

## **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**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Reissued, Geneva, 2011). In particular, they should be read in conjunction with *UNHCR's 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* (May 2002); *UNHCR's 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* (May 2002); and *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* (April 2004). They replace *UNHCR's Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity* (November 2008).

These Guidelines 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.

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* and the *Guidelines on International Protection* are available as a compilation at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

## I. INTRODUCTION

1. In many parts of the world, individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity. While persecution of Lesbian, Gay, Bisexual, Transgender and Intersex (hereafter “LGBTI”)<sup>1</sup> individuals and those perceived to be LGBTI is not a new phenomenon,<sup>2</sup> there is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereafter the “1951 Convention”).<sup>3</sup> Nevertheless, the application of the refugee definition remains inconsistent in this area.
2. It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world.<sup>4</sup> Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty.<sup>5</sup> In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.
3. Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status. Due to these multiple layers of discrimination, LGBTI individuals are often highly marginalized in society and isolated from their communities and families. It is also not uncommon for some individuals to harbour feelings of shame and/or internalized homophobia. Because of these and other factors, they may be inhibited from informing asylum adjudicators that their real fear of persecution relates to their sexual orientation and/or gender identity.
4. The experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant’s background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly as LGBTI. It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions. These Guidelines provide substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation and/or gender identity, with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention.<sup>6</sup>

## II. INTERNATIONAL HUMAN RIGHTS LAW

5. Article 1 of the Universal Declaration of Human Rights provides that “all human beings are born free and equal in dignity and rights”, and Article 2 declares that “everyone is entitled to all the rights and freedoms set forth in this Declaration”.<sup>7</sup> All people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.<sup>8</sup>
6. Although the main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity,<sup>9</sup> discrimination on these grounds has been held to be

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<sup>1</sup> For a discussion of terms, see below at III. Terminology. For the purpose of these Guidelines, “gender identity” also incorporates “intersex”.

<sup>2</sup> The 1951 Convention relating to the Status of Refugees was drafted not least as a response to the persecution during World War II, during which intolerance and violence cost the lives of thousands of people with a LGBTI background. See, UNHCR, “Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity”, November 2010, Expert Roundtable organized by UNHCR, Geneva, Switzerland, 30 September–1 October 2010 (hereafter “UNHCR, Summary Conclusions of Roundtable”), available at: <http://www.unhcr.org/refworld/docid/4cff99a42.html>, para. 3.

<sup>3</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951; Protocol Relating to the Status of Refugees, 31 January 1967.

<sup>4</sup> See, UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity”, 17 November 2011 (hereafter “OHCHR, Report on Sexual Orientation and Gender Identity”), available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>. For an overview of jurisprudence and doctrine, see also International Commission of Jurists (hereafter “ICJ”), *Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, fourth updated edition, available at: <http://www.unhcr.org/refworld/docid/4c627bd82.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at: <http://www.unhcr.org/refworld/docid/4a54bbb5d.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at: <http://www.unhcr.org/refworld/docid/4ad5b83a2.html>.

<sup>5</sup> See, International Lesbian, Gay, Bisexual, Trans and Intersex Association, “State-sponsored Homophobia, A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults”, May 2012, available at: [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf).

<sup>6</sup> These Guidelines supplement 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”, 7 May 2002 (hereafter “UNHCR, Guidelines on Gender-Related Persecution”), available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>

<sup>7</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

<sup>8</sup> OHCHR, Report on Sexual Orientation and Gender Identity, para. 5.

<sup>9</sup> However, some regional instruments expressly prohibit discrimination on grounds of sexual orientation. See, for example, Charter of Fundamental Rights of the European Union, Article 21, 18 December 2000, and Resolution of the Organization of American States, Human Rights, Sexual Orientation, and Gender Identity,

prohibited by international human rights law.<sup>10</sup> For example, the proscribed grounds of “sex” and “other status” contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and gender identity.<sup>11</sup> As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Convention and international refugee law,<sup>12</sup> the refugee definition must be interpreted and applied with due regard to them, including the prohibition on discrimination on the basis of sexual orientation and gender identity.

7. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in 2007 by a group of human rights experts and, although not binding, reflect well-established principles of international law.<sup>13</sup> They set out the human rights protection framework applicable in the context of sexual orientation and/or gender identity. Principle 23 outlines the right to seek and enjoy asylum from persecution related to sexual orientation and/or gender identity:

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

### III. TERMINOLOGY

8. These Guidelines are intended to be inclusive of and relevant to the range of claims relating to sexual orientation and/or gender identity. The concepts of sexual orientation and gender identity are outlined in the Yogyakarta Principles and this terminology is also used for the purposes of these Guidelines. Sexual orientation refers to: “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender”.<sup>14</sup> Gender identity refers 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 and other expressions of gender, including dress, speech and mannerisms”.<sup>15</sup>
9. Sexual 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.<sup>16</sup> 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.<sup>17</sup> 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 and their sexual and gender expressions may vary with age, and other social and cultural determinants.<sup>18</sup>
10. Refugee 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<sup>19</sup> individuals (usually abbreviated as “LGBT”, “LGBTI” or “LGBTIQ”<sup>20</sup>). The experiences of members of these various groups will often be distinct from one another; and, as noted above at paragraph 4, *between* members. It is, therefore,

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AG/RES. 2721 (XLII-O/12), 4 June 2012.

<sup>10</sup> “[D]iscrimination” as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”, UN Human Rights Committee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>, para. 7.

<sup>11</sup> The UN Human Rights Committee held in 1994 in the landmark decision *Toonen v. Australia* that the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966, hereafter “ICCPR”) prohibits discrimination on the grounds of sexual orientation, see CCPR/C/50/D/488/1992, 4 April 1994, (hereafter “*Toonen v. Australia*”) available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>. This has subsequently been affirmed by several other UN human rights treaty bodies, including also recognition that gender identity is among the prohibited grounds of discrimination. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 7.

<sup>12</sup> 1951 Convention, Preambular para. 1, Article 3.

<sup>13</sup> ICJ, Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, (hereafter “Yogyakarta Principles”), March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>.

<sup>14</sup> Yogyakarta Principles, Preamble.

<sup>15</sup> *Ibid.*

<sup>16</sup> American Psychological Association, “Sexual Orientation and Homosexuality” (hereafter “APA, Sexual Orientation and Homosexuality”), available at: <http://www.apa.org/helpcenter/sexual-orientation.aspx>.

<sup>17</sup> There is no consensus among scientists about the exact reasons that an individual develops a particular sexual orientation. See, APA, Sexual Orientation and Homosexuality.

<sup>18</sup> *Application No. 76175*, New Zealand Appeals Authority, 30 April 2008, available at: <http://www.unhcr.org/refworld/docid/482422f62.html>, para. 92.

<sup>19</sup> *Queer* is traditionally a pejorative term, however, it has been appropriated by some LGBT people to describe themselves.

<sup>20</sup> UNHCR has opted to refer to “LGBTI” individuals, which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity. See further, UNHCR, *Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement*, 2011, available at: <http://www.unhcr.org/refworld/docid/4e6073972.html>. For further information on terminology, see, for example, Gay & Lesbian Alliance Against Defamation, “Media Reference Guide: A Resource for Journalists”, updated May 2010, available at: <http://www.glaad.org/reference>.

essential that decision makers understand both the context of each refugee claim, as well as individual narratives that do not easily map onto common experiences or labels.<sup>21</sup>

### **Lesbian**

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. Lesbians are commonly subjected to harm by non-State actors, including acts such as “corrective” rape, retaliatory violence by former partners or husbands, forced marriage, and crimes committed in the name of “honour” by family members. Some lesbian refugee applicants have not had any experiences of past persecution; for example, if they have had few or no lesbian relationships. Lesbians may have had heterosexual relationships, often, but not necessarily, because of social pressures to marry and bear children. They may only later in life enter into a lesbian relationship or identify as lesbian. As in all refugee claims, it is important to ensure that the assessment of her fear of persecution is future-looking and that decisions are not based on stereotypical notions of lesbians.

### **Gay men**

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). Gay men numerically dominate sexual orientation and gender identity refugee claims, yet their claims should not be taken as a “template” for other cases on sexual orientation and/or gender identity. Gay men are often more visible than other LGBTI groups in public life in many societies and can become the focus of negative political campaigns. It is important, however, to avoid assumptions that all gay men are public about their sexuality or that all gay men are effeminate. Having defied masculine privilege by adopting roles and characteristics viewed as “feminine”, gay men may be viewed as “traitors”, whether they are effeminate or not. They could be at particular risk of abuse in prisons, the military<sup>22</sup> and other traditionally male dominated environments and job sites. Some gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children.

### **Bisexual**

*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. Bisexuality 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 of individuals who identify as bisexual. Bisexuals often describe their sexual orientation as “fluid” or “flexible” (see further below at paragraph 47).

### **Transgender**

*Transgender* describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth.<sup>23</sup> Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual.<sup>24</sup> Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times. For example, individuals may choose to express their chosen gender only at certain times in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender individuals are often highly marginalized and their claims may reveal experiences of severe physical, psychological and/or sexual violence. When their self-identification and physical appearance do not match the legal sex on official documentation and identity documents, transgender people are at particular risk.<sup>25</sup> The transition to alter one’s birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity. It is therefore important for decision makers to avoid overemphasis on sex-reassignment surgery.

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<sup>21</sup> Considerations relating to each group are also integrated elsewhere in these Guidelines.

<sup>22</sup> See, for example, *RRT Case No. 060931294*, [2006] RRTA 229, Australia, RRTA, 21 December 2006, available at: <http://www.unhcr.org/refworld/docid/47a707ebd.html>; *MS (Risk - Homosexuality - Military Service) Macedonia v. SSHD*, CG [2002] UKIAT 03308, UK Immigration and Asylum Tribunal, 30 July 2002, available at: <http://www.unhcr.org/refworld/docid/46836aba0.html>, which found that the “atrocious prison conditions” in the particular country would breach the appellant’s rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3. Lesbians may also be at risk in these environments. See, *Smith v. Minister of Citizenship and Immigration*, 2009 FC 1194, Canada, Federal Court, 20 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b3c7b8c2.html>.

<sup>23</sup> The term 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 further, APA, “Answers to Your Questions about Transgender People, Gender Identity and Gender Expression”, available at: <http://www.apa.org/topics/sexuality/transgender.aspx>.

<sup>24</sup> See also, *RRT Case No. 0903346*, [2010] RRTA 41, Australia, Refugee Review Tribunal, 5 February 2010, (hereafter “*RRT Case No. 0903346*”) available at: <http://www.unhcr.org/refworld/docid/4b8e783f2.html>, which concerned a transgender applicant who feared persecution because of her gender identity.

<sup>25</sup> The European Court of Human Rights has established that authorities must legally recognize the altered gender. See, *Goodwin v. United Kingdom*, Application no. 28957/95, European Court of Human Rights, 11 July 2002, available at: <http://www.unhcr.org/refworld/docid/4dad9f762.html>, finding a violation of the applicant’s right to privacy, noting that “the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality.”, para. 77, and that “Under Article 8 of the Convention in particular, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”, para. 90. See also Council of Europe Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, recognizing that “Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way.”, at 21.

## Intersex

The term *intersex* or "disorders of sex development" (DSD)<sup>26</sup> refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female. These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as "hermaphrodites", however this term is considered outdated and should not be used unless the applicant uses it.<sup>27</sup> An intersex person may identify as male or female, while their sexual orientation may be lesbian, gay, bisexual, or heterosexual.<sup>28</sup> Intersex 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.<sup>29</sup> 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 no understanding of the intersex condition in a given culture.

11. Not all applicants will self-identify with the LGBTI terminology and constructs as presented above 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, as explained above at paragraph 8, they present different aspects of the identity of each person.

## IV. SUBSTANTIVE ANALYSIS

### A. Background

12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that.<sup>30</sup> As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.<sup>31</sup> While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity.<sup>32</sup>
13. An applicant's sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms. The intersection of gender, sexual orientation and gender identity is an integral part in the assessment of claims raising questions of sexual orientation and/or gender identity. Harm as a result of not conforming to expected gender roles is often a central element in these claims. UNHCR's Guidelines on Gender-Related Persecution recognize that:

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<sup>26</sup> Note that some individuals (and/or their medical records) will just use the name of their particular condition, such as congenital adrenal hyperplasia or androgen insensitivity syndrome, rather than using the term intersex or DSD.

<sup>27</sup> US Citizenship and Immigration Services, "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims", 27 December 2011 (hereafter "USCIS, Guidance for Adjudicating LGBTI Claims"), available at: <http://www.unhcr.org/refworld/docid/4f269cd72.html>, p. 13.

<sup>28</sup> See further, Advocates for Informed Choice website: <http://aiclegal.org/faq/#whatisintersex>.

<sup>29</sup> Jill Schnobelen, *Witchcraft Allegations, Refugee Protection and Human Rights: A Review of the Evidence*, UNHCR, New Issues in Refugee Research, Research Paper No. 169, January 2009, available at: <http://www.unhcr.org/4981ca712.pdf>.

<sup>30</sup> UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department – Case for the First Intervener (United Nations High Commissioner for Refugees)*, 19 April 2010, (hereafter "UNHCR, *HJ and HT*"), available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>, para. 1. For a comparison with other Convention grounds, see para. 29 of the submission. See also, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010 (hereafter "*HJ and HT*"), available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>.

<sup>31</sup> See, for example, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993 (hereafter "*Canada v. Ward*"), available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html>; *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, US, 225 F.3d 1084, A72-994-275, (9<sup>th</sup> Cir. 2000), 24 August 2000, available at: <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, later affirmed by *Morales v. Gonzales*, US, 478 F.3d 972, No. 05-70672, (9<sup>th</sup> Cir. 2007), 3 January 2007, available at: <http://www.unhcr.org/refworld/docid/4829b1452.html>; *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia, High Court, 9 December 2003 (hereafter "*S395/2002*"), available at: <http://www.unhcr.org/refworld/docid/3fd9eca84.html>; *Refugee Appeal No. 74665*, New Zealand, Refugee Status Appeals Authority, 7 July 2004 (hereafter "*Refugee Appeal No. 74665*"), available at: <http://www.unhcr.org/refworld/docid/42234ca54.html>; *HJ and HT*, above footnote 30, paras. 11, 14, 78.

<sup>32</sup> Yogyakarta Principles, Principle 3, affirms that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. See further, *S395/2002*, para. 81; *Matter of Toboso-Alfonso*, US Board of Immigration Appeals, 12 March 1990, (hereafter "*Matter of Toboso-Alfonso*"), available at: <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, US, No. 02-72651, (9<sup>th</sup> Cir. 2005), 7 March 2005 (hereafter "*Karouni*") available at: <http://www.unhcr.org/refworld/docid/4721b5c32.html>, at III[6]; *Lawrence, et al. v. Texas*, US Supreme Court, 26 June 2003, available at: <http://www.unhcr.org/refworld/docid/3f21381d4.html>, which found that "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring", p. 6.

Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex.<sup>33</sup>

14. The impact of gender is relevant to refugee claims made by both LGBTI men and women.<sup>34</sup> Decision makers need to be attentive to differences in their experiences based on sex/gender. For example, heterosexual or male gay norms or country information may not apply to the experiences of lesbians whose position may, in a given context, be similar to that of other women in her society. Full account needs to be taken of diverse and evolving identities and their expression, the actual circumstances of the individual, and the cultural, legal, political and social context.<sup>35</sup>
15. Societal disapproval of varied sexual identities or their expression is usually more than the simple disapproval of sexual practices. It is often underlined by a reaction to non-compliance with expected cultural, gender and/or social norms and values. The societal norms of who men and women are and how they are supposed to behave are commonly based on hetero-normative standards. Both men and women may be subject to violent acts to make them conform to society's gender roles and/or to intimidate others by setting "an example". Such harm can be "sexualized" as a means of further degrading, objectifying or punishing the victim for his/her sexual orientation and/or gender identity, but can also take other forms.<sup>36</sup>

## B. Well-founded fear of being persecuted

16. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.<sup>37</sup>
17. Discrimination 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.<sup>38</sup> 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.<sup>39</sup>
18. Not all LGBTI applicants may have experienced persecution in the past (see further below at paragraphs 30-33 on concealment as persecution and at paragraph 57 on *sur place* claims). 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 origin.<sup>40</sup> 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.<sup>41</sup>
19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.<sup>42</sup>

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<sup>33</sup> UNHCR, Guidelines on Gender-Related Persecution, para. 16.

<sup>34</sup> UNHCR, Guidelines on Gender-Related Persecution, para. 3.

<sup>35</sup> UNHCR, Summary Conclusions of Roundtable, para. 5.

<sup>36</sup> UNHCR, Summary Conclusions of Roundtable, paras. 6, 16.

<sup>37</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (hereafter "UNHCR, *Handbook*"), paras. 51–53.

<sup>38</sup> *Ibid.*, paras. 54–55.

<sup>39</sup> *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 98, Canada, Federal Court, 21 January 2005 (hereafter "*Molnar v. Canada*") available at: <http://www.unhcr.org/refworld/docid/4fe81df72.html>.

<sup>40</sup> See, for example, *Bromfield v. Mukasey*, US, 543 F.3d 1071, 1076-77 (9<sup>th</sup> Cir. 2008), 15 September 2008, available at:

<http://www.unhcr.org/refworld/docid/498b08a12.html>, *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, para. 91.

<sup>41</sup> UNHCR, *Handbook*, para. 83.

<sup>42</sup> *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, CJEU, 5 September 2012, available at: <http://www.unhcr.org/refworld/docid/505ace862.html>, para. 62; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, UK Supreme Court, 25 July 2012, available at: <http://www.unhcr.org/refworld/docid/500fdac2.html>, paras. 75–76 (Lord Kerr); *UNHCR Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive* and UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, Case No. 2011/0011, available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>, para. 12(9).

## Persecution

20. Threats of serious abuse and violence are common in LGBTI claims. Physical, psychological and sexual violence, including rape,<sup>43</sup> would generally meet the threshold level required to establish persecution. Rape in particular has been recognized as a form of torture, leaving “deep psychological scars on the victim”.<sup>44</sup> Rape has been identified as being used for such purposes as “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity.”<sup>45</sup>
21. Many 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. Examples at the extreme end and which on their face reach the threshold of persecution include forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy.<sup>46</sup> Non-consensual medical and scientific experimentation is also explicitly identified as a form of torture or inhuman or degrading treatment under the International Covenant on Civil and Political Rights.<sup>47</sup> Some intersex individuals may be forced to undergo surgery aimed at “normalcy” and, where it will be applied without their consent, this is likely to amount to persecution. It is also important to distinguish in these cases between surgery necessary to preserve life or health and surgery for cosmetic purposes or social conformity. The assessment needs to focus on whether the surgery or treatment was voluntary and took place with the informed consent of the individual.<sup>48</sup>
22. Detention, 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.<sup>49</sup> Moreover, as noted by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there is usually a strict hierarchy in detention facilities and those at the bottom of this hierarchy, such as LGBTI detainees, suffer multiple discrimination. Male-to-female transgender prisoners are at particular risk of physical and sexual abuse if placed within the general male prison population.<sup>50</sup> Administrative segregation, or solitary confinement, solely because a person is LGBTI can also result in severe psychological harm.<sup>51</sup>
23. Social norms and values, including so-called family “honour”, are usually closely intertwined in the refugee claims of LGBTI individuals. While “mere” disapproval from family or community will not amount to persecution, it may be an important factor in the overall context of the claim. Where family or community disapproval, for example, manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of “honour”, it would clearly be classed as

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<sup>43</sup> International criminal tribunals in their jurisprudence have broadened the scope of crimes of sexual violence that can be prosecuted as rape to include oral sex and vaginal or anal penetration through the use of objects or any part of the perpetrator’s body. See, for instance, *Prosecutor v. Anto Furundzija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.unhcr.org/refworld/docid/40276a84.html>, para. 185; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002, available at: <http://www.unhcr.org/refworld/docid/3debaafe4.html>, para. 128. See also, International Criminal Court, *Elements of Crimes*, 2011, available at: <http://www.unhcr.org/refworld/docid/4ff5dd7d2.html>, Articles 7 (1) (g)-1 and 8(2)(b)(xxii)-1. For refugee-related jurisprudence, see *Ayala v. US Attorney General*, US, No. 09-12113, (11<sup>th</sup> Cir. 2010), 7 May 2010 (hereafter “*Ayala v. US Attorney General*”), available at: <http://www.unhcr.org/refworld/docid/4c6c04942.html>, which found that oral rape constituted persecution.

<sup>44</sup> *Aydin v. Turkey*, 57/1996/676/866, Council of Europe, European Court of Human Rights, 25 September 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b7228.html>, para. 83. See also, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, UK Asylum and Immigration Tribunal (AIT), 4 August 2005, available at <http://www.unhcr.org/refworld/docid/47fdafe0.html>, recognizing as torture the sexual assault the applicant had been subjected to while in detention, paras. 57, 134; *Arrêt n°36 527*, Belgium: Conseil du Contentieux des Etrangers, 22 December 2009, available at: <http://www.unhcr.org/refworld/docid/4dad94692.html>, referring to torture and serious violations of the appellant’s physical integrity while in prison as constituting persecution.

<sup>45</sup> *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998, available at: <http://www.unhcr.org/refworld/docid/40278fbb4.html>, para. 687.

<sup>46</sup> Yogyakarta Principles, Principle 18: “Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed”. See also, *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, US, 95-70887, (9<sup>th</sup> Cir. 1997), 24 June 1997 (hereafter “*Pitcherskaia v. INS*”), available at: <http://www.unhcr.org/refworld/docid/4152e0fb26.html>.

<sup>47</sup> ICCPR, Article 7, “... In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. As affirmed, for example, by the UN Committee Against Torture and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this includes subjecting men suspected of homosexual conduct to non-consensual anal examinations to prove their homosexuality. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 37.

<sup>48</sup> See, UN Committee on the Elimination of Discrimination against Women (CEDAW), *Communication No. 4/2004*, 29 August 2006, CEDAW/C/36/D/4/2004, available at: <http://www.unhcr.org/refworld/docid/4fdb288e2.html>, which considered non-consensual sterilization as a violation of women’s rights to informed consent and dignity, para. 11.3. In respect of surgery at birth, the best interests of the child is a primary consideration, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her (Convention on the Rights of the Child (CRC), Article 3). If sex re-assignment or reconstructive surgery is contemplated only later in childhood, “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” (CRC, Article 12(1)).

<sup>49</sup> See, UN Working Group on Arbitrary Detention, Opinions No. 22/2006 on Cameroon and No. 42/2008 on Egypt; A/HRC/16/47, annex, para. 8(e). See also, UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention”, 2012, (hereafter “UNHCR, Guidelines on Detention”), available at: <http://www.unhcr.org/refworld/docid/50348953b8.html>.

<sup>50</sup> OHCHR, Report on Sexual Orientation and Gender Identity, para. 34.

<sup>51</sup> As noted in the UNHCR Guidelines on Detention, “solitary confinement is not an appropriate way to manage or ensure the protection of such individuals”, para. 65.

persecution.<sup>52</sup> Other forms of persecution include forced or underage marriage, forced pregnancy and/or marital rape (on rape, see above at paragraph 20). In the context of sexual orientation and/or gender identity cases, such forms of persecution are often used as a means of denial or “correcting” non-conformity. Lesbians, 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.<sup>53</sup>

24. 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.<sup>54</sup> Their rights to freedom of expression, association and assembly may be restricted.<sup>55</sup> They may also be denied a range of economic and social rights, including in relation to housing, education,<sup>56</sup> and health care.<sup>57</sup> 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.
25. LGBTI individuals may also experience discrimination in access to and maintenance of employment.<sup>58</sup> Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal. For transgender individuals in particular, deprivation of employment, often combined with lack of housing and family support, may frequently force them into sex work, subjecting them to a variety of physical dangers and health risks. While being dismissed from a job generally is not considered persecution, even if discriminatory or unfair, if an individual can demonstrate that his or her LGBTI identity would make it highly improbable to enjoy any kind of gainful employment in the country of origin, this may constitute persecution.<sup>59</sup>

#### Laws criminalizing same-sex relations

26. Many 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.<sup>60</sup> 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.<sup>61</sup>
27. 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.
28. Assessing the “well-founded fear of being persecuted” in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country

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<sup>52</sup> UN Human Rights Committee and the Inter-American Commission on Human Rights have concluded that the inaction of State vis-à-vis death threats constitutes a violation of the right to life. See also, *RRT Case No. 0902671*, [2009] RRTA 1053, Australia, Refugee Review Tribunal, 19 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b57016f2.html>, which found that the “applicant’s chance of facing serious harm, possibly death by honour killing, if he returned to [the country of origin] now or in the reasonably foreseeable future is real and amounts to serious harm...in that it is deliberate or intentional and involves persecution for a Convention reason”. See also, *Muckette v. Minister of Citizenship and Immigration*, 2008 FC 1388, Canada, Federal Court, 17 December 2008, available at: <http://www.unhcr.org/refworld/docid/4989a27e2.html>. The case was remanded for reconsideration as the lower instance had “failed to address whether the death threats had a degree of reality to them and in effect dismissed them because no one had attempted to kill the Applicant.”

<sup>53</sup> OHCHR, Report on Sexual Orientation and Gender Identity, para. 66.

<sup>54</sup> *Ibid.*, paras. 68–70.

<sup>55</sup> *Ibid.*, paras. 62–65.

<sup>56</sup> *Ibid.*, paras. 58–61.

<sup>57</sup> *Ibid.*, paras. 54–57.

<sup>58</sup> *Ibid.*, paras. 51–53.

<sup>59</sup> USCIS, Guidance for Adjudicating LGBTI Claims, p. 23. See also, *Kadri v. Mukasey*, US, Nos. 06-2599 & 07-1754, (1<sup>st</sup> Cir. 2008), 30 September 2008, available at: <http://www.unhcr.org/refworld/docid/498b0a212.html>. The case was remanded for consideration of the standard for economic persecution, referring to *In re T-Z*, 24 I & N. Dec. 163 (US Board of Immigration Appeals, 2007), which had found that “[nonphysical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life may rise to persecution”.

<sup>60</sup> See, for example, *Toonen v. Australia*, above footnote 11, which found that the sodomy law of the territory concerned violated the rights to privacy and equality before the law.

<sup>61</sup> European Union, European Parliament, 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 “EU Qualification Directive”), Article 9; COC and Vrije Universiteit Amsterdam, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011 (hereafter “Fleeing Homophobia Report”) available at: <http://www.unhcr.org/refworld/docid/4ebba7852.html>, pp. 22–24. See also *Arrêt n°50 966*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad967f2.html>, concerning a lesbian, found that a prison term for homosexual conduct of 1–5 years and fines from 100 000 à 1 500 000 francs CFA and the fact that society was homophobic were sufficient grounds to constitute persecution in the circumstances of the case, para. 5.7.1. Similarly in *Arrêt n°50 967*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad97d92.html>, concerning a gay man.



concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined.<sup>62</sup> The “fear” element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws 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.

29. 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.<sup>63</sup>

### **Concealment of sexual orientation and/or gender identity**

30. 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.
31. That 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.<sup>64</sup> LGBTI people are as much entitled to freedom of expression and association as others.<sup>65</sup>
32. With this general principle in mind, 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. It 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.<sup>66</sup> 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 having children, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.<sup>67</sup>
33. Being 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<sup>68</sup> and could in particular cases lead to an intolerable predicament amounting to persecution.<sup>69</sup> Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one’s sexuality or gender identity are factors to consider, including over the long-term.

<sup>62</sup> UNHCR, *Handbook*, para. 45.

<sup>63</sup> *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, paras. 89, 96; *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008, available at: <http://www.unhcr.org/refworld/docid/4811a7192.html>.

<sup>64</sup> For example, *HJ and HT*, above footnote 30; UNHCR, *HJ and HT*, above footnote 30, paras. 26–33; *S395/2002*, above footnote 31; *Refugee Appeal No. 74665*, above footnote 31; *Karouni*, above footnote 32; *KHO:2012-1*, Finland, Supreme Administrative Court, 13 January 2012, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>. See also, 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”, 7 May 2002, HCR/GIP/02/02 (hereafter “UNHCR, Guidelines on Social Group”), available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, paras. 6, 12; UNHCR, “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”, 28 April 2004, HCR/GIP/04/06, (hereafter “UNHCR, Guidelines on Religion”), para. 13; UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>, para. 9.

<sup>65</sup> As noted by the UK Supreme Court in *HJ and HT*, above footnote 30: “The underlying rationale of the Convention is ... that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them”, para. 53.

<sup>66</sup> *S395/2002*, above footnote 31, paras. 56–58.

<sup>67</sup> *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, UK, CG [2011] UKUT 00251(IAC), Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e0c3fae2.html>.

<sup>68</sup> Discrimination of LGBTI individuals has been associated with mental health problems. Studies have shown that internalized negative attitudes towards non-heterosexuality in LGBT individuals was related to difficulties with self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development. See further, APA, “Practice Guidelines for LGBT Clients, Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients” (hereafter “APA, Practice Guidelines for LGBT Clients”), available at: <http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3>.

<sup>69</sup> *Pathmakanthan v. Holder*, US, 612 F.3d 618, 623 (7<sup>th</sup> Cir. 2010), available at: <http://www.unhcr.org/refworld/docid/4d249efa2.html>.

## Agents of Persecution

34. There is scope within the refugee definition to recognize persecution emanating from both State and non-State actors. State persecution may be perpetrated, for example, through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military. Individual acts of “rogue” officers may still be considered as State persecution, especially where the officer is a member of the police and other agencies that purport to protect people.<sup>70</sup>
35. In situations where the threat of harm is from non-State actors, persecution is established where the State is unable or unwilling to provide protection against such harm. Non-State actors, including family members, neighbours, or the broader community, may be either directly or indirectly involved in persecutory acts, including intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence. In some countries, armed or violent groups, such as paramilitary and rebel groups, as well as criminal gangs and vigilantes, may target LGBTI individuals specifically.<sup>71</sup>
36. In scenarios involving non-State agents of persecution, State protection from the claimed fear has to be available and effective.<sup>72</sup> State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence.<sup>73</sup> Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant.<sup>74</sup> As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return.
37. Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity.<sup>75</sup> The existence of certain elements, such as anti-discrimination laws or presence of LGBTI organizations and events, do not necessarily undermine the well-foundedness of the applicant’s fear.<sup>76</sup> Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws.<sup>77</sup> A *de facto*, not merely *de jure*, change is required and an analysis of the circumstances of each particular case is essential.

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<sup>70</sup> See *Ayala v. US Attorney General*, above footnote 42. The treatment by a group of police officers (robbery and sexual assault) constituted persecution and was deemed to be on account of the applicant’s sexual orientation.

<sup>71</sup> *P.S., a/k/a S.J.P., v. Holder, Attorney General*, US, No. 09-3291, Agency No. A99-473-409, (3<sup>rd</sup> Cir. 2010), 22 June 2010, available at: <http://www.unhcr.org/refworld/docid/4fbf263f2.html>, concerned a gay man who was targeted by a non-State armed group. See also, *RRT Case No. N98/22948*, [2000] RRTA 1055, Australia, Refugee Review Tribunal, 2 November 2000, available at: <http://www.unhcr.org/refworld/docid/4b7a97fd2.html>, which found that the applicant was at risk of persecution at the hands of vigilante groups. The identification of poor gay men as “disposables” put them at risk of “social clean up” operations.

<sup>72</sup> UNHCR, *Handbook*, paras. 97–101; UN Human Rights Committee, General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.unhcr.org/refworld/docid/478b26ae2.html>, 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, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html>, para. 36.

<sup>73</sup> See, for example, UK Home Office, “Sexual Orientation Issues in the Asylum Claim”, 6 October 2011, available at: <http://www.unhcr.org/refworld/docid/4eb8f0982.html>, p. 6.

<sup>74</sup> UNHCR, Summary Conclusions of Roundtable, para. 8.

<sup>75</sup> *RRT Case No. 0905785*, [2010] RRTA 150, Australia, Refugee Review Tribunal, 7 March 2010, available at: <http://www.unhcr.org/refworld/docid/4c220be62.html>, found that the decriminalization of homosexual acts in the particular country was unlikely to have an immediate impact on how people viewed homosexuality, para. 88.

<sup>76</sup> USCIS, Guidance for Adjudicating LGBTI Claims, p. 25. See also *Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 860, Canada, Federal Court, 8 July 2011, available at: <http://www.unhcr.org/refworld/docid/4fa952572.html>, which noted that the presence of many non-governmental organizations that fight against discrimination based on sexual orientation is in itself a telling factor in considering the country conditions.

<sup>77</sup> See, *Judgment No. 616907, K, France*, Cour nationale du droit d’asile, 6 April 2009, summary available at *Contentieux des réfugiés: Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile - Année 2009*, 26 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 61–62, which recognized as a refugee a gay man from a particular territory based on the fact that even though a 2004 law banned all discrimination on the basis of sexual orientation those showing their homosexuality in public were regularly subject to harassment and discrimination without being able to avail themselves of the protection of the authorities.

### C. The causal link (“for reasons of”)

38. As with other types of refugee claims, the well-founded fear of persecution must be “for reasons of” one or more of the five grounds contained in the refugee definition in Article 1A(2) of the 1951 Convention. The Convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant, cause.
39. Perpetrators may rationalize the violence they inflict on LGBTI individuals by reference to the intention of “correcting”, “curing” or “treating” the person.<sup>78</sup> The intent or motive of the persecutor can be a relevant factor to establishing the “causal link” but it is not a prerequisite.<sup>79</sup> There is no need for the persecutor to have a punitive intent to establish the causal link.<sup>80</sup> 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. Nonetheless, where it can be shown that the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.<sup>81</sup> Where the persecutor is a non-State actor, the causal link may be established either where the non-State actor is likely to harm the LGBTI person for a Convention reason or the State is not likely to protect him or her for a Convention reason.<sup>82</sup>

### D. Convention grounds

40. The five Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap. More than one Convention ground may be relevant in a given case. Refugee 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.
41. Individuals 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 stereotyped appearances and roles may be perceived as LGBTI. It is not required that they actually be LGBTI.<sup>83</sup> 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.

#### Religion

42. Where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.<sup>84</sup> The teachings of the world’s major religions on sexual orientation and/or gender identity differ and some have also changed over time or in particular contexts, ranging from outright condemnation, including viewing homosexuality as an “abomination”, “sin”, “disorder” or apostasy, to complete acceptance of diverse sexual orientation and/or gender identity. Non-LGBTI persons may also be subject to persecution for reasons of religion, for example, where they are (wrongly) perceived as LGBTI or where they support or are seen to support them or their rights.
43. Negative attitudes held by religious groups and communities towards LGBTI individuals can be given expression in a range of ways, from discouraging same-sex activity, or transgender behaviour or expression of identity, among adherents to active opposition, including protests, beatings, naming/shaming and “excommunication”, or even execution. The religion and political opinion grounds may overlap where

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<sup>78</sup> Yogyakarta Principles, Principle 18.

<sup>79</sup> UNHCR, *Handbook*, para. 66.

<sup>80</sup> *Pitcherskaia v. INS*, above footnote 45, found that the requirement on the applicant to prove the punitive intent of the perpetrator was unwarranted.

<sup>81</sup> UNHCR, “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees”, April 2001, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>, para. 19.

<sup>82</sup> UNHCR, *Guidelines on Social Group*, para. 23.

<sup>83</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 32; UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>, para. 5. See also, *Kwasi Amanfi v. John Ashcroft, Attorney General*, US, Nos. 01-4477 and 02-1541, (3<sup>rd</sup> Cir. 2003), 16 May 2003, available at: <http://www.unhcr.org/refworld/docid/47fd62c1a.html>, which concerned an applicant who claimed persecution on account of imputed homosexuality.

<sup>84</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 25. See by analogy, *In Re S-A*, Interim Decision No. 3433, US Board of Immigration Appeals, 27 June 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6f224.html>.

religious and State institutions are not clearly separated.<sup>85</sup> Religious organizations may impute opposition to their teachings or governance by LGBTI individuals, whether or not this is the case. LGBTI applicants may continue to profess adherence to a faith in which they have been subject to harm or a threat of harm.

### Membership of a Particular Social Group

44. The 1951 Convention includes no specific list of particular social groups. Rather, “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.”<sup>86</sup> UNHCR defines a particular social group as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>87</sup>

45. The two approaches – “protected characteristics” and “social perception” - to identifying “particular social groups” reflected in this definition are *alternative*, not cumulative tests. The “protected characteristics” approach examines whether a group is united *either* by an innate or immutable characteristic *or* by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The “social perception” approach, on the other hand, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group’s members apart from society at large.

46. Whether applying the “protected characteristics” or “social perception” approach, there is broad acknowledgment that under a correct application of either of these approaches, lesbians,<sup>88</sup> gay men,<sup>89</sup> bisexuals<sup>90</sup> and transgender persons<sup>91</sup> are members of “particular social groups” within the meaning of the refugee definition.<sup>92</sup> Relatively fewer claims have been made by intersex applicants, but they would also on their face qualify under either approach.

47. Sexual orientation and/or gender identity are considered as innate and immutable characteristics or as characteristics so fundamental to human dignity that the person should not be compelled to forsake them. Where the identity of the applicant is still evolving, they may describe their sexual orientation and/or gender identity as fluid or they may express confusion or uncertainty about their sexuality and/or identity. In both situations, these characteristics are in any event to be considered as fundamental to their evolving identity and rightly within the social group ground.

48. There is no requirement that members of the social group associate with one another, or that they are socially visible, for the purposes of the refugee definition. “Social perception” does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other.<sup>93</sup>

49. Decision makers should avoid reliance on stereotypes or assumptions, including visible markers, or a lack thereof. This can be misleading in establishing an applicant’s membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group.<sup>94</sup> In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid persecution (see above paragraphs 30-33).<sup>95</sup> The “social perception” approach requires neither that the common attribute be literally visible to the naked

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<sup>85</sup> UNHCR, Guidelines on Gender-Related Persecution, para. 26.

<sup>86</sup> UNHCR, Guidelines on Social Group, para. 3.

<sup>87</sup> UNHCR, Guidelines on Social Group, para. 11. Emphasis added.

<sup>88</sup> See, for example, *Pitcherskaia v. INS*, above footnote 45; *Decisions VA0-01624 and VA0-01625 (In Camera)*, Canada, Immigration and Refugee Board, 14 May 2001, available at: <http://www.unhcr.org/refworld/docid/48246f092.html>; *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, UK House of Lords (Judicial Committee), 25 March 1999, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>, pp. 8–10.

<sup>89</sup> See, for example, *Matter of Toboso-Alfonso*, above footnote 32; *Refugee Appeal No. 1312/93, Re GJ*, New Zealand, Refugee Status Appeals Authority, 30 August 1995, available at: <http://www.unhcr.org/refworld/docid/3ae6b6938.html>.

<sup>90</sup> See, for example, *VRAW v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 1133, Australia, Federal Court, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4dada05c2.html>; *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, available at: <http://www.unhcr.org/refworld/docid/4dada1672.html>.

<sup>91</sup> See, for example, *RRT Case No. 0903346*, above footnote 24; *CE, SSR, 23 juin 1997, 171858, Ourbih*, 171858, France, Conseil d’Etat, 23 June 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>.

<sup>92</sup> Sexual orientation and/or gender identity has been explicitly included in the refugee definition in some regional and domestic legislation. For instance, the European Union has adopted a definition of particular social group, recognizing that “depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation”, EU Qualification Directive, Article 10.

<sup>93</sup> UNHCR, Guidelines on Social Group, paras. 15–16.

<sup>94</sup> *Judgment No. 634565/08015025, C, France, Cour nationale du droit d’asile*, 7 July 2009, summary available at Contentieux des réfugiés: Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile - Année 2009, 26 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 58–59, recognizing as a refugee a gay man who had neither claimed nor manifested his homosexuality openly.

<sup>95</sup> UNHCR, *HJ and HT*, above footnote 30, para. 26.

eye nor that the attribute be easily identifiable by the general public.<sup>96</sup> It is furthermore not necessary that particular members of the group or their common characteristics be publicly known in a society. The determination rests simply on whether a group is “cognizable” or “set apart from society” in a more general, abstract sense.

## Political Opinion

50. The term political opinion should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged.<sup>97</sup> It may include an opinion as to gender roles expected in the family or as regards education, work or other aspects of life.<sup>98</sup> The expression of diverse sexual orientation and gender identity can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values. Anti-LGBTI statements could be part of a State’s official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.

## E. INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

51. The concept of an internal flight or relocation alternative (IFA) refers to whether it is possible for an individual to be relocated to a specific area of the country where the risk of feared persecution would not be well-founded and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and live a normal life.<sup>99</sup> Protection would need to be available in a genuine and meaningful way. United Nations agencies, non-governmental organizations, civil society and other non-State actors are not a substitute for State protection.

52. Within the context of the holistic assessment of a claim for refugee status, the assessment of whether or not there is an IFA requires two main analyses: (i) the relevance analysis<sup>100</sup> and (ii) the reasonableness analysis.<sup>101</sup> In considering the relevance and reasonableness of a proposed site of internal flight or relocation, gender considerations must be taken into account.

53. In respect of the relevance analysis, if the country in question criminalizes same-sex relations and enforces the relevant legislation, it will normally be assumed that such laws are applicable in the entire territory. Where the fear of persecution is related to these laws, a consideration of IFA would not be relevant. Laws which do not allow a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on his or her documents, would also normally be applicable nationwide and should be taken into account when considering the proposed place of relocation.

54. Furthermore, 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 (see paragraphs 30-33).<sup>102</sup>

55. Some countries have seen social and political progress which is sometimes localized in urban areas and these locations may in certain circumstances constitute a relocation alternative. In this context, it is important to recall that the decision maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case, including identifying the proposed place of relocation and collecting country of origin information about it (see further below at paragraph 66).<sup>103</sup>

56. In determining whether internal flight is reasonable, the decision maker needs to assess whether return to the proposed place of relocation would cause undue hardship, including by examining the applicant’s personal circumstances;<sup>104</sup> the existence of past persecution; safety and security; respect for human rights;

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<sup>96</sup> See, for example, UNHCR, *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, available at: <http://www.unhcr.org/refworld/docid/49ef25102.html>; *Gatimi et al. v. Holder, Attorney General*, No. 08-3197, United States Court of Appeals for the Seventh Circuit, 20 August 2009, available at: <http://www.unhcr.org/refworld/docid/4aba40332.html>.

<sup>97</sup> *Canada v. Ward*, above footnote 31.

<sup>98</sup> UNHCR, Guidelines on Gender-Related Persecution, para. 32.

<sup>99</sup> See 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”, 23 July 2003, HCR/GIP/03/04 (hereafter “UNHCR, Guidelines on Internal Flight Alternative”), para. 6.

<sup>100</sup> The elements to be examined under this analysis are the following: Is the area of relocation practically, safely and legally accessible to the individual? Is the agent of persecution a State or non-State agent? Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

<sup>101</sup> The criterion to be examined under this analysis is: Can the claimant lead a relatively normal life without facing undue hardship?

<sup>102</sup> See, for example, *Okoli v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, Canada, Federal Court, 31 March 2009, available at: <http://www.unhcr.org/refworld/docid/4a5b4bfa2.html>, which found that the concealment of an immutable characteristic, that is, the applicant’s sexual orientation, was an “impermissible requirement” for the assessment of internal flight alternative, paras. 36–37, 39; *HJ and HT*, above footnote 30, para. 21.

<sup>103</sup> UNHCR, Guidelines on Internal Flight Alternative, paras. 33–34.

<sup>104</sup> *Boer-Sedano v. Gonzales*, US, 418 F.3d 1082, (9th Cir. 2005), 12 August 2005, available at: <http://www.unhcr.org/refworld/docid/4821a2ba2.html>, found that the

and possibility for economic survival.<sup>105</sup> The 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.<sup>106</sup>

## F. SUR PLACE CLAIMS

57. 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.<sup>107</sup> *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 *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.

## V. PROCEDURAL ISSUES

### General

58. LGBTI individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives.

59. Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant's capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.<sup>108</sup> Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts.<sup>109</sup>

60. In order to ensure that refugee claims relating to sexual orientation and/or gender identity are properly considered during the refugee status determination process, the following measures should be borne in mind:

- i. An open and reassuring environment is often crucial to establishing trust between the interviewer and applicant and will assist the disclosure of personal and sensitive information. At the beginning of the interview, the interviewer needs to assure the applicant that all aspects of his or her claim will be treated in confidence.<sup>110</sup> Interpreters are also bound by confidentiality.
- ii. Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. 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.<sup>111</sup> There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.

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applicant's [HIV-positive] health status would make relocation unreasonable.

<sup>105</sup> UNHCR, Guidelines on Internal Flight Alternative, paras. 22–30.

<sup>106</sup> UNHCR, Guidelines on Gender-related Persecution.

<sup>107</sup> UNHCR, *Handbook*, paras. 94, 96.

<sup>108</sup> Some LGBTI applicants may, for instance, change their claims during the process by initially stating that their sexual orientation is imputed to them or making a claim on a ground unrelated to their sexual orientation or gender identity, to eventually expressing that they are LGBTI.

<sup>109</sup> UNHCR, "Statement on the right to an effective remedy in relation to accelerated asylum procedures", 21 May 2010, available at: <http://www.unhcr.org/refworld/docid/4bf67fa12.html>, paras. 11–12.

<sup>110</sup> UNHCR, Guidelines on Gender-Related Persecution, paras. 35, 36.iv.

<sup>111</sup> This issue has been addressed by a number of US Courts: *Shahinaj v. Gonzales*, 481 F.3d 1027, (8<sup>th</sup> Cir. 2007), 2 April 2007, available at: <http://www.unhcr.org/refworld/docid/4821bd462.html>; *Razkane v. Holder, Attorney General*, No. 08-9519, (10<sup>th</sup> Cir. 2009), 21 April 2009, available at: <http://www.unhcr.org/refworld/docid/4a5c97042.html>; *Todorovic v. US Attorney General*, No. 09-11652, (11<sup>th</sup> Cir. 2010), 27 September 2010, available at: <http://www.unhcr.org/refworld/docid/4cd968902.html>.

- iii. The interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant's sexual orientation, gender identity, sexual behaviour or relationship pattern. Interviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language. Self-awareness and specialized training (see iv.) are therefore critical aspects to a fair status determination.
  - iv. Specialized training on the particular aspects of LGBTI refugee claims for decision makers, interviewers, interpreters, advocates and legal representatives is crucial.
  - v. The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant's own language, is essential.<sup>112</sup> Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, "homosexual" is also considered a derogatory term in some countries.
  - vi. Specific requests made by applicants in relation to the gender of interviewers or interpreters should be considered favourably. This may assist the applicant to testify as openly as possible about sensitive issues. If the interpreter is from the same country, religion or cultural background, this may heighten the applicant's sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.
  - vii. Questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female.<sup>113</sup> Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.<sup>114</sup>
  - viii. For claims based on sexual orientation and/or gender identity by women, additional safeguards are presented in UNHCR's Guidelines on Gender-Related Persecution.<sup>115</sup> Women asylum-seekers should, for instance, be interviewed separately, without the presence of male family members in order to ensure they have an opportunity to present their case.
  - ix. Specific procedural safeguards apply in the case of child applicants, including processing on a priority basis and the appointment of a qualified guardian as well as a legal representative.<sup>116</sup>
61. Where an individual seeks asylum in a country where same-sex relations are criminalized, these laws can impede his or her access to asylum procedures or deter the person from mentioning his or her sexual orientation or gender identity within status determination interviews. In such situations, it may be necessary for UNHCR to become directly involved in the case, including by conducting refugee status determination under its mandate.<sup>117</sup>

### **Credibility and Establishing the Applicant's Sexual Orientation and/or Gender Identity**

62. Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring 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.<sup>118</sup>
63. Both open-ended and specific questions that are crafted in a non-judgemental manner may allow the applicant to explain his or her claim in a non-confrontational way. Developing a list of questions in preparation of the interview may be helpful, however, it is important to bear in mind that there is no magic

<sup>112</sup> For suggested appropriate terminology, see above at paras. 9–12.

<sup>113</sup> UNHCR, Guidelines on Gender-Related Persecution, para. 36 viii, xi.

<sup>114</sup> UNHCR, "Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity", 10 September 2011 (hereafter "UNHCR, Summary Report of Informal Meeting of Experts"), available at: <http://www.unhcr.org/refworld/docid/4fa910f92.html>, para. 34.

<sup>115</sup> UNHCR, Guidelines on Gender-Related Persecution paras. 35–37.

<sup>116</sup> 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, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>, paras. 65–77.

<sup>117</sup> It is generally only where States have not yet acceded to the international refugee instruments, or if they have acceded but have not yet established national procedures, or these procedures are not fully functioning that UNHCR may be called upon to undertake individual refugee status determination and recognize refugees under its mandate. This function, therefore, can be exercised either in a State which is, or a State which is not, a signatory to the international refugee instruments. In these situations, UNHCR conducts refugee status determination for protection purposes (in order to protect refugees from *refoulement* and detention, for example) and/or to facilitate a durable solution. See, for example, UNHCR, *MM (Iran) v. Secretary of State for the Home Department - Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, available at: <http://www.unhcr.org/refworld/docid/4c6aa7db2.html>, para. 11.

<sup>118</sup> UNHCR, Summary Report of Informal Meeting of Experts, para. 32.

formula of questions to ask and no set of “right” answers in response. Useful areas of questioning may include the following:

- i. **Self-identification:** Self-identification as a LGBTI person should be taken as an indication of the applicant’s sexual orientation and/or gender identity. The social and cultural background of the applicant may affect how the person self-identifies. Some LGBT individuals, for example, may harbour 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.
- ii. **Childhood:** In some cases, before LGBTI individuals come to understand their own identity fully, they may feel “different” as children. When relevant, probing this experience of “difference” can be helpful to establishing the applicant’s identity. The core attractions that form the basis for adult sexual orientation may emerge between middle childhood and early adolescence,<sup>119</sup> while some may not experience same-sex attraction until later in life. Likewise, persons may not be aware of their full gender identity until adolescence, early adulthood or later in life, as gender codes in many societies may be less prescriptive or strict during childhood than in (early) adulthood.
- iii. **Self-Realization:** The 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. Questions about both of these “coming out” or self-realization processes may be a useful way to get the applicant talking about his or her identity, including in the country of origin as well as in the country of asylum. 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. Prejudice and discrimination may make it difficult for people to come to terms with their sexual orientation and/or gender identity and it can, therefore, be a slow process.<sup>120</sup>
- iv. **Gender identity:** 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. 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. It may be appropriate to ask questions about any steps that a transgender applicant has taken in his or her transition.
- v. **Non-conformity:** LGBTI applicants may have grown up in cultures where their sexuality and/or gender identity is shameful or taboo. As a result, they may struggle with their sexual orientation or gender identity at some point in their lives. This may move them away from, or place them in opposition to their families, friends, communities and society in general. Experiences of disapproval and of “being different” or the “other” may result in feelings of shame, stigmatization or isolation.
- vi. **Family Relationships:** Applicants may or may not have disclosed their sexual orientation and/or gender identity to close family members. Such disclosures may be fraught with difficulty and can lead to violent and abusive reactions by family members. As noted above, an applicant may be married, or divorced and/or have children. These factors by themselves do not mean that the applicant is not LGBTI. Should concerns of the credibility of an applicant who is married arise, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, the portion of the testimony should be found credible.<sup>121</sup>
- vii. **Romantic and Sexual Relationships:** The applicant’s relationships with and attraction to partners, or their hope to have future relationships, will usually be part of their narrative of LGBTI individuals. Not everyone, however, especially young LGBTI people, will have had romantic or sexual relationships. The fact that an applicant has not had any relationship(s) in the country of origin does not necessarily mean that he or she is not LGBTI. It may rather be an indication that he or she has been seeking to avoid harm. Presuming that the applicant has been involved in a same-sex relationship, decision makers need to be sensitive with regard to questioning about past and current relationships since it involves personal information which the applicant may be reluctant to discuss in an interview setting. Detailed questions about the applicant’s sex life should be avoided. It is not an effective method of ascertaining the well-foundedness of the applicant’s fear of persecution on account of his or her

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<sup>119</sup> APA, Sexual Orientation and Homosexuality.

<sup>120</sup> APA, Sexual Orientation and Homosexuality.

<sup>121</sup> USCIS, Guidance for Adjudicating LGBTI Claims, pp. 39–40.



sexual orientation and/or gender identity. Interviewers and decision makers need to bear in mind that sexual orientation and gender identity are about a person's identity, whether or not that identity is manifested through sexual acts.

- viii. Community Relationship: Questions about the applicant's knowledge of LGBTI contacts, groups and activities in the country of origin and asylum may be useful. It is important to note, however, that applicants who were not open about their sexual orientation or gender identity in the country of origin may not have information about LGBTI venues or culture. For example, ignorance of commonly known meeting places and activities for LGBTI groups is not necessarily indicative of the applicant's lack of credibility. Lack of engagement with other members of the LGBTI community in the country of asylum or failure to join LGBTI groups there may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices or a fear of exposure.<sup>122</sup>
- ix. Religion: Where the applicant's personal identity is connected with his/her faith, religion and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity. The influence of religion in the lives of LGBTI persons can be complex, dynamic, and a source of ambivalence.<sup>123</sup>

### Evidentiary Matters

- 64. The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is a lack of country of origin information, the decision maker will have to rely on the applicant's statements alone. Normally, an interview should suffice to bring the applicant's story to light.<sup>124</sup> Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.
- 65. Medical "testing" of the applicant's sexual orientation is an infringement of basic human rights and must not be used.<sup>125</sup> On the other hand, medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of intersex individuals) may corroborate their personal narrative.
- 66. Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant's claim is unfounded or that there is no persecution of LGBTI individuals in that country.<sup>126</sup> The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant's situation in certain circumstances.

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<sup>122</sup> *Essa v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493, Canada, Federal Court, 20 December 2011, available at: <http://www.unhcr.org/refworld/docid/4f901c392.html>, paras. 30–31, found that the Board's insistence on the applicant going to or have knowledge about gay venues in the country of asylum in order to be gay was not reasonable.

<sup>123</sup> APA, Practice Guidelines for LGB Clients.

<sup>124</sup> UNHCR, *Handbook*, paras. 196, 203–204.

<sup>125</sup> See further, "UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation", April 2011, available at: <http://www.unhcr.org/refworld/docid/4daeb07b2.html>.

<sup>126</sup> See, for example, *Molnar v. Canada*, above footnote 39.