, artificially concentrated their attention on sexual practices,[379] rather than focussing on the complex array of interrelated rights arising from and inherent to these claims.

As Gummow and Hayne JJ held in S395/2002 and S396/2002, "[s]exual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human

[378] E.g., Article 2(3) of the International Covenant on Civil and Political Rights, provides, "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

[379] E.g., *AT (Homosexuals: need for discretion?) Iran v. Secretary of State for the Home Department*, [2005] UKAIT 00119, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 27 July 2005, paras 27-28.

relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality [….] the use of such language [i.e., discretion] will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity."[380]

In light of this, Gummow and Hayne JJ went on to hold that limiting the inquiry to "considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result" was too narrow a focus and was an incomplete and inadequate description of matters following from, and relevant to, sexual identity.[381]

The exclusive and misplaced focus on sexual acts/practices in the context of SOGI-based asylum claims mentioned above has led, in part, to consideration of what areas and rights relating to sexuality and sexual identity are 'core', and whether in fact there are lesser rights/areas that a person may be expected to give up. In fact, the 'core' right is the right to sexual and/or gender identity and expression of that identity free from discrimination and fear of serious harm.

In the context of asylum claims for reasons of religious belief, the Court of Justice of the European Union has held

[380] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per Gummow and Hayne JJ, paras 81-82.
[381] Per Gummow and Hayne JJ in *S395/2002 and S396/2002*, para. 83.

that, "[f]or the purpose of determining, specifically, which acts may be regarded as constituting persecution […], it is unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas'";[382] to do so would be incompatible with the broad definition of religion in Article 10(1)(b) of the Qualification Directive.[383] Indeed, the Court went on to hold that, "[a]cts which may constitute a 'severe violation' within the meaning of [persecution] include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly."[384]

Relying, by analogy, on the above-mentioned analysis in the case of *C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z* of which acts would be capable of constituting persecution in the context of asylum claims based on religious belief, the Court of Justice of the European Union went on to consider analogous issues in the context of SOGI-based asylum claims in *X, Y and Z v. Minister voor Immigratie en Asiel*. In its judgment in the case of *X, Y and Z* the Court made clear that: "it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas."[385]

The International Commission of Jurists is of the view that this must be the correct interpretation. Rather than focussing on disparate activities of the individuals

[382] Joined cases *C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z*, Judgment of the Court (Grand Chamber), Court of Justice of the European Union, 5 September 2012, para. 62.
[383] *C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z*, para. 63.
[384] *C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z*, para. 63.
[385] *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 78.

concerned, such as "drinking exotically coloured cocktails",[386] or on refugee applicants' sexual practices for that matter, it is critical to understand that persecution has nothing to do with the colour of the drink, to paraphrase Lord Roger's speech in *HJ (Iran) and HT (Cameroon)*, and everything to do with their persecutors' identification of them as defilers of social norms, whether or not they are in fact LGBTI individuals.[387]

'Persecution v. discrimination'?

Non-discrimination is one of the principles at the core of the Refugee Convention.[388] While, as the UNHCR SOGI Guidelines note, the main international human rights instruments do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity,[389] under international human rights law, LGBTI people are entitled to enjoy equality before the law and equal protection of the law on the basis of equality and non-discrimination.[390]

The right to identity and therefore sexual and/or gender identity is fundamental to the concept of human dignity. In recent times sexuality/sexual orientation has been accorded a similar protected status as race and gender.[391]

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[386] A stereotypical example given by Lord Rodger in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, at para. 78 of his speech.

[387] As seen by the arrest and imprisonment of men in Cameroon for 'drinking baileys' and wearing women's clothes, see Amnesty International UK, "*The country where 'looking gay' and drinking Bailey's Irish Cream can get you jailed*", 24 January 2013.

[388] See the Preamble to and Article 3 of the Refugee Convention. See also, e.g., the UNHCR Handbook, Foreword, p. 1.

[389] The UNHCR SOGI Guidelines, para. 6.

[390] See, e.g., the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, para. 9.

[391] See, *inter alia*, *Smith and Grady v. the United Kingdom*, European Court of Human Rights, Application Nos. 33985/96 and 33986/96, judgment, 27 September 1999, para. 89, where the European Court of Human Rights reiterated that "when the relevant restrictions concern 'a most intimate part of an

Thus, discrimination on the grounds of sexuality/sexual orientation is considered 'suspect' and subject to 'particularly severe scrutiny'.[392]

The European Court of Human Rights, for example, has repeatedly confirmed that the prohibition of discrimination under Article 14 of the European Convention on Human Rights: "duly covers questions related to sexual orientation and gender identity". [393] Furthermore, in the case of *Alevkseyev v. Russia* the Court held that: "when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to

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individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 § 2 of the Convention"; *Lawrence v. Texas*, United States Supreme Court (26 June 2003), 539 U. S. 558; *Obergefell et al v Hodges, Director, Ohio Department of Health et al*, United States Supreme Court (26 June 2015), 576 U.S..

[392] *R v Secretary of State for Work and Pensions, ex p. Reynolds; and R v Secretary of State for Work and Pensions, ex p. Carson*, [2005] UKHL 37, [2006] 1 AC 173, 26 May 2005, United Kingdom House of Lords, para. 55; *Lawrence v. Texas*. In the context of the European Court of Human Rights, for historical reasons, neither Article 14 of the Convention nor Article 1 of Protocol 12 explicitly lists sexual orientation (or gender identity) as a protected status. However, as the European Convention is a living instrument, in a series of cases, the European Court of Human Rights has expressly stated that the list in Article 14 is non-exhaustive and that the concept of one's sexual orientation is included among the "other" grounds protected by Article 14. See, for example, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, 21 December 1999, para. 28, ECHR 1999- IX; *Fretté v. France*, no. 36515/97, judgment, 26 February 2002, para. 32; *S.L. v. Austria*, no. 45330/99, judgment, 9 January 2003, para. 37; and *E.B. v. France* [GC], no. 43546/02, judgment, 22 January 2008, para. 50; *Kozak v. Poland*, no. 13102/02, judgment, 2 March 2010, paras 91-92; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010, para. 108; *X v. Turkey*, no. 24626/09, judgment, 9 October 2012, para. 50.

[393] *Identoba v Georgia*, no. 73235/12, 12 May 2015, judgment, para. 96.

justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention".[394]

The fact that there is "a predisposed bias on the part of the heterosexual majority against a homosexual minority" does not amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.[395]

Practitioners should note that discrimination against LGBTI individuals is often exacerbated by other features of one's identity such as sex, ethnicity, age and religion, as well as by socioeconomic factors, such as poverty and armed conflict.[396]

The impact of discrimination may be felt on an individual basis and at a societal level. LGBTI persons can find themselves deprived of access to employment, health, education and housing and find themselves in poverty and cut off from economic opportunity.

With respect to the dividing line between discrimination and persecution, the UNHCR's guidance is that:

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[394] *Alekseyev v. Russia*, judgment, para. 108.
[395] *S.L. v. Austria*, judgment, para. 44.
[396] As the UNHCR SOGI Guidelines note, "[i]ntersecting factors that may contribute to and compound the effects of violence and discrimination [for LGBTI applicants] include sex, age, nationality, ethnicity/race, social or economic status and HIV status", the UNHCR SOGI Guidelines, para. 3.

"[d]ifferences 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 […] 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."[397]

The UNHCR SOGI Guidelines, in turn, stress that:

"[d]iscrimination is a common element in the experiences of many LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned. Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information."[398]

A proper understanding of discrimination and the many and varied ways it can impact on an LGBTI individual's life is

[397] The UNHCR Handbook, paras 54-55.
[398] The UNHCR SOGI Guidelines, para. 17, footnotes in the original omitted.

imperative when considering persecution. Practitioners should be aware of the possibility of more than one form of discrimination operating simultaneously and of discrimination on SOGI grounds as forming either the persecution itself or as the contextual background to the feared persecution.

Practitioners should however also note that Courts and other refugee status decision-makers are generally quick to find that harm suffered and/or feared by LGBTI refugee claimants amounts to discrimination, as opposed to persecution.

For example, in *Szabados v Canada*,[399] the claimant, a homosexual man from Hungary, was forced from his home, lost his job, was beaten and received death threats from people in his neighbourhood. After moving to another town to live with his grandmother, the local authorities pressured her to kick him out as he looked "gay". The adjudicator, after analysing the documentary evidence concerning the frequency and likelihood of persecution, found that there was no objective fear of persecution. The Federal Court confirmed the adjudicator's decision, finding that the documentary evidence established that homosexuals were indeed subject to discrimination in Hungary but were not persecuted.

In another case, *Lopez v Canada*,[400] the claimant, a homosexual man from Mexico, was attacked, robbed and detained by police. He then moved to another area where he was attacked again and had his nose broken. He reported the first incident involving the police but not the second one. The Federal Court found that the claimant did not demonstrate that the harassment amounted to

[399] *Szabados v Canada (Minister of Citizenship and Immigration)*, 2004 FC 719, [2004] FCJ No 903 (QL). See also *Serrano v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1203, 90 ACWS (3d) 451.
[400] *Lopez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1156, 151 ACWS (3d) 678.

persecution, as it must be demonstrated that the attacks constitute a serious and repeated violation of his human rights.

However, in *Muckette v Canada*,[401] where the claimant was a citizen of Saint Vincent and the Grenadines whose refugee claim was based upon the persecution he had experienced as a gay man in his home country, the Federal Court held that the Refugee Protection Division had erred in finding that the claimant was facing mere discrimination, stating that: "the cumulative effect of the incidents tipped into the area of persecution when death threats, which had some degree of reality to them, were made."[402]

Similarly in *Ballestro Romero v Canada*, where the claimant was from Venezuela and alleged fear of persecution based on his sexual orientation and HIV status, the Federal Court held that the Refugee Protection Division had failed to consider "whether the systemic discrimination against HIV-positive persons in employment amounted to persecution".[403]

Other forms of persecution/denial of other human rights

Serious restrictions on the right or ability of LGBTI people to:

- earn a livelihood;
- enjoy private and family life;
- freedom of opinion, expression, association or assembly;
- political enfranchisement;
- practise or not practise a religion;
- access to public places; or

401 *Muckette v Canada* 2008 FC 1388 (QL).
402 *Muckette v Canada*, para. 8.
403 *Ballestro Romero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 709, para. 2.

- access to normally available education, legal measures (including law enforcement), welfare and health provision

resulting from legal, administrative and/or societal discrimination could amount to persecution.[404]

This broad spectrum of areas demonstrates how discrimination on the grounds of SOGI affects all aspects of life. In light of this, practitioners are advised to consider these matters cumulatively as, as such, they may in turn reach the serious harm threshold that "being persecuted" for the purposes of the Refugee Convention entails.

In this context, the UNHCR SOGI Guidelines advise that:

"LGBTI individuals may also be unable to enjoy fully their human rights in matters of private and family law, including inheritance, custody, visitation rights for children and pension rights. Their rights to freedom of expression, association and assembly may be restricted. They may also be denied a range of economic and social rights, including in relation to housing, education, and health care. Young LGBTI individuals may be prevented from going to school, subjected to harassment and bullying and/or expelled. Community ostracism can have a damaging impact on the mental health of those targeted, especially if such ostracism has lasted for an extended period of time and where it occurs with impunity or disregard. The cumulative effect of such restrictions on the exercise of human rights may constitute persecution in a given case".[405]

Many LGBTI children suffer homophobic and transphobic discrimination in school, which, in turn, can lead to truancy, expulsion, bullying, verbal and physical abuse,

[404] Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0, 11 February 2015, United Kingdom, Home Office, p. 11. See also section above entitled: "'Persecution v. discrimination'?".
[405] The UNHCR SOGI Guidelines, para. 24, footnotes in the original omitted.

physical or psychological harm, including attempted or actual suicide. According to UNESCO, "it is often in the primary school playground that boys deemed by others to be too effeminate or young girls seen as tomboys endure teasing and sometimes the first blows linked to their appearance and behaviour, perceived as failing to fit in with the hetero-normative gender identity."[406]

Attention should be given to the fact that an attempt to deny segments of the population (e.g. LGBTI people) access to or enjoyment of economic, social and cultural rights can be a more subtle yet nonetheless very powerful and effective method of producing the "slow suffocation of a minority group".[407]

As the denial of social and economic rights of LGBTI people can affect their physical and mental integrity, various jurisdictions now accept that the risk of a violation of these rights can amount to serious harm capable of being characterized as persecution.

As Hathaway and Foster state: "[p]hysical integrity may be compromised as much by the deprivation of an adequate standard of living as by more direct threats to life or physical well-being. Refugee jurisprudence thus now sensibly recognizes that the risk of violation of socio-economic rights may be understood to amount to a risk of serious harm. Where a person is denied access to the 'necessities of life'; where the harm threatened amounts to the 'deliberate imposition of substantial economic disadvantage'; or where there is evidence of the 'deliberate imposition of severe economic disadvantage or the

[406] UNESCO, "Review of Homophobic Bullying in Educational Institutions", 12 March 2012. See also, "Education Sector Responses to Homophobic Bullying", UNESCO, 2012.

[407] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 3 Serious Harm, 3.3.5 Adequate Standard of Living, footnote 303, p. 232, citing in turn, N. Boustany, "*Wretched Art They Amongst Women*", Washington Post, 5 August 1998.

deprivation of liberty, food, housing, employment or other essentials of life', there is evidence of precisely the sort of serious human rights abuse that is at the core of the notion of 'being persecuted.'"[408]

Violations of the right to private and family life as persecution

In the context of the right to private and family life, violations have been found where LGBT individuals have been refused child custody; [409] in respect of adoption matters; [410] in connection with granting of parental responsibility;[411] when LGBT people have been discharged from the army;[412] when they have been denied the right to succeed to a deceased partner's tenancy,[413] social security

[408] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 3 Serious Harm, 3.3.5 Adequate Standard of Living, p. 228, footnotes in the original omitted. See also, more generally, Michelle Foster, *International Refugee Law and Socio-Economic Rights - Refuge from Deprivation*, Cambridge University Press, 2009.

[409] *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, European Court of Human Rights, 21 December 1999.

[410] *Fretté v. France*, no. 36515/97, European Court of Human Rights, judgment, 26 February 2002; and *Gas and Dubois v France*, no.25951/07, European Court of Human Rights, judgment, 15 March 2012; *X and Others v. Austria* [GC], no. 19010/07, European Court of Human Rights, judgment, 19 February 2013.

[411] *Salgueiro da Silva Mouta v. Portugal*.

[412] *Lustig Prean and Beckett v. the United Kingdom*, nos 31417/96 and 32377/96, European Court of Human Rights, judgment, 27 September 1999; *Smith and Grady v. the United Kingdom*, nos 33985/96 and 33986/96, European Court of Human Rights, judgment, 27 September 1999; *Perkins and R. v. the United Kingdom*, nos 43208/98 and 44875/98, European Court of Human Rights, judgment, 22 October 2002; and *Beck, Copp and Bazeley v. the United Kingdom*, nos 48535/99, 48536/99 and 48537/99, European Court of Human Rights, judgment, 22 October 2002.

[413] *Karner v. Austria*, no. 40016/98, European Court of Human Rights, judgment, 24 July 2003; *Kozak v. Poland*, no. 13102/02,

cover,[414] access to marriage or other form of legal partnership recognition,[415] and pension rights.[416] However, the extent to which a breach of these rights will amount to persecutory harm, on their own, is a matter of fact and degree.[417]

Discrimination in the enjoyment of the right to work as persecution

The right to work has been accepted as being "essential for realizing other human rights and forms an inseparable and

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European Court of Human Rights, judgment, 2 March 2010; *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, 21 June 2004.

[414] *P.B. and J.S. v. Austria*, no. 18984/02, European Court of Human Rights, judgment, 22 July 2010.

[415] *Schalk and Kopf v. Austria*, no.30141/04, European Court of Human Rights, judgment, 24 June 2010; and *Vallianatos and others v. Greece* [GC], nos 29381/09 and 32684/09, European Court of Human Rights, judgment, 7 November 2013. In *Obergefell et al v Hodges, Director, Ohio Department of Health et al*, the US Supreme Court opined that the inequality resulting from discriminatory marriage laws considered "against a long history of disapproval of their relationships [and] denial to same-sex couples of the right to marry works a grave and continuing harm", p. 22. Although the international trend is moving towards a recognition that LGBTI individuals have a right to marry or form legally recognized partnerships, as of 2016, it remains unlikely that this is sufficiently well accepted to mean that that a breach of this right, on its own, will be sufficient to amount to persecution.

[416] *Jürgen Römer v Freie und Hansestadt Hamburg*, (C-147/08), Court of Justice of the European Union (Grand Chamber), judgment, 10 May 2011.

[417] See, e.g., *LH and IP (gay men: risk) Sri Lanka CG v. The Secretary of State for the Home Department*, [2015] UKUT 00073 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 18 February 2015, in which the UKUT held that the Sri Lankan authorities failure to recognize alternative marital and quasi-marital statuses such as civil partnership or homosexual marriage which are available in other countries in the world does not, without more, amount to a flagrant breach of core human rights.

inherent part of human dignity."[418] LGBTI individuals may experience discrimination in access to and in maintaining employment. Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal.

Systemic discrimination in employment against LGBTI individuals on the grounds of SOGI may constitute persecutory harm.[419] Practitioners will need to focus on whether LGBTI refugee claimants can demonstrate that their LGBTI identity would make it highly improbable for them to enjoy any kind of gainful employment in the country of origin. However, being dismissed from a job in general is not considered persecution, even if discriminatory or unfair.[420]

For transgender individuals, deprivation of employment is often combined with lack of housing and family support, which frequently forces them into sex work, subjecting them to a variety of physical dangers and health risks.[421] In some countries, the only way transgender people can survive is by engaging in prostitution.[422]

Systemic discrimination against HIV-positive persons in employment may amount to persecution. In the case of

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[418] UN Committee on Economic, Social and Cultural Rights, General comment No. 18, adopted on 24 November 2005 on Article 6 of the International Covenant on Economic, Social and Cultural Rights, the right to work, E/C.12/GC/18, 6 February 2006, para. 1.

[419] *Kadri v. Mukasey, Attorney General*, Nos. 06-2599 & 07-1754, United States Court of Appeals for the First Circuit, 30 September 2008, finding that the gay applicant may be eligible for refugee status on the basis that he would be unable to earn a living as a medical doctor if returned to Indonesia.

[420] The UNHCR SOGI Guidelines, para. 25.

[421] The UNHCR SOGI Guidelines, para. 25.

[422] On the need to resort to prostitution for survival generally, see *AA (Uganda) v. Secretary of State for the Home Department*, [2008] EWCA Civ 579, United Kingdom: Court of Appeal (England and Wales), 22 May 2008.

Ballestro Romero v Canada,[423] the Federal Court held that the failure by the adjudicator to determine whether employment discrimination faced by a gay and HIV-positive claimant amounted to persecution was unreasonable, and therefore, a reviewable error.

[423] *Ballestro Romero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 709, 7 June 2012.

Chapter Four: for reasons of

Introduction

Article 1A(2) of the Refugee Convention, as amended by its 1967 Protocol, defines the term refugee for the purposes of that treaty as someone, who, among other things,

"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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (**emphasis added**)

Thus, in order to meet the refugee definition in Article 1A(2) of the Refugee Convention, the claimant's well-founded fear of persecution must be "*for reasons of*" one of the five grounds set out in the Refugee Convention: race, religion, nationality, membership of a particular social group (see Chapter Five: membership of a particular social group) or political opinion.

The nexus requirement

The "for reasons of" element in the refugee definition in the Convention is commonly known as the "nexus" requirement. For refugee applicants to be entitled to protection under the Refugee Convention there must be a causal relationship between their well-founded fear of being persecuted and the Convention ground/s relied on. This means that at least:

1) either the "agents of persecution" (see section entitled: "Agents of persecution" in Chapter Three: persecution) would inflict persecutory harm on the applicant wholly or at least partly "for reasons of" one or more Convention grounds; or

2) the failure or inability to offer adequate and effective State protection (see Chapter Six: failure of State protection) against persecution stems from, wholly or at least partly, one or more Convention grounds; or
3) the Convention ground itself may explain why the applicant is at risk despite the fact that it does not explain the agents of persecution's intention or the State's failure or inability to offer protection. This is described as the predicament approach.[424]

One or more Refugee Convention grounds

More than one of the Refugee Convention grounds may be, and indeed often are, relevant in any given case.[425] For example, LGBTI human rights activists may be persecuted on the grounds of their membership of a particular social group (see Chapter Five: membership of a particular social group), their political opinions and their actual or imputed religious beliefs (or lack of). To take another example,

[424] See Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 5, Nexus to civil or political status, 5.2.3 The predicament approach, pp. 376-382, citing *Applicant N403 v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1088 (Aus. FC, Aug. 23, 2000), at para. 23, per Hill J, "[t]he draft laws as implemented in Australia during the Vietnam War permitted those with real conscientious objections to serve, not in the military forces, but rather in non-combatant roles. Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the conscientious belief, which could be political opinion, not merely the failure to comply with a law of general application."

[425] The UNHCR Handbook, para. 66; the UNHCR SOGI Guidelines, para. 38; *R v. Secretary of State for the Home Department, Ex parte Sivakumar (FC)*, [2003] UKHL 14, United Kingdom: House of Lords (Judicial Committee), 20 March 2003, [2003] 1 WLR 840, Lord Rodger, para. 40.

lesbians may be persecuted for reasons of their gender and their membership of the particular social group of lesbians.

For the nexus requirement to be satisfied, it is not necessary that the LGBTI applicants concerned be persecuted exclusively for reasons of their membership of their SOGI-based particular social group (and/or other Convention grounds), nor does their membership of their SOGI-based particular social group need to be the dominant reason. [426] The same individual may be persecuted for a multiplicity of reasons, including some that are unrelated to any of the Convention grounds. However, for the "for reasons of" requirement to be satisfied, there must be a causal link between the persecution and at least one of the five Refugee Convention grounds.

The trigger for the persecution may be because of the concerned individuals' preference for "exotically coloured cocktails",[427] their going to certain bars, discos or parks,[428]

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[426] The UNHCR, Interpreting article 1 of the 1951 Convention Relation to the Status of Refugees, April 2001; *Refugee Appeal No. 72635/01, 72635/01*, New Zealand: Refugee Status Appeals Authority, 6 September 2002 (NZ RSSA 2002); *Muhammed Iqbal MOHIDEEN, et al., Petitioners, v. Alberto R. GONZALES,* Attorney General of the United States, Respondent*, United States Court of Appeals, Seventh Circuit, 21 July 2005; *Bueso-Avila v. Holder*, 663 F.3d 934, 937, United States Court of Appeals, Seventh Circuit, 2012; *Cabarcas v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 297, Federal Court of Canada, 19 March 19 2002.

[427] A stereotypical example given by Lord Rodger in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, at para. 78 of his speech; see also the arrest and imprisonment of men in Cameroon for 'drinking baileys' and wearing women's clothes, Amnesty International UK, "*The country where 'looking gay' and drinking Bailey's Irish Cream can get you jailed*", 24 January 2013.

[428] *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 554, 218 ACWS (3d) 635, where the refugee claimant, a homosexual man from China, had been arrested and charged with "acting promiscuously and licentiously inside the Anti-British-fight

their forms and manner of dress[429] and speech or their appearance and mannerisms.[430] In reality, they are not at risk of being persecuted "for reasons of" the colour of their drink or t-shirt or because they go to a certain bar, etc., but because of their SOGI, which their behaviour discloses or which is otherwise imputed to them (see below section entitled: "Actual or imputed Convention ground").

As set out above, the causal link, i.e., the nexus with at least one of the Refugee Convention grounds, may exist where, whatever the cause of the serious harm, the State, owing to discrimination, is unable or unwilling to provide effective protection.[431]

It is not necessary for refugee applicants to identify the ground on which their well-founded fear is based. Instead, the duty to ascertain the relevant ground/s is on the examiner.[432] The UNHCR Handbook makes this clear:

"[o]ften the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail […] It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide

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Memorial Park", para. 4; see also the European Court of Human Rights admissibility decision in *I.I.N. v. the Netherlands*, no. 2035/04, 9 December 2004, which contains several references to "some parks in Teheran where many homosexuals meet up".

[429] *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000); A72-994-275, United States Court of Appeals for the Ninth Circuit, 24 August 2000.

[430] The UNHCR SOGI Guidelines, para. 8.

[431] *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, [1999] 2 AC 629, [1999] 2 All ER 545. See also Chapter Six: failure of State protection.

[432] See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, referring to the UNHCR Handbook; *Kalala v Minister for Immigration & Multicultural Affairs* [1999], FCA 1595, Australia: Federal Court, 19 November 1999.

whether the definition in the 1951 Convention is met with in this respect."[433]

The persecutor and applicant may share a common protected characteristic.[434]

In *Fornah*, for example, Lord Rodger held: "usually persecution is carried out by those who are not members of the persecuted group. But that is not always so. For various reasons - compulsion, or a desire to curry favour with the persecuting group, or an attempt to conceal membership of the persecuted group - members of the persecuted group may be involved in carrying out the persecution. Here, for whatever misguided reasons, women inflict the mutilation on other women. The persecution is just as real and the need for protection in this country is just as compelling, irrespective of the sex of the person carrying out the mutilation."[435]

In the context of SOGI-based asylum claims, members of "ex-gay" organizations, i.e. groups formed by people who formerly identified as lesbian, gay or bisexuals and who claim to have "overcome" same-sex sexual attraction altogether or who maintain that they abstain from acting on such attraction may be another example of persecutors sharing a common characteristic with the persecuted.

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[433] The UNHCR Handbook, paras 66-67.

[434] *Rakesh Maini, Jasmail Maini, Vikram Maini, Arjum Maini v. Immigration and Naturalization Service*, 98-70894, United States Court of Appeals for the Ninth Circuit, 19 May 2000; *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, United Kingdom: House of Lords (Judicial Committee), 18 October 2006, [2007] 1 AC 412.

[435] *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, speech of Lord Rodger, para. 81.

Whatever the Refugee Convention ground on which a claim is based, it is not necessary that everyone else defined by that ground has a well-founded fear of being persecuted.[436] "It is well settled that not all members of the group need be at risk. There is nothing in the Convention to say that all members have to be susceptible."[437]

Actual or imputed Convention ground

The applicant may either possess the relevant characteristic – or characteristics – that constitute/s the nexus with one or more Convention ground or it – or they – may be imputed to him or her.[438] This means that individuals may have a well-founded fear of persecution because of a real or imputed Convention ground, be it for reasons of race, religion, nationality, membership of a particular social group or political opinion. Thus, for example, applicants who are perceived as LGBTIs, even when they are not, and have a well-founded fear of being persecuted as a result, are as entitled to protection as those who are in fact LGBTIs.[439]

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[436] "Historically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negativing a Convention ground under article 1A(2) would drive a juggernaut through the Convention." *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Lord Steyn's speech, p. 10; Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 5, Nexus to civil or political status, 5.1 "For reasons of", p. 366.

[437] *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, speech of Lady Hale, para. 113.

[438] See, e.g., Article 10(2), EU Recast Qualification Directive; the UNHCR SOGI Guidelines, para. 39.

[439] *Kwasi Amanfi v John Ashcroft, Attorney General,* Nos 01-4477 and 02-1541, US Court of Appeal for the Third Circuit, 16 May 2003.

The following is an illustrative example.

In the case of *Dykon v Canada*,[440] the claimant, a citizen of Ukraine, sought refugee status based on the fear of persecution because he was perceived to be a homosexual. The claimant was sexually assaulted by another man and following, and because of, this incident was perceived to be a homosexual. His mother had received threats of extortion as a result of this perception. The Federal Court concluded that there was persecution against the claimant based on his imputed homosexuality. The Federal Court stated that: "it is totally irrelevant ... whether he was in fact a homosexual or not." It is the beliefs of the persecutors that are important, and in this case the individuals responsible for the harassment perceived the claimant to be a homosexual.

The next example addresses vicarious imputation.[441]

In the case of *Corneille v Canada*,[442] the claimant was an eight-year-old child from St Lucia. He claimed refugee protection in Canada, testifying that he was verbally and physically assaulted in St Lucia because his mother was a lesbian. The Immigration and Refugee Board dismissed the child's claim mainly because it did not believe the claimant's mother's evidence about her sexual orientation. The Federal Court held that the Board had failed to consider the child's evidence. The Federal Court also found that the Board had failed to address the possibility that the child's mother may be perceived to be a lesbian (or bisexual) and that, in an overtly homophobic country such as St Lucia, the child may suffer adverse consequences as

[440] *Dykon v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 0, 27 September 1994, (1994), 25 Imm LR (2d) 193, 50 ACWS (3d) 1085.
[441] This example also encompasses family as a particular social group. See also Chapter Five: membership of a particular social group.
[442] *Corneille v Canada (Minister of Citizenship and Immigration)* 2014 FC 901, 19 September 2014.

a result. The Court held that there was some evidence supporting that possibility which the Board had unreasonably dismissed without adequate explanation.

Insofar as imputation of sexual orientation is concerned, practitioners should note the following advice:

"[b]ecause of the wide range of expressions and experiences of gay and lesbian individuals, particularly when complicated by repression and persecution, one helpful approach is to decentralize the determination of **identity** and foreground the determination of **human rights abuse**. It matters not whether a person is LGBT or not; what matters is whether they are being persecuted on this basis. Indeed, there are cases of heterosexuals who are targeted for anti-LGBT violence based on the perception of their abusers rather than their actual identity."[443]

Establishing the causal link

Evidence of the reasons behind the infliction or threat of harm or withholding of effective State protection may establish the causal link between the applicant's predicament and a Convention ground.[444]

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[443] *Lesbian and Gay Refugee Issues: A Review of Federal Court Jurisprudence*, an initiative of Envisioning Global LGBT Human Rights, p. 7.

[444] University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 25 March 2001. "The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection […] The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the

Where country information demonstrates institutionalized discrimination, for example, by the police, the courts or the legal system on SOGI grounds, the causal connection is likely to be made out.[445]

In some jurisdictions the view has been taken that it is only the persecutor's intention that can supply the link to a Convention ground.[446] This interpretation is at odds with both the authoritative view of the UNHCR and with the opinion of leading academics.[447] The preferred approach is

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Convention ground contributes to the applicant's exposure to the risk of being persecuted", paras 8-10.

[445] See e.g. the speech of Lord Hoffman in *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*. See also the section entitled: "Country evidence" in Chapter One: establishing sexual orientation and gender identity.

[446] *Immigration and Naturalization Service v. Jairo Jonathan Elias-Zacarias*, 502 U.S. 478; 112 S. Ct. 812; 117 L. Ed. 2d 38; 60 U.S.L.W. 4130, United States Supreme Court, 22 January 1992, "Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." See also *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 56, where Burchett J stated: "[p]ersecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors."

[447] See Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 5, Nexus to civil or political status, "5.2.3 The predicament approach", "[t]he more principled approach to interpreting the Refugee Convention's nexus clause is to acknowledge that the causal element may be satisfied where the intention either of the persecutor or of the state in withholding protection is linked to a Convention ground,

that of the UNHCR SOGI Guidelines: "the focus is on the reasons for the applicant's feared predicament within the overall context of the case and how he or she would experience the harm rather than on the mind set of the perpetrator".[448]

Malicious or punitive intent is not required. In some cases the perpetrators of serious harm may believe that they are acting in the applicant's best interests to "treat", "cure" or "correct" them.[449] In such cases the "for reasons of" element of the refugee definition will still be satisfied.

For example, in the case of *Pitcherskaia v. Immigration and Naturalization Service*, the applicant claimed persecution on the basis of her political opinions in support of gay and lesbian civil rights in Russia and on account of her membership in a particular social group: Russian lesbians. She feared involuntary institutionalization, forced electroshocks and drug treatment because of her lesbian status.

The majority of the Board of Immigration Appeals (BIA) held that while electroshock treatment, forced institutionalization and drug treatments could constitute persecution, no intent to punish or harm could be attributed to the Russian authorities since they "intended to treat or cure [a] supposed illness". As a result, the majority of the BIA dismissed the applicant's asylum claim because of their understanding of persecution as requiring a malignant intent on the part of the persecutor.

In reviewing the Board's decision, the United States Court of Appeals for the Ninth Circuit pointed out that although a subjective 'punitive' or 'malignant' intent on the persecutor's part to punish or to cause harm or suffering to

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or where the Convention ground explains why the applicant is at risk of being persecuted", p. 382.

[448] The UNHCR SOGI Guidelines, para. 39.

[449] *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*.

the victim existed in most asylum applications, none of it was required for the infliction of harm or suffering to constitute persecution. The motive or intent of the alleged persecutor was relevant only insofar as the applicant had to prove that the persecution was 'on account of' a Convention ground, e.g. political opinion or membership in a social group. The Court held that the Board had erroneously required an intent to punish. While unreasonably severe punishment can constitute persecution, "punishment" is neither a mandatory or sufficient aspect of persecution. Punishment implies that the perpetrator believes the victim has committed a crime or some wrong whereas persecution simply requires that the perpetrator cause the victim suffering or harm. The Court held that the applicant did not have to prove a subjective intent to punish on the persecutor's part.

Recommended approach to fulfilling the nexus requirement

Practitioners should consider the reasons given by an applicant for their fear of persecution. Obvious examples of sufficient nexus could include:

i) laws, practices or state institutions that discriminate against LGBTI individuals; and/or
ii) what the persecutor actually said.

Less obvious examples would require consideration of:

i) the surrounding circumstances and social perception of the applicant's activities, dress, mannerisms, speech; and/or
ii) societal stereotyping of certain types of behaviour.[450]

[450] Although stereotyping should not be used to reject a person's SOGI, where such stereotyping takes place in the country of origin it can be very relevant to understanding the causal link between the harm feared and the Convention ground. In its judgment in the case of *A, B, and C v Staatssecretaris van Veiligheid en*

Justitie, the Court of Justice of the European Union underscored that, "[w]hile questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not […] satisfy the requirements" of the EU asylum *aquis* and "[t]herefore, the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility", paras 62-63, see also paras 72-73. See also section entitled: 'stereotyping' in Chapter One: establishing sexual orientation and gender identity.

Chapter Five: membership of a particular social group

Introduction

Article 1A(2) of the Refugee Convention, as amended by its 1967 Protocol, defines the term refugee for the purposes of that treaty as someone, who, among other things,

"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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (**emphasis added**)

Thus, properly interpreted, the refugee definition in Article 1A(2) of the Refugee Convention can encompass LGBTI refugee claimants whose well-founded fear of persecution is for reasons of their membership of a particular social group (PSG). Indeed, as the UNHCR SOGI Guidelines note, "[r]efugee claims based on sexual orientation and/or gender identity are most commonly recognized under the 'membership of a particular social group' ground."[451]

During the drafting of the Refugee Convention, "particular social group" was a late inclusion to the list of the Convention grounds set out in the definition of who is a refugee in Article 1A(2) and the expression PSG was left undefined in the Convention.

The UNHCR Handbook states:

"[a] 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear

[451] The UNHCR SOGI Guidelines, para. 40.

of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality."[452]

As the UNHCR Guidelines on "Membership of a particular Social Group" (hereafter the UNHCR PSG Guidelines), which were published in 2002, clarify:

"the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[453]

The UNHCR PSG Guidelines also state that the PSG ground "is being invoked with increasing frequency in refugee status determinations, with States having recognised women, families, tribes, occupational groups, **and homosexuals**, as constituting a particular social group for the purposes of the 1951 Convention." [454] (**emphasis added**)

Refugee status decision-makers, including Courts, have often adopted a very convoluted approach to determining whether or not a PSG exists for the purposes of the refugee definition in Article 1A(2) of the Refugee Convention. This is due to a misplaced fear that, if *all* social groups were to be recognized as PSGs for Refugee Convention purposes, the "overarching and clear human

[452]The UNHCR Handbook, para. 77. See also the section below entitled: "PSG need not be the sole Convention ground", as well as the section entitled: "One or more Refugee Convention grounds" in Chapter Four: for reasons of.
[453] The UNHCR Guidelines on International Protection No. 2: "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, HCR/GIP/02/02, 7 MAY 2002, (hereafter: the UNHCR PSG Guidelines) para. 3; the UNHCR SOGI Guidelines, para. 44.
[454] The UNHCR PSG Guidelines, para. 1.

rights object and purpose"[455] of the treaty would be undermined because various people who did not in fact have a well-founded fear of persecution *for reasons of* their membership of a PSG would, somehow, nonetheless qualify under the refugee definition in Article 1A(2). This misplaced approach is, for the reasons set out below, wrong in law.

First, importing a requirement of discrimination as necessary to define the existence of a PSG for the purposes of the refugee definition is wrong just as much as saying that the other four grounds enumerated in Article 1A(2) of the Refugee Convention, namely, race, religion, nationality and political opinion, in turn, require discrimination as a *sine qua non* defining feature of their own existence.[456]

Having said that, as far as discrimination is concerned, practitioners should note that what race, religion, nationality and political opinion all have in common is that they "are all grounds on which a person **may be discriminated against by society**",[457] (**emphasis added**).

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[455] *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, para. 57, p. 1024.

[456] Lord Hoffmann in *Islam and Shah* stated that, "[t]he notion that the Convention is concerned with discrimination on grounds inconsistent with principles of human rights is reflected in the influential decision of the U.S. Board of Immigration Appeals in *In re Acosta* (1985) 19 I. & N. 211 where it was said that a social group for the purposes of the Convention was one distinguished by: 'an immutable characteristic . . . [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.' This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights", *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, p. 16.

[457] Per Lord Hope in *Islam and Shah*, p. 20.

As Lord Hoffmann noted in the judgment of the UK House of Lords in the case of *Islam and Shah*, the significance of discrimination to the PSG inquiry is that, "the inclusion of 'particular social group' [in the Refugee Convention definition of who is a refugee] recognised that there might be different criteria for discrimination, *in pari materiae* with discrimination on the other [Convention] grounds, which would be equally offensive to principles of human rights."[458]

Second, as the UNHCR PSG Guidelines affirm, "a social group cannot be defined *exclusively* by the fact that it is targeted for persecution".[459]

To address the concern that a too broad and over inclusive understanding of the PSG ground could somehow undermine the overall object and purpose of the Refugee Convention, practitioners should focus instead on the causation element of the refugee definition, i.e. "for reasons of" (see Chapter Four: for reasons of).

In this context, the appropriate approach is to ask the following: if someone who is part of a PSG is at real risk of serious harm and lacking effective State protection is the risk of harm or lack of protection *because* of their membership of that PSG or is it for some other unconnected reason? For example, worldwide, in any given society, 'men' clearly form a PSG. In the vast majority of cases, however, any man who has a well-founded fear of persecution will not do so *because* he belongs to the PSG of 'men' but for some other reason.

Does the size of the group matter?

The size of the group is not a relevant criterion in determining whether a particular social group exists.[460] For

[458] *Islam and Shah*, per Lord Hoffmann, p. 15.
[459] The UNHCR PSG Guidelines, para. 2, see also para. 14.
[460] The UNHCR PSG Guidelines, para. 18.

example, very small groups such as the family[461] and very large groups such as women have been recognized as PSGs for the purposes of the refugee definition in Article 1A(2).[462]

However numerous within any given society they might be, there is broad acknowledgment that lesbians, [463] gay men,[464] bisexuals,[465] and transgender persons[466] constitute

[461] E.g. "the harm suffered by the Thomases was not the result of random crime, but was perpetrated on account of their family membership," *Thomas v Gonzales* 409 F 3d 1177 (9th Cir, 2005), p. 6136, cited, in turn, in *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, para. 19.

[462] The UNHCR PSG Guidelines, para. 19; see also *Islam and Shah*.

[463] E.g., *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*; *MK (Lesbians) Albania v. Secretary of State for the Home Department*, CG [2009] UKAIT 00036, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 9 September 2009, para. 350; *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 282, 26 February 2004; *Dosmakova v. Canada (Citizenship and Immigration)*, 2007 FC 1357, 21 December 2007; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31; *Decisions VA0-01624 and VA0-01625 (In Camera)*, Canada, Immigration and Refugee Board, 14 May 2001; *Islam and Shah*, pp. 8–10; *Arrêt n° 50 966*, N° 50 966, Belgium: *Conseil du Contentieux des Etrangers*, 9 November 2010; *Verwaltungsgericht (VG) Neustadt an der Weinstraße* [*Neustadt an der Weinstraße* Administrative Court], 3 K 753/07.NW, Germany, 8 September 2008.

[464] E.g., *Matter of Toboso-Alfonso*, United States Board of Immigration Appeals, 12 March 1990; *Refugee Appeal No. 1312/93, Re GJ, No 1312/93*, New Zealand: Refugee Status Appeals Authority, 30 August 1995; Germany, VG Schleswig-Holstein 21 November 2006, 4 A 244/05; *Arrêt n° 50 967*, N° 50 967, Belgium: *Conseil du Contentieux des Etrangers*, 9 November 2010; France, *Cour nationale du droit d'asile* (CNDA), 23 décembre 2010, *M. K., n° 08014099*, C, reported in CNDA, *Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile: Contentieux de réfugiés, Année 2010*, February 2012,

'particular social groups' for the purposes of the refugee definition in Article 1A(2) of the Refugee Convention.[467] For similar reasons intersex individuals would also constitute a PSG within the meaning of the refugee definition.[468]

CNDA, 10 janvier 2011, *M.N., No. 09012710*; and *HJ (Iran) and HT (Cameroon)*.

[465] E.g., *VRAW v Minister for Immigration and Multicultural and indigenous Affairs* [2004] FCA 1133, Australia, Federal Court, 3 Sept. 2004; *Decision T98-04159, T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000; and *HJ (Iran) and HT (Cameroon)*. However, note that, on occasion, refugee status decision-makers have struggled with the idea that bi-sexuality demonstrates an innate or unchangeable characteristic on the basis that the individual's sexuality is 'fluid'- see Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, McGill Law Journal, Vol. 53, p. 59, 2008. See also the section entitled: "Bisexuality v. immutability" in Chapter One: sexual orientation and gender identity.

[466] *CE, SSR, 23 Juin 1997, 171858, Ourbih, 171858*, France, Conseil d'Etat, 23 June 1997; CRR, 15 février 2005, M.B., No. 49775; *RPD File No. / No de dossier de la SPR : MA8-04150*, 23 June 2011; Austria: Independent Federal Asylum Senate (UBAS), 244.745/0-VIII/22/03, 28 March 2006; *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000); A72-994-275, United States Court of Appeals for the Ninth Circuit, 24 August 2000; and *RRT Case No. 0903346*, [2010] RRTA 41, Australia: Refugee Review Tribunal, 5 February 2010. It must be remembered, however, that the particular social group in the case of transgender applicants is primarily defined through gender identity rather than sexual orientation. Transgender people may be heterosexual, lesbian, gay or bisexual. For a discussion see e.g. Nicole Laviolette '*Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada*', Journal of Research in Gender Studies, Vol 4(2), 2014 68-123.

[467] The UNHCR SOGI Guidelines, para. 46.

[468] The UNHCR SOGI Guidelines, para. 46.

Not all members of the group must be at risk of persecution

Not all members of the group need to be experiencing persecution or to be at risk of persecution for the group to be established.[469]

In the context of SOGI-based asylum claims, the risks for LGBTI individuals of different social standing within a society may not be identical - for example, a poor/working class individual may in practice be more exposed to risk than those in higher echelons of society.

With respect to this, in *Islam and Shah*, Lord Steyn noted: "following the New Zealand judgment in *Re G.J.* [1998] 1 N.L.R. 387 I regard it as established that depending on the evidence homosexuals may in some countries qualify as members of a particular social group. Yet some homosexuals may be able to escape persecution because of their relatively privileged circumstances. By itself that circumstance does not mean that the social group of homosexuals cannot exist."[470]

In some societies there is a degree of 'protection' for the well off/elite[471] that is generally based on their ability to pay bribes or rely on their connections. However, practitioners are advised to consider how effective and durable such 'protection' is given that it is predicated on the individuals concerned maintaining their elite status,

[469] The UNHCR PSG Guidelines, para. 17.
[470] Per Lord Steyn, *Islam and Shah*, p. 10.
[471] See, e.g., *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, CG [2011] UKUT 00251(IAC), where the Upper Tribunal, considering the situation of lesbian women in Jamaica held that "[m]embers of the social elite may be better protected because they are able to live in gated communities where their activities are not the subject of public scrutiny. Social elite members are usually from known families, wealthy, lighter skinned and better educated; often they are high-ranking professional people", para. 107.

rather than any meaningful and effective protection from the State (see Chapter Six: failure of State protection).

PSG need not be the sole Convention ground

As the UNHCR SOGI Guidelines affirm:

"claims based on sexual orientation and/or gender identity are most commonly recognized under the 'membership of a particular social group' ground. Other grounds may though also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders (or perceived activists/defenders) may have either or both claims based on political opinion or religion if, for example, their advocacy is seen as going against prevailing political or religious views and/or practices."[472]

For example, in *Hernandez v Canada*,[473] the claimant, a transvestite, homosexual man from Mexico was an "outspoken activist on human rights issues for gays, lesbians, transvestites and trans-gendered people, both in Mexico and Vancouver", where he had fled, and critic of police brutality towards sexual minorities. He had been harassed by police, and was told by his brother, a police officer, that his name had been put on a list of people that were known to have disappeared. The Tribunal had rejected his claim on the basis that he was merely harassed by authorities and did not show a well-founded fear of persecution. The Federal Court disagreed and found: "the fundamental error made by the tribunal is that it missed the mark by failing to consider why the applicant feared being in Mexico - it was because of the police and how they dealt with activists such as him and not homosexuals in general. This is true whether his claim is

[472] The UNHCR SOGI Guidelines, para. 40.
[473] *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2003 FC 182, 228 FTR 253.

considered under the rubric of political opinion or membership in a social group."[474]

Cohesiveness/voluntary membership

There is no requirement for the PSG to be cohesive, that is, for the members of the group to know each other or associate as a group.[475] The relevant inquiry is whether there is a common element that group members share.[476] The UNHCR PSG Guidelines note that this is similar to the analysis adopted for the other Convention grounds where there is no requirement that members of a religion or holders of a political opinion associate together or belong to a 'cohesive' group.[477]

There is also no requirement that the individual volunteers to be a member of the group. Perception of membership of a PSG would suffice as would belonging to it without wishing to, or for the group itself to comprise a homogenous group of individuals.

Imputed membership of a particular social group[478]

The UNHCR SOGI Guidelines note:

"[i]ndividuals may be subject to persecution due to their actual or perceived sexual orientation or gender identity. The opinion, belief or membership may be attributed to the applicant by the State or the non-State agent of persecution, even if they are not in fact LGBTI, and based on this perception they may be persecuted as a consequence. For example, women and men who do not fit

[474] *Hernandez v Canada*, para. 20.
[475] The UNHCR PSG Guidelines, para. 15. See also the speeches of Lord Steyn and Lord Hoffmann in *Islam and Shah*, p. 8 and p. 16, respectively.
[476] The UNHCR PSG Guidelines, para. 15.
[477] The UNHCR PSG Guidelines, para. 15.
[478] See also section entitled: "Actual or imputed Convention ground" in Chapter Four: for reasons of.

stereotyped appearances and roles may be perceived as LGBTI. It is not required that they actually be LGBTI. Transgender individuals often experience harm based on imputed sexual orientation. Partners of transgender individuals may be perceived as gay or lesbian or simply as not conforming to accepted gender roles and behaviour or associating themselves with transgender individuals."[479]

Thus, even when the refugee claimants concerned do not themselves identify as LGBTI, the circumstances of their claims may nonetheless demonstrate that their fear of being persecuted arises from the persecutors attributing or imputing to them a particular SOGI. [480] Imputed membership of a PSG is sufficient to satisfy the causal link, as the case below illustrates.[481]

In *Amaya Jerez v. Canada*,[482] the claimant, a citizen from El Salvador, owned a popular restaurant that was known to be frequented by homosexuals. He was asked by a local gang to sell drugs, which he refused to do. They threatened him with violence and accused him of being gay because homosexuals went to his restaurant. The Federal Court held that: "[i]t is certainly possible for a claimant to support a refugee claim based on imputed membership in a particular social group when he or she is not actually a member of that group. Here, the Board did not rule out that possibility. It simply concluded that Mr. Amaya Jerez was targeted not for his sexual orientation but for his ownership of a restaurant. Based on the evidence before it,

[479] The UNHCR SOGI Guidelines, para. 41, footnotes in the original omitted.
[480] The UNHCR SOGI Guidelines, para. 39.
[481] See also, *Kwasi Amanfi v. John Ashcroft*, Attorney General, Nos. 01-4477 and 02-1541, United States Court of Appeals for the Third Circuit, 16 May 2003, where the applicant's claim was based on imputed homosexuality.
[482] *Amaya Jerez v. Canada (Citizenship and Immigration)*, 2012 FC 209, 13 February 2012; 215 ACWS (3d) 476.

I cannot conclude that its determination was unreasonable."[483] The Federal Court ultimately concluded that the claimant was a victim of criminality, not persecution due to an imputed membership of a particular social group.

Different approaches to the identification of PSGs

The 'protected characteristics' approach

In the case of *Matter of Acosta*,[484] the US Board of Immigration Appeals applied the doctrine of *ejusdem generis* and held that the phrase "particular social group" should be construed in a manner consistent with the other grounds enumerated in Article 1A(2) of the Refugee Convention.

"Each of these grounds [race, religion, nationality and political opinion] describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed [….] Applying the doctrine of ejusdem generis, we interpret the phrase

[483] *Amaya Jerez v. Canada (Citizenship and Immigration)*, para. 24.

[484] *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985. In *Matter of Acosta* the US Board of Immigration Appeals stated, "the well-established doctrine of *ejusdem generis*, meaning literally, 'of the same kind', to be most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words". See also Blacks Law Dictionary, Free Online Legal Dictionary 2nd Ed., which states that the *ejusdem generis* rule means "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned".

'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. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, 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. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under [Article 1A(2)], namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[485]

This approach to identifying a PSG for the purposes of the Refugee Convention definition of who is a refugee has become known as the 'protected characteristics' approach. Following *Matter of Acosta*, this approach was also adopted by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*[486] and in the UK by the House of Lords in *Islam and Shah*.

[485] *Matter of Acosta*.
[486] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993.

In light of the protected characteristics approach, in *Ward*, the Supreme Court of Canada identified three possible categories of PSGs for Refugee Convention purposes:

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

The Supreme Court also affirmed that groups defined by an innate or unchangeable characteristic "would embrace individuals fearing persecution on such bases as gender, linguistic background and **sexual orientation**". [487] (**emphasis added**)

Practitioners should note that adopting the protected characteristics approach to ascertaining whether or not a PSG exists for the purposes of the refugee definition in Article 1A(2) of the Convention would ordinarily result in the exclusion of PSGs such as 'a knitting circle' or a 'football team', etc., since such social groups would not constitute a PSG for the purposes of the Convention because knitting and playing football are not immutable, or otherwise unchangeable protected characteristics but, instead, are activities. However, practitioners should also note that, in some circumstances, people could be persecuted because the persecutor imputes a Convention ground to the group. For example, in country X knitting may be an activity undertaken by radical feminists and therefore if a person is persecuted for knitting it is because of the perception of knitting as a political activity indicating radical feminism.

[487] *Canada (Attorney General) v. Ward*.

The 'social perception' approach

In Australia, however, the judiciary developed a different approach to identifying a PSG beginning with *Applicant A*,[488] preferring to refer to the "ordinary meaning" of the text.

> "A 'group' is a collection of persons… the word 'social' is of wide import and may be defined to mean 'pertaining, relating, or due to… society as a natural or ordinary condition of human life.' 'Social' may also be defined as 'capable of being associated or united to others' or 'associated, allied, combined'… The adjoining of 'social' to 'group' suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large."[489]

This has become known as the 'social perception' approach to ascertaining the existence of a PSG for the purposes of the refugee definition in the Convention.

The Australian High Court considered the 'social perception' approach further in the case of *Applicant S v Minister for Immigration and Multicultural Affairs* where it explained that:

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[488] *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997, p. 11.

[489] *A and Another v Minister for Immigration and Ethnic Affairs and Another* (footnotes in the original omitted).

"[f]irst, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."[490]

The UNHCR PSG Guidelines

Partly as a consequence of the emergence of these two differing approaches, both with potential limitations,[491] in 2002 the UNHCR produced the UNHCR PSG Guidelines on International Protection.[492]

The UNHCR PSG Guidelines clearly state that a "particular social group" could be **either a group of persons**:

i) "who share a common characteristic other than their risk of being persecuted, **or**" (**as opposed to *and***)
ii) "who are perceived as a group by society." [493] (**emphasis added**)

This definition, which acknowledges the two above-mentioned approaches, however, is not premised on both

[490] *Applicant S v. Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, Australia: High Court, 27 May 2004, para. 36.
[491] For a detailed critique of the 'social perception' approach, see Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 5 - Nexus to civil or political status, 5.9 Membership of a particular social group, pp. 423-436; for criticism of the 'protected characteristics' approach, see, e.g., Guy Goodwin-Gill, "*Judicial Reasoning and 'Social Group' after Islam and Shah*" 11 International Journal of Refugee Law, pp. 537-541.
[492] The UNHCR PSG Guidelines.
[493] The UNHCR PSG Guidelines, para. 11. See, also, the UNHCR SOGI Guidelines, paras 44-45.

alternatives being applied cumulatively.[494]

As the UNHCR PSG Guidelines further recognized, "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 rights".[495]

The conflation of approaches: a cumulative test

Regrettably, in the hands of legislators, including the EU legislator[496] and various Courts, including the Court of Justice of the European Union in its judgment in *X, Y and Z*,[497] the two approaches to ascertaining the existence of a certain PSG for Refugee Convention purposes, namely, the "protected characteristics" and the "social perception" approach, have been conflated into a cumulative approach, necessitating the fulfilment of a two-limbed test, whereby

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[494] Alice Edwards, Senior Legal Coordinator and Chief, Protection Policy and Legal Advice Section, the UNHCR, '*Judging gender: Asylum adjudication and issues of gender, gender identity and sexual orientation*', Keynote statement at the Intergovernmental consultation on migration, asylum and refugees: Workshop on asylum issues relating to gender, sexual orientation and gender identity (Geneva, 25-26 October 2012). See also Michelle Foster, The '*Ground with the least clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*', August 2012.

[495] The UNHCR PSG Guidelines, para. 11.

[496] Article 10(1)(d), EU Recast Qualification Directive, see also below. The corresponding provisions of the 2004 Qualification Directive that the Recast replaced were identical. For a detailed critique of the two-limb test, see *X, Y and Z: a glass half full for "rainbow refugees"? The ICJ's observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel*, published on 3 June 2014, paras 30-31.

[497] *Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z (C-201/12) v Minister voor Immigratie en Asiel*, Judgment, paras 44-49. See also, *X, Y and Z: a glass half full for "rainbow refugees"?*, paras 36-40.

applicants are required to satisfy *both* "protected characteristics" and "social perception".

For example, in the US, a "social visibility" or "social distinction" test has been gaining ground.[498] As noted in *Gatimi et al. v. Holder*, the application of the 'social visibility' test in the US to groups defined by their sexual orientation does not bode well:

"[a] homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population'."[499]

While such a group may not be "seen", they will still be identifiable as a group and perceived as such by the surrounding society.

Erroneously, in the EU, the Recast Qualification Directive[500] at Article 10(1)(d) states:

"a group shall be considered to form a particular social group where in particular:
— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or

[498] *In re A-T-, Respondent*, 24 I&N Dec. 296 (BIA 2007) Interim Decision #3584, decided 27 September 2007, p. 303; vacated and remanded on other grounds: *Matter of AT*, (2008) 24 I & N Dec. 617 (USAG, Sept. 22, 2008).
[499] *Gatimi et al. v. Holder*, Attorney General, No. 08-3197, United States Court of Appeals for the Seventh Circuit, 20 August 2009, Posner J., p. 7.
[500] Article 10(1)(d), Recast Qualification Directive, is identical in both the Recast and it its predecessor, the 2004 Qualification Directive.

conscience that a person should not be forced to renounce it, **and [as opposed to *or*]**
— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society." (**emphasis added**)

The UNHCR has emphatically rejected the cumulative approach adopted by the US as a misunderstanding of its guidelines, [501] and the UK House of Lords, having specifically requested to be addressed on the matter, [502] considered that, if interpreted literally, the wording of the 2004 Qualification Directive proposed a test more stringent than is warranted by international authority.[503]

Regrettably, however, the Court of Justice of the European Union in *X, Y and Z* did not take the opportunity to interpret the 2004 Qualification Directive in line with the UNHCR's authoritative interpretation of the Refugee Convention.[504]

Further, in stating that, "**[d]epending on the circumstances in the country of origin**, a particular social group **might** include a group based on a common characteristic of sexual orientation", [505] the Recast Qualification Directive and its 2004 predecessor are at odds with UNHCR's SOGI Guidelines, which have clarified that,

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[501] See e.g., UNHCR intervention before the United States Court of Appeals for the Third Circuit in the case of *Valdiviezo-Galdamez v. Holder, Attorney General*, 4 April 2009, No. 08-4564, pp. 7-18. The UNHCR SOGI Guidelines state: "[t]he two approaches – 'protected characteristics' and 'social perception' - to identifying 'particular social groups' reflected in this definition are alternative, not cumulative tests", para. 45.
[502] As informed by Kathryn Cronin, Counsel for *Fornah*.
[503] *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, para. 16.
[504] See *X, Y and Z: a glass half full for "rainbow refugees"?*, paras 36-40.
[505] Article 10(1)(d), Recast Qualification Directive; Article 10(1)(d), 2004 Qualification Directive, (**emphasis added**).

"[w]hether applying the 'protected characteristics' or 'social perception' approach, there is a broad acknowledgment that under a correct application of either of these approaches, **lesbians, gay men, bisexuals and transgender persons are members of 'particular social groups**' within the meaning of the refugee definition".[506]

The application of the cumulative two-limb test to establish the existence of a PSG has given rise to a further disturbing development in the context of SOGI-based asylum claims. Namely, some refugee-status decision-makers have found that, while certain applicants' claims satisfied the protected characteristics limb, they did not meet the social perception limb, either because the group of LGBTI persons are not *visible*[507] within a given society or because the individuals themselves are not *'out' enough* to be perceived as part of that group by society.[508]

In this context, the case of *Mlle. F* in France is another regrettable example. The asylum applicant, a lesbian woman, was found not to be sufficiently 'out' in that she did not "seek to express openly her homosexuality through her behaviour". This, in turn, led to the decision-making authorities to hold that she: "does not belong to a group of persons sufficiently circumscribed and identifiable to constitute a social group".[509]

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[506] The UNHCR SOGI Guidelines, para. 46, (**emphasis added**). See also James C. Hathaway, *The Law of Refugee Status* (1991), pp. 157-161, 163-164.

[507] See the warning of Posner J. in *Gatimi et al. v. Holder* cited above.

[508] Referred to as the "discretion requirement in reverse" argument, see e.g. Jansen and Spijkerboer, *Fleeing Homophobia: Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, Sept. 2011, p. 36.

[509] *Mlle. F*, *Cour Nationale du Droit d'Asile*, 571904, 1 July 2008 in which the claim was rejected on the grounds that the applicant did not seek to "express openly her homosexuality through her behaviour" such that she does not belong to a group of persons sufficiently circumscribed and identifiable to constitute a social

In conclusion, regrettably, recent trends in jurisprudence therefore suggest that practitioners may, in future, have to pay more attention to identifying how their clients' SOGI-based claims to refugee status fall within the Refugee Convention ground of 'particular social group' based on a cumulative approach instead of the UNHCR's long-held view that either having a "common characteristic" or being "perceived as a group by society" would suffice to identify the relevant PSG.

Recommended approach to establishing the particular social group ground

Notwithstanding the fact that in any society, lesbians, gay men, bisexuals, transgender and intersex persons are *per se* members of SOGI-based 'particular social groups' within the meaning of the refugee definition in Article 1A(2) of the Refugee Convention,[510] practitioners should be mindful of the fact that refugee status decision-makers, including judges, may require applicants to prove their membership of a particular group on the basis of their sexual orientation and/or gender identity or intersex status, either (i) on the basis of the 'protected characteristics'; or (ii) 'social perception' approach; or even (iii) the regrettable cumulative test.

In light of the above, it is suggested that practitioners should consider first whether it is possible to argue in the relevant jurisdiction that LGBTI people are a particular

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group; see also *H*, *Cour Nationale du Droit d'Asile*, 605398, 7 May 2008 where the homosexual applicant from Kosovo was found not to be the target of disapproval of Kosovar society, but only of his immediate circle of acquaintances; hence he 'cannot be regarded as belonging to a circumscribed group of people sufficiently identifiable to constitute a PSG', both cases cited in M. Foster, "*The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, UNHCR August 2012, PPLA/2012/02, p. 52, footnote 305.

[510] The UNHCR SOGI Guidelines, para. 46; see also case-law cited above.

social group based on the protected characteristics approach.

Particular care should be taken with the social visibility test when dealing with claimants from countries where there is no social visibility because – owing to a fear of persecution – the relevant group is forced underground. Denial of status for this reason would negate the very purpose of the Refugee Convention.

In countries where the cumulative test is regrettably applied, for the time being, arguments should be presented in a way that seeks to satisfy the two-limbed test, cumulatively.

The matters briefly identified in the following paragraphs provide examples of areas of enquiry that practitioners may explore to evidence the existence of the relevant PSG.

i) Existence of criminal laws

In *X, Y and Z* the Court of Justice of the European Union, having accepted that it was common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it,[511] held:

"it should be acknowledged that the existence of criminal laws [criminalizing homosexual conduct] which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different."[512]

Conversely, however, the absence of such laws does not mean that the relevant SOGI-based particular social group does not exist.

[511] *X, Y and Z*, para. 46.
[512] *X, Y and Z*, para. 48.

ii) Evidence of the relevant country[513]

Evidence of the relevant legislative framework in the country of origin and, if available, of the treatment by society of LGBTI individuals may be helpful to establish that the claimant belongs to a PSG. In this context, practitioners should inquire as to whether there is a legislative scheme providing specific protection from discrimination for LGBTI individuals in the country of origin. Additionally, issues to be explored include the prevailing societal attitude towards LGBTI individuals and whether and to what extent the group is 'visible' in the given society.

However, it should be recognized that in many countries there will be scant reporting on the situation of LGBTI people, precisely because of the risk of persecution that documenting human rights abuses on SOGI grounds may entail.

In this context, it is also relevant to note that it has been acknowledged that abuses against lesbians, in particular, are not well documented.[514] Practitioners should also be aware that lesbians often experience harm as a result of their gender as well as their sexual orientation.[515] Persecution faced by lesbians may be less visible than that encountered by gay men and thus less well documented.[516] Similar considerations may apply with respect to the persecution of bisexual, transgender and intersex individuals.

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[513] See also the section entitled: "Country evidence" in Chapter One: establishing sexual orientation and gender identity.
[514] See e.g. Nicole Laviolette, '*Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada*', Journal of Research in Gender Studies, Vol. 4(2), 2014 68-123.
[515] The UNHCR SOGI Guidelines, para. 14; *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*; see also Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005).
[516] *SW (Jamaica)*.

iii) Recognition as a "vulnerable group" by the international community

The international community's recognition of LGBTI people as "vulnerable groups"[517] may be deployed as evidence to establish the existence of the relevant PSG.[518]

The European Union Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons make the following points:

"LGBTI persons constitute a vulnerable group, who continue to be victims of persecution" (para. 2);
"[t]he criminalisation of consenting same-sex adult relationships reinforces existing prejudices, increases stigmatisation, legitimises discrimination and can make LGBTI persons more vulnerable to human rights abuses and violence, including police brutality and instances of torture and other forms of cruel, inhuman and degrading treatment against LGBTI persons" (para. 15);
"[l]esbian, bisexual and transgender women are particularly vulnerable targets of bias-motivated killings and rape, due to gender inequality and gender norms

[517] In this context, the International Commission of Jurists uses the term "vulnerable" in quotation marks to denote the fact that the organization considers that rather than focussing on a purported inherent vulnerability of LGBTI individuals, it would be more accurate to focus on the fact that certain individuals may be at greater risk than others of human rights abuses/violations connected to their real or purported SOGI or intersex status. LGBTI people are not somewhat vulnerable for something that inheres to them because of their SOGI or intersex status.

[518] See for e.g. Council of the European Union *Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, Foreign Affairs Council meeting, Luxembourg, 24 June 2013; UN Human Rights Council, Resolution 27/32 Human rights, sexual orientation and gender identity A/HRC/RES/27/32, Distr.: General, 2 October 2014; and also the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23.

within family structures" (para. 26);
"human rights defenders (journalists, activists, lawyers, trade unionists etc.) working to promote and protect the human rights of LGBTI persons, are an extremely vulnerable group, and frequently become targets for persecution and human rights violations" (para. 29); and
"lesbian and bisexual women, trans, intersex and gender-variant persons make up a significant part of the LGBTI group and are particularly vulnerable to gender-based and sexual violence" (para. 36).

Chapter Six: failure of State protection

Introduction

Article 1A(2) of the Refugee Convention, as amended by its 1967 Protocol, defines the term refugee for the purposes of that treaty as someone, who, among other things,

"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**; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, **is unable or, owing to such fear, is unwilling to return to it**." (**emphasis added**)

Pursuant to Article 1A(2) of the Refugee Convention, as the UNHCR Handbook clarifies, refugees who have a nationality are people who nonetheless do not enjoy the protection of their country, whether because they are unable or unwilling to avail themselves of that protection.[519]

For stateless refugees the focus of the enquiry is on the country of their former habitual residence.[520] Ordinarily, once stateless people have abandoned that country, owing to a well-founded fear of persecution, they are usually unable to return to it.[521]

This Chapter discusses the meaning of 'State protection' for the purposes of the refugee definition in Article 1A(2) of the Refugee Convention and offers advice to practitioners

[519] The UNHCR Handbook, para. 97.
[520] The drafters of the Refugee Convention defined the phrase 'country of former habitual residence' as "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned", see the UNHCR Handbook, para. 103.
[521] The UNHCR Handbook, paras 101-105.

on how to evidence a failure of State protection in this context.

Only States can provide protection

At the outset, the International Commission of Jurists underscores that, as a matter of interpretation, only States can provide *effective protection* against persecution for the purposes of the Refugee Convention.

Regrettably, however, Article 7 of the EU Recast Qualification Directive[522] erroneously states, among other things, that:

"[p]rotection against persecution or serious harm can only be provided by:
(a) the State; or
(b) **parties or organisations, including international organisations controlling the State or a substantial part of the territory of the State**;
provided they are willing and able to offer protection … [that is] effective and of a non-temporary nature." (**emphasis added**)

The notion that actors other than the State may be capable of providing *effective protection* in this context is of profound concern to the International Commission of Jurists. Such a concept is wrong in law, as it is clearly contrary to the explicit language of Article 1A(2) of the Refugee Convention,[523] which, as mentioned above, refers

[522] The EU Recast Qualification Directive.
[523] With respect to this, e.g., the UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04 23, July 2003, (hereafter: the UNHCR IFA Guidelines) note that: "[n]ot all sources of possible protection are tantamount to State protection. For example, if the area is under the control of an international organisation, refugee status should not be denied solely on the assumption that the threatened individual could be protected by that organisation. The facts of the

to the *protection of the country of nationality or former habitual residence* of the individual concerned, rather than the protection of any other entity.[524] As Hathaway and Foster explain, parties or organizations controlling a State or a substantial part of the territory of the State, even if providing a degree of safety, are not providing substitute or surrogate national protection; they are unaccountable in international law and have no legal duty, under international law or otherwise to provide that protection. Hathaway and Foster conclude that such an approach:

"…ignores completely the Refugee Convention's principled commitment to restoring refugees to membership in a

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individual case will be particularly important. **The general rule is that it is inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis with national protection provided by States. Under international law, international organisations do not have the attributes of a State**", para. 16 (**emphasis added**).

[524] See e.g. *Azad Gardi v. Secretary of State for the Home Department*, C/2002/0193; EWCA Civ 750, United Kingdom: Court of Appeal (England and Wales), 24 May 2002, in which the Court of Appeal of England and Wales drew a distinction between UNMIK in Kosovo, which had been given an international mandate to protect, and the self appointed authorities of the Kurdish Autonomous Area in Iraq. "The reference in Article 1A(2) is to an asylum seeker being unable or unwilling to avail himself 'of the protection of that country', a reference to the earlier phrase 'the country of his nationality'. That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognized internationally.… The KAR [Kurdish Autonomous Area in Iraq] does not meet that criterion. I see force also in the point made by Hathaway and Foster […] that protection can only be provided by an entity capable of being held responsible under international law. The decision in Vallaj is not inconsistent with that proposition, since the UNMIK regime in Kosovo had the authority of the United Nations plus the consent of the Federal Republic of Yugoslavia. Yet no-one suggests that the KAR or any part of it is such an entity under international law", para. 37 (NB: the decision was later declared a nullity on jurisdictional grounds).

national community, that is, in a political community that has clear protective duties under international law."[525]

In reviewing the implementation of the equivalent provision in the 2004 Qualification Directive (the predecessor to the Recast Qualification Directive) in five European States, the UNHCR concluded that the practice in those countries revealed that it would only be in an exceptional case, where the party or organization is comparable to a State, that it could be considered an actor of protection, i.e. capable of providing effective protection against persecution.[526]

Any suggestion that a tribe, a clan, an unrecognized political entity or another body without accountability in international law can be an actor of protection should be resisted.[527]

State persecution is clear evidence of unwillingness to provide adequate and effective protection

Persecution at the hands of the authorities of a country is clear evidence that protection is not available. As Lord Clyde held in *Horvath*: "[a]ctive persecution by the state is the very reverse of protection".[528]

Where the State itself is the persecutor,[529] for example, as torturer, imprisoner, or authority promulgating and/or

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[525] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Chapter 4, Failure of State Protection, 4.1 Protection is state protection, p. 292.
[526] The UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, IV.2. Actors of protection in countries of origin, pp. 47-50.
[527] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 4, Failure of State Protection, 4.1 Protection is state protection, p. 290.
[528] *Horvath v. Secretary of State for The Home Department* [2000] UKHL 37 (6th July, 2000), per Lord Clyde.
[529] "The most obvious failure of state protection will arise when the state and its agencies and officials are the actual perpetrators

enforcing discriminatory laws[530] or implementing general laws in a discriminatory fashion,[531] it is fairly clear that the State is unwilling to provide effective protection.[532]

Similarly, when central government encourages or condones persecution carried out by other organs of the State at regional or local level (e.g. police officers, local government officials, members of the armed forces or administrative officers), unwillingness to provide effective protection would be equally established.[533]

Additionally, where the State tolerates or gives tacit encouragement to non-State actors and stands by in the face of human rights abuses, [534] despite a clear ability to

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of serious harm to a person who subsequently claims protection on the ground of refugee status", Kirby J, *Minister for Immigration and Multicultural Affairs v. Respondent S152/2003*, [2004] HCA 18, Australia: High Court, 21 April 2004, para. 101.

[530] E.g., the UNHCR SOGI Guidelines state, "[m]any lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms. Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident", para. 26, footnotes in the original omitted; see also section below entitled: "Consequences of criminalization of LGBT identities on availability of effective protection".

[531] E.g., the UNHCR SOGI Guidelines state: "laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution", para. 29, footnotes in the original omitted.

[532] See, e.g., *Minister for Immigration and Multicultural Affairs v. Respondent S152/2003*, para. 101, cited above; *Baballah v Ashcroft* (2003) 335 F3d 981 [1078].

[533] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 4, Failure of State Protection, 4.2.1 Unwillingness to protect, pp. 297-303.

[534] Kirby J in *Minister for Immigration and Multicultural Affairs v. Respondent S152/2003* para. 110.

intervene, this constitutes circumstances that would likewise establish that a person would be unable to obtain adequate and effective State protection.[535]

Considering the spectrum of potential persecutors, i.e. from the State being wholly complicit to ordinary civilian/private individuals, the Court of Appeal of England and Wales recognized that:

"there is an important distinction between abuse which is authorised or tolerated by the state and rogue officials who from time to time abuse their authority. And in the space between these two poles lie cases like the present, where the evidence accepted by the fact-finding tribunals depicts a police force which systematically or endemically abuses its power despite the law and the will of the government to stop it [….] 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state' seems to [….] make a key distinction between state and non-state agents of persecution. While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them."[536]

The importance of the distinction between civilian perpetrator and State perpetrator was explained in *PS (Sri Lanka)*:

"[the] characterisation of the soldiers' conduct as no different from that of civilian rapists is, with respect, unsustainable. The whole point was that, unlike ordinary criminals, the soldiers were in a position to commit and

[535] Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 4, 4.2.1 Unwillingness to protect, cited above.
[536] *Svazas v. Secretary of State for the Home Department*, [2002] EWCA Civ 74, United Kingdom: Court of Appeal (England and Wales), 31 January 2002, paras 15-16; [2002] 1 WLR 1891.

repeat their crime with no apparent prospect of detection or punishment."[537]

In *Guinez v Canada*,[538] the claimant, a homosexual man from Chile, was a lieutenant in the Chilean army. His sexual orientation was discovered and as a result he was beaten by two colleagues and forced to resign. He suffered further threats from the same colleagues. In considering the availability of State protection the Refugee Protection Division had made findings with respect to the police in Chile: "they abuse their authority; they have a homophobic attitude; and they show that attitude in unacceptable fashion to homosexuals with whom they are in contact" (para. 4). Notwithstanding such findings, the Refugee Protection Division found that, if the former colleagues attempted to harm him again, the claimant would receive protection from the police. The Federal Court however held that this conclusion was not reasonable, as the Refugee Protection Division had accepted that the Chilean police abused their authority and had a homophobic attitude toward homosexuals with whom they were in contact. "[T]he police in Chile constitute a potential agent of persecution [and] there is no evidence that the police can protect the [claimant] from itself" (para 6).

The UK Upper Tribunal found in *LH and IP (Sri Lanka)* that, while persecution rarely existed against the LGBT community in Sri Lanka, it usually emanated from the police, and that "in such cases […] there is a failure of state protection. The perpetrators named in most if not all of the instances cited to us are police officers. There is no evidence that such abuse is ordered from a high level, but nor is there any evidence that the state does anything to

[537] *PS (Sri Lanka) v. Secretary of State for the Home Department*, [2008] EWCA Civ 1213, United Kingdom: Court of Appeal (England and Wales), 6 November 2008, para. 8.
[538] *Espejo Guiñez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 211, 16 February 2006; 146 ACWS (3d) 318.

stop it. On the contrary, the perpetrators, as far as we can see, enjoy complete immunity."[539]

Consequences of criminalization of LGBT identities on availability of effective protection

While the courts have considered whether the existence of criminal laws targeting individuals on account of their SOGI constitutes persecution, [540] there has been scant consideration of the impact of such laws on the ability of the State to provide effective protection and/or, in the circumstances, on the willingness of the individual concerned, owing to fear, to seek such protection.

As the UNHCR SOGI Guidelines advise, "laws criminalizing same-sex relations are normally a sign that [State] protection of LGB individuals is not available".[541]

The fact that a relevant SOGI and/or SOGI-related behaviours are illegal in the LGBTI refugee claimant's home country are relevant considerations in demonstrating the reasonableness of the person's unwillingness, *owing to fear*, to seek effective protection against the threatened or on-going persecution at the hands of non-State agents (whether the persecution is SOGI-related or not).

It is difficult to imagine how people being targeted wholly or partly on account of animus/prejudice or hatred against being gay, for example, could walk into a police station in a country where consensual same-sex conduct is criminalized, and request and be granted adequate and effective protection to stop their neighbour from violently attacking them.

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[539] *LH and IP (gay men: risk) Sri Lanka CG v. The Secretary of State for the Home Department*, [2015] UKUT 00073 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 18 February 2015, para. 112.
[540] See the section entitled "Criminalization of same-sex relations" in Chapter Three: persecution.
[541] The UNHCR SOGI Guidelines, para. 36.

In such circumstances, the UNHCR SOGI Guidelines advise that it would be unreasonable to expect the applicant to approach the State for protection and that it should be presumed, in the absence of evidence to the contrary, that the State is unable or unwilling to provide effective protection to the applicant.[542]

In circumstances where LGBTI applicants fear serious harm such as domestic violence, rape, sexual abuse, harassment, discrimination or other forms of persecutory behaviour that is unrelated to their SOGI, the existence of laws criminalizing consensual same-sex or conduct may well still result in the individuals concerned, owing to a fear of persecution on SOGI grounds, being unwilling to seek protection lest their LGBTI status may become known to the authorities. The combination of the occasioned and/or threatened serious harm and discriminatory denial of effective protection on SOGI grounds could lead to a conclusion that the individual has a well-founded fear of persecution.

Due consideration should be given to the risk of 'exposure' of one's SOGI when contemplating what would happen in the event that the person concerned sought protection from the authorities. In addition, due regard should be given to the consequent potential risk of persecution, blackmail and/or bribery, corruption etc.[543]

Inability to provide adequate and effective protection

Inability to avail oneself of State protection implies circumstances that are beyond the will of the person concerned. Straightforward examples would include cases

[542] The UNHCR SOGI Guidelines, para. 36.
[543] Regarding the possibility of blackmail, see, e.g., the report of the European Commission cited in the European Court of Human Rights in its judgment in *Dudgeon v. the United Kingdom* mentioned in the section entitled "Criminalization of same-sex relations" in Chapter Three: persecution.

of war, civil war or other grave disturbances that prevent the country of nationality from extending adequate and effective protection or make such protection ineffective.[544]

An inability to provide adequate and effective protection may also arise if the relevant State lacks:

"a system of domestic protection and machinery for the detection, prosecution and punishment of actings [sic] contrary to the purposes which the [Refugee] Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery."[545]

What is relevant is whether protection mechanisms against the risk feared exist, and if so, that they are implemented or enforced, available to the individual, adequate and effective.[546]

So for example, no prosecutions in relation to 'corrective' rapes perpetrated against lesbians may evidence a lack of ability or readiness to implement the criminal law to provide effective and adequate protection to lesbians against corrective rape.

The effectiveness of State protection is normally to be judged by its systemic ability to deter and/or prevent the form of feared persecution that risks materializing, not just punishment of it after the event.[547] This means that the

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[544] The UNHCR Handbook, para. 98.

[545] *Horvath v. Secretary of State for The Home Department*, per Lord Clyde.

[546] The UNHCR Handbook, para. 65; UN Human Rights Committee, General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paras 8, 15–16; CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, para. 36.

[547] *Macdonald's Immigration Law & Practice* Ninth edition 9th Ed, LexisNexis, Chapter Twelve, para. 12.58; see also, *Queen on the*

protection system must be effective at deterring people from committing offences against others on SOGI grounds, as well as protecting individuals and providing them with adequate redress *after* such offences have been committed.

Where levels of discrimination on SOGI grounds reach persecutory levels, the absence of anti-discrimination legislation may similarly be indicative of a lack of State protection.

Practitioners should be aware that in many countries where protection is theoretically available, in practice it might not be. Where the authorities responsible for providing protection are "riddled with corruption and are operating outside the law" protection may not be available in practice.

This was the conclusion of the Canadian Federal Court in *Lopez Villicana v. Canada*,[548] where the Court stated that democracy alone does not ensure adequate State protection; the quality of the democratic institutions providing that protection must be considered. The claimant in the case, a Mexican gay man, testified that the "Mexican police discriminate against homosexuals and, as a result,

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Application of Ruslanas Bagdanavicius, Renata Bagdanaviciene v. Secretary of State for the Home Department, [2003] EWCA Civ 1605, United Kingdom: Court of Appeal (England and Wales), 11 November 2003, "[t]he effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event", para. 55; *Kinuthia v Secretary of State for the Home Department* [2001] EWCA Civ 2100, 18 December 2001, [2002] INLR 133. See, in particular: "[s]ubsequent judicial action may be insufficient protection against maltreatment pending trial" (para. 21) and "[r]ecourse after mistreatment does not provide adequate protection", (para. 26); *McPherson v Secretary Of State for Home Department* [2001] EWCA Civ 1955, 19 December 2001, [2002] INLR 139.

[548] *Lopez Villicana v. Canada (Citizenship and Immigration)*, 2009 FC 1205, 24 November 2009; 86 Imm LR (3d) 191.

assistance would not be forthcoming" (para. 4). The Federal Court concluded that the evidence before the Immigration and Refugee Board suggested that "all police forces in Mexico are riddled with corruption and are operating outside the law" (para. 71) and the Board had an obligation to review that evidence.

Similarly, in countries where there are high levels of corruption, additional risks, e.g. demands for sexual 'favours', may arise for women when they seek protection from the authorities, including when they attempt to lodge complaints against agents of persecution.[549] Alternatively, corruption may detrimentally affect the effectiveness of protection because perpetrators would be able to pay bribes to secure their impunity.

Progressive States: where legal protection is developing

In practice, in the case of a State where there is evidence of some political will to provide effective protection and/or an existing legal framework, there may be a simple inability to do so.

For example, a State may well have become a party to international human rights treaties, incorporated them into domestic law and established a legal protection framework, i.e. *de jure* protection; there may also be an increasing awareness and understanding of the rights of LGBTI people. However, ingrained and long-held cultural, social or religious beliefs may create obstacles to that framework being implemented effectively in practice because some of those responsible for putting into practice the system of protection retain their own prejudices and fail to fulfil the State's duty to provide adequate and effective protection.

[549] See, e.g., *"Everyone's in on the Game" Corruption and Human Rights Abuses by the Nigeria Police Force*, Human Rights Watch, August 2010.

The Canadian courts have found, for example, that Brazil was taking steps and making efforts to combat homophobia. Nonetheless, they held that asylum decision-makers were required to consider whether such steps resulted in any meaningful protection in practice, i.e., *de facto* protection.[550]

In *Melo v Canada*,[551] the claimants, a homosexual couple from Brazil, were victims of threats, violence and mistreatment for many years; the Federal Court noted that, in assessing the availability of State protection, the Immigration and Refugee Protection Board had only focused on the positive legislative changes that had taken place in Brazil. The Federal Court held that this was an error, as the "real life situation" of the claimants had to be examined (para. 6). It further stated that decision-makers must address "whether the legislative changes have in fact resulted in any meaningful protection for homosexuals in Brazil […] regardless of what positive legislative advancements are being made, it is the operational level that must be considered" (para. 7).

Similarly, in *Galogaza v Canada*,[552] the claimant was a Croatian citizen who applied for protection based on his fear of persecution due to his Serbian ethnicity and his

[550] See *Neto v. Canada (Citizenship and Immigration)* 2007 FC 664, 21 June 2007; 158 ACWS (3d) 811, where the claimant, a homosexual man from Brazil, suffered abuse from his grandfather and the police on account of his sexual orientation. The Immigration and Refugee Board accepted that State authorities were involved in the persecution of homosexuals but determined that State protection was still available. The Federal Court found such a contradiction to be unreasonable. The Court held that although Brazil was making efforts to combat homophobia, consideration must be given to whether these actions "have translated into any meaningful protection being available for gays and lesbians in that country", (para. 9).

[551] *Melo v. Canada (Citizenship and Immigration)* 2008 FC 150, 4 February 2008; 165 ACWS (3d) 335.

[552] *Galogaza v. Canada (Citizenship and Immigration)* 2015 FC 407, 31 March 2015.

sexual orientation. The Immigration and Refugee Board had found that adequate, albeit not perfect, State protection was available in Croatia, and had rejected his claim. The Federal Court however held that the Board had unduly emphasized Croatia's efforts to improve the situation faced by minorities and downplayed its failure to achieve concrete results.

The actual protection available in practice in such circumstances needs to be carefully assessed based on reliable and up-to-date country of origin information. There must be credible and convincing evidence that the relevant reforms undertaken are more than merely transitional since, notwithstanding good intentions, there may not be any immediate or timely impact on how society perceives LGBTI people.[553]

Protection against non-State agents of persecution

Where persecution emanates from non-State actors, it will be particularly important to consider whether protection is both available and effective in practice.

The Court of Appeal of England and Wales stated:

"[if the Tribunal] considered that where the law enforcement agencies are doing their best and are not being either generally inefficient or incompetent (as that word is generally understood, implying lack of skill rather than lack of effectiveness) this was enough to disqualify a potential victim from being a refugee […] we consider that it erred as a matter of law".[554]

For example, if the police fail to respond to requests for protection or the authorities refuse or fail to investigate and prosecute or appropriately punish perpetrators of violence or other forms of harm against LGBTI individuals

[553] The UNHCR SOGI Guidelines, para. 37.
[554] *Noune v Secretary Of State for Home Department* [2000] EWCA Civ 306, 6 December 2000, para. 28(1).

in a timely fashion, then State protection is unlikely to be either available or effective.[555]

In *Franklyn v Canada*,[556] the claimant, a lesbian woman from St. Vincent and the Grenadines, was subject to abuse by her ex-boyfriend on account of her relationships with other women. The police would not assist after numerous complaints and the claimant feared inadequate State protection, considering that her ex-boyfriend's uncle was a sergeant in the police force. The Federal Court found that it was not objectively reasonable that the claimant seek further protection after her previous complaints had been ignored.

In *Kadah v Canada*,[557] the claimant, a gay male Muslim Palestinian citizen of Israel, was subjected to multiple physical attacks by his family and received numerous threats on account of his sexuality. He had moved several times in an attempt to flee the abuse. The claimant sought assistance from the police after a fight but was told not to bother them. The Federal Court determined that where the State is a functioning democracy, the claimant must have exhausted all courses of action available to him. A single incident of refusal of assistance is insufficient to negate the presumption of State protection. However, reviewing the adequacy of State protection of similarly situated individuals, the Federal Court found that the documentary evidence showed that Israeli police violence towards both Palestinian Arabs and homosexuals was extensive and should have been considered by the Immigration and Refugee Board.

Similarly, if a State encourages or tolerates particular social, religious or cultural laws, practices or behaviours that discriminate on grounds of SOGI or if the State is

[555] The UNHCR SOGI Guidelines, para. 36.
[556] *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249, 13 September 2005; 142 ACWS (3d) 308.
[557] *Kadah v. Canada (Citizenship and Immigration)*, 2010 FC 1223, 3 December 2010.

unwilling or unable to take action against such discriminatory behaviours (for example in cases of societal or familial violence) protection is unlikely to be available or effective.[558]

Requirement to complain to a higher authority?

In assessing whether effective protection exists sometimes an applicant is told that they should have complained to an ombudsperson, a police complaints commission or similar body either about their treatment by the authorities or in relation to the latter's failure to provide protection or, alternatively, that they would be able to do so on return if protection failed.

At the very least, however, refugee status decision-makers are required to provide an explanation if they find sufficient protection in cases where previous efforts to seek assistance have proved ineffective.[559]

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[558] Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0, 11 February 2015, United Kingdom, Home Office, 3.4.4 Failure of Protection p. 14.

[559] *Ramirez v. Canada (Citizenship and Immigration)*, 2008 FC 466, 11 April 2008; 168 ACWS (3d) 1040, where the claimants, a gay couple from Mexico, had received numerous threats from colleagues, neighbours and the police over many years. Most recently the couple received death threats by police after leaving a gay bar. Their car had been shot at and they feared that it was the police who were responsible. The couple also feared kidnapping and extortion as their parents were asked for money in exchange for their safety. All incidents were filed with the Attorney General's office upon which the police requested a bribe in order to investigate. The Federal Court found that given that "the applicants testified to multiple and essentially fruitless attempts to seek the assistance of the authorities in two localities, the RPD [Refugee Protection Division] should have articulated why this evidence was not sufficient to meet the evidentiary burden […] and how one more complaint might have made any difference. Moreover, the Court agrees with the applicants that the analysis of state protection must be personalized and take account of all grounds raised […] Accordingly, the RPD's laconic statements on the applicants' failure to seek state protection

Claims from individuals with a relevant SOGI have been accepted, in circumstances where they went to the police on numerous occasions and it was found unreasonable to expect them to take their complaint further owing to their treatment on previous occasions.

For example, in *Varadi v Canada*,[560] the claimant was an ethnic Roma and a lesbian from Hungary; she suffered abuse from her husband and harassment from the community. She made numerous attempts to seek protection from authorities but they refused to help. She was threatened, sexually assaulted and attacked at her workplace. The Immigration Officer had found the abuse amounted only to discrimination and that the claimant still had the option to approach the Police Complaints Commission. The Federal Court, however, found that since the claimant had gone to police on numerous occasions, it was not reasonable to expect her to address the Police Complaints Commission given her previous experiences. Finally, the Federal Court held that the adequacy of State protection could not be taken for granted because a country was a democracy and was making efforts to protect citizens. The evidence demonstrated that the State initiatives had not addressed the claimant's circumstances and therefore State protection was not available to her (para. 41).

Particular circumstances of the individual

Practitioners should note that, even if a State in general has a system that provides effective protection, there might be cases where the risk to the individual is such that additional protective steps are required on the part of the authorities in order for the protection to be adequate and effective. In those circumstances, if the State is unlikely to undertake additional steps to ensure adequate and

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cannot be regarded as sufficiently well-explained to meet the reasonableness threshold" (para. 20).

[560] *Varadi v. Canada (Citizenship and Immigration)*, 2013 FC 407, 23 April 2013.

effective protection, then practitioners should focus on putting forward evidence about whether the authorities know or ought to know of the particular circumstances of the individual concerned that give rise to the need for additional protection, i.e. why protection ordinarily available will not be sufficient.[561]

It is therefore always important to look at the individual circumstances. Even where in general "systemic sufficiency of state protection" exists, applicants may still be able to demonstrate a well-founded fear of persecution if they can show that the authorities know or ought to know of circumstances particular to their case that give rise to their fear but are nonetheless unlikely to take the additional protective steps the individual circumstances reasonably require. This may include, for example, a case where an applicant has received specific death threats but no measures were taken to provide protection.

No requirement to seek out State protection if it is unlikely to be forthcoming

While on the one hand, there is no requirement in the Refugee Convention to seek out State protection in the home country,[562] there is an obligation, on the other, to

[561] "Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require", *Bagdanavicius & Anor, R (On the Application of) v Secretary of State for the Home Department* [2003] EWCA Civ 1605, 11 November 2003, para. 55(6), citing in turn *Osman v. UK* [GC], no. 23452/94, European Court of Human Rights, judgment, 28 October 1998, (1998) 29 EHRR 245.

[562] See the UNHCR SOGI Guidelines, para. 36. The Canadian asylum system, however, requires the applicant to rebut the presumption that the State will protect and has in the past dismissed SOGI-based asylum claims on the grounds that the applicants had not sought protection in their home states (see e.g. *Szorenyi v Canada (Minister of Citizenship and Immigration)* 2003 FC 1382, 127 ACWS (3d) 737, 25 November 2003; *Inigo*

seek such protection if that protection can be said to "reasonably have been forthcoming".[563]

In *Galogaza v Canada*,[564] the Federal Court found that the Immigration and Refugee Board had imposed an obligation on the claimant to seek out State protection, which, in his circumstances, was not legally required. Indeed, the Federal Court found that "[t]he evidence shows that most homosexuals in Croatia choose, out of fear, not to disclose their sexual orientation or to report the violence to which they are subjected. On the evidence, therefore, Mr Galogaza's fear was not unreasonable" (para. 14). Furthermore, it clarified that there is no absolute requirement to approach State authorities for protection (para. 14). "In addition, any obligation to approach state authorities for protection could only arise in circumstances where protection was likely to be provided" (para. 15).

In respect of a failure to seek protection, the Court of Appeal of England and Wales held in *Skenderaj*, that: "if the state cannot or will not provide a sufficiency of protection, if sought, the failure to seek it is irrelevant. And that is so whether the failure results from a fear of

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Contreras v. Canada (Minister of Citizenship and Immigration) 2006 FC 603, 148 ACWS (3d) 782, 16 May 2006; *Castro v. Canada (Minister of Citizenship and Immigration)* 2006 FC 332, 14 March 2006. However, more recently the courts have been clear in stating that there is no absolute requirement to approach State authorities for protection and that where the evidence shows that most homosexuals in a country choose out of fear not to disclose their sexual orientation or report the violence to which they are subjected, the claimed fear was not unreasonable (see, e.g., *Jack v Canada* and *Galogaza v. Canada*, cited below).

[563] See *Ward v Canada (Attorney General)*, [1993] 2 SCR 689 (Can. SC, Jun. 30, 1993), in turn, citing Hathaway, *The Law of Refugee Status* (1991).

[564] *Galogaza v. Canada (Citizenship and Immigration)*, see above under section entitled "Progressive States: where legal protection is developing".

persecution or simply an acceptance that to do so would be futile."[565]

Evidencing lack of effective protection

In many countries where homophobia and transphobia are deeply embedded, there will likely be little or no evidence of the State refusing to provide protection because few if any people would consider seeking such protection in the first place, owing to prevailing societal attitudes.

For example, in countries where consensual same-sex sexual conduct is criminalized, it is counterintuitive to expect that evidence of unwillingness on the part of the State authorities to provide effective protection against SOGI-based human rights violations and abuses will be easily obtainable. In fact, the greater the risk of persecution on SOGI grounds in the country, the more difficult it may prove to obtain such objective evidence. If LGBTI people are criminalized, for example, it is very unlikely that there will be any evidence of what action the police take when, say, a SOGI-based hate crime is reported to them. Few, if anyone in such circumstances would be likely to go to the police and out themselves as LGBTI because to do so would expose them to a risk of State persecution, including through a persecutory prosecution.

"Where the country of origin information does not establish whether or not, or the extent, that the laws [criminalizing LGBTI people] are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted."[566]

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[565] *Secretary of State for the Home Department v Skenderaj* [2002] EWCA Civ 567, 26 April 2002, para. 42.
[566] The UNHCR SOGI Guidelines, para. 28.

Evidence of similarly situated individuals can be taken into account to demonstrate a lack of protection.[567]

For example, in *Jack v Canada*,[568] the claimant, a male citizen of Grenada, was sexually assaulted by a neighbour after fleeing an abusive step father as a teenager. The claimant was harassed and beaten on account of his perceived homosexual relationship with his abuser. The claimant did not seek assistance from the police as he knew another perceived homosexual who was a victim of violence and who, having sought police assistance, had not received it. However, the Immigration and Refugee Board rejected his claim finding that "it was not unreasonable for the applicant to seek help from the police after being attacked […] It was thus unreasonable for him not to have made any efforts to seek state protection and exhaust all avenues of protection" (para. 9). The Federal Court disagreed. Citing *Ward v Canada*, where the Canadian Supreme Court had found that, "examples of clear and convincing confirmation of a state's inability to protect might include the claimant's testimony of similarly situated individuals let down by the state protection arrangement" (para. 32), the Federal Court held that the claimant could rely on the experience of a similarly situated individual to determine whether State protection was available or not.

Recommended approach and questions/issues relating to protection

Practitioners will need to consider the following matters in seeking to evidence a failure of State protection in the context of asylum claims based on SOGI. Practitioners should note that the applicant may not know the answers to some of these questions and these issues may require consideration in light of the objective material, e.g. country of origin information.

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[567] *Ward v Canada (Attorney General)*, [1993] 2 SCR 689 (Can. SC, Jun. 30, 1993).
[568] *Jack v. Canada (Citizenship and Immigration)*, 2007 FC 93, 31 January 2007; 155 ACWS (3d) 159.

In particular, practitioners should have regard to the legal framework that exists in the country of origin, including the State's obligations under any relevant provisions of international treaties to which the State is a party, and then consider what happens in practice. Issues to explore/questions that practitioners should consider include the following:

- What is the legal structure? Is the persecutory conduct feared illegal in the country of origin? If so, is the act/harm the applicant fears covered by the criminal/civil law?
- How is any such legal framework implemented in practice? What happens in practice when a person attempts to seek protection against the particular risk or risks?
- Is there evidence of attempts to rely on the legal framework? E.g. any evidence of charges or prosecutions?
- Are there arrests, charges, prosecutions and punishments commensurate with the severity of the crime for those that have or would persecute the applicant on protected grounds?
- If there is a legal structure in place but no evidence of it being used, why is this? Is it because nobody is being persecuted, or because of a lack of reporting owing to fear or because it is not implemented?
- Is the persecution at the hands of the State or non-State agents?
- If persecution is at the hands of the State, at what level? High level, low level? Central, regional or local government?
- If it is from 'rogue' officials, how timely is any intervention taken by the State?
- Is the State "able" to provide adequate and effective protection?
- Is there a pattern of impunity for SOGI-related crimes? Or more generally for human rights violations?
- How, if at all, is what might be termed *de jure* protection implemented in practice so that protection is effective, i.e. *de facto*?

- Are there any other barriers to obtaining protection (e.g., bribery, corruption, social, religious, cultural attitudes)? How pervasive are bribery and corruption (and other relevant barriers to protection, if any) and what effect do they have on access to effective protection and redress?
- Does the State prosecute/persecute on SOGI grounds or for SOGI-related behaviour? If so, can the applicant truly seek effective State protection from the feared harm?
- Is the applicant unwilling, owing to a fear of persecution, to avail herself/himself of the protection available?
- If the State partially protects but partially criminalizes SOGI, can LGBTI applicants obtain protection without exposing themselves to a risk of (further) persecution?
- Do the applicant's circumstances disclose aspects particular to the applicant (e.g. high profile activist, specific threats of death) such that the State should be required to provide additional protection? If so, will that additional protection be available?
- In a country where protection is theoretically available, did the applicant try and complain? Has the applicant ever sought protection from the authorities in the home country? E.g. did s/he ever to go the police?
- If not, why not?
- If yes, what was the result?
- Is the applicant aware of any complaint mechanisms and how to access them?
- If the applicant has not sought protection what would have been the likely outcome if s/he had done so?
- What is the applicant's status, position and power and how does it affect, if at all, the possibility of obtaining protection?

Chapter Seven: internal flight or relocation alternative

Introduction

If refugee claimants have a well-founded fear of persecution for a Refugee Convention reason in their home area and are unable or unwilling to avail themselves of the protection of their country, they may still be denied refugee status if there is another place within that country where they will not be persecuted, and where it is reasonable to expect them to go. In those circumstances, applicants are said to have what is known as a viable internal flight or relocation alternative (IFA).

The concept of IFA is relevant to SOGI-based refugee claims because, increasingly, they tend to be rejected on the grounds that the individual concerned has a viable IFA.

This chapter discusses the IFA concept and its relevance to SOGI-based asylum claims.

Ascertaining whether there is a viable IFA

The definition of who is a refugee in Article 1A(2) of the Refugee Convention does not mention the concept of internal flight or relocation alternative. However, during the refugee status determination process the question of whether refugee claimants may have a viable IFA within their home country may arise. In determining whether applicants would face a real risk of persecution on return, the refugee status decision-maker may give consideration to whether there is a location within the country of return where the individuals concerned would be safe from persecution. In this context, applicants may be safe in the proposed area of relocation either because the threat of persecution is localized to their home area or because they would be able to access effective State protection against persecution in the proposed area of relocation. In these circumstances, and providing that it is reasonable to expect

the people concerned to go there, they would have a viable IFA and, therefore, they are not entitled to be recognized as refugees.

However, with respect to IFA in the context of SOGI-based refugee claims, as the UNHCR SOGI Guidelines caution:

"intolerance towards LGBTI individuals tends to exist countrywide in many situations, and therefore an internal flight alternative will often not be available. Relocation is not a relevant alternative if it were to expose the applicant to the original or any new forms of persecution. IFA should not be relied upon where relocation involves (re)concealment of one's sexual orientation and/or gender identity to be safe".[569]

The ruling of the Canadian Federal Court in the case of *Okoli v Canada*[570] is consistent with the UNHCR SOGI Guidelines' caution. The claimant in the case, a homosexual man from Nigeria, was a market trader who suffered death threats, physical attacks and expulsion from his traders' association. The Refugee Protection Division had found that if the claimant was to "practise discretion" with respect to his sexual orientation, Lagos would be a viable IFA. The Federal Court confirmed, as it has done repeatedly in other cases, that such decisions are erroneous as they require an individual to repress an immutable characteristic, that is, the applicant's sexual orientation, something which was an "impermissible requirement" for the assessment of an internal flight alternative.[571]

In enquiring into whether an applicant meets the refugee definition in Article 1A(2) of the Refugee Convention, different jurisdictions place the 'internal flight/relocation

[569] The UNHCR SOGI Guidelines, para. 54.
[570] *Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, 79 Imm LR (3d) 253, paras 36–37, 39.
[571] See also discussion of concealment, below, and the section entitled: "Concealment" in Chapter Three: persecution).

alternative' analysis either at the point where the well-foundedness of the fear of persecution itself is being determined or where they are ascertaining whether the applicant is likely to receive effective and adequate protection from the State against the feared harm.[572]

The UNHCR considers that:

"[t]hese approaches are not necessarily contradictory, since the [refugee] definition comprises one holistic test of interrelated elements. How these elements relate, and the importance to be accorded to one or another element, necessarily falls to be determined on the facts of each individual case."[573]

However, as the UNHCR IFA Guidelines also clarify:

"[i]nternational law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort. The concept of internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against *refoulement*. Moreover, since the concept can only arise in the context of an assessment of

[572] The UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04 23, July 2003, (hereafter: the UNHCR IFA Guidelines), para. 3. For further discussion see Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 4, 4.3.1 The conceptual basis of the internal protection alternative, pp. 335-342. See also Chapter Two: well-founded fear and Chapter Six: failure of State protection.

[573] The UNHCR IFA Guidelines, para. 3, footnote in the original omitted.

the refugee claim on its merits, it cannot be used to deny access to refugee status determination procedures." [574]

Furthermore, if the risk of persecution to the applicant arises throughout the State, then there can be no question of internal relocation.[575]

In order to ascertain whether refugee claimants can avail themselves of a viable internal flight/relocation alternative, the UNHCR IFA Guidelines recommend consideration of the answers to the following questions:

i) is the area of relocation practically, safely and legally accessible to the individual?[576]
ii) is the agent of persecution the State?[577]
iii) is the agent of persecution a non-State agent?[578]
iv) would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?[579]
v) can the claimant lead a relatively normal life without facing undue hardship in the alternative location concerned?[580]

This approach is broadly reflected in the EU Recast Qualification Directive[581] and in national jurisprudence.[582]

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[574] The UNHCR IFA Guidelines, para. 4.
[575] E.g., *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and others* [2007] UKHL 49 per Baroness Hale, "[b]y definition, if the claimant had a well-founded fear of persecution, not only in the place from which he has fled, but also in the place to which he might be returned, there can be no question of internal relocation", para. 21. See, also, the UNHCR IFA Guidelines, para. 13; and the Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, University of Michigan Law School, International Refugee Law.
[576] The UNHCR IFA Guidelines, paras 10-12.
[577] The UNHCR IFA Guidelines, paras 13-14.
[578] The UNHCR IFA Guidelines, paras 15-17.
[579] The UNHCR IFA Guidelines, paras 18-21.
[580] The UNHCR IFA Guidelines, paras 24-30.
[581] Paragraph 27 of the preamble of the Recast Qualification Directive states, "[i]nternal protection against persecution or

Assessing whether an internal flight/relocation alternative is viable involves two stages:

i) is there a place within the individual's home country that the applicant can reach in safety where she or he will be free from persecution?
ii) if so, is it reasonable to require her or him to relocate there?

Subjective and objective analysis of reasonableness

Consideration of what is 'reasonable' requires a subjective and objective analysis in light of the refugee claimant's personal circumstances and the conditions in the proposed place of internal flight/relocation.[583]

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serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available."

[582] E.g., *Januzi (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Hamid (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Gaafar (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Mohammed (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Consolidated Appeals)*, [2006] UKHL 5, United Kingdom: House of Lords (Judicial Committee), 15 February 2006.

[583] The UNHCR IFA Guidelines, para. 23. For a critique of the predominant approach to "reasonableness" in this context and for alternatives approaches to the same, see Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 4 Failure of state protection, 4.3.2, Minimum affirmative state protection, pp. 350-361.

In *Parrales v Canada*,[584] for example, the claimant, a lesbian from Mexico, suffered severe abuse from police in Querétaro state, in Northern Mexico, to the point where she required reconstructive surgery. She reported the incidents to the Human Rights Commission but did not receive assistance. She moved to two other cities where she continued to fall victim to both physical and sexual abuse by both police and civilians. Her experiences led to severe psychological trauma for which she sought therapy. The Immigration and Refugee Board rejected her refugee claim on account of an IFA in Mexico City. However, the Federal Court concluded that the applicant's personal circumstances and previous experiences could not be ignored and must be considered when determining the reasonableness for her of an IFA in Mexico City, something which the Board had failed to do.[585]

Underlying the notion of 'reasonableness' is the absolute prohibition on *refoulement* under Article 33 of the Refugee Convention "in any manner whatsoever." In practice this means that if *this* refugee applicant would *in fact* be compelled to return to the site where there is a well-founded fear of persecution or to another part of the country where serious harm may be a possibility, then the IFA is not viable because it would result in constructive *refoulement*.[586]

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[584] *Parrales v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 504, 21 April 2006; 54 Imm LR (3d) 120; see also, *Gomez v. Canada (Minister of Citizenship and Immigration)*, IMM-3785-97, 23 June 1998, para. 8; 81 ACWS (3d) 130.

[585] The Federal Court held that the Immigration and Refugee Board had failed to consider whether: "the conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there", *Parrales v. Canada*, paras 9, 12-13 (emphasis in the original).

[586] See the UNHCR IFA Guidelines, para. 21.

While this analysis appears in some leading decisions,[587] it is notable by its absence from others.[588]

Practitioners should take care to distinguish between the *objective* conditions that the applicant would likely face in the site of relocation, and whether – for that particular individual – such conditions would be *subjectively* reasonable in light of the personal circumstances of the person concerned.

Burden of proof

The duty is on the refugee status decision-maker to identify the proposed site of relocation. [589] Refugee claimants, in turn, are entitled to put forward any evidence or reasons they may have that indicates that either the IFA in fact would not be viable in the sense that they would still have a well-founded fear of persecution (original or new or both) at the proposed IFA location or that relocation to the site identified would nonetheless be unreasonable all things considered.[590]

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[587] E.g., *SZIED v. Minister for Immigration and Citizenship*, [2007] FCA 1347, Australia: Federal Court, 30 August 2007, paras 49-52; and *Sufi and Elmi v. the United Kingdom*, European Court of Human Rights, Applications nos. 8319/07 and 11449/07, judgment of 28 June 2011, paras 265-296.

[588] E.g., *Januzi* and *AH (Sudan)*, both cited above.

[589] The UNHCR IFA Guidelines, para. 34. However, practitioners should note a particularly concerning development in Australia where there has been a suggestion that there is no requirement to identify the particular site of relocation and that, instead, what is required is to "look at realistically and sensibly the possibility of the person living elsewhere in his or her country of nationality other than the area where he or she was at risk", *Guide to Refugee Law in Australia*, Chapter 6 2 Feb 2015.

[590] See, e.g., *Flores de la Rosa v. Canada (Citizenship and Immigration)*, 2008 FC 83, 23 January 2008; 164 A.C.W.S. (3d) 497, where the claimant, a homosexual man from Mexico, had been beaten and stabbed by an ex-lover. When he tried to hide in another city, his attacker attempted to find him. The police did not assist the claimant. The Immigration and Refugee Board concluded that an IFA was available to the claimant in Mexico

Is the area of relocation practically, safely and legally accessible to the individual?

If the applicant cannot in practice access the proposed site of relocation then internal flight will not be a reasonable option.[591] This would include: cases where the person was being removed to or through the place where they have a well-founded fear of persecution; logistical or safety impediments; [592] travelling through minefields or risking attack or banditry;[593] extortion; military or traffic checks (where their identity may be disclosed).

For example, in *Su v Canada*, [594] the claimant, a homosexual man from China, was arrested after being seen kissing his partner in a park. He was charged with prostitution then detained and tortured by police. The evidence showed that the Chinese authorities had a quota to meet for 'sexual crimes' and were targeting homosexuals. The claimant feared persecution on return to China. The Immigration and Refugee Board had not found

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City. The Federal Court held that, "[t]he Applicant has not identified any evidence related to the IFA which runs contrary to the Board's finding." (para. 10).

[591] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, Canada: Federal Court, 10 November 1993; *Harjit Singh Randhawa v. The Minister for Immigration Local Government and Ethnic Affairs*, No. NG994 of 1993, Australia: Federal Court, 11 August 1994 [442]; see also, Article 8(1) of the EU Recast Qualification Directive, which, among other things, refers to the fact that the individual concerned "can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there". See also *Sufi and Elmi v. the United Kingdom*, cited above. See generally Hathaway and Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, Chapter 4 Failure of state protection, 4.3.2, The test for assessing international protection, pp. 342-350.

[592] *SZATV v. Minister for Immigration and Citizenship*, [2007] HCA 40, Australia: High Court, 30 August 2007.

[593] The UNHCR IFA Guidelines, para. 10.

[594] *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 554, 9 May 2012; 218 ACWS (3d) 635.

the claimant credible regarding his interactions with police. In the alternative, the Board had concluded that the claimant had an IFA in Shanghai where, the Board claimed, gay and lesbian life was generally accepted. The Federal Court, however, found that an IFA is not viable if the claimant must face persecution in order to obtain permission to travel to the IFA site.

An inability to obtain travel documents or travel to and enter and reside in the territory, including via any intermediary State, will render the relocation alternative inaccessible. [595] Similarly, if the State has residence restrictions formally rendering the site of relocation unavailable to the applicant, then the refugee status decision-maker should find conclusively that internal relocation is in fact not available to the applicant.[596]

Durable safety and security

The safety and security in the site of relocation must be 'durable' and not illusory or unpredictable.[597] This may be particularly important in LGBTI cases. In some countries progress towards establishing equality and protecting and respecting the human rights of LGBTI individuals may be in its infancy and it may not be possible to determine whether safety and security will be 'durable'.

A number of country examples, where some limited progress in recent years in the advancement of the rights of LGBT individuals was followed by a sudden deterioration of the situation, illustrate this point.

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[595] *Al-Amidi v Minister for Immigration & Multicultural Affairs*, [2000] FCA 1081; *Salah Sheekh v. the Netherlands*, European Court of Human Rights, Application no. 1948/04, Judgment of 11 January 2007.

[596] *Sathananthan v. Canada (Minister of Citizenship and Immigration)*, IMM-5152-98, 2 September 1999; the *hukou* system of household registration operated in China is an example of residence restrictions that may preclude internal relocation.

[597] The UNHCR IFA Guidelines, para. 27.

While according to the Zambian Penal Code, same-sex sexual activity had been illegal in the country prior to 2013, until then the law had been largely unenforced. However, in May 2013 police in Kapiri Mposhi arrested Phil Mubiana and James Mwansa, both aged 21, on charges of having sex "against the order of nature".[598] The arrest of the two men took place just weeks after a human rights activist had been arrested in the capital, Lusaka, following an appearance on television supporting LGBT rights.[599] The arrests appeared to be a direct response to increasingly homophobic statements made by political and religious leaders since the election of President Michael Sata in September 2011.[600]

Malawi is another example where an apparent practice of non-enforcement of criminal provisions consistent with ongoing progress in favour of LGBT rights was abruptly reversed. In January 2010, Steven Monjeza and Tiwonge Chimbalanga were prosecuted for holding a wedding ceremony in December 2009. The two individuals were reportedly subjected to torture and other ill-treatment while in custody. They were later sentenced to 14 years' hard labour for "gross indecency";[601] subsequently they were pardoned following engagement of the United Nations officials with the then Malawian President.[602] Prior to this case, there had been no recent reports of prosecutions using the colonial era law criminalizing consensual same-sex sexual activity.

[598] Amnesty International, '*Zambia urged to release two men charged with same-sex sexual conduct*', 8 May 2013.
[599] Amnesty International, '*Two men on trial for unnatural sex 'unnatural'*', 15 May 2013.
[600] Open Society Initiative for Southern Africa, '*Zambia begins jailing gays*'.
[601] Amnesty International, '*Malawian couple sentenced to 14 years hard labour for 'gross indecency'*', 20 May 2010.
[602] UN News Centre, '*In Malawi, Ban welcomes pardoning of gay couple*', 29 May 2010.

Is the agent of persecution the State?

Given that there can be no IFA if the risk of persecution to the applicant arises throughout the State, the identity of the agent of persecution is critical to inquiring into the potential viability of an IFA.

National authorities are presumed to act throughout the State unless it is clearly established that the State's authority or power is limited to a specific geographical area or where a State only has control over certain parts of the country. Such circumstances arise, for example, in a civil war situation or in cases of disputed territory.[603]

Local or regional State authorities ordinarily derive their authority from the State. Therefore, the internal relocation alternative will only be relevant and viable if there is clear evidence that the persecuting authority has no reach outside its own region, and there are particular circumstances to explain the national government's failure to counteract the localized harm.[604]

The fact that the national authorities may be unable or unwilling to provide protection to the refugee claimant in one part of the country may be dispositive of the question of whether there is a viable IFA somewhere else in the country given that such inability or unwillingness on the national authorities' part may demonstrate that durable safety in another part of the same country is not in fact available.[605]

The presumption of the State acting throughout the country could be displaced if, for example, there is no *offending* State policy or practice and the persecution arose owing to 'rogue' State actors against whom the State will take timely

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[603] The UNHCR IFA Guidelines, paras 13-14; EU Recast Qualification Directive, preamble, para. 27.
[604] The UNHCR IFA Guidelines, para. 14.
[605] *SZATV v. Minister for Immigration and Citizenship*, [2007] HCA 40, Australia: High Court, 30 August 2007, para. 81.

and effective action,[606] or if the government has tolerated the actions in one area of the country but is unlikely to do so in another part of the country.[607]

Criminalization of same sex-relations

If the country in question criminalizes consensual same-sex relations and "enforces" the relevant legislation,[608] then it will normally be assumed that such laws are applicable in the entire country. Thus, "where the fear of persecution is related to these laws, a consideration of IFA would not be relevant."[609]

Similarly, if people have fled persecutory prosecutions (e.g., on account of having been charged with an offence under laws that make consensual same-sex conduct a crime) or have outstanding arrest warrants against them, it is likely that such circumstances will be relevant anywhere in the country. Many countries require local registration with the authorities and have centralized police and/or security files, which, in turn, may create a new risk in the place of relocation even when no arrest warrant existed prior to flight.[610]

If the feared persecution arises as a result of action taken by government officials to enforce the law or to implement government policy that is not implemented in another area, "this must be because the responsible officials have failed to discharge their duty to enforce the relevant law or policy … that situation might change overnight; either

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[606] See *Januzi* per Lord Bingham, para. 21, referring, in turn, to *Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74; [2002] 1 WLR 1891, para. 55 and see also, therein paras 16-17.
[607] This is most likely to be relevant for example where government control is weak in rural areas and attitudes towards LGBT individuals are more progressive in big cities.
[608] See also the section entitled: "Criminalization of same-sex relations" in Chapter Three: persecution.
[609] The UNHCR SOGI Guidelines, para. 53.
[610] For example Iran and Turkey.

because of the appointment of one or more new officials or insistence on enforcement by superior officers."[611]

Access to medical treatment

Laws that do not allow a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on documents, would also normally be applicable nationwide.[612] Difficulties in accessing medical treatment owing to past persecution may also be relevant, particularly if they would lead to shame, stigma or ostracism. Similarly, discriminatory access to HIV treatment or medical treatment flowing from HIV status may need to be taken into account.[613]

Is the agent of persecution a non-State actor?

An assessment should be made of whether the agent of persecution is a non-State actor. If so, consideration should be given to the persecutors' motivation and their ability to pursue the applicant to the proposed site of relocation,[614] as well as the availability, if any, of effective State protection at the proposed IFA site.

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[611] *Minister for Immigration and Multicultural Affairs v Jang* (2000) 175 ALR 752 (Aus. FC, Aug. 4, 2000), para. 27.
[612] The UNHCR SOGI Guidelines, para. 53.
[613] See section entitled: "Denial of access to health care as persecution" in Chapter Three: persecution.
[614] E.g. *Perampalam v Minister for Immigration and Multicultural Affairs*, FCA 165, Australia: Federal Court, 1 March 1999, referred to in *Guide to Refugee Law in Australia*, Chapter 6 2 Feb 2015, where "the Full Federal Court found that the Tribunal had failed to engage in an examination of the evidence to determine whether it would be reasonable to assume the LTTE's extortion demands would cease if the appellant moved a mere quarter of a mile away from her own home to her daughter's home in Thambiluvil, or if she attempted to resettle among strangers at Kiriulla where she has a son, but no other family or friends to provide protection in a country racked by civil war. The Court further held that the Tribunal had failed to consider whether the appellant would be pursued if she were to relocate: 'Nor did it consider whether a woman suspected by the STF of collusion with the LTTE when

Concealment

If the reasonableness of the proposed relocation site is predicated on refugee applicants concealing their SOGI or not being discovered, then essentially this amounts to persecution and internal relocation is not viable.[615]

"To say that an internal flight alternative exists if the homosexual refugee claimant lives a 'discreet' existence, is to say that it is not an internal flight alternative."[616]

Would the claimant be exposed to a risk of serious harm upon relocation?

With respect to the degree of harm that will render relocation unreasonable, while the risk of serious harm amounting to persecution upon relocation is obviously relevant,[617] there is no requirement for that harm to rise to the level of persecutory harm/serious harm; nor does the harm need to reach the level of breaches of non-derogable human rights.[618] Nor is there a need to show that such harm would result from systematic and discriminatory conduct in order to render relocation unreasonable.[619]

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terrorists strike in the vicinity of Thambiluvil might not continue to be similarly suspected (and interrogated with consequences of the kind she has previously experienced) upon similar events occurring in the vicinity of her residence, wherever it may be in Sri Lanka'", see, footnote 32; see also, the UNHCR IFA Guidelines, para. 15.

[615] The UNHCR SOGI Guidelines, para. 54. See the section entitled: "Concealment" in Chapter Three: persecution.

[616] *Fosu Atta v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1135, 8 October 2008, para. 1.

[617] Speech of Baroness Hale in *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and others*, paras 20-31 and, in particular, paras 20-22.

[618] *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and others*.

[619] *Guide to Refugee Law in Australia*, Chapter 6 2 Feb 2015, p. 12 and cases cited therein at footnote 62: "*SZQXW v MIAC* (2013) 139 ALD 591; *SZSSM v MIBP* [2013] FCCA 1489 (Judge Driver, 11 November 2013) at [88]-[90]; *MZZHK v MIBP* [2014] FCCA 86

Similarly, there is no requirement that the risk of harm at the proposed site of relocation be based on a Refugee Convention reason for relocation to be unreasonable.[620]

If the LGBTI person would be safe from SOGI-related persecution in the proposed site of relocation but would face a real risk of persecution on different grounds or even other harm not reaching the level of persecution, then internal relocation should not be relied upon. This may be particularly important in countries featuring marked ethnic or religious-based cleavages or where there is particular reliance on family for socio-economic support.[621]

If an applicant fears persecution on more than one basis (e.g. as a lesbian and as a woman), it will be necessary for all of those fears to be confined to the local area of original flight before considering the viability of an internal relocation alternative.[622]

(Judge Riethmuller, 23 January 2014) at [4] where the Court held that the factors which may show that it is unreasonable to expect a person to relocate do not necessarily have to amount to harm of the type that would be within the ambit of the Refugee Convention or the complementary protection provisions. See also *MZZKM v MIBP* [2014] FCCA 24 (Judge Riethmuller, 17 January 2014) at [11], [24]-[27], where the Court found that while there may well be considerable overlap between 'a risk of significant harm' in the context of complementary protection and facts and circumstances that may make it unreasonable to relocate, the test of whether factors relevant to the consideration of whether relocation was unreasonable is not the same test as the test of 'a real risk of significant harm'".

[620] *Perampalam v Minister for Immigration and Multicultural Affairs*; *SZATV v. Minister for Immigration and Citizenship*, [2007] HCA 40, Australia: High Court, 30 August.

[621] The UNHCR SOGI Guidelines, "[t]he applicant needs to be able to access a minimum level of political, civil and socio-economic rights. Women may have lesser economic opportunities than men, or may be unable to live separately from male family members, and this should be evaluated in the overall context of the case", para. 56.

[622] See, *mutatis mutandis*, *NABM of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC

Effect of progressive realization of rights

In countries where there has been social and political progress towards the recognition and protection of the human rights of LGBTI people there may be some localized areas that could constitute a viable relocation alternative. In this context, the UNHCR's view is that it is important to remember that the refugee status decision-maker bears the burden of proving that such relocation is reasonable in a given case, *including identifying the proposed place of relocation and collecting country of origin information about it*.[623]

In a number of recent decisions involving refugee applicants with SOGI-based claims, the UK Upper Tribunal (Immigration and Asylum Chamber) has found an IFA to exist relying in part on the existence of LGBTI support or activist groups in the place of proposed relocation.[624] Of some concern is that these cases, on the one hand, recognize that a risk of persecution exists in the site of relocation but, on the other hand, deem that risk too remote to render relocation unreasonable. Additionally, these recent UK decisions rely on charitable or activist bodies rather than the State to provide the protection and/or assistance necessary to render relocation reasonable, while recognizing that these groups sometimes came under attack themselves. This approach is legally unsustainable. The responsibility to provide effective protection and ensure access to rights without discrimination rests on the relevant State and not on NGOs or *ad hoc* group of individuals who may themselves be

294, paras 19-21; *SZQLM v MIAC* [2011] FMCA 921, paras 45-46; and *MZYKW v MIAC*, [2011] FMCA 630, para. 104; all cases are cited at footnote 33 in *Guide to Refugee Law in Australia*, Chapter 6.

[623] The UNHCR SOGI Guidelines, para. 55.

[624] *MD (same-sex oriented males: risk) India CG* [2014] UKUT 00065 (IAC); *LH and IP (gay men: risk) Sri Lanka CG* [2015] UKUT 00073 (IAC).

under threat.[625] It should be emphasized that an individual who is relocated in these circumstances will have no opportunity for redress if the assistance and support of activist groups fail to materialize or prove to be ineffective and/or of short-term duration.

Recommended approach to assessing the viability of an IFA

In light of and in addition to the various matters raised in this chapter, practitioners may wish to consider the following matters when assessing the viability of a potential IFA:

- Whether third-party 'protection' or 'assistance' is effective either for the purposes of the Refugee Convention or otherwise;
- Whether it is reasonable to expect a person from a city to relocate to a rural area or vice versa;[626]
- The resources available to a person to relocate;
- The social standing/belonging to a certain class and financial status that allows some LGBTI individuals to survive in cities relatively unscathed;
- The different extents to which a newcomer would feel obliged to conceal their SOGI either owing to the effects of past persecution or the country conditions;
- In cases involving prosecution or arrest warrants as a basis for persecutory conduct would these be enforceable in the proposed site of relocation?

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[625] See, for example, the UNHCR IFA Guidelines, paras 16-17; see also section entitled: "Only states can provide protection" in Chapter Six: failure of State protection.

[626] "One cannot reasonably expect a city dweller to go to live in a desert in order to escape the risk of persecution. Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is 'outside the country of his nationality by reason of a well-founded fear of persecution'", *AE & Anor v Secretary of State for the Home Department* [2003] EWCA Civ 1032 (16 July 2003) para. 23.

- What additional security records (aside from outstanding arrest warrants/sentencing records) does the country keep?
- Do any such records have administrative as well as criminal effect (e.g., would an intelligence indicator that a person was LGBTI impact on the ability to obtain employment)?
- Is there access to healthcare, employment, education and other basic socio-economic rights without discrimination elsewhere in the country?
- To what extent would the applicant's rights be restricted? E.g. in a country where there is a relatively safe area - how big is the proposed site of relocation? Is it a few streets or a whole state?
- Whether it is reasonable in any event for the person's freedom of movement to be limited to the geographical confines of a few 'gay streets'.

Sometimes the subjective fear that refugee applicants apprehend will be so great that they will find it difficult to fathom that there may be other areas of their country where they would not experience harm/a repeat of their previous experience. Such cases will need particularly sensitive handling. Practitioners should remember that the refugee claimants will not necessarily know some of the answers to the questions below and they are advised to consult objective evidence (i.e. country of origin information) and/or experts.

- Is there somewhere else in your country where your persecutors will not find you?
- If so, are there any practical or legal restrictions on you moving to this area?
- If the treatment was at the hands of 'rogue' State agents, why do you think this would happen somewhere else?
- In cases of persecution at the hands of non-State agents, is there anywhere else you could live where the persecutor would not be able to find you?
- What level of education do you have?
- What work/employment experience do you have?

- Do you have any family members and/or friends living in different areas who would be able to provide an informal safety net?
- Is there a social network you might rely on in the proposed site of relocation?

Chapter Eight: *sur place* refugee claims

Introduction

The UNHCR Handbook provides the following definition of a refugee *sur place*:

"[a] person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee '*sur place*'."[627]

A person may become a refugee *sur place* in two broad sets of circumstances:

i) as a result of events occurring in the home country since the applicant's departure (type 1);[628] or
ii) as a result of the applicant's activities/behaviour in the country of asylum (type 2).[629]

This chapter discuses the concept of *sur place* refugee claims and its relevance to SOGI-based asylum claims.

Sur place SOGI-based refugee claims

The following is a non-exhaustive list of circumstances that may give rise to an entitlement to refugee status recognition in the context of *sur place* claims based on real or imputed SOGI:

i) a change of circumstances in the home country – through, for example, the introduction of persecutory measures – such that the refugee applicant, on return, would now have a well-founded fear of being persecuted on account of SOGI (type 1);[630]

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[627] The UNHCR Handbook, para. 94.
[628] The UNHCR Handbook, para. 95.
[629] The UNHCR Handbook, para. 96.
[630] For example, in January 2011 Malawi amended S137 of the Penal Code (gross indecency law) to extend its potential reach to

ii) the intensification of a pre-existing situation in the home country.[631] In Nigeria and Uganda, for example, the situation has significantly worsened for LGBTI individuals over the last few years such that, while LGBTI people may not previously have qualified for refugee status on grounds of their real or imputed SOGI, they may now do so (type 1);[632]

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criminalize lesbian women, see the Human Dignity Trust, *Criminalisation of Homosexuality*, Malawi.

[631] On this point, see, for example, Lord Hope's speech in *HJ (Iran) v Secretary of State for the Home Department*, ".... More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years' imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they had committed a crime against the country's culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief […] The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time..... the problem ... seems likely to grow and to remain with us for many years. **In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries**. It is crucially important that they are provided with the protection that they are entitled to under the Convention...", at paras 2-3, (**emphasis added**).

[632] In a backlash that galvanized opposition against a more visible and outspoken LGBT community, adding to the already existing criminalization of consensual same-sex activity in private, same-sex marriage was made a crime in Nigeria in January 2014 when President Goodluck Jonathan signed the Same Sex Marriage (Prohibition) Bill into law. In February 2014 Uganda introduced the Anti-Homosexuality Act, 2014, which, among other things, made it a criminal offence for people to discuss and be open about

iii) the individual's own actions abroad may cause him or her to be at risk. For example, if the person has become an activist for LGBTI rights and this has come to the attention of the authorities in the home country (type 2); or

iv) given the freedom to do so, the applicant may have developed an understanding of her or his own sexuality and/or gender identity or begun to express it in such a way that would give rise to a real risk of persecutory harm if returned (type 2).

The UNHCR SOGI Guidelines further clarify the relevance of *sur place* claims to refugee claims based on SOGI as follows:

"[a] *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure. *Sur place* claims may also arise due to changes in the personal identity or gender expression of the applicant after his or her arrival in the country of asylum. It should be noted that some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim

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their sexuality; the Act was in force between 24 February and 1 August 2014, when the Constitutional Court of Uganda declared the Act invalid, as Parliament had adopted it without the required quorum (see, Constitutional Court (Uganda), *Oloka-Onyango & 9 Ors v Attorney General*, [2014] UGCC 14, Constitutional Petition No. 8 of 2014 (1 August 2014)). For more information, see the ICJ's statement *Nigeria and Uganda: new laws herald further persecution based on sexual orientation and gender identity*, issued on 27 February 2014, as well as the *ICJ's submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of Uganda's initial periodic report*, issued on 12 May 2015.

sur place. Many such claims arise where an LGBTI individual engages in political activism or media work or their sexual orientation is exposed by someone else."[633]

In light of the above, practitioners should note that *sur place* refugee claims may have particular resonance in the context of SOGI-based refugee claims where applicants from very repressive societies may have been subjected to powerful social constraints and experienced internalized homophobia as a result. Equally, *sur place* claims may be particularly relevant in SOGI-based refugee claims when the *sur place* applicants may have arrived in the country of asylum as children, and/or have developed an awareness of their SOGI only after departure from their home country.

That a person may become a refugee *sur place* is broadly accepted.[634]

In *Kyambadde v Canada*,[635] for example, the claimant, a homosexual man from Uganda, submitted, among other things, that a *sur place* refugee claim should have been considered since he was a gay activist in Canada and he would be at risk if forced to return to Uganda where homosexuals are vilified and sexual rights activists are subject to harassment. The Federal Court defined a refugee *sur place* as a person who is not a refugee when he left his country of origin but becomes a refugee at a later date, which can arise from changes within his country or due to an action of the individual while outside his country of

[633] The UNHCR SOGI Guidelines, para. 57, footnotes in original omitted.
[634] See the UNHCR Handbook, paras 94-6; Recast Qualification Directive, Article 5; Interpretation of the Convention Refugee Definition in Case Law, Immigration and Refugee Board of Canada, *5.6. SUR PLACE CLAIMS AND WELL-FOUNDED FEAR*; *Asfaw v. Canada (Minister of Citizenship and Immigration)* (F.C.T.D., no. IMM-5552-99), July 18, 2000, para. 4.
[635] *Kyambadde v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1307, 337 FTR 93, November 24, 2008, inter alia, para. 15.

origin.

Furthermore, in respect of political cases it has long been accepted that *sur place* refugee claims can and do arise. In the context of assessing whether such claims are well-founded, the UNHCR's advice is as follows:

"[a]n 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'."[636]

Similar considerations apply by analogy in SOGI-based refugee claims.[637] However, practitioners should be aware that issues relating to post-arrival activities may give rise to particular challenges in the context of asylum claims on SOGI grounds. The matters raised under the headings below seek to highlight such potential challenges and suggest ways of addressing them.

Creation of risk by the applicant

Where refugee applicants may have previously been 'safe' in their home country, their own actions in the host country could lead to a situation where they would face a real risk of being persecuted on return. For LGBTI refugee applicants such circumstances could include, for example, a realization or development of their SOGI, an unwillingness to remain closeted or LGBTI activism.

[636] The UNHCR Handbook, para. 83.
[637] The UNHCR SOGI Guidelines, para. 57.

In this context, the UNHCR has made it clear that its view is that:

"the '*sur place*' analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision. Rather, as in every case, what is required is that the elements of the refugee definition are in fact fulfilled. The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection is unavailable to persons whose claims for asylum are the result of actions abroad."[638]

A good faith requirement?

In certain cases, it may well be accepted that the *sur place* refugee applicant has engaged in same-sex conduct or political activism relevant to SOGI but the refugee status decision-maker may find that such activity or conduct was undertaken in "bad faith" and reject the claim on that basis.[639]

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[638] See, for example, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), July 2010, p. 16.

[639] See, for example, *R (AA) v Secretary of State for the Home Department* [2015] EWHC 888 (Admin) 1 April 2015, concerning a Nigerian woman and a LGBT activist who claimed asylum in the UK, where the High Court of England and Wales reviewed the First-tier Tribunal's findings that the applicant had a history of deception and deceit and concluded that her lesbian sexuality was not genuine and had been fabricated in order to claim asylum. The High Court found that the applicant's same-sex relationships and her adoption of lesbian customs and dress were purely part of the fabrication to gain refugee status, thus she was not a member of a 'particular social group' entitled to protection. However, the

Both Australia[640] and New Zealand[641] have a 'bad faith' statutory exclusion for *sur place* refugee claims in their domestic laws. In contrast, jurisprudence in the UK has explicitly rejected the requirement of good faith.[642]

As a matter of principle, there is nothing in the Refugee Convention itself justifying exclusion of a person from refugee status on these grounds.[643] The exclusion clauses

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Court failed to provide any reasons for this finding. Moreover, even if it were true that the applicant herself was not a lesbian, and that she had simply "fabricated" her lesbian sexuality by having sex with women when she was in fact heterosexual, the Court did not give any consideration as to whether others may in any event perceive her as a lesbian woman (NB: permission to appeal to the Court of Appeal has been granted).

[640] Migration Act 1958 section 91R(3)(as amended); however, note that the Courts have mitigated the effect of this section, see e.g. *SZJZN v Minister for Immigration and Citizenship* [2008] FCA 519, 18 April 2008.

[641] Immigration Act 2009 section 134(3).

[642] *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000, 28 October 1999, where Brooks LJ stated: "I do not accept the Tribunal's conclusion that a refugee *sur place* who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered"; see also, *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360, 15 April 2008.

[643] See also the UNHCR's position mentioned above that, "the '*sur place*' analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision [….] The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances," UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for

in Article 1F of the Refugee Convention, enumerating the circumstances in which people are excluded from the Convention's protection,[644] notwithstanding the fact that they would otherwise fulfill all the relevant requirements of Article 1A(2), do not include bad faith.[645]

Often, however, when *sur place* refugee applicants are found to have acted in 'bad faith' (e.g. in cases where it is held that the individuals concerned have 'manufactured' their SOGI for the purposes of claiming asylum), refugee status decision-makers dismiss these claims on credibility grounds or because of a failure to establish the fear's well-foundedness on the basis that on return the agents of persecution would know that the applicants' LGBT identity had been 'fabricated' for self-serving purposes.

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the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009).

[644] Article 1F of the Refugee Convention reads as follows: "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations." Furthermore, UNHCR's view is that, "[t]he exclusion clauses in the 1951 Convention are exhaustive", see UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003 para. 3.

[645] "Article 1 sets out the well-known definition of 'refugee' [….] It then mentions the cases in which the Convention is not to apply at all (Articles 1D-F), for example in the case of a person who has committed a crime against humanity (Article 1F(a)). There is no reference in Article 1 to a person who has acted in bad faith in relation to his asylum claim", per Brooks LJ, *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000, 28 October 1999.

Practitioners should note, however, that, even in cases where refugee claimants may have actually lied about their SOGI and/or otherwise have acted in 'bad faith', the ultimate question remains the same, namely, whether the individuals concerned would in any event be at risk on return owing to the persecutor's perception of their SOGI.[646] Furthermore, once an applicant has engaged in 'bad faith' activities and these give rise to a real risk of serious harm, she or he is unlikely not to possess the relevant subjective fear even if her or his original intention in carrying out the said activities, etc. may have not been genuine. In such cases, practitioners are advised to concentrate on evidencing the risk the applicant faces on return.

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[646] See, e.g., *Mostafa Ejtehadian v. Canada (Minister of Citizenship and Immigration)* [2007] FC 158, 12 February 2007, where the Canadian Federal Court held that, "[t]he IRB's [Immigration and Refugee Board] articulation of the test in a *sur-place* claim is incorrect. In a refugee *sur-place* claim, credible evidence of a claimant's activities while in Canada that are likely to substantiate any potential harm upon return must be expressly considered by the IRB even if the motivation behind the activities is non-genuine: *Mbokoso v. Canada (Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1806 (QL). The IRB's negative decision is based on a finding that the Applicant's conversion is not genuine, and 'nothing more than an alternative means to remain in Canada and claim refugee status.' The IRB accepted that the Applicant had converted and that he was even ordained as a priest in the Mormon faith. The IRB also accepted the documentary evidence to the effect that apostates are persecuted in Iran. In assessing the Applicant's risks of return, in the context of a *sur-place* claim, it is necessary to consider the credible evidence of his activities while in Canada, independently from his motives for conversion. Even if the Applicant's motives for conversion are not genuine, as found by the IRB here, the consequential imputation of apostasy to the Applicant by the authorities in Iran may nonetheless be sufficient to bring him within the scope of the convention definition. See *Ghasemian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266, at paragraphs 21-23, and *Ngongo c. Canada (M.C.I.)*, [1999] A.C. F. No 1627 (C.F.) (QL)", para. 11.

Subsequent, i.e. repeat, claims

In the EU, Article 5(3) of the Recast Qualification Directive provides:

"[w]ithout prejudice to the Geneva Convention, Member States may determine that an applicant who files **a subsequent application** shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin."[647]

Practitioners should note that this provision, which the UNHCR has strongly criticised,[648] applies only in respect of

[647] Article 5(3), Recast Qualification Directive, **emphasis added**.

[648] UNHCR's Comment on article 5(3) is that "[t]here may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of 'manufacturing' an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article 4(3)(d) of the Directive. In UNHCR's view, such an analysis does not require an assessment of whether the asylum-seeker acted in 'bad faith' but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase 'without prejudice to the Geneva Convention' in Article 5(3) would therefore require such an approach", see UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international

subsequent asylum claims and therefore does not apply to a person who is or has been present on the territory in another capacity (such as student, visitor, business person).

In asylum cases involving SOGI matters, Article 5(3) of the Recast Qualification Directive must also be read consistently with case-law of the Court of Justice of the European Union noting that,

"having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset."[649]

Therefore, claims involving SOGI where refugee applicants have delayed disclosing the SOGI basis of their claim should not be rejected solely on the grounds of SOGI only being disclosed in a subsequent asylum claim.

In the context of *sur place* SOGI-based refugee claims, however, it would be important to refer to the reasons why the applicant did not raise SOGI during her or his first claim.

Delay[650]

Sur place refugee claims are often refused on the grounds of delay in claiming asylum. The judgment of the Court of Justice of the European Union in *A, B and C* mentioned

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protection and the content of the protection granted (COM (2009) 551, 21 October 2009), 29 July 2010, page 17.

[649] Judgment of the Court (Grand Chamber) of 2 December 2014, *A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie*, para. 69. NB both A's and C's refugee claims involved second (i.e. subsequent) asylum applications.

[650] See also the section entitled: "Delay in disclosing one's SOGI" in Chapter One: establishing sexual orientation and gender identity.

above is also relevant with respect to the issue of delay as it concerns, *inter alia*, the issue of delay in the context of SOGI-based claims.

Recommended approach to *sur place* refugee claims

In light of the various matters raised in this chapter, practitioners may wish to consider the following issues when dealing with *sur place* SOGI-based refugee claims:

i) Is the claim connected to events that have occurred in the home country post departure? (type 1); or
ii) Is the claim related to the applicant's activities/behaviour in the country of asylum? (type 2).

In respect of type 1 claims:

i) What is the change in circumstances and what evidence is there of this? E.g. new laws or practices specifically targeting LGBTI individuals;
ii) How is the change of circumstance going to affect the individual?

In respect of type 2 claims:

i) If the applicant has only gained awareness of her/his SOGI in the host country, how did this come about?
ii) What prevented the applicant from being aware of or expressing her/his SOGI in the home country?
iii) If it is a case of late disclosure, why did the applicant not raise these matters before?
iv) In a case of increased political activism related to SOGI, why has the applicant become involved in such activities?
v) Even if the applicant has fabricated her/his SOGI, and/or acted in 'bad faith', e.g. in relation to political activities connected with SOGI, would the applicant now abandon the SOGI/activities if removed to the home country?

vi) Would the applicant's activities *sur place* in any event put her or him at risk? Consider in particular whether such activities would have come to the attention of the authorities in the home country.

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Annex: country of origin information sources and other online resources

Country of Origin Information

US Department of State Human Rights Reports (released annually) http://www.state.gov/j/drl/rls/hrrpt/

UK Visas and immigration operational guidance collection: Country information and guidance: https://www.gov.uk/government/collections/country-information-and-guidance

Immigration and Refugee Board of Canada, National Documentation Package: http://www.irb-cisr.gc.ca/Eng/ResRec/NdpCnd/Pages/ndpcnd.aspx

European Country of Origin Information Network: https://www.ecoi.net/

Electronic Information Network (subscriber service) http://www.ein.org.uk

UNHCR refworld http://www.refworld.org/category,COI,,,,0.html

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UNHCR Resources on Sexual Orientation and Gender Identity

UNHCR refworld SOGI pages http://www.refworld.org/sogi.html

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http://www.refworld.org/docid/4cff9a8f2.html

The Heightened Risk Identification Tool (Second Edition), June 2010
http://www.refworld.org/docid/4c46c6860.html

Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees, April 2013
http://www.refworld.org/docid/5163f3ee4.html

Other SOGI-specific online resources

International Refugee Rights Initiative – RIGHTS IN EXILE PROGRAMME - Sexual orientation and gender identity (LGBTI) webpages
http://www.refugeelegalaidinformation.org/sexual-orientation-and-gender-identity-lgbti

Organization for Refuge, Asylum and Migration
http://www.oraminternational.org/en

ILGA http://ilga.org/ (worldwide legislation relating to LGBTI claims)

ICJ's SOGI UN Database http://www.icj.org/sogi-un-database/

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ISBN 978-92-9037-221-9

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