



**UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS  
RELATING TO SEXUAL ORIENTATION AND  
GENDER IDENTITY**

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### **Note**

The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes on thematic legal issues pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*.

Through analyzing international legal principles, jurisprudence and other relevant materials, these Guidance Notes seek to clarify applicable law and legal standards with the aim of providing guidance in the particular thematic area concerned. The ultimate purpose is to enhance the delivery of protection to refugees and asylum-seekers through adherence to international standards in refugee protection.

When related to refugee status determination, the Guidance Notes supplement and should be read in conjunction with the relevant Guidelines on International Protection. The Guidance Notes are developed to respond to emerging operational needs and legal issues and do not necessarily follow the same extensive drafting process as the Guidelines on International Protection.

The Guidance Notes are in the public domain and are available on Refworld, <http://www.refworld.org>. Any questions relating to specific aspects of this Note should be addressed to the Protection Policy and Legal Advice Section (PPLAS) of the Division of International Protection Services, UNHCR, Geneva.

## Table of Contents

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>4</b>
<b>II.</b>	<b>SUBSTANTIVE ANALYSIS .....</b>	<b>6</b>
A.	BACKGROUND.....	6
B.	WELL-FOUNDED FEAR OF PERSECUTION .....	7
i.	Laws criminalizing homosexual conduct .....	10
ii.	Fear of future persecution.....	12
iii.	Avoiding persecution .....	12
iv.	Agents of persecution.....	13
v.	The causal link (“for reasons of”) .....	14
C.	CONVENTION GROUNDS .....	14
D.	INTERNAL FLIGHT / RELOCATION ALTERNATIVE .....	15
E.	BURDEN OF PROOF AND CREDIBILITY (ASSESSMENT).....	16
F.	SUR PLACE CLAIMS.....	17
<b>III.</b>	<b>CONCLUSION.....</b>	<b>18</b>

## I. INTRODUCTION

1. This Note provides guidance in respect of refugee claims related to sexual orientation and gender identity. The persecution of people because of their sexual orientation and gender identity is not a new phenomenon. It is only in more recent years that a growing number of asylum claims has been made by lesbian, gay, bisexual and transgender (“LGBT”) individuals. This has necessitated greater awareness among decision-makers of the specific experiences of LGBT asylum-seekers and a deeper examination of the legal questions involved.

2. In recent years, both national judicial decision-making and academic writing have seen substantial progress in the analysis and interpretation of the concepts of sexual orientation and gender identity in the refugee law context. These developments have run parallel to, and indeed drawn upon, a growing jurisprudence and legal developments at the international (through the UN human rights treaty monitoring bodies, for example) and regional level.<sup>1</sup> While this continues to be an evolving area of refugee law, this Note will, *inter alia*, focus on legislative developments, examine international jurisprudence in the refugee context, analyze persecution and persecutory practices as well as build on some of the positive practices developed by States in their asylum decisions. The Note supplements and should be read in conjunction with UNHCR’s *Guidelines on 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*,<sup>2</sup> which remain applicable to LGBT asylum claims made by both men and women.

3. LGBT individuals may be subjected by State authorities, their families or communities to physical, sexual and verbal abuse and discrimination, because of who they are or who they are perceived to be. This might be because of prevailing cultural and social norms, which result in intolerance and prejudice, or because of national laws, which reflect these attitudes. Where such acts of abuse and discrimination go unpunished and/or where LGBT orientation is criminalized,<sup>3</sup> such individuals may, if they seek asylum on these

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<sup>1</sup> For an overview of jurisprudence and doctrine relating to the rights of LGBT persons, including human rights violations on grounds of sexual orientation, see International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 3rd updated edition, 2007, available at [http://www.icj.org/IMG/UN\\_References.pdf](http://www.icj.org/IMG/UN_References.pdf); ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at [http://www.icj.org/IMG/European\\_Compilation-web.pdf](http://www.icj.org/IMG/European_Compilation-web.pdf); and ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at [http://www.icj.org/IMG/Inter-American\\_References.pdf](http://www.icj.org/IMG/Inter-American_References.pdf).

<sup>2</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html> (hereafter: “UNHCR Guidelines on Gender-Related Persecution”).

<sup>3</sup> More than 80 States have laws prohibiting or regulating sexual acts performed by consenting adults of the same sex, often referred to as “sodomy laws”. Some proscribe specific sexual acts regardless of sexual orientation and gender identity, while others prohibit a range of same-sex sexual activities. At least seven States maintain the death penalty for such acts. For further information on such laws, see International Gay and Lesbian Human Rights Commission (<http://www.iglhrc.org/site/iglhrc/>) and SodomyLaws.org (<http://www.sodomylaws.org/>).

grounds, fall within the refugee definition of the 1951 Convention relating to the Status of Refugees (“1951 Convention”).

4. A common element in the experience of many LGBT applicants is having to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions. The consequence is that they often have limited evidence to establish their LGBT identity or may not be able to demonstrate past persecution, in particular where they were not living openly as LGBT in the country of origin.

5. According to the 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*<sup>4</sup> (“Yogyakarta Principles”), “sexual orientation” refers to a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender. “Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms.<sup>5</sup> Courts in various jurisdictions have likewise affirmed that sexual orientation relates not just to conduct or a series of sexual acts, but equally to a person’s identity and how he or she seeks to express it.<sup>6</sup>

6. For the purposes of this Note, the term “LGBT” is used in preference to “homosexuals” as this term tends to make lesbians invisible, does not encompass bisexuals and transgender people and may be considered offensive by many gays and lesbians. Although the term “gay” or “gay people” is sometimes used to describe both men and women whose enduring physical, romantic, and emotional attractions are to persons of the same sex, in this Note preference is given to the use of “gay” to refer to men, while “lesbian” refers to women. “Bisexual” is used to describe a person who is physically, romantically, and emotionally attracted to men and women. While there is no universally accepted definition of “transgender”, in this Note the term refers to men and women whose gender identity does not align to their assigned sex. Transgender does not imply any specific form of sexual orientation and may include transsexuals and cross-dressers. They could identify as female-to-male or male-to-female, and may or may not have undergone surgery and/or hormonal therapy.<sup>7</sup>

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<sup>4</sup> *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) (hereafter: “Yogyakarta Principles”). The Principles were developed by the ICJ and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, 6–9 November 2006.

<sup>5</sup> See Preamble, and Recitals 4 and 5 of the Yogyakarta Principles, above footnote 4.

<sup>6</sup> Persecution can be perpetrated against an individual as much for the fact of being LGBT, as for acts associated with the status. If harsh punishment is attracted by the latter, “it is scarcely possible that homosexuals are otherwise treated with dignity and respect”; see, *Refugee Appeal No. 74665*, 7 July 2004 (New Zealand Refugee Status Appeals Authority, (RSAA)), paras. 27, 129, available at <http://www.unhcr.org/refworld/docid/42234ca54.html>. See also *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, 399 F.3d 1163 (2005), 7 March 2005 (US Court of Appeals, Ninth Circuit), at III[6], available at <http://www.unhcr.org/refworld/docid/4721b5c32.html>; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), para. 81, available at <http://www.unhcr.org/refworld/docid/3fd9eca84.html>.

<sup>7</sup> For further definitions, see, for instance, Gay & Lesbian Alliance Against Defamation, *Media Reference Guide*, 7<sup>th</sup> edition, May 2007, available at [http://www.glaad.org/media/guide/GLAAD\\_MediaRefGuide](http://www.glaad.org/media/guide/GLAAD_MediaRefGuide).

## II. SUBSTANTIVE ANALYSIS

### A. BACKGROUND

7. An applicant's sexual orientation can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation, which does not, or is seen not to, conform to prevailing political, cultural or social norms.<sup>8</sup> The refugee definition applies to all persons without distinction as to sex, age, sexual orientation, gender identity, marital or family status, or any other status or characteristics. Some States have chosen to include specific references to sexual orientation in the refugee definition in domestic legislation.<sup>9</sup>

8. Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion.<sup>10</sup> Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group, but may also be linked to other grounds, notably political opinion and religion, depending on the circumstances. This has been affirmed by courts and tribunals in various jurisdictions, including Australia, Canada, France, Germany, New Zealand, Sweden, the United Kingdom and the United States.<sup>11</sup>

9. Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBT persons are entitled to all human rights on an equal basis with others. The Preamble to the 1951 Convention reiterates the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". The principle of non-discrimination is also enshrined in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* ("ICCPR"), and in Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").<sup>12</sup>

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[7thEdition.pdf](#); Merriam-Webster OnLine Dictionary, available at <http://www.merriam-webster.com/dictionary>.

<sup>8</sup> See *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, paras. 6–7. See also UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, para. 3, available at <http://www.unhcr.org/refworld/docid/4551c0d04.html> (hereafter: "*UNHCR Advisory Opinion to the Tokyo Bar Association*").

<sup>9</sup> See, for instance, Sweden, *Aliens Act (SFS 2005:716)*, Chapter 4, Section 1, available at <http://www.unhcr.org/refworld/docid/3ae6b50a1c.html>. See also Migrationsverket (Swedish Migration Board), *Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground*, 28 January 2002, available at <http://www.unhcr.org/refworld/docid/3f8c1af44.html>.

<sup>10</sup> As defined in Article 1A(2) of the *Convention relating to the Status of Refugees*, 28 July 1951, available at <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter: "1951 Convention").

<sup>11</sup> For a more detailed discussion of national case law, see below Section C. CONVENTION GROUNDS.

<sup>12</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>. The non-discrimination provisions on account of "sex" or "other status" in the ICCPR and ICESCR, as well as in Article 2 of the *Convention on the Rights of the Child* (available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>), are to be taken as including sexual orientation, as affirmed by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. The same interpretation has been adopted by the European Court of Human Rights (ECtHR) in relation to Article 14 (Prohibition of discrimination) of the *European Convention for the Protection of Human Rights and Fundamental*

The Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instruments.<sup>13</sup>

## B. WELL-FOUNDED FEAR OF PERSECUTION

10. 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>14</sup> Developments in international human rights law can help decision-makers determine the persecutory nature of the various forms of harm that a person may experience on account of his or her sexual orientation.<sup>15</sup> A pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution. While the element of discrimination is often central to claims made by LGBT persons, they also frequently reveal experiences of serious physical and, in particular, sexual violence. Each of the incidents of harm must be assessed in a holistic manner. They must be evaluated in light of the prevailing situation and attitudes with regard to sexual orientation and gender identity in the country of origin.

11. International and regional jurisprudence and legal doctrine affirm that discrimination on account of a person's sexual orientation is prohibited.<sup>16</sup> Discriminatory measures may be enforced through law and/or through societal practice, and could have a range of harmful outcomes. Discrimination will amount to persecution where such measures, individually or cumulatively, lead to consequences of a substantially prejudicial

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*Freedoms* (hereafter: "ECHR") (available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>). See also, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada), available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>, drawing on the Preamble to the 1951 Convention; *Islam (A.P.) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)* [1999] UKHL 20, 25 March 1999 (United Kingdom House of Lords), available at <http://www.unhcr.org/refworld/docid/3dec8abe4.html>.

<sup>13</sup> See Yogyakarta Principles, above footnote 4. For regional instruments specifically addressing sexual orientation, see Organization of American States, "Human Rights, Sexual Orientation, and Gender Identity," AG/Res. 2435 (XXXVIII-O/08), 3 June 2008, available at [http://www.oas.org/dil/AGRES\\_2435.doc](http://www.oas.org/dil/AGRES_2435.doc); European Parliament, *Resolution of 26 April 2007 on Homophobia in Europe*, Resolution P6\_TA(2007)0167, 26 April 2007 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+0+DOC+XML+V0//EN>. See also Article 7(g) of the Council of Europe, Parliamentary Assembly, *Recommendation I470 (2000), Situation of Gays and Lesbians and their Partners in Respect of Asylum and Immigration in the Member States of the Council of Europe*, 30 June 2000, available at <http://www.unhcr.org/refworld/docid/3dde404c6.html>, which urges Member States *inter alia* to "co-operate more closely with UNHCR and national non-governmental organisations, promote the networking of their activities, and urge them to systematically monitor the observance of the immigration and asylum rights of gays and lesbians".

<sup>14</sup> See, for instance, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, 4 August 2005 (UK Asylum and Immigration Tribunal (AIT)), available at <http://www.unhcr.org/refworld/docid/47fd93cf2.html>, regarding the impact of the persecutory acts on the individual.

<sup>15</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited January 1992, available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter "UNHCR Handbook"), paras. 42, 60. See also, for instance, *Refugee Appeal No. 76152*, 8 January 2008 (New Zealand RSAA), para. 34, available at <http://www.unhcr.org/refworld/docid/47bd93cf2.html>; *Refugee Appeal No. 74665*, above footnote 6, paras. 81–123.

<sup>16</sup> For an overview, see the compilations produced by the ICJ, above footnote 1. See also Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review*, Vol. 8, No. 2 (2008), pp. 207–48, available at <http://hrlr.oxfordjournals.org/cgi/reprint/8/2/207>.

nature for the person concerned. This may be the case, for instance, where a LGBT person is consistently denied access to normally available services, be they in his or her private life or workplace, such as education, welfare, health, and the judiciary.<sup>17</sup> As noted in the UNHCR *Handbook*:

Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution, if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his [or her] future existence.<sup>18</sup>

12. Being 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>19</sup> LGBT persons who live in fear of being publicly identified will often conceal their sexual orientation as a result in order to avoid the severe consequences of such exposure, including the risk of incurring harsh criminal penalties, arbitrary house raids, dismissal from employment and societal disapproval. Such actions can not only be considered discriminatory and as violating the right to privacy, but also as infringing the right to freedom of opinion and expression. As interpreted by the Yogyakarta Principles:

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, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.<sup>20</sup>

13. LGBT persons may be unable to forge meaningful relationships, be forced into arranged marriages or experience extreme pressure to marry. They might fear that a failure to marry will ultimately mark them out as LGBT in the public eye. Social, cultural and other restrictions which require them to marry persons of the opposite sex can have the effect of violating the right to marry with full and free consent, and the right to respect for private life.<sup>21</sup> Such community pressure could escalate beyond general societal expectations

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<sup>17</sup> See, for instance, *Decision No. MA6-01580*, 12 January 2007 (Immigration and Refugee Board (IRB) of Canada), available at <http://www.unhcr.org/refworld/docid/482457202.html>; *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 147.

<sup>18</sup> UNHCR *Handbook*, above footnote 15, paras. 54–55. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC), 9 October 1998 (Constitutional Court of South Africa), para. 113, available at <http://www.unhcr.org/refworld/docid/48246cf72.html>.

<sup>19</sup> See, for instance, *RRT Case No. 071818233* [2008] RRTA 62, 15 February 2008 (Refugee Review Tribunal (RRT) of Australia), available at <http://www.unhcr.org/refworld/docid/484552e22.html>.

<sup>20</sup> Yogyakarta Principles, above footnote 4, the right to freedom of opinion and expression (Principle 19). Requiring a person to conceal his or her sexual orientation or identity would also violate the right to the universal enjoyment of human rights (Principle 1), the right to equality and non-discrimination (Principle 2), the right to recognition before the law (Principle 3), and the right to participate in public life (Principle 25). See also, *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999 (ECtHR), available at <http://www.unhcr.org/refworld/docid/47fdfac80.html>, where the Court noted that it “would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression” (para. 127).

<sup>21</sup> See Article 23(3) of the ICCPR, above footnote 12: “No marriage shall be entered into without the free and full consent of the intending spouses”. See also UN General Assembly, *Convention on the Elimination of Discrimination Against Women*, 18 December 1979, available at <http://www.unhcr.org/refworld/docid/3b00f2244.html>. Article 16 of the Convention stipulates, *inter alia*, that State Parties shall ensure (b) “The same right freely to choose a spouse and to enter into marriage only with their free and full consent.” See also Article 12 of the ECHR, above footnote 12: “Men and women of

and reach the threshold of persecution, bearing in mind that LGBT persons may experience such pressures differently from heterosexuals.<sup>22</sup>

14. Claims made by LGBT persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killing. These are all acts of harm and mistreatment so serious in nature that they would, generally, reach the threshold of persecution within the meaning of the 1951 Convention. Severe forms of family and community violence, rape and other forms of sexual assault, particularly if occurring in detention settings, would fall within the definition of torture.<sup>23</sup> Such acts violate the right to life, liberty and security of person, and the right not to be subjected to torture, cruel, inhumane or degrading treatment, as contained in various international human right instruments. LGBT persons could also experience lesser forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

15. While the violence and human rights abuses faced by LGBT persons have many common elements, it is also necessary to distinguish among them. Lesbian women often experience harm as a result of the inter-relation of their sexual orientation and gender, since women's position in society is generally less powerful than that of men.<sup>24</sup> Lesbians are even more likely than gay men to feel obliged to conform outwardly to family and social expectations, for instance, by marrying someone of the opposite sex. In societies where women are regarded primarily as the wives (of men) and mothers, lesbians may be isolated and invisible. They are generally at a higher risk of harm at the hands of non-State actors than are gay men, including as a result of retaliatory violence by former partners or husbands. They often have lesser access to informal protection systems, including organized venues of support in the country of origin.

16. Transgender persons, as even a smaller group, will often have distinct experiences of persecution. These could, for example, relate to accessing health care or due to an increased risk of exposure to harm if their gender identity is not legally recognized (where, for instance, they are not able to change their name and sex in the civil registry). Such exposure could, for instance, be prompted where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex as indicated in the documents. Someone who is seeking to change or

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marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

<sup>22</sup> See, for instance, *SZANS v. Minister for Immigration* [2004] FMCA 445, 13 August 2004 (Federal Magistrates' Court of Australia), available at <http://www.austlii.edu.au/au/cases/cth/FMCA/2004/445.html>

<sup>23</sup> See, for instance, *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, paras. 57, 134. See also UN Human Rights Council, “*Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural rights, including the Right to Development, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”, A/HRC/7/3, 15 January 2008, paras. 34–49, available at <http://www.unhcr.org/refworld/docid/47c2c5452.html>.

<sup>24</sup> See *Amare v. Secretary of State for the Home Department* [2005] EWCA Civ 1600, 20 December 2005 (England and Wales Court of Appeal), where the Court noted (although dismissing the appeal on other grounds), that the “combination of discrimination against women and discrimination against homosexuals is an especially poisonous mix liable to give rise to the risk of persecution”, para. 17, available at <http://www.unhcr.org/refworld/docid/47fdfb5b0.html>. See also, *RRT Case No. 071862642* [2008] RRTA 40, 19 February 2008 (RRT of Australia), available at <http://www.unhcr.org/refworld/docid/4811a7192.html>.

has changed his or her sex may particularly be perceived as challenging prevailing conceptions of gender roles.

#### **i. Laws criminalizing homosexual conduct**

17. Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy.<sup>25</sup> The very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBT persons' enjoyment of their fundamental human rights.<sup>26</sup> Even where homosexual practices are not criminalized by specific provisions, others directed at homosexual sex such as those proscribing "carnal acts against the order of nature" and other crimes, such as "undermining public morality" or "immoral gratification of sexual desires", may be relevant for the assessment of the claim.<sup>27</sup>

18. A law can be considered as persecutory *per se*, for instance, where it reflects social or cultural norms which are not in conformity with international human rights standards. The applicant, however, still has to show that he or she has a well-founded fear of being persecuted as a result of that law. Penal prosecution, under a law which *per se* is not inherently persecutory or discriminatory, may in itself amount to persecution, for instance, if applied to particular groups only or, if it is arbitrary or unlawfully executed.<sup>28</sup>

19. Where harsh punishments are imposed that do not conform to international human rights standards, such as the death penalty or severe corporal punishment, including flogging, their persecutory character is particularly evident.<sup>29</sup> A substantive body of international and national jurisprudence affirms that consensual homosexual conduct is not to be criminalized.<sup>30</sup> In some circumstances, one cannot exclude that even relatively lenient

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<sup>25</sup> See *Toonen v. Australia*, CCPR/C/50/D/488/1992, 4 April 1994 (Human Rights Committee), paras. 8.6–8.7, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>. Finding a violation of Article 17 of the ICCPR, the Committee noted that while the applicant had not yet been prosecuted under the Tasmanian Criminal Code, the "criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views of reform of the relevant laws on sexual matters", and that the relevant sections of the Criminal Code interfered with the author's privacy, "even if these provisions have not been enforced for a decade". See also, *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981 (ECtHR), available at <http://www.unhcr.org/refworld/docid/47fdaf7d.html>.

<sup>26</sup> See, further, *Case of Norris v. Ireland*, Application No. 10581/83, 26 October 1988 (ECtHR), para. 38, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=10581/83&sessionid=12354864&skin=hudoc-en>.

<sup>27</sup> See for instance, *RRT Case No. 071862642*, above footnote 24. The applicant was found to be in need of international protection even in the absence of a specific law criminalizing homosexual acts in the country of origin.

<sup>28</sup> See further UNHCR *Handbook*, above footnote 15, paras. 57, 59; *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 10; *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, paras. 4, 10.

<sup>29</sup> See further, *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 12. See also, Yogyakarta Principles, above footnote 4, the right to life (Principle 4): "Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity", requiring States, *inter alia*, to "repeal all forms of crime that the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them" (Principle 4.A).

<sup>30</sup> See, for instance, *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, above footnote 18. The Court found that the common law offence of sodomy was repugnant to constitutional provisions which prohibited discrimination on grounds of sexual orientation, and noted that

punishment can be considered disproportionate and persecutory. A too narrow focus on the severity of the penalty could in effect reinforce the misperception that being LGBT constitutes a crime.<sup>31</sup>

20. An applicant may exceptionally be able to demonstrate a well-founded fear of persecution even if a law criminalizing LGBT is no longer enforced, where the existence of that law has the effect of creating an intolerable predicament for him or her. Such laws, although no longer systematically enforced, can also be used by the authorities for extortionary purposes, or be enforced in an unofficial manner which does not lead to recorded prosecutions, such as through police inflicted violence or extra-legal detention.<sup>32</sup>

21. What is material to a refugee status determination is whether there is a real risk of harm should the applicant have to return to the country of origin. Persecution may be found even where there is no conclusive country of origin information to evidence that laws criminalizing homosexual conduct are actually enforced. This can be the case if a State seeks to disguise its penalization of LGBT persons from the outside world, for example, by prosecuting them instead for crimes of rape, child molestation or drug-related crimes which he or she is alleged to have committed. A high burden of proof for the crimes, including strict evidentiary requirements, should also not be taken as an indication of a lesser possibility of enforcement but needs to be read in its religious and societal context. A pervading and/or generalized climate of homophobia in the country of origin (for example, where the government displays its disapproval through harsh anti-homosexual rhetoric, where LGBT persons are repressed and surveilled by their families or neighbours, or the media uses derogatory stereotypes to describe them) can be considered an indication that LGBT persons are being persecuted.<sup>33</sup>

22. It should furthermore be noted that criminal sanctions for homosexual activity also impede the access of LGBT persons to State protection. For example, a LGBT person who has been exposed to violence may hesitate to approach the police for protection because he or she may be regarded as an offender instead of a victim. An applicant could therefore also establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect him or her effectively against such harm.<sup>34</sup> It should also be noted that where an individual is seeking asylum in a country where same sex relations are criminalized, such laws can impede his or her access to asylum procedures or deter the person from presenting his or her LGBT

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“conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm” (para. 108).

<sup>31</sup> Some jurisdictions, while admitting that “there is no easy formulation” hold that the criminalization of homosexual conduct is persecutory only if “accompanied by penal sanctions of severity which are in fact in force”. See, for instance, *Refugee Appeal No. 74665*, above footnote 6, para. 103; *Refugee Appeal No. 76152*, above footnote 15, para. 34.

<sup>32</sup> See, for instance, *Decision VA5-02751*, 16 February 2007 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/48245a5f2.html>; *Refugee Appeal No. 76152*, above footnote 15, para. 50.

<sup>33</sup> See, for instance, European Parliament, *Resolution of 13 March 2008 on the Case of the Iranian Citizen Sayyed Mehdi Kazemi*, PA\_TA-PROV(2008)0107, 13 March 2008, available at <http://www.unhcr.org/refworld/docid/47da75002.html>.

<sup>34</sup> See further below Sub-section B iv. Agents of persecution. See also, *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 17. See also, *Décision M. OI, No. 543182*, 31 May 2006 (Commission des Recours des Réfugiés (CRR), France), where the Commission found that although laws criminalizing homosexual activity had been repealed, cultural norms still led to persecution.

experiences as part of the claim to refugee status. In such situations, it may be necessary for UNHCR to become directly involved in the case.

## ii. Fear of future persecution

23. LGBT applicants who have concealed their sexual orientation in the country of origin might not have experienced harm in the past sufficient to amount to persecution. It is possible that their conduct was not a voluntary choice and was modified precisely to avoid the threat of being persecuted. As noted by the High Court of Australia: “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.”<sup>35</sup> Additionally, LGBT persons, who have left their country of origin for a reason other than their sexual orientation and/or have “come out”<sup>36</sup> after arrival in the country of asylum, could qualify for refugee status if they can demonstrate a well-founded fear of *future* persecution.<sup>37</sup>

24. As with claims based on political opinion, an applicant claiming a fear of being persecuted on account of his or her sexual orientation need not show that the authorities knew about his or her sexual orientation before he or she left the country of origin. The well-foundedness of the fear will in such cases be based on the assessment of the consequences that an applicant with a certain sexual orientation would have to face if he or she returned.<sup>38</sup> Moreover, the fact that a LGBT applicant has never actually been prosecuted for his or her homosexual conduct does not prevent him or her from having a well-founded fear of being persecuted.<sup>39</sup>

## iii. Avoiding persecution

25. A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.<sup>40</sup> Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.<sup>41</sup> As noted by the Immigration and Refugee Board of Canada:

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<sup>35</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, para. 43.

<sup>36</sup> For the purposes of this Note, the term “come out” refers to the process in which an individual acknowledges and accepts his or her own sexual and gender identity and feels able to inform others about it.

<sup>37</sup> UNHCR *Handbook*, above footnote 15: “Fear refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution” (para. 45).

<sup>38</sup> *Ibid.*, para. 83.

<sup>39</sup> *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 12.

<sup>40</sup> See, for instance, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, paras. 34–60; *Refugee Appeal No. 74665*, above footnote 6, paras. 114, 126–127; *Nasser Mustapha Karouni, Petitioner, v. Alberto Gonzales, Attorney General*, above footnote 6; *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department* CG [2005] UKAIT 00168, 28 November 2005 (UK AIT), para. 78, available at <http://www.unhcr.org/refworld/docid/46836aa80.html>.

<sup>41</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, para. 41: “It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give

Into the equation must be added the claimant's new found freedom of expression in Canada and his desire to live openly in Sri Lanka as he does here in Canada [...]. We do not tell claimants that they have a right to practise their religion so long as they hide it. A hidden right is not a right.<sup>42</sup>

26. The question to be considered is whether the applicant has a well-founded fear of being persecuted, rather than whether he or she could live in the country of origin without attracting adverse consequences.<sup>43</sup> This requires an objective examination of how the applicant may be treated if he or she were returned to that country. Hence, it is not relevant whether the applicant's conduct with regard to his or her sexual orientation is viewed as "reasonable" or "necessary". There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships. A requirement for discretion would furthermore imply that a person's sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviours and everyday activities otherwise affected by that person's sexual orientation and gender identity.<sup>44</sup> It would, in fact, amount to requiring the "same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution seeks to achieve by persecutory conduct".<sup>45</sup> As stated by the New Zealand Refugee Status Appeal Authority:

Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm.<sup>46</sup>

#### iv. Agents of persecution

27. Persecution may be perpetrated either by (i) State actors, for example, through the criminalization of consensual sexual relations between persons of the same sex, through physical or sexual violence, or degrading treatment inflicted by those under their direct control, or by (ii) non-State (private) actors. A refugee claim can, thus, be established where the State is unwilling or unable to protect against violations committed by State or non-State actors. Instances where a State's inaction may be persecutory include failure of the police to respond to requests for assistance and refusal by the authorities to investigate, prosecute or punish individuals inflicting harm on LGBT persons. Non-State actors, whether family members, neighbours, strangers or work colleagues, can either be directly involved in persecutory acts, including through physical abuse and forced marriage, or indirectly by exposing the individual concerned to harm, for example, by reporting his or her conduct or sexual orientation to the authorities.

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them protection under the Convention." See also with regard to the concealment of ethnicity, *HYSI v. Secretary of State for the Home Department* [2005] EWCA Civ 711, 15 June 2005 (England and Wales Court of Appeal), paras. 32–34, 37, available at <http://www.unhcr.org/refworld/docid/43fc2eac24.html>.

<sup>42</sup> *Decision VA5-02751*, above footnote 32. See also, *Decision No. IV/IE06244/81*, 26 April 1983 (Administrative Court (Verwaltungsgericht) Wiesbaden, Germany).

<sup>43</sup> See, for instance, *MN (Findings on sexuality), Kenya v. Secretary of State for the Home Department* [2005] UK IAT 00021, 28 January 2005 (UK Immigration Appeal Tribunal (IAT)), paras. 21–23, 25, available at <http://www.unhcr.org/refworld/docid/47a7081cd.html>.

<sup>44</sup> See *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, paras. 40–45; and *Wang v. Minister for Immigration & Multicultural Affairs* [2000] FCA 1599, 10 November 2000 (Federal Court of Australia), paras. 91, 99, available at <http://www.unhcr.org/refworld/docid/47fdfb330.html>.

<sup>45</sup> See *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, above footnote 18, para. 130.

<sup>46</sup> *Refugee Appeal No. 74665*, above footnote 6, para. 114.

**v. The causal link (“for reasons of”)**

28. As with other types of refugee claims, the well-founded fear of persecution must be related to one or more of the five grounds listed in the 1951 Convention refugee definition. The Convention ground must be a relevant contributing factor though it not need be shown to be the direct or main cause.<sup>47</sup> The focus is on the reasons for the applicant’s predicament, rather than on the mind-set of the perpetrator. State and non-State agents of persecution may inflict harm on LGBT persons with the intention of “curing” or “treating” them, for instance, through what is, however, effectively medical abuse or forced marriage. In this context, “it is important to recall that nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status”.<sup>48</sup> Thus, the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor, if the applicant experiences the abuse as harm.<sup>49</sup>

**C. CONVENTION GROUNDS**

29. The Convention grounds contained in the refugee definition are not mutually exclusive and may overlap. As such, the transgression of social or religious norms, including by expressing one’s sexual orientation or identity, may be analyzed in terms of political opinion, religion or membership of a particular social group. This opinion, belief or membership may also be imputed or attributed to the applicant by the State or the non-State agent of persecution.<sup>50</sup>

30. For the purposes of the 1951 Convention, the term “political opinion” should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged. This may include opinions on sexual orientation and gender identity, particularly in countries where sexual orientation (other than heterosexuality) is viewed as contrary to the core of the country policy.<sup>51</sup>

31. Religion may be a relevant 1951 Convention ground where the attitude of religious authorities towards LGBT people is hostile or discriminatory or where being LGBT is seen as an affront to religious beliefs in a given society. Where someone has a well-founded fear

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<sup>47</sup> See *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 20. See also, UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, paras. 20–23, available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html> (hereafter: “*UNHCR Guidelines on Membership of a Particular Social Group*”). See also, for instance, *Refugee Appeal No. 74665*, above footnote 6, para. 132.

<sup>48</sup> See UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, August 2005, para. 26, available at <http://www.unhcr.org/refworld/docid/4301a9184.html>.

<sup>49</sup> See further, *RRT Case No. 061020474* [2007] RRTA 25, 7 February 2007 (RRT of Australia), available at <http://www.unhcr.org/refworld/docid/47a707d82.html>; *Pitcherskaia v. Immigration and Naturalization Service*, No. 95-70887, 24 June 1997 (US Court of Appeals, Ninth Circuit), para. 20, available at <http://www.unhcr.org/refworld/docid/4152e0fb26.html>.

<sup>50</sup> *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 5. See also *Kwasi Amanfi v. John Ashcroft, Attorney General of United States*, A01-4477 and 02-1541, 328 F.3d 719, 16 May 2003 (US Court of Appeals, Third Circuit), available at <http://www.unhcr.org/refworld/docid/47fdfb2c1a.html>, where the Court recognized persecution on account of imputed membership in a particular social group (i.e. homosexuals), even if the applicant was not gay. See also *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica*, above footnote 40, para. 71.

<sup>51</sup> See further *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 6.

of persecution because he or she is seen as not conforming to the interpretation given to a particular religious belief, a link to that ground may be established.

32. Claims relating to sexual orientation have most often been considered within the “membership of a particular social group” ground.<sup>52</sup> Many jurisdictions have recognized that homosexuals (gays and lesbians) may constitute a particular social group.<sup>53</sup> While claims relating to bisexuals and transgender people have been less common, such groups may also constitute a particular social group.<sup>54</sup> It has furthermore been well established that sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it.<sup>55</sup> Requiring a person to conceal his or her sexual orientation and thereby to give up those characteristics, contradicts the very notion of “particular social group” as one of the protected grounds in the 1951 Convention.<sup>56</sup>

#### D. INTERNAL FLIGHT / RELOCATION ALTERNATIVE

33. As homophobia, whether expressed through laws or people’s attitudes and behaviour, often tends to exist nationwide rather than merely being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation and gender identity. Any suggested place of relocation would have to be carefully assessed and must be both “relevant” and “reasonable”.<sup>57</sup> Internal flight is

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<sup>52</sup> See European Union, *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 19 May 2004, Art. 10(1)(d), available at <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

<sup>53</sup> See, for instance, *Matter of Toboso-Alfonso*, 20 I& N. Dec 819, 12 March 1990 (US Board of Immigration Appeals), available at <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; Toboso was designated “as precedent in all proceedings involving the same issue or issues”, Attorney General’s Order No. 1895-94, 19 June 1994. *Canada (Attorney General) v. Ward*, above footnote 12; *Re GJ, Refugee Appeal No. 1312/93*, 30 August 1995 (New Zealand RSAA), available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html>; *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah*, above footnote 12; *Singh v. Minister for Immigration and Multicultural Affairs* [2001] FCA 1653, 27 November 2001 (Federal Court of Australia), available at <http://www.unhcr.org/refworld/docid/47fdfb33d.html>; *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 146.

<sup>54</sup> See *Decision Ourbih No. 269875*, 15 May 1998 (CRR, France), finding that transsexuals may constitute a particular social group. This position was affirmed in *Decision M. MB, No. 496775*, 15 February 2004 (CRR, France). See further, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), 24 August 2000 (US Court of Appeals, Ninth Circuit), available at <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, where the Court recognized that “gay men with female sexual identities” constituted a particular social group.

<sup>55</sup> See, *UNHCR Guidelines on Membership of a Particular Social Group*, above footnote 47, para. 6. See also, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, above footnote 54, where the Court noted that “the sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them” (p. 10483). See also, *Refugee Appeal No. 74665*, above footnote 6. The Authority recognized that there is a “broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not be required to be changed” (para. 81).

<sup>56</sup> See, *Refugee Appeal No. 74665*, above footnote 6. The Authority recognized that there is a “broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not be required to be changed” (para. 81). See also, Sub-section B (iii) Avoiding persecution, above paras. 25–26.

<sup>57</sup> See UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, para. 7, available at <http://www.unhcr.org/refworld/docid/3f2791a44.html> (hereafter: “UNHCR Guidelines on Internal Flight or Relocation Alternative”). See

normally not considered relevant where the State is the agent of persecution, unless the State's authority is limited to certain parts of the country. A law of general application, such as a penal code criminalizing homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in a proposed place of relocation.

34. Where a non-State actor is the persecutor, it can often be assumed that if the State is not willing or able to protect in one part of the country, it will not be willing or able to do so in any other part.<sup>58</sup> Applicants cannot be expected to suppress their sexual orientation or gender identity in the internal flight area, or required to depend on anonymity to avoid the reach of the agent of persecution. While a major or capital city in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a "safe haven". The applicant must also be able to access a minimum level of political, civil and socio-economic rights.<sup>59</sup> Thus, he or she must be able to access State protection in a genuine and meaningful way. The existence of LGBT related Non Governmental Organizations does not in itself provide protection from persecution.

#### **E. BURDEN OF PROOF AND CREDIBILITY (ASSESSMENT)<sup>60</sup>**

35. Self-identification as LGBT should be taken as an indication of the individual's sexual orientation. 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. Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is a lack of sufficiently specific country of origin information the decision-maker will have to rely on that person's testimony alone. As the UNHCR Handbook has noted "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>61</sup> In the same vein, the United Kingdom Asylum and Immigration Tribunal stated: "[T]here is the full, consistent detail and the plausible noting of small points, unlikely to be observed or recounted by a person who had not had the experiences described."<sup>62</sup>

36. In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular "flamboyant" or feminine demeanour in gay men, or "butch" or masculine appearance in lesbian women. Similarly, a person should not

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for instance, also, *RRT Case No. 061020474*, above footnote 49, noting that "indeed the situation outside the capital city is likely to be even less favourable to her".

<sup>58</sup> *Decision VAO-01624 & VAO-01625*, 8 March 2001 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/48246f092.html>, which states: "Claimant's former husband and his agents would seek them [the claimant and her partner] out wherever they went because he would not tolerate the mother of his child living in a lesbian relationship anywhere" (p. 6). See also, *UNHCR Guidelines on Internal Flight or Relocation Alternative*, above footnote 57, para 15.

<sup>59</sup> *UNHCR Guidelines on Internal Flight or Relocation Alternative*, above footnote 57, para. 19; see also *Decision MA6-01580*, 12 January 2007 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/482457202.html>, which states that "[i]n this case the claimant was not living in a provincial town but in [...] the most tolerant city in the country according to the documentary evidence [...] homophobia is still common and although positive measures exist, they are [...] ineffective" (pp. 4 and 5).

<sup>60</sup> This section should be read in conjunction with *UNHCR Guidelines on Gender-related Persecution*, above footnote 2, Section III: Procedural Issues.

<sup>61</sup> *UNHCR Handbook*, above footnote 15, para. 196. See also, *Nasser Mustapha Karouni, Petitioner, v. Alberto Gonzales, Attorney General, Respondent*, above footnote 176, at para. 7: "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."

<sup>62</sup> *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 128.

automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes. Enquiries as to the applicant's realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant's credibility.

37. It is important that LGBT applicants are interviewed by trained officials who are well informed about the specific problems LGBT persons face. The same applies for interpreters present at the interview. Relevant ways to increase officials' awareness, include short targeted training sessions, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, ensuring awareness of websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure.

38. The fact that an applicant has not had any significant relationship(s) in the country of origin or in the country of asylum does not necessarily mean that he or she is not LGBT. It may, rather, be an indication that he or she has been seeking to avoid harm as explained above in paragraphs 23-26. The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim.<sup>63</sup>

## F. SUR PLACE CLAIMS

39. A *sur place* claim for refugee status may arise as a consequence of events which have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin.<sup>64</sup> This may be the case where the applicant has "come out" after arrival in the country of asylum, and/or where his or her LGBT status or views on sexual orientation have been publicly expressed, for instance by taking part in advocacy campaigns, demonstrations and other human rights activism on behalf of LGBT persons.<sup>65</sup> In such cases, particular credibility concerns may arise, and an in-depth examination of the circumstances and genuineness of the applicant's sexual orientation will be necessary.

40. Even where public exposure of an applicant's LGBT status is the result of "self-serving" activities, he or she may nonetheless have a well-founded fear of persecution on return or may otherwise be in need of international protection.<sup>66</sup> Consideration should

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<sup>63</sup> See, UNHCR *Handbook*, above footnote 15, para. 198. See also, *Refugee Appeal No. 74665*, above footnote 6. The applicant's "[a]ccident story was a pretext to mask that which he believed he could not reveal, namely his sexual orientation [...] His misguided persistence with the original false claim has not deflected a finding that he is an otherwise credible witness" (para. 22).

<sup>64</sup> See UNHCR *Handbook*, above footnote 15, paras. 94–96. See also, *Refugee Appeal No. 75576*, 21 December 2006 (New Zealand RSAA), para. 78, available at <http://www.unhcr.org/refworld/docid/477cfbc8d.html>, regarding the situation of homosexuals in Iran and change of circumstances.

<sup>65</sup> See further, *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 12.

<sup>66</sup> See by analogy, *UNHCR Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, paras. 34–36, available at <http://www.unhcr.org/refworld/>

therefore be given to whether the applicant's sexual orientation/gender identity may come to the attention of the authorities in country of origin, and to the ensuing risk of persecution.<sup>67</sup> A careful assessment of all the circumstances, including the extent to which the activities were self-serving, the nature of the harm feared, and the degree of risk, is necessary.<sup>68</sup>

### III. CONCLUSION

41. International and national developments in sexual orientation case law clearly show that LGBT persons may be recognized as a "particular social group" and, as such, are entitled to protection under the 1951 Convention. These developments, however, also indicate that ill-treatment of persons due to their sexual orientation and gender identity continues to be seen as a highly personal or hidden form of persecution. As a result, LGBT persons who seek asylum have on occasion been expected by adjudicators to avoid persecution by concealing their sexual orientation, while similar expectations are not applied to the same extent in claims concerning political opinion or religious belief. It is, thus, essential that assessments of claims based on sexual orientation and/or gender identity be conducted in a sensitive and appropriate manner by decision-makers specifically trained on these issues. Given the difficulties of providing proof in sexual orientation claims, the assessment of such claims often rests on the credibility of the applicant. In these circumstances, decision-makers must lean towards giving the applicant the benefit of the doubt.

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[docid/4090f9794.html](http://www.unhcr.org/refworld/docid/4090f9794.html); *Refugee Appeal No. 75139*, 18 November 2004 (New Zealand RSAA), paras. 8, 35, available at <http://www.unhcr.org/refworld/docid/467908082.html>.

<sup>67</sup> See, *Regeringsbeslut 11:6*, Document No. 1926, 28 May 1998 (Swedish Government, Foreign Ministry (Regeringen, Utrikesdepartementet)), where it was determined that with the wide attention the applicant's case had received both in Sweden and abroad and the involvement by different organisations, it could not be excluded that the applicant was at risk of attracting the particular interest of the Iranian authorities.

<sup>68</sup> For further jurisprudence on *sur place* claims, see for instance, *Danian v. Secretary of State for the Home Department*, CO/30274/97, 9 June 1998 (UK IAT), available at <http://www.unhcr.org/refworld/docid/3ae6b6b92c.html>; and *Ghasemian v. Canada (Minister of Citizenship and Immigration)* [2003] FCJ No. 1591; 2003 FC 1266, 30 October 2003 (Federal Court of Canada), available at <http://www.unhcr.org/refworld/docid/412f420b4.html>.