



WORKING PAPER SERIES NO. 73

# **Sexual orientation in Refugee Status Determination**

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April 2011

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## Working Paper Series

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# Contents

1	Introduction	3
	Background and explanation of the research question	3
	Definition of terms	7
2	Gay men and lesbians: Convention refugees? Social group and persecution	9
	Interpretation of “membership of a particular social group”	10
	“...of being persecuted”: Persecution and sexual orientation	15
3	“Well-founded fear” and procedural issues in sexual orientation claims	31
	“Fear”: Subjectivity and credibility – how to prove sexual orientation	32
	“Well-foundedness”: Objectivity and reliable country information	42
4	Conclusion	46
	References cited	49
	Case law (in chronological order)	54

# 1 Introduction

“I feel scared. I feel I am in danger. I’ve tried to put a few security measures in place and I am constantly watching over my shoulder”,<sup>1</sup> says Julian Pepe, a gay Ugandan campaigning for gay rights, at a time when the Ugandan government is planning to pass a law severely punishing “homosexuality”. Uganda’s proposal has led to massive repercussions not only in Uganda, but also in neighbouring countries and the international community: Burundi and Rwanda are embarking on legislating or reinforcing existing legislation against consensual gay sex.<sup>2</sup> A Malawian court convicted a gay couple to fourteen years in prison for gross indecency and unnatural acts after celebrating their engagement and planning a wedding.<sup>3</sup> Iran also provoked considerable global outcry after hanging two gay youths a few years ago.<sup>4</sup> These examples show that in spite of declarations by international human rights bodies, decisions from national courts, and the reform of anti-gay legislation in many countries, sexual orientation is still an issue that provokes strong opinions and divides societies. Sexual minorities continue to be oppressed and persecuted in many parts of the world. As a result, gay people often flee their home countries and seek protection abroad. However, within the current refugee protection legal framework, they are likely to encounter many difficulties with their claims.

## Background and explanation of the research question

The main legal instrument mandating refugee protection is the 1951 Convention Relating to the Status of Refugees<sup>5</sup> in combination with its 1967 Protocol.<sup>6</sup> Art. 1A(2) of the 1951 Convention defines that the term refugee shall apply to:

*“any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of*

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<sup>1</sup> This paper was written as a dissertation for the MSc in Forced Migration at the Refugee Studies Centre, University of Oxford. The author would like to thank Alice Edwards for her guidance and insightful comments and Paul Weßels for many helpful questions on and discussions about the paper, as well as Judy Barr for proofreading the manuscript.

Mmali, J. (2010) ‘Uganda fear over gay death-penalty plans’, *BBC News* December 22. Available from: <http://news.bbc.co.uk/1/hi/world/africa/8412962.stm> (accessed May 27, 2010).

<sup>2</sup> Civil Society Coalition On Human Rights And Constitutional Law (2009) ‘Uganda’s Anti-Homosexuality Bill – The Great Divide’, *Refugee Law Project*, Kampala, p. 2.

<sup>3</sup> Although the couple was recently pardoned by the president of Malawi due to international pressure, *BBC News* (2010) ‘Malawi court convicts gay couple’, May 18. Available from: <http://news.bbc.co.uk/1/hi/world/africa/10121618.stm> (accessed May 27, 2010) and *BBC NEWS* (2010) ‘Malawi pardons jailed gay couple’, May 29. Available from: <http://news.bbc.co.uk/1/hi/10190653.stm> (accessed June 3, 2010).

<sup>4</sup> Eke, S. (2005) ‘Iran “must stop youth executions”’, *BBC News* July 28. Available from: [http://news.bbc.co.uk/1/hi/world/middle\\_east/4725959.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4725959.stm) (accessed May 30, 2010).

<sup>5</sup> United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, July 28, 1951.

<sup>6</sup> Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, Dec. 16, 1967.

*his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.*<sup>7</sup>

The five grounds on which refugee recognition can be based do not include a reference to sexual orientation. However, persecution on account of sexual orientation is a relatively unknown, but nonetheless frequent,<sup>8</sup> reason for which people flee their home countries. Over 80 countries currently have sodomy laws or other legal provisions criminalizing homosexuality;<sup>9</sup> in 2007, nine countries maintained the death penalty as the maximum penalty for homosexual acts.<sup>10</sup> Persecution may not only be state-sponsored but also socially accepted such that many of the afflicted see no choice other than fleeing their home countries.<sup>11</sup>

Achieving asylum or refugee status on the basis of sexual orientation, however, is generally linked to a large number of legal and procedural obstacles and such applications are often unsuccessful.<sup>12</sup> Present international guidance on refugee rights for gay people is very sparse. This issue was directly addressed only in November 2008<sup>13</sup> when the UNHCR published the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*.<sup>14</sup> This Note recognises that lesbian, gay, bisexual and transgender (LGBT) refugees have encountered a specific set of problems in the application of the refugee definition to their claims.<sup>15</sup> LaViolette welcomes the Note as “entirely appropriate and long overdue”,<sup>16</sup> but warns that it should be viewed as a work in progress as it

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<sup>7</sup> Art 1A(2) of the 1951 Convention Relating to the Status of Refugees.

<sup>8</sup> UNHCR (2008) *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, Protection Policy and Legal Advice Section, Geneva. p. 4.

<sup>9</sup> International Gay and Lesbian Human Rights Commission (2009) *Human Rights for everyone. Everywhere* (online). Available from: <http://www.iglhrc.org/cgi-bin/iowa/theme/1.html> (accessed April 5, 2010).

<sup>10</sup> Sodomy Laws (2007) *Laws Around the World* (online). Available from: <http://www.sodomylaws.org/> (last edited November 24, 2007, accessed April 5, 2010).

<sup>11</sup> UNHCR Guidance Note, above n. 8, p. 4.

<sup>12</sup> For example, in Australia, over the period of 1994-2003, the failure rate of lesbian applicants before the Refugee Review Tribunal (RRT) was 86% and the failure rate of gay male applicants was before the RRT was 73%.

See: Millbank, J. (2009) ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’, *The International Journal of Human Rights* 13(2/3): 391-414, p. 407.

<sup>13</sup> LaViolette, N. (2009b) ‘The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, ASIL Insight. *The American Society of International Law* 13(10), July 30. p. 1. Note however, that the UNHCR guidelines on gender-related persecution contain two paragraphs on sexual orientation: UNHCR (2002a) *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, Geneva.

<sup>14</sup> Hereinafter: “Guidance Note”.

<sup>15</sup> See for example: *Refugee Appeal No. 75272*, New Zealand: Refugee Status Appeals Authority, 16 May 2006.

<sup>16</sup> LaViolette, N. (2009b) above n. 13, p. 5.

overlooks a number of important issues. These include difficulties connected to evidentiary practices and procedures, such as the credibility of claims and independent country of origin information.<sup>17</sup> As such, LaViolette points out that the *Guidance Note* is not a full and complete analysis of refugee claims based on sexual orientation, but rather that it provides a basis for further commentary on the many issues facing gay, lesbian, bisexual and transgender refugees.<sup>18</sup> Indeed, subsequent to the publication of the *Guidance Note* in November 2008, a number of articles in 2009 explored a range of issues connected to refugee claims based on sexual orientation.<sup>19</sup>

This dissertation seeks to build on this work by examining some of the core issues that arise in refugee claims based on sexual orientation, with a focus on lesbian and gay claimants only. It seeks to answer the following questions: How have decision-makers dealt with gay and lesbian refugee claimants? Are decision-makers adequately prepared for the complexities of sexuality-based refugee claims? How have the different elements of the Convention definition been interpreted so as to include or exclude gay refugees? What particular obstacles and difficulties do gay and lesbian refugees face in their claims?

To answer these questions, the Convention definition will be broken down into four elements: the Convention ground, persecution, fear and well-foundedness. Each of these will be analysed in turn with respect to their application to gay refugees.

The first section deals with the Convention ground on which gay refugee claims are based, namely, “membership of a particular social group”. Although earlier cases were sometimes based on political opinion or religion, this has become extremely rare in the past fifteen years.<sup>20</sup> The paper will therefore only address “membership of a particular social group”.

The second section addresses the role and interpretation of “persecution” in gay refugee claims. It focuses on, in particular, the question of when prosecution or discrimination amount to persecution, and the problematic “discretion reasoning” which some jurisdictions have frequently used, asking gay claimants to participate in their own protection by “acting discreetly”.

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid, p. 6.

<sup>19</sup> See for example: LaViolette, N. (2009a) ‘Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process’, *The International Journal of Human Rights* 13(2/3): 437-467; Millbank, J. (2009b) “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations”, *International Journal of Refugee Law* 21(1): 1-33; Millbank, J. (2009a) above n. 12; Rehaag, S. (2009) ‘Bisexuals Need Not Apply: a Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia’, *International Journal of Human Rights* 13(2): 415-436.

<sup>20</sup> Out of 29 sexual orientation cases from the Michigan Database, only one German case from 1988 considered the claim on the basis of political opinion; all other cases considered sexual orientation under the particular social group ground (*Bundesverwaltungsgericht, Urteil vom 15.03.1988 - BVerwG 9 C 278.86*, Germany: Bundesverwaltungsgericht, 15 March 1988).

The next section analyses the subjective element of “fear” in the definition. Refugee determinations involve a narrative mode of legal adjudication.<sup>21</sup> The issue of credibility is particularly difficult in sexual orientation claims because the claim to group membership often rests entirely upon the applicant’s narrative with few if any external items of proof,<sup>22</sup> which often leads to negative determinations on the basis that the applicant is not “actually gay.”<sup>23</sup> Unlike disbelief regarding other aspects of a claimant’s narrative, disbelief regarding actual group membership will almost always lead to a rejection of the claim.<sup>24</sup>

The final section deals with the objective “well-foundedness” element of the definition. The claimant’s story is weighed against available information on the country of origin.<sup>25</sup> While this is the case for all asylum decisions, applicants who base their claims on sexual orientation have a “specific evidentiary problem”,<sup>26</sup> given that existing human rights documentation fails to provide the kind of information gay refugees need to support their applications.<sup>27</sup> Therefore, both credibility and country of origin information constitute particular difficulties for sexual orientation refugee claims, which have been described repeatedly as “easy to make and impossible to disprove” by UK and Australian decision-makers.<sup>28</sup>

In order to analyse the application of the Convention refugee definition to cases based on sexual orientation, reference will be made to the pertinent academic debate. There is still a dearth of literature on the particular issue of sexuality-based refugee claims and the current debate is strongly informed by authors such as Millbank and Dauvergne, who conducted a research project examining refugee claims involving sexual orientation in Canada, Australia, the UK and New Zealand over the time period from 1994-2007. Their data set comprises over 1,000 cases, all publicly available tribunal and court decisions.<sup>29</sup>

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<sup>21</sup> Millbank, J. (2009b) above n. 19, p. 2.

<sup>22</sup> Ibid, p. 5.

<sup>23</sup> Millbank, J. (2009b) above n. 19, p. 4.

<sup>24</sup> For example, Millbank found in her research that in the years between 2003 and 2007, 28% of negative decisions in cases related to sexual orientation in Canada were based on disbelief regarding the gay, lesbian or bisexual identity of the claimant (this issue emerging in 22% of the cases); in the same time period in Australia, the actual group membership of the claimants was seriously doubted or disbelieved in 38% of the cases. See: Millbank, J. (2009b) above n. 19, p. 4.

<sup>25</sup> Millbank, J. (2009b) above n. 19, p. 2.

<sup>26</sup> LaViolette, N. (2009a) above n. 19, p. 438.

<sup>27</sup> Ibid, p. 439. See also: Dauvergne, C. and Millbank, J. (2003b) ‘Burdened by Proof – How the Australian Refugee Review Tribunal has failed lesbian and gay asylum seekers’, *Federal Law Review*, 31: 299-342.

<sup>28</sup> Millbank, J. (2009b) above n. 19, p. 4.

<sup>29</sup> The Australian cases were all obtained from the Austlii case database ([www.austlii.edu.au](http://www.austlii.edu.au)); UK cases were obtained from the Electronic Immigration Network case database ([www.ein.org.uk](http://www.ein.org.uk)), the Asylum and Immigration Tribunal website ([www.ait.gov.uk](http://www.ait.gov.uk)) and LEXIS; Canadian cases were obtained from the Quicklaw, Canlii ([www.canlii.org](http://www.canlii.org)) and LEXIS databases; New Zealand cases were obtained from the Refugee Status Appeals Authority website ([www.nzrefugeeappeals.govt.nz](http://www.nzrefugeeappeals.govt.nz)). The United States were excluded from this study as lower-level determinations are unavailable. See: Berg, L. and Millbank, J. (2009) ‘Constructing the Personal

Other prominent authors, like LaViolette and Berg, also draw on that data set so that those four countries of asylum are heavily overrepresented in the literature.

In order to take a different approach, the Michigan-Melbourne Refugee Caselaw site served as a basis for this paper. The core collection of the Michigan database contains cases from the highest national courts and the most important decisions of lower courts and tribunals of Australia, Canada, New Zealand, the United Kingdom and the United States, selected by Professor Hathaway, as well as decisions from 28 other asylum countries, selected and indexed by teams of leading experts from around the world. Cases are included in this database because of their topical relevance; it is explicitly not a current, correct or complete statement of the law.<sup>30</sup> For this paper, the website's search engine has been used to find cases related to the concept "sexual orientation", which yielded a total of 29 cases involving 17 countries of origin<sup>31</sup> and 8 countries of destination<sup>32</sup> from 1988 to 2009. 23 out of the 29 cases are from 2000 onwards. The cases are not used for quantitative conclusions but rather to highlight certain aspects with respect to their subsequent history and treatment in order to illustrate the literature. Other relevant cases that are not part of the Michigan collection will also be used.

### **Definition of terms**

Before turning to the argument, it is necessary to address the terminology used in this paper. The appropriate labels for sexual identities and orientations are continuously debated. One of the main issues is that regardless of which terminology is chosen, the self-understanding of many of those who are supposed to be embraced by this terminology will disaccord. Concerns include the occlusion, the inappropriate conflation or bifurcation and the exclusion of certain identities as well as cross-cultural issues.<sup>33</sup>

The terminology used here follows the Yogyakarta Principles<sup>34</sup> and the Media Reference Guide of the Gay & Lesbian Alliance Against Defamation.<sup>35</sup> Accordingly, for the purposes

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Narratives of Lesbian, Gay and Bisexual Asylum Claimants', *Journal of Refugee Studies* 22(2):195-223, p. 218.

<sup>30</sup> Hathaway, J. (2010) *The Michigan-Melbourne Refugee Caselaw Site* (online). Available from: <http://www.refugeecaselaw.org/> (accessed May 24, 2010).

<sup>31</sup> Albania, Bangladesh (two cases), Brazil, China (two cases), Costa Rica, Ghana, India (three cases), Iran (five cases), Lebanon, Mexico (four cases), Nigeria, Pakistan, Russia (two cases), St Vincent and Grenadines, Uganda, Venezuela, Zimbabwe.

<sup>32</sup> Australia (six cases), Canada (four cases), Germany (one case), New Zealand (two cases), Norway (two cases), Switzerland (one case), United Kingdom (four cases) and United States of America (nine cases).

<sup>33</sup> Rehaag, S. (2009) above n. 19, p. 416.

<sup>34</sup> The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity are a set of international principles relating to sexual orientation and gender identity. The document contains 29 Principles and recommendations to governments, regional intergovernmental institutions, civil society, and the UN, adopted unanimously by members of the International Commission of Jurists and human rights experts



of this paper, “sexual orientation” is used to refer to a “person’s capacity for profound emotional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.<sup>36</sup>

The adjective “gay” will be used in preference to homosexual to describe people attracted to members of the same sex. “Gay man” is used to refer specifically to male same-sex attracted individuals; “lesbian” is used to describe same-sex attracted women. “Gay people” refers to both men and women.<sup>37</sup> In accordance with the Media Reference Guide, the term “homosexual” will be largely avoided as it is outdated and considered derogatory and offensive by many gay people.<sup>38</sup> The words “heterosexual” and “straight” will be used interchangeably to describe people whose enduring physical, romantic and/or emotional attraction is to people of the opposite sex.

Although in much of the literature – as well as, for example, in the UNHCR *Guidance Note* – lesbians and gay men are considered at the same time as bisexual<sup>39</sup> and transgender<sup>40</sup> people (which has led to the acronym LGBT), this dissertation looks at gay men and lesbians only. This decision has been made for the following reasons: firstly, bisexuality tends to be invisible and there are only a very small number of reported bisexual refugee decisions.<sup>41</sup> Rehaag has shown in his research that bisexuals who allege persecution on account of their sexual identity face extra obstacles that differ from those

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from around the world at a meeting on Java from 6 to 9 November in 2006. See: YOGYAKARTA PRINCIPLES on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007. Available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (accessed April 7, 2010).

<sup>35</sup> The Gay & Lesbian Alliance Against Defamation (GLAAD) is a media monitoring organization that works toward public acceptance of LGBT people and to prevent the defamation of LGBT people in the media. Their activities include the publication of the “Media Reference Guide” that promotes fair, accurate and inclusive reporting of LGBT issues. See: Gay & Lesbian Alliance Against Defamation (2010) *Media Reference Guide*, 8th edition, New York/Los Angeles January 2010.

<sup>36</sup> See preamble of the Yogyakarta Principles above n. 34.

<sup>37</sup> Gay & Lesbian Alliance Against Defamation (2010) above n. 35, p. 6-7.

<sup>38</sup> Gay & Lesbian Alliance Against Defamation (2010) above n. 35, p. 12.

<sup>39</sup> A bisexual is an “individual who is physically, romantically and/or emotionally attracted to men and women. Bisexuals need not have had sexual experience with both men and women; in fact, they need not have had any sexual experience at all to identify as bisexual.” See: Gay & Lesbian Alliance Against Defamation (2010) above n. 35, p. 6.

<sup>40</sup> Transgender is an “umbrella term (adj.) for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gendervariant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Use the descriptive term (*transgender*, *transsexual*, *cross-dresser*, FTM or MTF) preferred by the individual. Transgender people may or may not decide to alter their bodies hormonally and/or surgically.” See: Gay & Lesbian Alliance Against Defamation (2010) above n. 35, p. 8.

<sup>41</sup> See: Berg, L. and Millbank, J. (2009) above n. 29, p. 213. and Rehaag, S. (2009) above n. 19, p. 423.

of gay men and lesbians. Therefore, they are largely excluded from this paper, although some reference may be made for illustrative purposes.<sup>42</sup>

Secondly, although transgender people are often mentioned in the same breath as gay people, this is in fact an “erroneous association”.<sup>43</sup> Gender identity and sexual orientation are not the same. Transgender people may be straight, lesbian, gay or bisexual. For example, a man who transitions from male to female and is attracted to other women would be identified as a lesbian.<sup>44</sup> Transgender refugees therefore constitute a separate topic and are covered here only insofar as they are identified as gay men or lesbians.

## 2 Gay men and lesbians: Convention refugees? Social group and persecution

Refugee claims relating to sexual orientation started to emerge at the beginning of the 1990s.<sup>45</sup> Although especially in early cases such claims were based on political opinion or religion,<sup>46</sup> sexual orientation was accepted as the basis for a particular social group claim in most major refugee-receiving nations by the mid-1990s.<sup>47</sup> In spite of this general acceptance, the question of whether gay people constitute a particular social group under the 1951 Convention still gives rise to discussion today,<sup>48</sup> as in the recent case of *MK v Secretary of State for the Home Department*. In this decision, the decision-makers avoided a finding on the social group, arguing it was not constructive as they had found a lack of a well-founded fear of serious harm on the part of lesbians in Albania.<sup>49</sup>

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<sup>42</sup> For further information see: Rehaag, S. (2009) above n. 19; Rehaag, S. (2008) ‘Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada’, *McGill Law Journal* 53: 59-102.

<sup>43</sup> Amnesty International (2008) *Love, Hate and the Law: Decriminalizing Homosexuality*, London, Amnesty International Publications. Available from: <http://www.amnesty.org/en/library/asset/POL30/003/2008/en/e2388a0c-588b-4238-9939-de6911b4a1c5/pol300032008en.pdf> (accessed April 6, 2010).

<sup>44</sup> Gay & Lesbian Alliance Against Defamation (2010) above n. 35, p. 8.

<sup>45</sup> Millbank, J. (2005) ‘A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003’, *Social Legal Studies* 14(1): 115-138. p. 116.

<sup>46</sup> See for example *BVerwG 9 C 278.86* above n. 20, where an Iranian gay man’s sexual orientation was argued to be a political opinion.

<sup>47</sup> Millbank, J. (2009a) above n. 12, p. 405.

<sup>48</sup> *MK (Lesbians) Albania v. Secretary of State for the Home Department*, CG [2009] UKAIT 00036, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 9 September 2009.

<sup>49</sup> *MK v Secretary of State for the Home Department* above n. 48.

Even more explicitly, and contrary to general principles about cohesion,<sup>50</sup> the UK Home Office argued in a 2005 case that absent evidence of persecution, gay people cannot constitute a social group because they are not a “cohesive group”.<sup>51</sup> This section therefore addresses the issue of establishing that gay people constitute a particular social group within the meaning of Art. 1(A)2 of the 1951 Convention.

### **Interpretation of “membership of a particular social group”**

Such inconsistency in the interpretation of the Convention ground “particular social group” in relation to gay refugees, as described above, is partly due to the fact that “membership of a particular social group” is the least clear of the five Convention grounds for refugee status.<sup>52</sup> In addition, the *travaux préparatoires* are “particularly unhelpful”<sup>53</sup> as a guide to interpretation. Interpretive guidance therefore had to be sought in the term’s association with the other Convention grounds. This has been tried using various strategies, such as applying the principle of *ejusdem generis*,<sup>54</sup> or identifying “anti-discrimination”<sup>55</sup> or “human rights violations”<sup>56</sup> as the underlying norm of the 1951 Convention. There is, however, no unanimity on how to interpret the drafters’ intention concerning “particular social groups”, with the exception that it is widely accepted that it cannot be interpreted in a way so as to make the other grounds superfluous.<sup>57</sup> In the case of sexual orientation, both the “anti-discrimination” and the “human rights violations” approach would presumably lead to an inclusion.<sup>58</sup>

Sexual orientation jurisprudence, however, was “rather confused”<sup>59</sup> and has given rise to various differing interpretations, especially in the early cases. Several outstanding cases have mainly contributed to the current understanding of “membership of a particular social group”, namely *Canada (Attorney-General) v. Ward*,<sup>60</sup> *Applicant A v. Minister for*

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<sup>50</sup> Aleinikoff, T. A. (2003) ‘Protected Characteristics and Social Perceptions: an Analysis of the Meaning of ‘membership of a “particular social group”’, in Feller, E., Türk, V. and Nicholson F. (eds.) *Refugee Protection in International Law*, Cambridge, Cambridge University Press, p. 298.

<sup>51</sup> *In Re Struk* [2005] ScotsCS SCOH 30 (18 Feb 2005), cited in Millbank, J. (2009b) above n. 19, p. 15.

<sup>52</sup> UNHCR (2002b) *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, Geneva. p. 2.

<sup>53</sup> Aleinikoff, T. A. (2003) above n. 50, p. 266.

<sup>54</sup> *Ibid*, p. 290.

<sup>55</sup> See for example: *Refugee Appeal No. 1312/93, Re GJ*, No 1312/93, New Zealand: Refugee Status Appeals Authority, 30 August 1995. or *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords, 25 March 1999, p.511.

<sup>56</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

<sup>57</sup> *Canada (Attorney-General) v. Ward*, above n. 56, p. 63-69.

<sup>58</sup> See also: Yogyakarta Principles above n. 34.

<sup>59</sup> *Refugee Appeal No. 1312/93, Re GJ* above n. 55.

<sup>60</sup> *Canada (Attorney-General) v. Ward*, above n. 56.

*Immigration and Ethnic Affairs*,<sup>61</sup> and *Islam and Shah*.<sup>62</sup> This case law has brought forth two different approaches to interpret the Convention particular social group. The Canadian case *Canada (Attorney-General) v. Ward* (1993) established the protected characteristics approach, which builds on *Matter of Acosta*<sup>63</sup> and suggests three categories of particular social groups:

*“(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.”*<sup>64</sup>

In contrast, in the Australian case *Applicant A v. Minister for Immigration and Ethnic Affairs* from 1997, the court adopted a “Social Perception” approach:

*“A particular social group ... is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society. ... However, one important limitation ... is that the characteristic or element which unites the group cannot be a common fear of persecution.”*<sup>65</sup>

The UNHCR Guidelines on ‘Membership of a particular social group’ largely draw on the reasoning of these cases. They note that while analyses under the two approaches may frequently converge, these may at times yield different results, possibly leading to protection gaps.<sup>66</sup> In order to fill these potential gaps, UNHCR proposes a third approach which attempts to incorporate both dominant approaches into a single standard:

*“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”*<sup>67</sup>

UNHCR’s definition states that the group must exist *dehors* its persecution, “[n]onetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.”<sup>68</sup> This reasoning is drawn from McHugh J in *Applicant A*, where he established the so-called “left-handed test”:

*“[w]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because*

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<sup>61</sup> *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, (1997) 190 CLR 225, Australia: High Court, 24 February 1997.

<sup>62</sup> *Islam and Shah* above n. 55.

<sup>63</sup> *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985, para. 233.

<sup>64</sup> *Canada (Attorney-General) v. Ward*, above n. 56, p. 7-8.

<sup>65</sup> *Applicant A* above n. 61, p. 8-9.

<sup>66</sup> UNHCR (2002b) above n. 52.

<sup>67</sup> *Ibid*, p. 3.

<sup>68</sup> *Ibid*, p.4.

*they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.*<sup>69</sup>

This reasoning brings up the question of the quality of the group, as regards to how much its members have to associate with each other: left-handed men are certainly not a cohesive group. *Sanchez-Trujillo v. Immigration and Naturalization Service* (USA, 1986) dealt with the question whether “young urban males who have maintained political neutrality in El Salvador” constituted a “particular social group” according to the Convention<sup>70</sup> and found that an associational and cohesive test was required for a “social group”, since “[t]he statutory words ‘particular’ and ‘social’ which modify ‘group’, ... indicate that the term does not encompass every broadly defined segment of a population...<sup>71</sup> However, adjudicative bodies have largely rejected the “cohesiveness” standard of *Sanchez-Trujillo*.<sup>72</sup> In *Applicant A*<sup>73</sup> and in *Islam and Shah*,<sup>74</sup> the *Sanchez-Trujillo* analysis is expressly rejected. It is contrary to accepted State practice and, accordingly, the UNHCR Guidelines. The size of the purported social group is irrelevant in the determination of the existence of that group because even a characteristic that is widely shared among the members of a society may be the focus of persecution or suppression.<sup>75</sup>

Accordingly, in *Islam and Shah*, Lord Hoffman found support among the other Peers in finding that the “particular social group” at hand could appropriately be defined as “Pakistani women”.<sup>76</sup> This argument follows *Matter of Acosta*, where it is suggested that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some cases it might be a shared past experience such as former military leadership or landownership”.<sup>77</sup> Importantly for this paper, Lord Steyn in *Islam and Shah* used the example of gay people in order to reject the cohesiveness standard:

*“In some countries, homosexuals are subjected to severe punishments, including the death sentence. In Re G.J. ... the New Zealand Refugee Status Authority faced this question... [and] ... concluded in an impressive judgment that depending on the evidence homosexuals are capable of constituting a particular social group with the meaning of Art. 1(A)2.... Subject to the qualification that everything depends on evidence in regard to the*

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<sup>69</sup> *Applicant A* above n. 61, para. 21.

<sup>70</sup> *Sanchez-Trujillo, et al., v. Immigration and Naturalization Service*, 801 F.2d 1571, United States Court of Appeals for the Ninth Circuit, 15 October 1986, para. 16.

<sup>71</sup> *Sanchez-Trujillo* above n. 70, para. 25.

<sup>72</sup> Aleinikoff, T. A. (2003) above n. 50, pp. 277 and 286.

<sup>73</sup> *Applicant A* above n. 61, p. 8: “To the extent that *Sanchez-Trujillo v. INS* suggests the contrary I do not think it is persuasive.”

<sup>74</sup> *Islam and Shah* above n. 55 at p. 501f: “The support in the case law for the *Sanchez-Trujillo* view is slender. In the literature on the subject there is no support.”

<sup>75</sup> UNHCR (2002b) above n. 66, p. 5.

<sup>76</sup> *Islam and Shah* above n. 55, p. 9.

<sup>77</sup> *Matter of Acosta* above n. 63, para. 233.

*position of homosexuals in a particular country I would in principle accept the reasoning in Re G.J. as correct. But homosexuals are, of course, not a cohesive group. This is a telling point against the restrictive view in Sanchez-Trujillo's case.*<sup>78</sup>

It follows that gay people do not have to know each other or associate with each in order to constitute a particular social group. Such a broad definition of the particular social group as “same-sex attracted persons” is an important advantage for lesbian and gay claimants in particular, since it would be a difficult and sometimes impossible hurdle for gay applicants to prove the existence of a social group that may have little cohesion, organisation or voice and may even be officially non-existent in the country of origin.<sup>79</sup> Indeed, some authors have suggested that a narrow construction, such as in *Hernandez-Montiel*, where the social group was defined as “gay men with female sexual identities in Mexico”,<sup>80</sup> can actually be seen as an inappropriate analysis of the “nexus” issue.<sup>81</sup>

According to existing jurisprudence, the fact that some “are able to avoid the impact of persecution, for example, because their circumstances enable them to receive protection ... by itself does not mean that the social group ... cannot exist”.<sup>82</sup> In other words, not all members of a particular social group need to fear persecution for one to be a refugee. Consequently, and analogous to “women” in *Islam and Shah*, a broad definition of the relevant particular social group as “gay people” is appropriate, considering that the questions of persecution and of the nexus with the group definition must be analysed for each single person in his or her particular circumstances.<sup>83</sup> This conclusion was also reached in the case *Applicant S395/2002*, in which the Australian High Court found that the tribunal had erred in implicitly dividing the relevant social group into two separate groups, one consisting of discreet gay men and one consisting of non-discreet gay men.<sup>84</sup> Because claiming refugee status is asserting an individual right, the question of whether or not a gay man from Bangladesh has a well-founded fear of persecution cannot be determined by assigning him to the discreet or non-discreet group of homosexual males and then determining the probability of a member of that group suffering persecution.<sup>85</sup> Moreover, the case of *Amanfi v Attorney General* established that asylum may also be granted because of imputed membership in a social group, i.e. when a person is perceived to be, but is not actually, gay.<sup>86</sup>

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<sup>78</sup> Lord Steyn in *Islam and Shah* above n. 55, p. 8 (in-text citations omitted).

<sup>79</sup> Dauvergne, C. and Millbank, J. (2003a) ‘Before the High Court: *Applicants S396/2002 and S395/2002*, a Gay Refugee Couple from Bangladesh’, *Sydney Law Review* 25: 97-124. p. 117.

<sup>80</sup> *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000); A72-994-275, United States Court of Appeals for the Ninth Circuit, 24 August 2000, p. 4.

<sup>81</sup> Dauvergne, C. and Millbank, J. (2003a) above n. 79, p. 121.

<sup>82</sup> Lord Steyn in *Islam and Shah* above n. 55, p. 9.

<sup>83</sup> Dauvergne, C. and Millbank, J. (2003a) above n. 79, p. 121.

<sup>84</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, p. 6.

<sup>85</sup> *Ibid*, p. 16.

<sup>86</sup> *Kwasi Amanfi v. John Ashcroft, Attorney General*, Nos. 01-4477 and 02-1541, United States Court of Appeals for the Third Circuit, 16 May 2003. In this case, a Ghanaian man had engaged in a

In spite of the general agreement, at the very least since *Islam and Shah*, that same-sex attracted people can constitute a social group, jurisprudence on the matter has frequently remained confused. The US Court of Appeals recognized this fact in *Karouni v Attorney General*, the case of a Lebanese Shi'ite Muslim gay man. It decided to state that “to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a ‘particular social group’”.<sup>87</sup> This reasoning interprets sexual orientation as either innate or so fundamental to human identity that a person ought not to be required to change it rather than taking the social perception approach. Seeking cohesion in sexual orientation cases, this decision makes express what has been impliedly recognized in the US since *Matter of Toboso-Alfonso* in 1990 (set as precedence in 1994)<sup>88</sup> and more so since the *Hernandez-Montiel* decision from 2000.<sup>89</sup> Subsequent cases, such as *Boer-Sedano v Attorney General* and *Halmenschlager v Holder* explicitly referred to the general decision that all “alien homosexuals” are members of a particular social group,<sup>90</sup> while others simply accepted homosexuality as founding membership of a particular social group without further discussion of the matter.<sup>91</sup> With this general decision, the judge agrees that the Attorney General cannot “dispute that, as a general matter, homosexuals constitute a ‘particular social group’ ... Indeed, it would be difficult for the Attorney General to do so.”<sup>92</sup> Such clear words reduce the discretion of decision-makers in sexual orientation cases to use the interpretation of the particular social group to exclude gay refugees from protection, and provide lower-level decision-makers with legal guidance on the matter.

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homosexual act in order to become “impure” according to his cult and thereby avoid becoming a human sacrifice.

<sup>87</sup> *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005, para. 2854.

<sup>88</sup> *Matter of Toboso-Alfonso*, A-23220644, United States Board of Immigration Appeals, 12 March 1990. The applicant was a gay man from Cuba whose parole status following the Mariel boatlift was terminated and who successfully conceded his excludability and applied for asylum and withholding of deportation to Cuba on the grounds of his membership in a particular social group (homosexuals in Cuba).

<sup>89</sup> Sexual orientation can be the basis for establishing a “particular social group” for asylum purposes.” See: *Hernandez-Montiel*, above n. 80, p. 3. This was the case of a gay man with a female sexual identity from Mexico, who was expelled from his school and home and was sexually assaulted by police officers twice. The court reasoned that the petitioner’s female sexual identity was immutable because it was inherent in his identity and that he should not be required to change it.

<sup>90</sup> *Boer-Sedano v. Alberto Gonzales, Attorney General*, No. 03-73154, United States Court of Appeals for the Ninth Circuit, 12 August 2005, p. 3; *Halmenschlager v. Holder, Attorney General*, No. 08-9514, United States Court of Appeals for the Tenth Circuit, 31 July 2009, p. 16.

<sup>91</sup> For example *Ixtlilco-Morales v. Keisler, Acting Attorney General*, 507 F.3d 651, United States Court of Appeals for the Eighth Circuit, 2 November 2007; *Paredes v. Attorney General*, No. 06-13944, United States Court of Appeals for the Eleventh Circuit, 5 March 2007.

<sup>92</sup> *Karouni v. Attorney General* above n. 87, at 2851.

### **“...of being persecuted”: Persecution and sexual orientation**

More so than the interpretation of the term “particular social group”, the interpretation of “persecution” still very much depends on the decision-maker in many sexuality-based cases. The Convention definition requires that the source of the “well-founded fear” of an applicant is the risk of being persecuted for one of the Convention grounds. There is no universally accepted definition of “persecution.”<sup>93</sup> The 1951 Convention does not provide one, although Art. 33 on the prohibition of *refoulement* suggests that threats to “life or freedom ... on account of ... race, religion, nationality, membership of a particular social group or political opinion” are always persecution.<sup>94</sup> The UNHCR *Guidance Note* provides a definition based on case law that reads:

*“Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant.”*<sup>95</sup>

International human rights law should serve as guidance for decision-makers in the determination of the persecutory nature of the various forms of harm that a person may experience due to his or her sexual orientation.<sup>96</sup> The Yogyakarta Principles facilitate this task.<sup>97</sup>

In order for the fear of persecution to be well-founded, there must also be a “reasonable degree of likelihood”, or a “real risk” that the applicant will be persecuted if returned to his or her country of origin.<sup>98</sup> This likelihood may however be well below fifty percent,<sup>99</sup> as decided in *Cardoza-Fonseca*, the case of a Nicaraguan national applying for asylum in the USA: “the alien need not prove that it is more likely than not that he or she will be persecuted upon return to his or her home country”, it “is enough to show that persecution is a reasonable possibility.”<sup>100</sup>

The predicament lies in the determination of whether certain circumstances amount to persecution – a decision highly dependent on how a decision-maker interprets and weighs the evidence. For asylum cases based on sexual orientation, such circumstances include prosecution related to criminal laws prohibiting same-sex consensual relations between adults and the penalties following prosecution and conviction, discrimination,

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<sup>93</sup> UNHCR (1992) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva. para. 51.

<sup>94</sup> 1951 Convention above n. 5, art. 33.

<sup>95</sup> UNHCR Guidance Note above n. 8, p. 7.

<sup>96</sup> *Ibid*, p. 10.

<sup>97</sup> Yogyakarta Principles above n. 34.

<sup>98</sup> UK Border Agency (2008) *Asylum Policy Instructions: Assessing the Claim* (online.) Available from: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed May 24, 2010), p. 12.

<sup>99</sup> Even a 10 percent chance that an applicant will be persecuted in the future is enough to establish eligibility for asylum, see: *Karouni v. Attorney General* above n. 87.

<sup>100</sup> *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, p. 2-3.



the question of discretion, the question of state protection and the “nexus requirement”. Each of these is prone to misinterpretation and will now be examined in turn.

### **Persecution and prosecution**

Persecution must naturally be distinguished from prosecution for a common law offence. However, prosecution may amount to persecution if it was “pretextual, accompanied by excessive punishment or administered under inadequate or arbitrary procedures.”<sup>101</sup> The *UNHCR Handbook* states that it is necessary to refer to the laws of the country concerned in order to make this sometimes obscured distinction.<sup>102</sup> Moreover, the degree to which the respective national legislation conforms with accepted human rights standards has to be evaluated. This is of particular importance for cases involving sexual orientation.<sup>103</sup> In the UN Human Rights Committee case of *Toonen v. Australia*, a prominent case from 1994, Toonen complained that the Tasmanian Sodomy laws were in breach of Art. 17 of the International Covenant on Civil and Political Rights.<sup>104</sup> The Committee found that sexuality was a proscribed ground of discrimination and that the relevant sections of the Criminal Code interfered with Toonen’s privacy, even though the provisions had not been enforced for a number of years, and ordered the repeal of these sections of the Tasmanian Criminal Code.<sup>105</sup>

In terms of refugee law, this decision supports the position that international human rights standards must serve as the yardstick for the evaluation of national laws. Furthermore, it supports the view that it is irrelevant to a finding of persecution that the law is not enforced. So in some cases, a law may be persecutory *per se*, particularly when the law emanates from religious or cultural norms that are not in conformity with international human rights standards.<sup>106</sup> However, even where there is no conclusive country of origin information to evidence that laws criminalising gay conduct are actually enforced, persecution may be found.<sup>107</sup> As such, the UNHCR warns that it would be inappropriate to completely disregard the existence of a death sentence on the basis of

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<sup>101</sup> European Legal Network on Asylum (1997) *Research Paper on Sexual Orientation as a ground for recognition of refugee status* (online). Available from: European council on Refugees and Exiles (ECRE): <http://www.ecre.org/files/orient.pdf> (accessed May 24, 2010), p.7.

<sup>102</sup> UNHCR (1992) above n. 93, p.11.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

<sup>105</sup> *Ibid.*, para. 8.2.

<sup>106</sup> UNHCR (2004) *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, UNHCR Regional Representation in Japan. Available from: <http://www.unhcr.org/refworld/docid/4551c0d04.html> (accessed May 24, 2010), p. 1.

<sup>107</sup> See *Appellant S395/2002* where the Australian High Court found that where a Penal Code makes same-sex sexual relations an offence, “there may be a real chance that a homosexual person will suffer serious harm – bashings or blackmail, for example – that the government of the country will not or cannot adequately suppress,” even where such a law is not enforced; *Appellant S395/2002* above n. 84, p. 13. See also UNHCR Guidance Note, above n. 8, p. 11.

sources indicating a relative tolerance or the fact that there is no systematic effort to prosecute gay people in a particular country.<sup>108</sup>

Nonetheless, a contrary finding was quite common, especially in earlier cases, and frequently in conjunction with the finding of an internal flight alternative (see below, section 2.2.5).<sup>109</sup>

In many cases, it is not the law itself but its arbitrary or unlawful application that is discriminatory. Such a hidden prohibition, where provisions do not explicitly refer to gay sex but rather to crimes such as “undermining public morality” or “immoral gratification of sexual desires”, is quite common in many countries and needs to be considered in the assessment of a claim. Many Latin American countries have used laws that penalise offences against morality and decency to repress homosexuality.<sup>110</sup> The absence of penal provisions prohibiting homosexuality can therefore not be taken to mean that same-sex conduct is legally condoned.<sup>111</sup>

With regards to the difficulty of such an evaluation, the UNHCR instructs decision-makers to use the receiving country’s own national law and international human rights instruments as a yardstick.<sup>112</sup> This advice is very important as is evident from the unreported case *Secretary of State for the Home Department v. “S”* (75394) from 1996, cited by McGhee: Two of the members of the tribunal regarded prosecution for

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<sup>108</sup> UNHCR (2004) above n. 106, p. 3.

<sup>109</sup> See, for example: *Singh v Minister for Immigration and Multicultural Affairs* from 2000, where it was held that a Punjabi gay man could safely relocate to New Delhi or Mumbai as the law s 377 of the Indian Penal Code, penalising sodomy with life imprisonment, was not generally enforced; also *Jain v Secretary of State for the Home Department* from 1999 on the same law of the Indian Penal Code, finding that there was no reasonable possibility that the applicant may face prosecution thereunder. *Singh v Minister for Immigration & Multicultural Affairs* [2000], 178 A.L.R. 742, Australia: Federal Court, 27 November 2000 and *Jain v. Secretary of State for the Home Department*, [2000] Imm AR 76, United Kingdom: Court of Appeal (Civil Division), 6 October 1999.

<sup>110</sup> LaViolette, N. (2009a) above n. 19, p. 453.

<sup>111</sup> See: *Paredes v. Attorney General* above n. 91, where it was found that the applicant was not able to establish a well-founded fear of persecution as it was against the law that the “Venezuelan police regularly stop[ped], harass[ed], extort[ed], or sexually abuse[d] gay people, and that the police [were] rarely prosecuted for that behaviour”, although that law was not actually enforced. See also: *Ixtlilco-Morales v. Keisler, Acting Attorney General* above n. 91, where it was found that “attacks on homosexuals and those with HIV [were] certainly troubling and a legitimate concern,” but determined that such attacks “have not been so numerous or so wide-spread as to support a claim that the respondent has a well-founded fear of persecution; also referring to *Salkeld v. Gonzales*, 420 F.3d 804 (8th Cir. 2005), United States Court of Appeals for the Eighth Circuit, 25 August 2005, holding that evidence of police harassment of homosexuals and “alarming instances of violence towards homosexuals” in Peru did not compel a finding that alien demonstrated a clear probability of persecution if returned to Peru; noting that Peru does not have laws prohibiting homosexuality or requiring homosexuals to “register themselves”.

<sup>112</sup> UNHCR (1992) above n. 93, p.11.

homosexual activities as dependent purely on the law of Iran and not persecutory. One of the tribunal members stated regarding the Iranian state's official treatment of gay people:

*"I am not in a position to criticize a government's Criminal Laws or the penalties imposed for their breach but it is rather difficult to extend prosecutions for criminal acts into a Convention reason for asylum."*<sup>113</sup>

Thus, although same-sex consensual sexual activities between adults in private are clearly legal in the UK since 1967, they are reduced to "criminal acts" in this statement of the member of tribunal.<sup>114</sup> This case illustrates that the evaluation of the criminal laws in the country of origin is prone to misrepresentations, particularly if the decision-maker is unfamiliar with sexuality-related issues or even homophobic himself. This may lead to the application of a higher standard of persecution in sexuality claims, where, as in the case of *Singh*, a maximum term of imprisonment of two years may be represented as not persecutory.<sup>115</sup>

### **Persecution and discrimination**

Some states do not have or have abolished legal proscriptions on same-sex sexual conduct. Nonetheless, a prevailing homophobic atmosphere and discrimination may also amount to persecution under certain circumstances.<sup>116</sup> While differences in the treatment of various groups do exist in societies without necessarily amounting to persecution, patterns of harassment and discrimination can cumulatively reach the threshold of persecution.<sup>117</sup> A 2001 report by Amnesty International shows that discrimination against gay people is quite common at all levels: by the community, by the police and by the

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<sup>113</sup> McGhee, D. (2001) 'Persecution and Social Group Status: Homosexual Refugees in the 1990s', *Journal of Refugee Studies* 14(1): 20-42, p. 32.

<sup>114</sup> McGhee, D. (2001) above n. 113, p. 32. Note that, in a dissenting opinion, the Chairman Whitaker instead followed the UNHCR Handbook by stating that "[t]here is no doubt but that the enforcement against him of any of the Iranian penalties available for homosexuality would fall well within the realm of persecution. By British standards these penalties are unnecessarily repressive and extreme and, were one to apply the standard set by the European Convention of Human Rights, totally disproportionate to the legitimate aim pursued, i.e. of defining the boundaries of, and seeking to control within socially acceptable limits, homosexual behaviour", Whitaker, in *Secretary of State for the Home Department v. "S"* (75394) 1996.

<sup>115</sup> "[T]he tribunal also noted that some country information suggested that abetting the offence of sodomy, by participating in discussion to procure a homosexual relationship, may itself constitute an offence with a penalty of imprisonment for up to 10 years, but that the maximum term of imprisonment imposed had been two years." The Full Federal Court of Australia upheld the decision that the applicant could relocate. *Singh v Minister for Immigration and Multicultural Affairs* above n. 109.

<sup>116</sup> UNHCR (1992) above n. 93, p.11.

<sup>117</sup> UNHCR Guidance Note, above n. 8, p. 7.

state.<sup>118</sup> International jurisprudence and legal doctrine clearly state that discrimination on account of a person's sexual orientation is prohibited.<sup>119</sup>

Asylum claims made by gay people often reveal acts of harm and mistreatment so serious in nature that they would generally reach the threshold of persecution, such as physical and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killing.<sup>120</sup> However, there is little agreement on what constitutes persecution on account of sexual identity for purposes of protection under the immigration laws.<sup>121</sup> In an article analysing the interpretation of persecution in US asylum claims based on sexual orientation, O'Dwyer criticises that "a repeated refrain from the courts of appeals is that certain incidents, such as police raids on gay bars, arbitrary short-term detention of gay people, and discrimination, will not constitute persecution".<sup>122</sup> He notes that the fact that only a showing of lengthy detention or physical injury will suffice to establish a case of sexual orientation-based persecution means that a higher standard is imposed on this particular group of claimants than on other asylum applicants.<sup>123</sup> The case of *Muckette v Canada* may illustrate this point. The Canadian Refugee Protection Division decided that the various incidents the claimant suffered were discriminatory and not individually or cumulatively persecutory, dismissing death threats because they were "not acted upon", although the applicant at one point was stoned by a group of men before he could escape.<sup>124</sup> It is conceivable that this higher standard is due to underlying homophobic sentiments in some decision-makers or their inability to imagine the situation of a gay person in a heterosexist environment.<sup>125</sup> In the case of *Halmenschlager*, a Brazilian gay man, who was continually harassed and beaten in school and who had vainly sought help from teachers and from the police after men exposed themselves to him on different occasions,<sup>126</sup> the Court of Appeals found that:

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<sup>118</sup> Amnesty International (2001) *Crimes of Hate, Conspiracy and Silence – Torture and ill-treatment based on sexual identity*, ACT 40/016/2001, London, Amnesty International Publications.

<sup>119</sup> See: *Young v. Australia*, CCPR/C/78/D/941/2000, *Toonen v. Australia* above note 104; see also O'Flaherty, M. and Fisher, J. (2008) 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles', *Human Rights Law Review* 8(2): 207-248.

<sup>120</sup> UNHCR Guidance Note, above n. 8, p. 7.

<sup>121</sup> O'Dwyer, P. (2008) 'A Well-Founded Fear of Having My Sexual Orientation Claim Heard in the Wrong Court', *New York School Law Review* 52: 185-212, p.186.

<sup>122</sup> O'Dwyer, P. (2008) above n. 121, p. 212.

<sup>123</sup> *Ibid.*

<sup>124</sup> This decision was quashed by the Federal Court, criticising the RPD's "dismissive attitude towards complaints which were found to be credible." *Mutumba v. Minister of Citizenship and Immigration*, 2009 FC 19, Canada: Federal Court, 7 January 2009.

<sup>125</sup> The case of *Mutumba v Canada* raises a similar question concerning the interpretation of the exclusion clause. The applicant had worked taking notes during interrogations for a government intelligence group using torture. He had lost his previous jobs because he was openly gay and had difficulties finding another job due to his sexuality. See: *Mutumba v. Minister of Citizenship and Immigration* above n. 124.

<sup>126</sup> *Halmenschlager v Holder*, above n. 90, p. 11.

*“He testified credibly as to the bleak nature of his life in Brazil and is deserving of sympathy. But other than childhood ‘beatings’ at the hands of other children, he related no instance of violence directed toward him because of his sexual preference. ... The isolated failure of teachers to respond adequately to childhood bullying (particularly if the problems were not called to their attention) or one police officer’s failure to respond appropriately to improper sexual conduct is not necessarily sufficient to show ‘persecution’ even when accompanied by evidence of general intolerance of homosexuals in Brazil ...”*<sup>127</sup>

One particular problem O’Dwyer points to is the “artificial distinction between persecution on account of homosexual *status or identity*, which some circuits hold warrants protection, and punishment for homosexual *acts*, which some circuits hold does not warrant such protection”.<sup>128</sup> This was especially true for early decisions, such as in *Matter of Toboso-Alfonso*.<sup>129</sup> LaViolette harshly criticises the distinction between status and conduct as it permits discrimination against people “on the basis of things about which they do have a choice, such as sexual behaviour and public sexual identity”.<sup>130</sup> Indeed, the distinction between the simple “status” of being gay, where the person was expected to act “discreetly” on his or her sexual orientation and gay conduct, i.e. not acting discreetly and living openly as a gay, was used in subsequent decisions. This distinction has given rise to much controversy and will now be analysed more closely.

### **Persecution and discretion**

The UNHCR Guidance Note clearly states that “[b]eing compelled to forsake or conceal one’s sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution.”<sup>131</sup> This is in accordance with Yogyakarta Principle 19, which states:

*“Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means ...”*<sup>132</sup>

In spite of this clear guidance, recent research has shown that “discretion” remains a problematic concept in decisions related to asylum claims based on sexual orientation,

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<sup>127</sup> Ibid, p. 17 (emphasis added).

<sup>128</sup> O’Dwyer, P. (2008) above n. 121, p. 186 (emphasis added).

<sup>129</sup> *Matter of Toboso-Alfonso* above n. 88: “The government’s actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual.”

<sup>130</sup> LaViolette, N. (1997) ‘The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward’, *University of Toronto Faculty Law Review* 55(1): 1-42, p. 30.

<sup>131</sup> UNHCR Guidance Note, above n. 8, p. 8.

<sup>132</sup> Yogyakarta Principles above n. 34, Principle 19, p. 24.

particularly in Australia<sup>133</sup> and in the UK<sup>134</sup> – at least before the UK Supreme Court decision *HJ (Iran) and another* from 7 July 2010.<sup>135</sup>

The discretion requirement repeatedly expressed in courts consists of a “reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection.”<sup>136</sup> The reasoning can be illustrated by a representative case involving a gay man from Sri Lanka in 1998, where the Australian tribunal stated:

*“The evidence is that he can avoid a real chance of serious harm simply by refraining from making his sexuality widely know – by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a normal member of society if he does this. This does not seem to me to involve any infringement of fundamental human rights.”*<sup>137</sup>

One of the central and most important cases that dealt with this problematic concept is *S395/2002*, a case before the Australian High Court decided in 2003.<sup>138</sup> At issue was the interpretation of persecution and whether it was lawful to consider whether gay applicants could or even should be “discreet”, i.e. secretive, in their country of origin so as to avoid or lessen the risk of persecution. By a narrow majority (4:3), the Court decided that the tribunal had erred in failing to consider the future-focused question of what would happen if the applicant were in fact discovered to be gay, and furthermore, whether the need to act “discreetly” to avoid the threat of serious harm itself constituted persecution.<sup>139</sup> The two majority judgments, by Gummow and Haynes JJ. jointly and McHugh and Kirby JJ. jointly, clearly rejected the possibility to “expect” or “reasonably require” refugee applicants to “co-operate in their own protection” by concealing their sexuality.<sup>140</sup> In *Appeal No 74665/03*, Haines QC agrees with this rejection, arguing:

*“By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same*

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<sup>133</sup> Kassisiéh, G. (2008) *From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation*, Gay & Lesbian Rights Lobby, Glebe, p. 64-70.

<sup>134</sup> Millbank, J. (2005) above n. 45, p. 133-134.

<sup>135</sup> *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action; HT (Cameroon) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010.

<sup>136</sup> *RRT Case No. V95/03527*, [1998] RRTA 246, Australia: Refugee Review Tribunal, 9 February 1996.

<sup>137</sup> *RRT Case No. V98/08356*, [1998] RRTA 4841, Australia: Refugee Review Tribunal, 28 October 1998; *Applicant L.S.L.S. v Minister for Immigration and Multicultural Affairs* [2000] FCA 211, Australia: Federal Court, 6 March 2000.

<sup>138</sup> *Appellant S395/2002* above n. 84.

<sup>139</sup> *Ibid*, per McHugh and Kirby JJ., at 18, p. 6.

<sup>140</sup> *Ibid*.

*denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct.*<sup>141</sup>

This rejection of the discretion requirement can, among others, be reached by an analogy with other Convention grounds. The general position that “[a] hidden right is not a right”<sup>142</sup> is supported by many Courts.<sup>143</sup>

In Australia, one decision-maker found a very strong comparison for a case which questioned whether persecution could be said to be non-existent if those concerned did not speak out:

*“[B]y reference to an historical example, upon the approach adopted by counsel for the respondent, Anne Frank, terrified as a Jew for hiding and for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered were remote, she would be sent back to live in the attic.”*<sup>144</sup>

However, a similar reasoning has not consistently been applied to sexual orientation based cases and Courts continue to send gay men and lesbians back to their attics – or, for that matter, closets – as for example was the case in *MK v. Secretary of State for the Home Department*, decided in September 2009. The AIT decided that lesbian women were able to carry on lesbian relations *discreetly* without attracting the risk of serious harm and that, if their sexual orientation was discovered, there was likely to be an adequacy of state protection.<sup>145</sup> Why, then, would they have to behave discreetly in the first place?

This brings up the question of the reliability of discretion. Even in those cases where applicants have made great efforts to conceal their sexuality over many years, they are often outed against their will, be it by accident, through rumours or growing suspicion.<sup>146</sup>

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<sup>141</sup> *Refugee Appeal No. 74665*, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004.

<sup>142</sup> *X (Re)*, VA5-02751 [2007], Canada: Immigration and Refugee Board, 16 February, 2007.

<sup>143</sup> For example, Sachs J of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98, South Africa: Constitutional Court, 9 October 1998; the German Bundesverwaltungsgericht in Wiesbaden compared sexual orientation with “race” and “nationality” in an early case: BVerwG 9 C 278.86, above n. 20, p. 11-12; in Canada a comparison was found with the request to practise the official state religion in public and one’s own faith only in private or carrying false identification and “passing” for someone of another race or nationality in: *In RE X.M.U.* [1995] CRDD No 146; cited in: Kendall, C. N. (2003) ‘Lesbian and Gay Refugees in Australia: Now that “Acting Discreetly” is no Longer an Option, will Equality be Forthcoming?’ *International Journal of Refugee Law* 15: 715-749, p. 739. Note that even the UNHCR Handbook rejects discretion in the case of political opinion: UNHCR (1992) above n. 93, para. 82.

<sup>144</sup> *Win v Minister for Immigration & Multicultural Affairs* [2001], FCA 132, Australia: Federal Court, 23 February 2001, at para. 17. This reasoning also raises the question of whether the *expression* of sexual orientation is as a form of political opinion rather than a social group. See: Edwards, A. (2003) ‘Age and gender dimensions in international refugee law’ in Feller, E. (ed.); Türk, V. (ed.) and Nicholson, F. (ed.) *Refugee Protection in International Law*. UNHCR’s Global Consultations on International Protection, Geneva.

<sup>145</sup> *MK v Secretary of State for the Home Department* above n. 48.

<sup>146</sup> Kassisiéh, G. (2008) above n. 133, p. 69.

The decision to be discreet may be made out of fear, but also for more subtle reasons. In many cases, this “decision” may not be a decision but rather be constrained by an actual or perceived homophobic environment. Most importantly, the decision is sometimes out of the applicants’ control when friends betray their trust or rumours are circulated.<sup>147</sup> Accordingly, Kassisieh argues that the chance of disclosure will almost always be real and not remote.<sup>148</sup>

These arguments would presumably also refute the frequently expressed assumption of “natural” discretion or discretion “by choice”.<sup>149</sup> However, even in the previously cited case of *Applicant S395/2002*, Justice Callinan and Justice Heydon re-inscribed discretion as a “naturally” occurring state in their joint dissenting opinion:

*“On the tribunal’s findings, no fear of such harm as could fairly be characterised as persecution imposed a need for any particular discretion on the part of the appellants: such ‘discretion’ as they exercised, was exercised as a matter of free choice. The outcome of these proceedings might have been different – it is unnecessary to decide whether that is so – if that position were different.”*<sup>150</sup>

Callinan and Heydon JJ. found that the appellants were not oppressed as their mode of conduct was voluntarily chosen.<sup>151</sup> They placed the responsibility on applicants to claim at first instance that their lives of secrecy were motivated largely, or even exclusively, by fear of harm.<sup>152</sup> This finding reflects their unawareness of or blindness towards the issues surrounding the disclosure of sexual orientation. Moreover, the problem with such reasoning is that if a claimant admits to a “choice” of discretion, the tribunal may not consider the way he or she made this choice in reaction to the constraints of a homophobic environment.<sup>153</sup>

Such questioning to understand why a person adopted such a course of living, however, is a duty of the Tribunal. Justice Gummow and Justice Hayne emphasised in *S395/2002*:

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<sup>147</sup> Kassisieh, G. (2008) above n. 133, p. 70.

<sup>148</sup> Ibid.

<sup>149</sup> For example in *J v. Secretary of State for the Home Department*, [2006] EWCA Civ 2138, United Kingdom: Court of Appeal (Civil Division), 26 July 2006, it was found that discretion was the applicant’s “preferred way of dealing with the problem” and therefore also “a way which was reasonably tolerable to him”.

<sup>150</sup> *Appellant S395/2002* above n. 84, para. 110.

<sup>151</sup> Ibid.

<sup>152</sup> This position was also adopted in *Z v. Secretary of State for the Home Department*, [2004] EWCA Civ 1578, United Kingdom: Court of Appeal (England and Wales), 2 December 2004, where the Court of Appeal found that the applicant had not provided evidence to support discretion out of fear. See also: Millbank, J. (2009a) above n. 12, p. 396.

<sup>153</sup> Kassisieh, G. (2008) above n. 133, p. 68.



*“The tribunal did not ask why the appellants would live ‘discreetly’. It did not ask whether the appellants would live ‘discreetly’ because that was the way in which they would hope to avoid persecution.”*<sup>154</sup>

Accordingly, discretion cannot be a relevant factor for a decision if the applicant would have a real chance of persecution, were it not for the discretion.<sup>155</sup> Nonetheless, courts continued to revert to the “discretion reasoning”, particularly in the UK, where in a 2008 case of *HJ* concerning a gay man from Iran, the Home Secretary claimed that:

*“self-restraint due to fear will be persecution only if it is such that a homosexual person cannot reasonably be expected to tolerate such self-restraint. Where a person does in fact live discreetly to avoid coming to the attention of the authorities he is reasonably tolerating that position.”*<sup>156</sup>

Millbank argued that in fact, the interpretation of persecution was not materially altered by the tribunals, which shifted from merely asking whether a claimant “should” be secretive to asking whether an applicant can “reasonably be expected to tolerate” secrecy.<sup>157</sup> In response to this critique, it is this disputed “reasonably tolerable” test that was at issue when the case of *HJ* proceeded to the High Court, where it was dealt with together with the case of *HT*, a gay man from Cameroon, in 2010: the Supreme Court unanimously allowed the appeal, holding that the “reasonably tolerable test” applied by the Court of Appeal was contrary to the Convention and should not be followed in the future.<sup>158</sup> Instead, they propose a complicated test that tries to distinguish between “discretion” because of fear of persecution, which would warrant international protection, and “discretion” for reasons other than fear of persecution, such as a personal choice or

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<sup>154</sup> *Appellant S395/2002* above n. 84, para. 88; Similarly, Justice McHugh and Justice Kirby argued in their statement:

“The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly” *Appellant S395/2002* above n. 84, p. 12.

<sup>155</sup> *Kassisieh, G.* (2008) above n. 133, p. 70.

<sup>156</sup> *HJ (Iran) v. Secretary of State for the Home Department; HT (Cameroon) v. Secretary of State for the Home Department*, [2009] EWCA Civ 172, United Kingdom: Court of Appeal (England and Wales), 10 March 2009, para. 10. This decision was later overturned by the Supreme Court, see *HJ (Iran) and another*, above n. 135.

<sup>157</sup> Millbank, J. (2009a) above n. 12, p. 398. Note that the discretion reasoning with the “reasonably expected to tolerate” standard has also been used in parallel for a case based on religion: “[T]he independent evidence suggests that the applicant would be able to continue to carry out exercises in private, as he has done here for the last three months.” *NAEB v. Minister for Immigration & Multicultural & Indigenous Affairs*, [2004] FCAFC 79, Australia: Federal Court, 30 March 2004.

<sup>158</sup> *HJ (Iran) and another*, above n. 135.

social pressures, which would not warrant international protection.<sup>159</sup> This test will have to prove itself in courts, but it seems that it remains problematic as it repeats a number of previous mistakes. Firstly, it distinguishes between “gay people who [live] openly”<sup>160</sup> and those who will conceal their sexual orientation and assumes that persecution exists only for the former – and as such omits the possibility of discovery by accident or against a person’s will, i.e. what McHugh and Kirby refer to as the “future-focused question of what would happen if the applicant were in fact discovered to be gay”.<sup>161</sup> The fact is that all gay people are usually persecuted in the respective countries; persecution is not restricted to gay people “who [live] openly”. Even gay people who conceal their sexual orientation will be persecuted if their sexual orientation comes to the knowledge of the persecutors. So why do the Peers propose to ask only whether “gay people *who lived openly* would be liable to persecution [...]”?<sup>162</sup> This question seems to re-inscribe the issue of discretion into the test.

Secondly, by assuming that some may “choose” to live discreetly,<sup>163</sup> the Peers follow a similar reasoning as Callinan and Haydon JJ. in their joint dissenting opinion in *Appellant S395/2002* that risks placing the responsibility on applicants to state at first instance that their discretion is motivated by fear of harm.<sup>164</sup>

And finally, the test proposed by the Supreme Court seems contradictory in that it first requires that the decision-makers are satisfied that “gay people who lived openly would be liable to persecution in the applicant’s country of nationality” and then proceeds to ask whether concealment may be a personal choice or a reaction to social pressures – although it already found that openly gay people are persecuted in that country.<sup>165</sup> To illustrate this point, Anne Frank’s hiding would never have been qualified as a personal choice in response to anti-Semitic neighbours in an environment of the Third Reich. Other factors may play a role for concealment but in a country where gay people are persecuted, this fact will always be decisive for secrecy. Although it is undisputable that discrimination is not protected by the Convention unless it passes the threshold of persecution (see above, section 2.2.2) and it is understandable that the Supreme Court seeks to make that distinction, this seems to be a problematic way of doing so, which lends itself to misinterpretations and in fact leads to a situation where discretion or “concealment”, as the Peers call it, remains a variable in the decision.

The fact that discretion continues to play a role in adjudications demonstrates the predominant heterosexist biases, particularly on the side of the decision-makers, that are cited by various authors. Kendall has been particularly clear in his critique:

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<sup>159</sup> *Ibid.*, per Lord Rodger at 82, p. 38 and Lord Hope at 35, p. 16.

<sup>160</sup> *Ibid.*, per Lord Rodger at 82, p.38.

<sup>161</sup> *Appellant S395/2002* above n. 84, per McHugh and Kirby JJ., at 18, p. 6. (see n. 138, 139 above)

<sup>162</sup> *HJ (Iran) and another*, above n. 135, per Lord Rodger at 82, p. 38 (emphasis added).

<sup>163</sup> *HJ (Iran) and another*, above n. 135, per Lord Rodger at 82, p.38.

<sup>164</sup> See above, p. 28 and n. 152.

<sup>165</sup> *HJ (Iran) and another*, above n. 135, per Lord Rodger at 82, p. 38.

*“Indeed, any decision that dictates ‘discretion’ as a solution to anti-lesbian and anti-gay persecution, presents an understanding of the term persecution that is at best socially myopic, at worst support for considerable individual and social inequality.”<sup>166</sup>*

These biases lead to the fact that the “discretion requirement” wrongly reduces the expression of gay identities to sexual activities between persons of the same sex. Simple expressions of sexuality in everyday gestures are perceived as highly sexualised and characterised as living “indiscreetly”.<sup>167</sup> Several authors attribute this sexualisation of gay people to the “hegemonic nature of heterosexuality”<sup>168</sup> of societies: “Heterosexism means heterosexual expression is celebrated whilst homosexual expression of the same degree is highly shunned and punished.”<sup>169</sup> Millbank underlines this point by citing two cases in which the applicants were faced with harsh reactions for kissing and cuddling in a park<sup>170</sup> and having sex in a hotel room<sup>171</sup> respectively. In both cases the Courts found their behaviour contravened general social norms without considering that a heterosexual couple in their place would not have been faced with such harsh reactions.

So key observable and often unconscious gestures and objects, such as wedding rings, a double bed or use of phrases like “my wife” routinely express sexuality in a “notably blatant” fashion. However, while this is seen as an expression of humanity for heterosexual persons, it is perceived as glaringly visible sexual expressions for gay people, “flaunting” or “parading” their sexual orientation.<sup>172</sup> Such heterosexist biases as the basis for the discretion reasoning therefore often lead to the reduction of gay *sexuality* to sexual *acts*, thereby ignoring large parts of gay identities.<sup>173</sup> Although this problem is recognised

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<sup>166</sup> Kendall, C. N. (2003) above n. 142, p. 736.

<sup>167</sup> Kassisieh, G. (2008) above n. 133, p. 64.

<sup>168</sup> Millbank, J. (2002) ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’, *Melbourne University Law Review* 26: 144-177, p. 147.

<sup>169</sup> Kassisieh, G. (2008) above n. 133, p. 64.

<sup>170</sup> This Chinese gay couple was caught by the police while kissing and cuddling in a park and then bashed, arrested and detained for three months. Their case in front of the Australian Tribunal was unsuccessful as it was held that they were engaging in public sex which contravened social norms for heterosexuals and homosexuals alike. *RRT Case No. N97/14768*, [1998] RRTA 2303, Australia: Refugee Review Tribunal, 29 April 1998; quashed on appeal to the Federal Court in *Gui v Minister of Immigration and Multicultural Affairs* (1998) 1592 FCA; reinstated on appeal to Full Federal Court in *Minister for Immigration & Multicultural Affairs v Guo Ping Gui* [1999] FCA 1496, N 52 OF 1999, Australia: Federal Court, 29 October 1999; cited in Millbank, J. (2002) above n. 159, p. 147.

<sup>171</sup> Here, a Chinese lesbian couple was having sex in a hotel room, which was invaded by policemen when neighbours overheard them. The women were reported to the Public Security Bureau in China, where they were separately interrogated and one of them was forced to undergo electric shock ‘therapy’. The tribunal reasoned that “the difficulty occurred after her lover made sufficient noise in their hotel room to disturb the occupants of other rooms and hostel staff [which] was the cause of her problem with authorities”; *RRT Case No N97/17155*, [1998] RRTA 4386, Australia: Refugee Review Tribunal, 23 September 1998.

<sup>172</sup> Kassisieh, G. (2008) above n. 133, p. 64.

<sup>173</sup> *Ibid.*

by the Supreme Court in *HJ (Iran)*,<sup>174</sup> the approach they suggest to be followed by tribunals does not account for this as it assumes discretion may be a personal choice in an environment where openly gay people are persecuted.<sup>175</sup> Kassisieh therefore recommends sexuality training for decision-makers that would help them understand the impact of actual or perceived homophobia and heterosexism on the experience of persecution and the refugee determination process.<sup>176</sup>

However, discretion reasoning is not limited to the issues described above. It has also led to and compounded errors in a range of other areas of analysis in the refugee determination process, including the relationship between the criminalisation of gay sex and the dearth of state protection, the role of internal relocation alternatives and also the likelihood of objective risk based on country evidence.<sup>177</sup> The former two issues will be briefly outlined below, the latter will be analysed in more detail in section 3.2.

### State protection

Among others, the “discretion problem”<sup>178</sup> has obscured the connection between formal criminal sanctions and the failure of state protection from harm caused by both state (see 2.2.1) and, importantly, non-state actors.<sup>179</sup> The latter may also be the basis for a refugee claim if the state is unwilling or unable to protect against violations committed by non-state or private actors.<sup>180</sup> The *Guidance Note* clarifies that a State’s inaction may be persecutory, for example, if the police fail to respond to requests for assistance and the authorities refuse to investigate, prosecute or punish the perpetrators of harm on gay people.<sup>181</sup> There are at least two situations in which the establishment of a state nexus may be particularly problematic in sexuality-based cases. The first is when the decision-makers place a high expectation on applicants to report harms inflicted by non-state actors to the police, especially in situations where the police itself has shown persecutory conduct.<sup>182</sup> The case of *Ixtlilco-Morales v Keisler*, involving a Mexican gay man who had suffered abuse from his family as a child and left his family at the age of ten reflects this expectation. The immigration judge determined that:

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<sup>174</sup> “To illustrate the point with trivial stereotypical examples from British society: [...] male homosexuals are free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. [...] In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.” See: *HJ (Iran) and another*, above n. 158 per Lord Rodger at 78, p. 36.

<sup>175</sup> *HJ (Iran) and another*, above n. 135, per Lord Rodger at 82, p. 38.

<sup>176</sup> *Ibid*, Recommendation 7, p. 74.

<sup>177</sup> Millbank, J. (2009a) above n. 12, p. 394.

<sup>178</sup> *Ibid*, p. 393.

<sup>179</sup> Millbank, J. (2009a) above n. 12, p. 395.

<sup>180</sup> UNHCR Guidance Note, above n. 8, p. 13.

<sup>181</sup> UNHCR Guidance Note, above n. 8, p. 13.

<sup>182</sup> Kassisieh, G. (2008) above n. 133, p. 63.

*“the past abuse Morales suffered at the hands of his family did not amount to persecution because it was not inflicted by the government or by actors the government was unable or unwilling to control (Morales never reported the abuse to the authorities).”*<sup>183</sup>

Kassisieh therefore argues that the state nexus should necessarily be satisfied in sexuality claims by the applicant’s inability or unwillingness, due to well-founded fear, to secure state protection.<sup>184</sup> Provided that this is supported by the country of origin information, this argument can be seen as reasonable.<sup>185</sup>

Millbank points to the second situation in which the state nexus may be problematic: namely, in cases where it is found that existing legal proscriptions of same-sex conduct are not actually enforced. Such a finding assumes that applicants will not and cannot alert authorities to their sexuality. In the incidence of sexuality-based violence, the victims would clearly be left without state protection as they would be characterised as criminal offenders.<sup>186</sup> So the assumption of state protection ignores in many cases the particular difficulties that gay people face in relation to the state authorities, including anti-gay sentiments in police officers and the consequences of disclosure of sexuality to state officials.

### **Internal flight alternative**

The question of internal relocation or flight alternative is closely linked to the issues of state protection discussed above. The UNHCR *Guidance Note* adopts relatively clear language on the issue: “As homophobia ... often tends to exist nationwide rather than being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation...”<sup>187</sup> It goes on to specify that internal flight is normally not considered relevant where the state is the agent of persecution, and that in cases where the persecutor is a non-state actor, it can be assumed that the state will be unwilling or unable to protect the person concerned in any part of the country.<sup>188</sup> This

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<sup>183</sup> The BIA later reversed this decision: “Given Morales’ young age at the time of the abuse and evidence in the record showing that domestic abuse of homosexual children is a significant problem in Mexico, the BIA deemed it insignificant that Morales did not report the abuse.” See: *Ixtlilco-Morales v. Keisler, Acting Attorney General* above n. 91. Another example is an Australian case involving a Filipino gay man, the tribunal did not believe that he was physically abused by his family because he had failed to report this to the police – who was known to have raided gay bars and had singled the applicant out for being gay, and disrobed and searched him before; *RRT Case No 061000497*, [2007] RRTA 39, Australia: Refugee Review Tribunal, 15 February 2007.

<sup>184</sup> Kassisieh, G. (2008) above n. 133, p. 5.

<sup>185</sup> For example, in the *Decision TA0-1587*, the applicant was rejected because he had not reported the incidents of police abuse he experienced to any state authorities as he had been warned not to trust the police and preferred to protect himself. The Canadian Immigration and Refugee Board argued that he failed to lodge a complaint with the Ministry of Security and therefore had not pursued all the available recourses of state protection open to him. *Decision TA0-1587*, Immigration and Refugee Board of Canada, 31 March 2003.

<sup>186</sup> Millbank, J. (2009a) above n. 12, p. 395.

<sup>187</sup> UNHCR Guidance Note, above n. 8, p. 15.

<sup>188</sup> UNHCR Guidance Note, above n. 8, p. 15-16.

position represents progress as compared with its gender-related persecution guidelines, which have been critiqued for discriminating indirectly against women and children, who mainly suffered from persecution from non-State actors.<sup>189</sup>

Millbank warns that in sexuality cases, discretion reasoning has in a number of cases led to implicitly or explicitly assuming that the purpose of relocation was to achieve re-concealment of the sexual orientation rather than to move to a place of actual safety with sufficient state protection.<sup>190</sup>

In spite of these criticisms, decision-makers continue to base negative asylum decisions on the availability of a flight alternative. The patron of the UK Lesbian and Gay Immigration Group, Angela Mason, stated in May 2010: “It seems that the Home Office are routinely refusing applications on the grounds that lesbians and gay men can go back and be ‘discreet’ or ‘relocate’”.<sup>191</sup> This statement is clearly supported by the 2009 case of *Okoli v Canada*: The Refugee Protection Division found that “an internal flight alternative was available within Nigeria in Lagos City if the Applicant kept his sexual orientation discreet,”<sup>192</sup> and specified further on that “the Applicant would not have to give up his homosexual identity or lifestyle, just that he would need to be discreet.”<sup>193</sup> Such reasoning reflects the sexualised and limited conception of sexual identity described above. It was subsequently overturned by the Canadian Federal Court which recalled that the “Federal Court has repeatedly found such findings [discretion] perverse as they require an individual to repress an immutable characteristic.”<sup>194</sup> This case, as with many others, shows that lower-level court decisions are often not in concordance with existing jurisprudence on sexual orientation issues and such decisions are based on ignorance or heterosexist biases of the decision-makers. However, only a very small number of cases are appealed as the means to challenge asylum decisions are increasingly reduced.<sup>195</sup> It remains to be seen, whether the recent UK Supreme Court decision in the case of *HJ (Iran)* and *HT (Cameroon)* will influence internal flight decisions in the future: the Supreme Court overturned the tribunal’s dismissal of HT’s appeal. The tribunal had decided that *HT* could relocate in Cameroon and act discreetly there.<sup>196</sup>

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<sup>189</sup> Edwards, A. (2003) above n. 143, p. 72.

<sup>190</sup> Millbank, J. (2009a) above n. 12, p. 394.

<sup>191</sup> Cited in: Hirsch, A. (2010) ‘UK policy on gay and lesbian asylum seekers challenged in supreme court. Laws that mean gays and lesbians can be deported to countries where they face persecution under scrutiny’. *The Guardian*, May 9. Available from: <http://www.guardian.co.uk/world/2010/may/09/supreme-court-gay-lesbian-asylum-seekers>. (accessed May 20, 2010).

<sup>192</sup> *Okoli v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, Canada: Federal Court, 31 March 2009, para. 4.

<sup>193</sup> *Ibid*, para. 34.

<sup>194</sup> *Okoli v. Canada* above n. 181, para. 36.

<sup>195</sup> Millbank, J. (2009b) above n. 19, p. 2.

<sup>196</sup> *HJ (Iran) and another*, above n. 135, per Sir John Dyson SJC at 131, p. 55.

### **Nexus requirement: “on account of”**

One other consistent obstacle for sexual orientation cases has been the establishment of the link between the fear of persecution and the Convention ground: the fulfilment of the so-called nexus requirement.<sup>197</sup> The persecution of the gay or lesbian person concerned must be “for reasons of” their membership of the particular social group of “gay people”. This is particularly important as the group is generally broadly defined and not all members of the group may suffer a risk of persecution (see above, section 2.1). The link may also be satisfied if the risk of serious harm at the hands of a non-state agent is for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground.<sup>198</sup> While the intent of the persecutors matters only insofar as the persecutory acts can be attributed to one of the Convention grounds – without the necessity to prove intent to punish<sup>199</sup> – the intent-reasoning has at times been used for a negative decision. Decision-makers have expected very specific references to sexual orientation, as was the case in *M. S. v Swiss Federal Office of Refugee*: a Russian lesbian had been forced to undergo psychiatric “treatment” for several months and was expelled from her university upon her return. The court argued that as the university did not specify the motives for the exclusion, there was no sufficiently concrete indication to assume that it was intended as a direct or indirect sanction of her homosexuality.<sup>200</sup> Importantly, the case *Hernandez-Montiel* later established that the applicant is not required to prove that his persecutors were motivated by his or her sexual orientation to the exclusion of all other possible motivations.<sup>201</sup> However, this decision is frequently ignored, as was the case in *Boer-Sedano v Attorney General*. Here, the Court of Appeals overturned a decision from an immigration judge which held that the sex acts the applicant was forced to perform by a police officer on nine different occasions were simply the result of a “personal problem” with this officer, and that the applicant therefore failed to establish past persecution on account of a protected basis.<sup>202</sup> So the nexus requirement may be problematic in sexual orientation cases particularly when the decision-maker refuses to admit homophobic sentiments on the side of the persecutors.

Overall, it can be maintained that interpretation of the persecution element has proven very difficult in sexual orientation cases. Decision-makers are faced with the challenging task of determining whether certain given circumstances amount to persecution – often with an incomplete understanding of either the country conditions and the level and quality of prevailing homophobia, or of the way these conditions may affect a gay person.

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<sup>197</sup> UNHCR Guidance Note, above n. 8, p. 14.

<sup>198</sup> Justice Haines (NZRSAA) *Refugee Appeal No. 71427/99, 71427/99*, New Zealand: Refugee Status Appeals Authority, 16 August 2000, para. 112.

<sup>199</sup> For sexuality-based cases, this was established in *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, 95-70887, United States Court of Appeals for the Ninth Circuit, 24 June 1997], where a Russian lesbian had been forced to undergo a psychiatric treatment in order to “cure” her of her lesbianism.

<sup>200</sup> *M. S. v Swiss Federal Office of Refugees*, EMARK 1996 Nr. 29, Erw. 2b, Switzerland: Asylum Appeal Commission, 31 July 1995.

<sup>201</sup> *Hernandez-Montiel* above n. 80.

<sup>202</sup> *Boer-Sedano v. Alberto Gonzales, Attorney General* above n. 90.

At the same time such decisions are possibly informed by underlying personal homophobic sentiments, or, at the very least, heterosexist biases.

### 3 “Well-founded fear” and procedural issues in sexual orientation claims

After analysing the terms “membership of a particular social group” and “persecution” from the Convention definition of refugees in the previous two sections, the following two sections will look at the terms “fear” and “well-foundedness.”<sup>203</sup> The application of these terms to sexuality-based asylum claims is also connected to a number of particular difficulties, many of which can be attributed to the decision-makers’ heterosexist biases and an inability to empathise with same-sex-attracted people.

The concept of “fear” is the relevant motive for defining refugees.<sup>204</sup> According to the UNHCR Handbook, there is a subjective as well as an objective element of fear and both elements have to be taken into consideration. Although this distinction is never clearly made, as Noll and other authors have pointed out,<sup>205</sup> it is upheld for the purpose of this paper as it is the basis for most relevant cases. Hence, the establishment of a “well-founded fear” will be split into the (subjective) credibility assessment and the (objective) country of origin information, as suggested by case law. In his research on asylum seekers and sexual orientation in Scandinavia, Hojem found that generally, rejections in Norway as well as in Sweden were due to country of origin information or credibility issues.<sup>206</sup> Millbank has recently emphasized the increasingly major role of credibility issues in asylum decisions related to sexual orientation particularly in Australia and the United Kingdom,<sup>207</sup> but also more generally in other receiving countries, including the United States and Canada.<sup>208</sup> LaViolette addressed the crucial role of country of origin information for the outcomes of asylum decisions in those four countries in a publication

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<sup>203</sup> Note that Gregor Noll harshly criticises the division of “well-founded fear” into a subjective fear and an objective well-foundedness element as suggested by the UNHCR Handbook and commonly employed in the academic debate and in case law. Noll draws attention to the risks and confusion caused by this language in Noll, G. (2005) ‘Evidentiary Assessment Under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear’, in Noll, G. (ed.) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff. However, as this separation is the basis for most of the relevant cases, it is upheld for the purpose of the analysis of this paper.

<sup>204</sup> UNHCR (1992) above n. 93, para. 37.

<sup>205</sup> Noll, G. (2005) above n. 191.

<sup>206</sup> Hojem, P. (2009) ‘Fleeing for Love: Asylum seekers and sexual orientation in Scandinavia’, UNCHR New Issues in Refugee Research – Research Paper No. 181. UNHCR Policy Development and Evaluation Service, Geneva. p. 14-15.

<sup>207</sup> Millbank, J. (2009a) above n. 12.

<sup>208</sup> Millbank, J. (2009b) above n. 19.



in 2009.<sup>209</sup> The issues of credibility and country of origin information will therefore be analysed below.

### **“Fear”: Subjectivity and credibility – how to prove sexual orientation**

Credibility is very often an issue of significance in refugee determinations generally. It is “at the core of the asylum process”<sup>210</sup> and may often be “the single biggest substantive hurdle before applicants beginning the refugee status determination process”.<sup>211</sup> Even in successful claims it is common for some or many aspects to not be believed.<sup>212</sup> A person does not have to be credible to be a refugee: Kagan suggests that a Tutsi fleeing Rwanda in 1994, with an invented and entirely false refugee claim, could still establish a well-founded fear of being persecuted due to independent evidence of her ethnic identity combined with evidence of ongoing ethnic genocide.<sup>213</sup>

While credibility is an issue with asylum claims on any ground, it is of particular importance when it comes to asylum claims based on sexual orientation, which have repeatedly been described as “easy to make and impossible to disprove.”<sup>214</sup> Unlike a Tutsi, who may have some sort of legal document to prove his or her ethnic identity, this is usually not the case for gay claimants. Quoting *Z. v. Secretary of State for the Home Department*, para. 4, Jenni Millbank illustrates the apprehension of false claims: “The real mischief ... that is likely to be caused by this allowing his appeal is by encouraging a flood of fraudulent Zimbabwean (and no doubt other) asylum-seekers posing as sodomites.”<sup>215</sup> This apprehension has sometimes led to inhumane and degrading methods in order to assess claimants’ sexual orientation: the Czech Republic has only recently, at the beginning of 2010, abolished phallometric testing, where men were shown both homosexual and heterosexual pornography while sensors monitored the blood flow to the penis.<sup>216</sup>

The particular quality of sexual orientation cases is that unlike disbelief regarding other aspects of a claimant’s narrative, disbelief regarding actual group membership, such as

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<sup>209</sup> LaViolette, N. (2009a) above n. 19.

<sup>210</sup> Thomas, R. (2006) ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’, *European Journal of Migration and Law* 8: 79-96, p. 79.

<sup>211</sup> Kagan, M. (2003) ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination’, *Georgetown Immigration Law Journal* 17: 367-415, p. 368.

<sup>212</sup> Millbank, J. (2009a) above n. 12, p. 399.

<sup>213</sup> Kagan, M. (2003) above n. 198, p. 370. Note that Hathaway makes a similar point in Hathaway, J. and Hicks, W. (2005) ‘Is there a Subjective Element in the Refugee Convention’s Requirement of Well-Founded Fear?’, *Michigan Journal of International Law* 26: 505-562.

<sup>214</sup> Millbank, J. (2009b) above n. 19, p. 4.

<sup>215</sup> Millbank, J. (2009a) above n. 12, p. 398. Upon research, it proved impossible to find the quote in the case *Z v. Secretary of State for the Home Department*, [2004] EWCA Civ 1578, United Kingdom: Court of Appeal (England and Wales), 2 December 2004.

<sup>216</sup> Day, M. (2010) Czechs criticized for ‘sexual arousal’ tests. *The Telegraph*, 9 Dec 2010.

that the applicant really is gay, almost always leads to a negative decision.<sup>217</sup> The determination of group membership in cases based on sexuality is further complicated by the fact that as opposed to claims on other grounds such as political opinion, there are usually no external or objective indicators of the applicant's membership of the group.<sup>218</sup> Even women's claims can be considered as easier in this respect. In *Islam and Shah*, the question was whether "Pakistani women" could constitute a particular social group, whereas their identification as women was never in doubt.<sup>219</sup> In the *Guidance Note*, the UNHCR states quite simply that:

"[s]elf-identification as LGBT should be taken as an indication of the individual's sexual orientation. ... Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is lack of sufficiently specific country of origin information the decision-maker will have to rely on that person's testimony alone."<sup>220</sup>

The Note further instructs decision-makers not to rely on stereotypical images, to accept that there may not be any previous same-sex relationships, and that claimants may have been married, and to be aware that applicants may not always know that sexual orientation can constitute the basis for refugee status and that they may be reluctant to talk about such intimate matters.<sup>221</sup> Unfortunately, this section of the *Guidance Note* does not provide decision-makers with any tools to facilitate the credibility assessment in sexual orientation claims other than a quote from the *UNHCR Handbook* noting that "if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt."<sup>222</sup> Accordingly, LaViolette found that

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<sup>217</sup> This was the case for example in *SZMDS v Minister for Immigration and Citizenship*, decided in 2009. The tribunal did not believe that a Pakistani claimant was gay because he made a visit to Pakistan to see his children instead of travelling directly from the United Arab Emirates to Australia to seek asylum, although the Federal Court overturned this decision on judicial review as based on no evidence and consisting of inferences of fact; *SZMDS v. Minister for Immigration and Citizenship*, [2009] FCA 210, Australia: Federal Court, 10 March 2009. Similarly, the 2008 case *SZGUP v Minister for Immigration and Citizenship*, involved a claimant from Bangladesh who was not deemed a credible gay, since he began his gay rights advocacy work only after his release from the detention centre. This decision was upheld by the Australian Federal Court: *SZGUP v. Minister for Immigration and Citizenship*, [2008] FCA 183, Australia: Federal Court, 29 February 2008.

<sup>218</sup> Millbank, J. (2009a) above n. 12, p. 399.

<sup>219</sup> *Islam and Shah* above n. 55.

<sup>220</sup> UNHCR Guidance Note, above n. 8, p. 16.

<sup>221</sup> *Ibid*, p. 16-17.

<sup>222</sup> *Ibid*, p. 16, citing the UNHCR Handbook above n. 93, para. 196, which reads as follows:

"It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support

questions about credibility are not appropriately addressed in the *Guidance Note*.<sup>223</sup>

Sexual orientation is rarely a visible characteristic but rather one that has to be revealed. Consequently, sexual orientation claims depend upon the presentation of a very internal form of self identity.<sup>224</sup> Whether this presentation of self then leads to a successful claim depends entirely on the question whether or not the decision-maker finds it to be credible – which, in turn, much depends on his or her knowledge about issues of sexuality and possible biases he or she might have. Several tools are usually used by adjudicators to assist them in their decision-making, including the use of corroborative evidence and an assessment of demeanour, consistency and plausibility. All of these elements will now be examined with respect to sexuality-based cases.

### **Corroborative evidence**

One of the difficult issues concerning the credibility assessment is the role of corroborative evidence that supports the applicant's claims. The *Guidance Note* clearly rules out a requirement of corroborative evidence:

*“While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity.”*<sup>225</sup>

In practice, the use of such corroborative evidence is indeed double-edged. McGhee cites the case of Ioan Vraciu, who was determined as being an inauthentic gay as a result of a lack of evidence to support his self-declaration.<sup>226</sup> He also cites the case of Mr. X, who was subjected to disbelief in his first trial but whose gay status was determined as credible on review. This was based not only on the applicant's self-declaration of being gay but also on the corroborative evidence of his identity presented, including a witness, membership of a “homosexual” organisation, letters and correspondence and an injunction addressed to a former male partner.<sup>227</sup> However, Berg and Millbank found that paradoxically, although decision-makers claim to prefer “objective verification”, such evidence is often disregarded as self-serving or staged.<sup>228</sup> Macklin sees it as a circle:

*“The result is that claimants are damned if they do not produce the documents (failing to discharge burden of proof) and damned if they do (the documents turn out to be false, or*

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of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”

<sup>223</sup> LaViolette, N. (2009b) above n. 13, p. 5.

<sup>224</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 196 and 198.

<sup>225</sup> Guidance Note, p. 16.

<sup>226</sup> McGhee, D. (2001) above n. 113, p. 30.

<sup>227</sup> Secretary of State for the Home Department v. “S” (75349) 1995, unreported, cited in: McGhee, D. (2001) above n. 113, p. 31.

<sup>228</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 198.

are discounted on the assumption that genuine documents containing false information can be obtained illicitly anyway).<sup>229</sup>

In sexual orientation cases, such documents may include papers confirming membership of a gay and lesbian association, or similar documentation of gay activism.<sup>230</sup> In many cases, however, the applicant may not have such documentation, especially if he or she was not politically active. To support sexual orientation claims it is therefore quite common that applicants provide medical or psychological reports. In *SZMDS*, the applicant provided a report from his general practitioner, attesting to his sexual orientation. According to the applicant, the tribunal seemed to assume that the report was forged or concocted and dismissed it as evidence:

*“The Tribunal notes that [the doctor’s] findings are based primarily on the applicant’s own evidence, the letterhead on which the report appears contains a spelling error, as does the report itself. For these reasons the Tribunal gives the report no weight.”*<sup>231</sup>

In some cases, such medical or psychological evidence is not brought forth by the applicant but requested by the decision-makers; this was especially true for the earlier decisions. This also causes the problem, both conceptual as well as political, of identifying same-sex attraction as a medical condition equivalent to other illnesses or trauma. The most prominent example of this is the case cited before of Ioan Vraciu, a Romanian gay man who was asked by a lawyer from the Home Office to undergo an anal examination by a medical doctor to prove his sexual orientation.<sup>232</sup> LaViolette criticizes the use of such attempts to verify an applicant’s sexual orientation as questionable at best, as no consensus exists in the scientific, medical, and social science field about the factors that determine a person’s sexual orientation.<sup>233</sup>

Given these difficulties related to corroborative evidence, particularly in sexuality-related refugee cases, such claims are often entirely founded on the applicant’s own testimony of self-identity which is then weighed against available country of origin evidence (see section 3.2).<sup>234</sup> In that sense, the outcome of the claim depends on the decision-maker as much as on the claimant and the facts – he or she decides whether or not to believe this tale of self-identity. This is where heterosexist biases, pre-conceived conceptions or

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<sup>229</sup> Macklin, A. (1998) ‘Truth and Consequences: Credibility Determination in the Refugee Context’, Conference Paper, *International Association of Refugee Law Judges*, Ottawa, Canada, 14-16 October 1998, p. 136.

<sup>230</sup> For example, in *SZGUP*, the applicant had given an interview in a magazine on homosexuality and was also involved with an organization called “Community Action Against Homophobia”. *SZGUP v Minister for Immigration and Citizenship* above n. 204.

<sup>231</sup> The Federal Court upheld this decision with a rather obscure reasoning, *SZMDS v Minister for Immigration and Citizenship* above n. 204, para. 16 and 19.

<sup>232</sup> However, a physical examination of the applicant was avoided as Mr Vraciu was requested to undergo a psychiatric examination instead. For a critique of this case see: McGhee, D. (2000) ‘Assessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu’, *Body and Society* 6(1): 29-50.

<sup>233</sup> LaViolette, N. (1997) above n. 130, p. 36.

<sup>234</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 198.

stereotypes held by decision-makers play a very important, and mostly unfavourable, role for the claimants, as credibility determination is “necessarily and inexorably subjective”.<sup>235</sup> Earl Russell puts it down to this: “Credibility is a way by which the interviewer is able to express his ignorance of the world. What he finds incredible is what surprises him.”<sup>236</sup>

In the literature on credibility assessments in refugee status determination, there are three key areas that usually guide the decisions of the adjudicators: demeanour, consistency and plausibility.<sup>237</sup> Millbank critically applies them to the context of refugee claims relating to sexual orientation.<sup>238</sup> Each of these elements will now be briefly highlighted below.

### **Demeanour**

The stereotypical demeanour of a truth teller includes direct eye contact, straightforward answers without hesitations and the portrayal of an appropriate amount of emotions.<sup>239</sup> A typical liar, on the other hand, is gaze-aversive and makes many body movements.<sup>240</sup> Macklin calls it “dangerous at best and misleading at worst to rely on a uniform set of cues as demonstrative of credibility”.<sup>241</sup> Millbank notes that although this position is widely accepted, decision-makers clearly continue to revert to it.<sup>242</sup> This may be particularly detrimental for gay applicants, as there are numerous stereotypes around sexual orientation: rigid notions of gay identity may consciously or even subconsciously shape decision-makers’ approaches to sexuality in asylum claims.<sup>243</sup> Although overt reliance on appearance as a basis for decisions has been infrequent in recent years, and more likely to be used in support of positive positions, sporadic references to “effeminate voice and manner” or “looking gay” can be found at the tribunal level in Canada, which suggests that decision-makers consider appearance for both negative and positive assessments of credibility without necessarily revealing it in their reasons.<sup>244</sup>

Such a generalisation is difficult to defend, particularly as it completely ignores different cultural ways in which men and women behave. Research findings indicate that non-

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<sup>235</sup> Macklin, A. (1998) above n. 216, p. 140.

<sup>236</sup> Cited in: Thomas, R. (2006) above n. 198, p. 91.

<sup>237</sup> See for example: Coffey, G. (2003) ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ *International Journal of Refugee Law* 15: 377-417; Kagan, M. (2003) above n. 199, and Macklin, A. (1998) above n. 216.

<sup>238</sup> Millbank, J. (2009b) above n. 19, p. 6-22.

<sup>239</sup> Macklin, A. (1998) above n. 216, p. 137.

<sup>240</sup> Granhag, P. A.; Strömwall, L. and Hartwig, M. (2005) ‘Granting Asylum or Not? Migration Board Personnel’s Beliefs about Deception’, *Journal of Ethnic and Migration Studies* 31(1): 29-50, p. 44.

<sup>241</sup> Macklin, A. (1998) above n. 216, p. 138.

<sup>242</sup> Millbank, J. (2009b) above n. 19, p. 7.

<sup>243</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 217.

<sup>244</sup> Millbank, J. (2009b) above n. 19, p. 7. The case of *Halmenschlager v Holder*, involving a gay man from Brazil seeking asylum based on his sexual orientation in the United States is one example where the applicant was repeatedly described as having “effeminate traits” and being “very feminine”, even by the US Court of Appeals; *Halmenschlager v Holder*, above n. 90, p. 11-12.

verbal behaviour is primarily culturally determined, and therefore must be interpreted with the help of knowledge about relevant ethnic or cultural backgrounds, i.e., what may be seen as effeminate in one culture may be interpreted differently in another. However, Granhag et al. have shown that the Swedish Migration Board personnel believe that non-verbal behaviour is both culturally determined and *universal*.<sup>245</sup> This belief may explain in part why adjudicators continue to revert to demeanour in their decisions in spite of clear legal guidance in many countries to the contrary.

Even more problematic for the particularly sensitive issues of sexuality are the so-called “objective” elements of demeanour, such as frankness and spontaneity.<sup>246</sup> A gay claimant’s ability to be frank and open in answering questions about sexuality and relationships may be restrained by internalised shame and embarrassment.<sup>247</sup> Repressive social norms and negative experiences may lead an applicant to self-denial or strategies to “pass” as straight.<sup>248</sup>

Coffey warns that the manner of presentation and subtle aspects of demeanour may affect the weighing of substantive evidence in unacknowledged ways.<sup>249</sup> In *Kathiresan v Minister for Immigration and Multicultural Affairs*, Gray J found that different cultural backgrounds, the use of interpreters and foreign languages constituted risks in the reliance on demeanour in credibility assessments: “It is all too easy for the ‘subtle influence of demeanour’ to become a cloak, which conceals and unintended, but nonetheless decisive bias.”<sup>250</sup>

Kagan points out that even without cultural and linguistic differences, interpretations of demeanour are poor indicators of whether someone is telling the truth.<sup>251</sup> The particular difficulty in the case of gay applicants is that in addition to possible language, culture and gender differences, there is frequently a difference in sexual orientation.<sup>252</sup> Stereotypes concerning gay people and their lives persistently surface in the hearings and assessments of claims.<sup>253</sup> LaViolette prepared training and guidance material on sexual orientation and the Refugee Determination Process for the Canadian Immigration and Refugee Board which contain advice for decision-makers on how to question a claimant about their

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<sup>245</sup> Granhag, P. A.; Strömwall, L. and Hartwig, M. (2005) above n. 227, p. 44.

<sup>246</sup> This may be illustrated by two dissimilar cases, cited by Millbank from her research. In one case the claimant was disbelieved because he was vague and hesitant when asked how an invitation to tea developed to a situation of sexual intimacy, whereas in the other one, the claimant was considered too relaxed and jovial when talking about his experiences. See: Millbank, J. (2009b) above n. 19, p. 7 and 9.

<sup>247</sup> Kassisieh, G. (2008) above n. 133, p. 22.

<sup>248</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 200-201.

<sup>249</sup> Coffey, G. (2003) above n. 224, p. 387.

<sup>250</sup> *Sivaganeshan Kathiresan v Minister for Immigration & Multicultural Affairs* [1998] 159 FCA, Australia: Federal Court, 4 March 1998.

<sup>251</sup> Kagan, M. (2003) above n. 199, p. 379.

<sup>252</sup> Millbank, J. (2002) above n. 159.

<sup>253</sup> Kassisieh, G. (2008) above n. 133, p. 22.

group membership.<sup>254</sup> Here she argues that questions about the personal experience of being gay in a predominantly heterosexual society provide the strongest basis for assessing credibility with respects to group membership, though such questioning must exclude intensely personal inquiry, such as details of sexual activity.<sup>255</sup> While this is certainly the only respectful way to conduct the determination process, it does not make the case for the decision-maker any easier: LaViolette herself recognises at another instance that there is “no uniform way in which lesbians and gay men recognize and act on their sexual orientation.”<sup>256</sup>

Moreover, these “personal experiences” then frequently encounter pre-formed expectations on the side of the decision-makers as to how gay identity is understood, experienced and expressed by applicants from a widely diverse range of cultures and backgrounds.<sup>257</sup> In its extreme, this pre-formed expectation of gay identity may even favour false narratives as they are likely to equally rely on clichés. These are often based on what Berg and Millbank, following the Australian psychologist Vivienne Cass, refer to as the staged model of homosexual identity formation as the basis of the expected standard “coming out” story.<sup>258</sup>

Accordingly, in *SZMDS*, the Pakistani claimant, who had been married since 1991 and had four children with his wife, was disbelieved when stating that he started to develop an attraction to members of the same sex only in 2005.<sup>259</sup> A clear and straightforward narrative that begins at a young age is certainly easier to handle for decision-makers than a man who had been married for almost fifteen years and fathered four children, as in the case of *SZMDS*.<sup>260</sup>

### Consistency

Next to demeanour, the other two tools that decision-makers usually use are consistency and plausibility. According to Kagan, inconsistencies are the most widely cited reason for

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<sup>254</sup> LaViolette, N. (2004b) Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group, prepared for the Immigration and Refugee Board.

<sup>255</sup> Ibid, p. 5.

<sup>256</sup> LaViolette, N. (2004a) ‘Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act’, *McGill Law Journal* 49: 969-1003, p. 996.

<sup>257</sup> Kasssieh, G. (2008) above n. 133, p. 22-29

<sup>258</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 206-207.

<sup>259</sup> *SZMDS v Minister for Immigration and Citizenship* above n. 204, para. 3. Note, however, that this disbelief was justified by other (unconvincing) reasons than the development of his sexual identity, which were later overturned by the Federal Court as inferences of fact.

<sup>260</sup> See also the case of *SZAKD* [2004], where a Hungarian man in Australia said that he was still confused about his sexual identity, because he had sex with women before making his first gay experiences at the age of 24. The judge insisted he clearly identified as exclusively homosexual; *SZAKD v Minister of Immigration* [2004] FMCA 78, Australia: Federal Magistrates Court, 19 March 2004.

rejecting refugee applicants' credibility.<sup>261</sup> Consistency basically means the absence of contradictions.<sup>262</sup> Refugee decision-makers heavily rely on consistency, and more specifically contradictions, in their credibility assessments, although they generally acknowledge that contradiction is inevitable in almost all cases.<sup>263</sup> In fact, contradictions frequently occur because claimants are repeatedly questioned in different ways about their claims.<sup>264</sup> Moreover, existing research shows that "deceptive consecutive statements are consistent to at least the same extent as truthful ones."<sup>265</sup> Stress, shame, depression and trauma, as well as the passage of time, negatively affect the ability to recall.<sup>266</sup> Millbank therefore suggests that using inconsistency as a key criterion for assessing credibility is likely to lead to erroneous conclusions of deception where applicants have suffered post-traumatic stress and delays in the assessment of their claims.<sup>267</sup> In *Okoli v Canada*, the Federal Court overturned the judgment of the Canadian Refugee Protection Division that the applicant was not credible because of inconsistencies and contradictions in his testimony, namely as to the frequency and details of beatings he claimed to have suffered. The applicant explained the inconsistencies found were the result of his fear upon arrival, incompetent counsel by his lawyer and memory problems: the incidences had all happened several years before.<sup>268</sup>

Kassisieh draws attention to the fact that sexual identity development is very complex.<sup>269</sup> The simplistic and essentialist expectation that sexual orientation is a fixed quality, settled upon at an early age and immovable thereafter, has supported negative credibility decisions when asylum seekers have engaged in heterosexual relationships that are seen as "inconsistent" with a claimed lesbian or gay identity,<sup>270</sup> although research indicates that sexual orientation is by no means static but much rather constantly evolving.<sup>271</sup> This may lead to frustration on the side of decision-makers as this further reduces their tools to decide on credibility issues. For this reason, an awareness of the diversity and the

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<sup>261</sup> Kagan, M. (2003) above n. 199, p. 386.

<sup>262</sup> Macklin, A. (1998) above n. 216, p. 138.

<sup>263</sup> Granhag, P. A.; Strömwall, L. and Hartwig, M. (2005) above n. 227, p. 44.

<sup>264</sup> Kagan, M. (2003) above n. 199, p. 386.

<sup>265</sup> Granhag, P. A.; Strömwall, L. and Hartwig, M. (2005) above n. 227, p. 43.

<sup>266</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 201.

<sup>267</sup> Millbank, J. (2009b) above n. 19, p. 13.

<sup>268</sup> *Okoli v. Canada* above n. 181.

<sup>269</sup> Kassisieh, G. (2008) above n. 133, p. 26-28.

<sup>270</sup> See for example *Refugee Appeal No. 71185/98*, 71185/98, New Zealand: Refugee Status Appeals Authority, 31 March 1999, status revoked in *Refugee Appeal No. 75376*, 753768, New Zealand: Refugee Status Appeals Authority, 11 September 2006; or *Minister of Citizenship and Immigration v X*, MA6-02300 [2006], Canada: Immigration and Refugee Board, 27 September, 2006. In both cases the status was revoked because of later heterosexual relationships. Such cases also raise the question whether the fear has been removed as the claimants are now in a heterosexual relationship, including whether the past sexuality assertion would continue to give rise to future persecution. It would have to be considered whether a return to the country of origin would mean that the possibility of future same-sex relationships is ruled out and whether this in itself is enough to give rise to persecution.

<sup>271</sup> Berg, L. and Millbank, J. (2009) above n. 29, p. 200, 206-207.



development of sexual identities as well as the traumatic effect that talking about sexual orientation may have is all the more important for decision-makers.

### Plausibility

Plausibility means a testimony depicting a realistic, possible chain of events.<sup>272</sup> Implausibility findings may either refer to “intrinsically implausible evidence”, or to the dismissal of claims with reference to independent information contradicting the evidence.<sup>273</sup> In both cases, the plausibility criterion, which seems sensible on the surface, actually adds very little.<sup>274</sup> A finding of implausibility based on concrete evidence about the country of origin is really a finding that the account is not consistent with generally known facts (see next section).<sup>275</sup> If, on the other hand, evidence is regarded as intrinsically implausible because of a simple disbelief that the applicant would have acted in the alleged way, or that a described event would have taken place, this amounts to the inference of adverse credibility findings without a basis.<sup>276</sup> In fact, such plausibility assessments arise from assumptions about what is real or likely, and rely on speculation rather than evidence, which is particularly problematic in sexuality-based cases.<sup>277</sup> The case *Okoli v Canada* illustrates such an unsubstantiated implausibility finding. The Refugee Protection Division had:

*“found it to be implausible, in the homophobic context of Nigeria, that [the applicant’s partner] would ask a priest to marry them and also provide a photograph and letter which could be used as evidence against them.”*<sup>278</sup>

Higher Courts have often reversed decisions that are based on such unsupported assumptions, citing, for example, “common sense.”<sup>279</sup> In these cases, the applicant should always be given the chance to rebut these conclusions, especially if they involve speculation about how a foreign culture or government would function.<sup>280</sup> This warning about speculations on foreign culture should be extended to speculations on sexual minorities.<sup>281</sup>

In order to test the plausibility of a gay refugee claim, decision-makers frequently revert

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<sup>272</sup> Kagan, M. (2003) above n. 199, p. 390.

<sup>273</sup> Coffey, G. (2003) above n. 224, p. 390.

<sup>274</sup> Kagan, M. (2003) above n.199, p. 390.

<sup>275</sup> Ibid.

<sup>276</sup> Coffey, G. (2003) above n. 224, p. 390.

<sup>277</sup> Millbank, J. (2009b) above n. 19, p. 17.

<sup>278</sup> *Okoli v. Canada* above n. 181, para. 15.

<sup>279</sup> Kagan, M. (2003) above n. 199, p. 390.

<sup>280</sup> Ibid.

<sup>281</sup> In *Okoli v Canada*, the Federal Court reversed the refugee board decision, stating that “The board member’s finding of implausibility with respect to [his partner’s] approaching the priest ignored the explanation provided. The Applicant’s companion did not approach just any priest but rather a priest he thought was gay and would be receptive to the idea. This may have been naïve, but is an explanation that negates an implausibility conclusion”; *Okoli v. Canada* above n. 181, para. 31.

to testing the claimants' familiarity with the gay "scene" in the receiving country.<sup>282</sup> Such reasoning reflects strong assumptions about what are perceived to be unifying cultural features of gay and lesbian lives, particularly connected to participation in sexuality-based groups and meeting places.<sup>283</sup> This often includes inquiring about the names and street addresses of gay nightclubs. It has been critiqued, however, that this type of questioning is inadequate as it is based on the assumption that gay people necessarily search out and frequent such places, shutting out the possibility that traumatic experiences in the past or even just individual preference may result in a lack of interest in such places.<sup>284</sup> Similar critiques have been levied at courts which have found it logically plausible that same-sex attracted people are clearly aware of the legal and political situation of gay people in their country of origin, such that not knowing whether or not gay sex was legal in their country of origin, for instance, has led to negative credibility decisions.<sup>285</sup> Decisions based on plausibility are therefore often founded upon stereotype or inference rather than on evidence.<sup>286</sup> Thus, Coffey has warned against the use of intrinsic implausibility, stating it may constitute an error of law.<sup>287</sup>

To conclude, while negative credibility assessments are not always based on well-reasoned or defensible grounds, and while there are only very few possibilities to disturb findings on credibility,<sup>288</sup> it is very difficult to fathom how to improve credibility assessment. Many commentators and NGOs suggest the use of administrative guidelines on sexual orientation, analogous to established gender guidelines.<sup>289</sup> Although the UNHCR *Guidelines on Gender-Related Persecution*,<sup>290</sup> which explicitly include sexuality-based on the grounds that sexual orientation contains a gender element, remain applicable to gay and lesbian asylum seekers and should be read in conjunction with the *Guidance Note*,<sup>291</sup> these Guidelines do not efficiently address the prevalence of homophobia and ignorance surrounding sexual orientation claims.<sup>292</sup> Additional measures that have been suggested include the improvement of the quality of decision-makers through specific, ongoing training on gender and sexual orientation issues<sup>293</sup> and the creation of a space of critical reflection for the decision-makers. This could be achieved individually through critical

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<sup>282</sup> Millbank, J. (2009b) above n. 19, p. 18.

<sup>283</sup> Kassisieh, G. (2008) above n. 133, p. 22.

<sup>284</sup> Millbank, J. (2009b) above n. 19, 18-19.

<sup>285</sup> Ibid, p. 19. Coffey points to the same problem for cases based on political opinion, where adverse plausibility findings were reached due to the level of knowledge of their cause that the politically active applicants would be expected to possess: Coffey, G. (2003) above n. 224, p. 391.

<sup>286</sup> Millbank, J. (2009b) above n. 19, p. 19.

<sup>287</sup> Coffey, G. (2003) above n. 224, p. 415 and Kagan, M. (2003) above n. 199, p. 391.

<sup>288</sup> Millbank, J. (2009b) above n. 19, p. 2.

<sup>289</sup> For example: Amnesty International (2001) above n. 118, Recommendation 7; UK Lesbian and Gay Immigration Group (2010) *Sexual and Gender Guidelines Initiative*. Available from: <http://www.uklgig.org.uk/guidelines.htm> (accessed May 22, 2010).

<sup>290</sup> UNHCR (2002a) above n. 13.

<sup>291</sup> UNHCR (2008) above n. 8, p. 4.

<sup>292</sup> UK Lesbian and Gay Immigration Group (2010) above n. 276.

<sup>293</sup> Millbank, J. (2009b) above n. 19, p. 27-28.

self-awareness and in groups by using multiple member panels.<sup>294</sup> However, while all these suggestions are laudable and important, they are very qualitative in nature and almost entirely dependent on the willingness of the decision-maker. Moreover, improvement in the area of credibility assessment is very hard to measure as there is usually no follow-up on cases.

### **“Well-foundedness”: Objectivity and reliable country information**

As discussed above, the establishment of the subjective element of the assessment of a “well-founded fear” is very difficult to achieve in credibility evaluations. However, as will be shown in the following section, the objective element is equally connected to numerous hurdles related to homophobia and biased interpretations. The UNHCR emphasises that the merits of an individual asylum claim ultimately have to be assessed on the basis of its subjective and objective elements including country of origin information.<sup>295</sup> Coffey found in his research that the genuineness of the applicant’s fears did not figure predominantly in the reasons for the courts’ decision. Instead, “[t]he subjective element of the well-founded fear test appears to have been largely eclipsed by the objective element.”<sup>296</sup> This underlines the fact that objective evidence is a necessary, even decisive, element in any refugee claim, including sexuality-based cases.<sup>297</sup> Indeed, a very large number of sexual orientation cases encounter problems with the availability of reliable country of origin information. Hojem found that in Norway, the asylum seeker’s story – and often the sexual orientation itself – were doubted by the decision-makers in 12 out of the 40 cases he examined, whereas the majority of cases (25 out of 40) failed pertaining to country of origin information.<sup>298</sup> He further notes that the lack of information about the particular needs of LGBT persons, both in their countries of origin and in their countries of destination, makes it difficult to ensure these groups the right to seek asylum.<sup>299</sup> A number of commentators have referred to the particular difficulty of obtaining country information on sexuality.<sup>300</sup> Macklin points out that the country documentation and assorted governmental and human rights reports that decision-makers receive “usually paint the canvas with broad, crude strokes”, rarely providing the kind of detailed information necessary to back up a particular story.<sup>301</sup> In order to understand “the nature of homophobic persecution, which is cemented by a complex interaction between legal, political, social, religious and familial spheres”, however, decision-makers need a diversity of country information that paints a complete picture for them.<sup>302</sup> This links to the general controversy surrounding objective country evidence used in asylum decision-making, questioning whether it is possible at all to collect wholly objective evidence

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<sup>294</sup> Macklin, A. (1998) above n. 216, p. 135 and Millbank, J. (2009b) above n. 19, p. 29-31.

<sup>295</sup> UNHCR (2004) above n. 106, p. 3.

<sup>296</sup> Coffey, G. (2003) above n. 224, p. 393.

<sup>297</sup> LaViolette, N. (2009a) above n. 19, p. 439.

<sup>298</sup> Hojem, P. (2009) above n. 194, p. 16.

<sup>299</sup> *Ibid*, p. 25.

<sup>300</sup> Kassisieh, G. (2008) above n. 133, and LaViolette, N. (2009a) above n. 19.

<sup>301</sup> Macklin, A. (1998) above n. 216, p. 135

<sup>302</sup> Kassisieh, G. (2008) above n. 133, p. 34.

regarding the conditions, culture, and norms in countries from which persons flee.<sup>303</sup>

Some of the main obstacles can be summarised as the availability and reliability of country information and the relevance of such information to particular claims. The difficulties connected to each of these issues will now be illustrated briefly.

### Sources

Country information is typically drawn from press reports, human rights organisations and government sources.<sup>304</sup> One major problem concerning the use of country information for the assessment of sexuality-based cases is the continuing preference of official government reports over information prepared by human rights organizations. For example, Kassisieh found in his research on cases involving sexual orientation in Australia that the most frequently cited source was the information prepared by the Department of Foreign Affairs, the second most cited source was composed of reports from international multi-focus human rights organisation such as Human Rights Watch and Amnesty International, whereas the least cited source were reports from gay and lesbian human rights groups. Media reports, gay travel guides and academic papers were all referred to more frequently.<sup>305</sup> This preference for government reports is clearly illustrated by the case *Halmenschlager v Holder*, where the Brazilian applicant argued that the BIA had erred in relying on only the latest US State Department country report which suggested some efforts to combat homophobia on the side of the state authorities while failing to credit evidence describing harm done to gay people. However, the US Court of Appeals found that “the BIA acted reasonably in choosing to give greater weight to the 2005 assessment of the State Department.”<sup>306</sup> It based this decision on US case law, which generally holds that private entities have their own agendas and concerns, their condemnations being “virtually omnipresent”, preferring to “warrant deference to those whose expertise the United States tasks” with the assessment of conditions in a foreign country.<sup>307</sup>

The problem with such a stance is that government reports on sexual orientation have frequently been criticised for their brevity and incomprehensiveness (such is the case with DFAT advice in Australia)<sup>308</sup> or for being inaccurate and partisan (as with the country evidence reports produced by the UK Home Office).<sup>309</sup>

Moreover, as LaViolette points out, interested human rights groups have the knowledge, expertise and connections to best document specific kinds of persecution, especially in the case of sexual minorities, who are often particularly difficult to reach as they are

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<sup>303</sup> Thomas, R. (2006) above n. 198, p. 85.

<sup>304</sup> Dauvergne, C. and Millbank, J. (2003b) above n. 27, p. 308.

<sup>305</sup> Kassisieh, G. (2008) above n. 133, p. 32-33.

<sup>306</sup> *Halmenschlager v Holder*, above n. 90, p. 18.

<sup>307</sup> Ibid.

<sup>308</sup> Kassisieh, G. (2008) above n. 133, p. 41.

<sup>309</sup> Thomas, R. (2006) above n. 198, p. 85.

extremely marginalised in society.<sup>310</sup> In spite of this, in assuming a bias, decision-makers generally show a preference for reports prepared by mainstream human rights organisations over those that are dedicated to sexuality.<sup>311</sup> However, these refused to document abuses against gay men and lesbians until the early 1990s and have only recently begun to regularly collect information on the plight of sexual minorities.<sup>312</sup> In conjunction with the NGOs' limited resources, this results in a situation where the collected information does not cover all countries and cannot continually be kept current.<sup>313</sup> Moreover, mainstream human rights organisations may be ill-equipped to provide such information due to a lack of understanding of the specific issues facing sexual minorities, having only recently overcome homophobia themselves.<sup>314</sup> Decision-makers are not always aware of these shortcomings and sometimes infer from the scarcity or absence of evidence in official state reports and the reports from the largest non-governmental organisations an absence of persecution altogether.<sup>315</sup> This view does not take into account the reasons contributing to such a lack of information. One important challenge is related to the particular risks faced by human rights defenders working on issues of sexual orientation. In persecutory regimes, it is difficult to marshal or make public evidence of persecution, particularly for cases involving sexual orientation.<sup>316</sup> This situation was also recognized by the UN Special Rapporteur on Human Rights Defenders.<sup>317</sup>

One consequence of this general scarcity of country information on sexual orientation is the use of inappropriate sources as substitutes. The Australian Refugee Review Tribunal, for example, continues to use the *Spartacus Guide*, a travel guide aimed at Western gay men as a basis for its decisions.<sup>318</sup> This source however, is expressly focused on tourist information and not on human rights issues. In spite of that, the *Spartacus Guide* was frequently used as evidence of increased tolerance and a flourishing gay scene in Shanghai – a presumption construed from two pages covering all of China in five languages, including a half-page map of the country.<sup>319</sup>

Therefore there is a general problem of access to and reliability of country information on the situation of sexual minorities. The matter is complicated further since the small amounts of existing information frequently do not apply to the particular cases at hand, an issue that will be analysed in the following section.

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<sup>310</sup> LaViolette, N. (2009a) above n. 19, p. 443.

<sup>311</sup> Ibid, p. 441-442.

<sup>312</sup> European Legal Network on Asylum (1997) above n. 101, p. 7.

<sup>313</sup> LaViolette, N. (2009a) above n. 19, p. 447-448.

<sup>314</sup> Kassisieh, G. (2008) above n. 133, p. 39.

<sup>315</sup> LaViolette, N. (2009a) above n. 19, p. 451-452.

<sup>316</sup> Dauvergne, C. and Millbank, J. (2003b) above n. 27, p. 309.

<sup>317</sup> UN ECOSOC, Commission on Human Rights (2001) *Promotion and Protection of Human Rights – Human Rights Defenders. Report of the Special Representative of the Secretary-General on Human Rights Defenders*, UN ECOSOC, 57th Session, E/CN.4/2001/94. at 89 (g), p. 24.

<sup>318</sup> Kassisieh, G. (2008) above n. 133, p. 46.

<sup>319</sup> Dauvergne, C. and Millbank, J. (2003b) above n. 27, p. 318.

## Relevance

There is a general scarcity of sources on the human rights situation of gay men and lesbians. As a result, the existing information is often not relevant to the circumstances of the individual applicant. A whole range of markers of difference, such as gender, socio-economic status, rural or urban locality, religious or ethnic background, education level, age and many more, may impact on the individual applicant's experience in the country of origin.<sup>320</sup> Reports are often not detailed enough to allow an appreciation of these differences. Dauvergne and Millbank point to the particular issues of gender-blindness and misrepresentation or misreading the evidence.<sup>321</sup> In their research on the Australian Tribunal, they found that the country information about "homosexuality" that was used was very often information exclusively about gay men, which was simply assumed to be applicable.<sup>322</sup> Similarly, decision-makers frequently use sources of information selectively, emphasizing evidence that describes minor progress in the social situation of sexual minorities rather than information that suggests problems with state protection or homophobic violence and impunity.<sup>323</sup> This was the case in *Halmenschlager v Holder* in which the immigration judge had granted asylum, deciding that "even though Brazil is making some progress ... homosexuals still in that particular country have problems."<sup>324</sup> However, on appeal, the BIA recognized a "history of problems with violence in against homosexuals"<sup>325</sup> in Brazil but found that the latest State Department report indicated that Brazil had taken steps to protect the rights of homosexuals,<sup>326</sup> a decision that was upheld by the Court of Appeals:

*"And that report does not compel a finding that Halmenschlager demonstrated a reasonable fear of future persecution. The unvarnished fact that 180 homosexuals were killed in one year is not remarkable in a country of over 180 million, particularly when the report does not identify the killings as murder, contains no mention of the reasons for the killings or any description of the perpetrators (by type, not by name)."*<sup>327</sup>

This case also serves to illustrate that reports are very often not detailed enough to be able to answer complex legal questions such as the distinction between persecution and discrimination.<sup>328</sup> The BIA found in *Halmenschlager* that although the applicant had shown that "societal discrimination and occasional violence exist[s], without more, this does not establish an objective basis for a well-founded fear of persecution."<sup>329</sup> LaViolette warns that while the distinction between discrimination and persecution rests entirely on

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<sup>320</sup> Kassisieh, G. (2008) above n. 133, p. 47.

<sup>321</sup> Dauvergne, C. and Millbank, J. (2003b) above n. 27.

<sup>322</sup> Dauvergne, C. and Millbank, J. (2003b) above n. 27, p. 321.

<sup>323</sup> LaViolette, N. (2009a) above n. 19, p. 453 and 457.

<sup>324</sup> *Halmenschlager v Holder*, above n. 90, p. 12.

<sup>325</sup> *Ibid*, p. 14.

<sup>326</sup> *Ibid*.

<sup>327</sup> *Ibid*, p. 18.

<sup>328</sup> LaViolette, N. (2009a) above n. 19, p. 450-454.

<sup>329</sup> *Halmenschlager v Holder*, above n. 90, p. 14.

the evidence submitted, the assessment is sometimes based on little objective evidence.<sup>330</sup> Similar difficulties arise in cases where the available country information does not provide evidence on the questions of state protection and internal flight alternatives, both of which would require additional, very detailed analyses.<sup>331</sup>

Therefore, in spite of the potential that country information has in rendering asylum decisions more objective, the sources currently available do not provide the detailed information necessary to inform in the specific circumstance of a case. As a result, decision-makers often use inadequate information and infer facts, weighing evidence according to their personal expectations and biases.

## 4 Conclusion

This paper has analysed sexual orientation in refugee status determination through the consideration of several questions: how decision-makers have dealt with gay applicants, how the Convention definition has been applied to gay refugees, and finally, how to understand the particular obstacles and difficulties facing gay refugees in their claims.

As a result, the examination has shown that sexuality-based cases pose major challenges to decision-makers. Decision-makers are confronted with a situation in which they must decide on the fate of a person, based on very little evidence – neither to support the applicant’s sexual orientation, nor to support the well-foundedness of their fear – while at the same time, the tools to assess the claimant’s credibility are of very limited use. Consequently, decision-makers are left empty-handed. Neither can they rely on objective evidence, as there is none or little, nor on their own assessment of the situation. Their resulting frustration heightens the constant risk of falling into the trap of their own ignorance or (potentially subconscious) heterosexual biases or even outright homophobia in some cases, which may misguide their judgment on the way certain circumstances may affect and be experienced by gay claimants. As such, the identity of the decision-maker, rather than that of the applicant, becomes a decisive factor for the outcome of the claim.<sup>332</sup>

This finding is based on the obstacles and difficulties connected to every one of the four analysed elements of the Convention refugee definition: the Convention ground – with a focus on membership of a particular social group – persecution, fear and well-foundedness. It has been found that although a general agreement has emerged from the case law reviewed that gay men and lesbians do constitute a particular social group, there continue to be cases where decision-makers ignore these standards or avoid a decision on the matter. Some courts have defined the relevant social group in restrictive ways, wrongfully excluding claimants. A clear ruling that all alien gay people constitute a

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<sup>330</sup> LaViolette, N. (2009a) above n. 19, p. 451.

<sup>331</sup> Ibid, p. 454-461.

<sup>332</sup> O’Dwyer, P. (2008) above n. 121, p. 186.

particular social group for the purposes of the 1951 Convention, like the one from the US Court of Appeals from 2005 would arguably reduce the discretion of decision-makers in sexuality-based cases to use the definition of the particular social group to exclude gay refugees and could therefore serve as a model for other asylum states. Although this would not prevent lower-level adjudicators from ignoring this legislative guidance, it would at the very least provide clear grounds for appeal.

The paper has also shown that the interpretation of “persecution” in sexuality-based cases has equally caused serious challenges for decision-makers. The determination of whether certain criminal laws, especially if there is no evidence of their enforcement, and discriminatory acts amount to persecution is often very difficult to make. There is usually little independent country information to guide such decisions and the effect those situations have on gay people in a predominantly heterosexist setting. This is extremely difficult to comprehend for adjudicators. This inability to empathize, along with sexualized conceptions of same-sex attraction have also fuelled the frequently expressed expectation that claimants should participate in their own protection by “acting discreetly”, a stance that contradicts jurisprudence on the other Convention grounds. It also ignores the future-focused question of the consequences of an (involuntary) discovery, and is based on a limited understanding of sexuality associated with sexual acts only. These underlying assumptions also influence misrepresentations on the availability of state protection or internal flight alternatives and the “nexus requirement”. Sexuality training, as has been provided for the Immigration and Refugee Board in Canada, can assist decision-makers in understanding the impact of actual or perceived homophobia and heterosexism in the experience of persecution and the refugee status determination process and could be a starting point to address the stereotypes on which many decisions are based.

The credibility assessment, used to establish whether the claimant actually has a subjective “fear” of persecution is a particular area of concern in sexuality-based cases. As there is usually no external evidence of sexual orientation, the decision-maker has to assess the credibility of the “allegedly gay” claimant based on their story alone. However, all of the tools generally used for credibility assessments – demeanour, consistency and plausibility – have been shown to be susceptible to misleading interpretations, based on stereotypes and insensitivity towards the claimant’s difficulties when talking about his or her sexual orientation as much as on ignorance and heterosexist biases. The use of guidelines on sexual orientation, which specify appropriate ways to interrogate claimants about their sexual orientation and inform decision-makers of the risks of ignorance with respect to decisions concerning people of a different sexual orientation, might help address these shortcomings. The use of such guidelines would provide decision-makers with a supporting tool to make a decision in a claim that, in their helplessness, they have repeatedly called “easy to make and impossible to disprove.”<sup>333</sup>

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<sup>333</sup> Millbank, J. (2009b) above n. 19, p. 4.



Finally, the analysis showed that the assessment of the objective “well-foundedness” of a gay claimant’s fear or persecution also faces numerous challenges. This is due to, inter alia, the risks related to collecting information on sexual minorities and the prevalent homophobia until recently in many mainstream NGOs. Therefore, there is only very scarce information on the situation of gay people in most countries. Much of the information, particularly from official government sources, is very broad, while the assumption of biases leads decision-makers to disregard information from gay and lesbian NGOs, even though these are often better positioned to reach this marginalised section of society. The resulting use of inappropriate or irrelevant sources, blind to the many markers of difference, including gender, may be detrimental for gay applicants. Sexuality training for decision-makers could therefore also be useful in raising an awareness of the inappropriate use of country of origin information, in order to reduce inferences of fact and the weighing of evidence according to personal expectations and biases of decision-makers.

Clearly the connecting element between all of these separate aspects of refugee status determination is homophobia. Consequently, homophobia can be seen as the major obstacle facing gay refugees in their claims. This is particularly dramatic for the afflicted persons as they are precisely seeking refuge from homophobic persecution. It is even more dramatic because such a subtle and widespread sentiment is extremely difficult to combat, as it is present in society at large and would require a profound societal change. In the meantime, however, there continue to be refugees who base their claims on persecution on account of their sexual orientation. Thus, it is of utmost importance to provide guidance for decision-makers. Even though such guidance can always only be an offer and its acceptance necessarily depends on the willingness of the decision-maker, it may be useful for those seeking help. Eventually it could lead to improved legal standards. Although the *UNHCR Guidance Note* is an important first step in this respect because it emphasizes some of the important ways in which sexuality-based claims differ from asylum claims on other grounds, it is not enough to simply state that a claimant’s self-identification as gay should be accepted with the benefit of the doubt. This paper has shown that there is an overall need for more research into the question of how the refugee status determination can be done in a meaningful and respectful way for gay applicants as decision-makers are in need of guidance on this issue. A general awareness of the risks of heterosexist biases and ignorance in the status determination process as well as appropriate tools to approach such cases would certainly be welcomed by people like Julian Pepe, the Ugandan gay rights activist mentioned at the beginning of the paper, as he may be forced to seek asylum if the bill passes.

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