

## Ensuring protection for LGBTI Persons of Concern

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**Lesbian, gay, bisexual, transgender and intersex (LGBTI) asylum seekers and refugees face a myriad of threats, risks and vulnerabilities throughout all stages of the displacement cycle. There needs to be greater awareness not only of the specific protection concerns relating to LGBTI individuals but also of related jurisprudence and guidance available for UN staff, partners, state authorities and decision-makers.**

At the centre of the 1951 Refugee Convention are human dignity, the richness and diversity of human life, and the full expression of individual freedoms. The very purpose of the Convention is the protection of those who manage to flee predicaments that violate their dignity, identity and freedoms. Despite the fact that there was no explicit recognition in the Convention of persecution for reasons of sexual orientation or gender identity, its drafters used broad enough language to cover such instances, notably through the introduction of the 'membership of a particular social group' ground.

I have no doubt that the framers of both the Universal Declaration of Human Rights and of the 1951 Convention were aware of what had happened in Nazi Germany to LGBTI people. People were arrested on suspicion of homosexuality and many were incarcerated in concentration camps. We will never know how many LGBTI persons fled Nazi Germany to avoid ending up in the camps. As homosexuality was – and remains in many societies – a social stigma and a criminal offence, they would have been forced to hide their reasons for flight even in their new countries of asylum. Unfortunately, this remains the situation for LGBTI asylum seekers and refugees in many parts of the world today.

There has been growing awareness in recent years about the rights of LGBTI individuals within the human rights and humanitarian community and an emergence of a body of research on this topic. The 2007 Yogyakarta Principles, in particular, have made a significant contribution to a better appreciation of how human rights

norms apply and are to be interpreted in the context of sexual orientation and gender identity.<sup>1</sup> It is perhaps premature to assess the role played by the Principles in making concrete improvements in the lives of LGBTI people; however, encouragingly, the Principles have been drawn upon on numerous occasions by the UN (including UNHCR), states, activists, asylum courts and tribunals, and have a constructive role to play as a legal, practical and advocacy tool.

For almost two decades the UN has documented violations against LGBTI people and articulated human rights standards in the context of sexual orientation and gender identity. More recently, the UN has called, at the highest levels, for equal rights, non-discrimination, an end to violence and the abrogation of laws that criminalise same-sex relationships. And in May 2012, the UN High Commissioner for Refugees issued a message to all UNHCR staff, encouraging them to help improve protection for LGBTI persons of concern as well as to eliminate homophobia and transphobia in the workplace.

### Issues in jurisprudence

Since the first refugee claims based on sexual orientation and gender identity were recognised in the 1980s, jurisprudence in this area of refugee law has continued to evolve, though at times with diverging views in different jurisdictions. We have identified a number of issues in this regard.

The first is that of demanding 'discretion' – that is, concealing one's sexual orientation in order to avoid persecution. The idea that gay people should have to tolerate being 'discreet' about their sexual orientation was



2008 Manila (Philippines) Pride March and launch of Yogyakarta Principles in the country.

dismissed by the UK Supreme Court in 2010,<sup>2</sup> a ruling which has received wide attention outside Europe. Discretion has the potential to undermine one of the basic tenets of refugee law – that one should not be compelled to hide, change or renounce one’s identity in order to avoid persecution. Nevertheless, such reasoning continues to be used in a number of countries, particularly within Europe.<sup>3</sup>

The second is ‘criminalisation’ and the challenges involved in determining whether laws criminalising same-sex relations amount to persecution. The mere existence of such laws is insufficient in some jurisdictions for recognition of refugee status; recent or regular enforcement of the law is required. Some countries also require that applicants show that steps towards enforcement have taken place in his or her individual case. In our view, quite apart from the potential law enforcement perspective, such an interpretation does not take sufficiently into account the level of societal discrimination in countries criminalising same-sex relationships and

the impact of this on the actual or feared predicament of LGBTI individuals.

The third relates to ‘sexualisation’ – the over-emphasis by some decision-makers on sexual acts rather than on sexual orientation as an identity. Not only can this lead to intrusive and humiliating questioning about a person’s sexual life (not appropriate for anyone regardless of their sexuality) but it also overlooks the fact that LGBTI people are often persecuted because of the threat they are thought to represent to prevailing social and cultural mores.

The fourth concern is ‘stereotyping’. Sexual orientation and gender identity are not visible in the same way that race and nationality may be. Decision-makers have consequently been preoccupied with obtaining evidence to prove whether an applicant is in fact LGBTI. Lacking guidance and knowledge, they have relied on their own personal assumptions or stereotypes to draw conclusions. This risks undermining the impartiality of decision-making.

The fifth is that of ‘disbelief’ – which often goes hand-in-hand with stereotyping. Not all courts accept the self-identification of the applicant as LGBTI. Some ask for witness statements or documentation such as emails, ignoring the fact that this might be impossible for the applicant to produce, in particular when he or she has been doing everything possible to hide their sexual orientation.

### Developing guidance

UNHCR has developed policy and practical guidance for staff, partners, state authorities and decision-makers to promote a consistent and rights-based approach to the protection of LGBTI people.

In 2008 UNHCR issued a Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity<sup>4</sup> to improve decision-makers’ awareness about the specific experiences of LGBTI asylum seekers and encourage a deeper analysis of the legal questions involved. This Guidance Note is now superseded by a new set of guidelines on international protection, published in October 2012, which for the first time deal comprehensively with refugee claims based on sexual orientation and/or gender identity. These new Guidelines<sup>5</sup> provide advice on substantive, procedural, evidentiary and

credibility issues relating to such claims. The Guidelines are intended to provide guidance to governments, legal practitioners, decision-makers and the judiciary, as well as to UNHCR staff adjudicating these claims under the 1951 Convention, and to ensure a proper and harmonised interpretation across jurisdictions of the definition of a refugee under the 1951 Convention. They recognise that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention.

In 2011 UNHCR released a Need to Know Guidance Note on Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement<sup>6</sup> to help UNHCR and partners’ staff improve their understanding of the rights and the distinct vulnerabilities of LGBTI refugees and promote concrete actions to ensure that they are protected throughout all stages of their displacement. It provides practical advice on how to make office environments more welcoming, make programmes safe for, and inclusive of, LGBTI persons, and promote participation. In addition, UNHCR’s Age, Gender and Diversity Policy<sup>7</sup> explicitly refers to LGBTI refugees and asylum seekers.

However, policy and guidance will be of limited effect if prejudice and ignorance prevail among those responsible for implementing that guidance. To remedy lack of understanding among UNHCR’s as well as partners’ staff,<sup>8</sup> UNHCR is developing a staff training package with ORAM.<sup>9</sup> This package covers terminology, responses to day-to-day protection issues, refugee status determination (RSD) and LGBTI-sensitive interviewing techniques. The refugee status determination and resettlement processing phases are often the stages when LGBTI persons of concern will self-identify but are also where the most vital decision-making concerning their future will occur.

The 2011 *UNHCR Resettlement Handbook* provides guidance on the resettlement of LGBTI individuals, which is often the only

### New UNHCR SOGI Guidelines

**Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees: available online at [www.unhcr.org/509136ca9.html](http://www.unhcr.org/509136ca9.html)**

A new set of guidelines on international protection – superseding the Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity (2008) – was issued by UNHCR in October 2012. The Guidelines complement the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (reissued in 2011).

Other materials on sexual orientation and gender identity can be found on the Special Feature on Sexual Orientation and/or Gender Identity on Refworld at [www.unhcr.org/refworld/sogi.html](http://www.unhcr.org/refworld/sogi.html)

viable solution in many first-country-of-asylum contexts. UNHCR expedites the resettlement of LGBTI refugees according to their vulnerability, which has in some cases involved emergency resettlement. Although the latest edition of the Heightened Risk Identification Tool addresses the detection of protection risks facing LGBTI individuals, further efforts are needed, including improvement of referral mechanisms. UNHCR is currently working on a resettlement assessment tool for LGBTI refugees which will include a checklist and step-by-step guide for assessing LGBTI refugees in need of resettlement. We are aware, however, that the lengthy average processing time for resettlement by states has an adverse impact on the well-being of LGBTI individuals, who are often in dangerous and difficult situations.

## Conclusion

Homophobia is a human-made construct, fed by political, religious, legal and even pseudo-medical justifications. We know that human beings can be quick to judge, fear and even hate the 'other' – people who are different. And departure from the majority 'norm' inherently implies social change and can even be seen as a threat. In this context, LGBTI people risk becoming embodiments of that threat. And we have seen similar resistance and bigotry towards individuals promoting social change in the past. Comparable to the anger and hatred today directed against LGBTI individuals and those advocating for their rights is the denigration and abuse that women suffered in the early 20th century when demanding the right to vote or that African Americans

and others active in the civil rights movement experienced in the US in the mid-20th century.

Fortunately, research shows that prejudices can be overcome. We need to change the way society treats LGBTI people by discussing this as an issue of diversity and equality, and by promoting respect for those outside the mainstream. But as long as LGBTI individuals continue to be shunned, abused and criminalised by societies and communities, they will need to be able to avail themselves of the protection – and dignity – that refugee status can provide.

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1. [www.unhcr.org/refworld/pdfid/48244e602.pdf](http://www.unhcr.org/refworld/pdfid/48244e602.pdf)
2. See *HJ and HT v. Secretary of State for the Home Department*, UKSC 31, UK Supreme Court, 7 July 2010 [www.unhcr.org/refworld/docid/4c3456752.html](http://www.unhcr.org/refworld/docid/4c3456752.html)
3. The 2011 *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* report found discretion reasoning still being invoked in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, the Netherlands, Malta, Poland, Romania, Spain, Norway and Switzerland [www.unhcr.org/refworld/docid/4ebba7852.html](http://www.unhcr.org/refworld/docid/4ebba7852.html)
4. [www.unhcr.org/refworld/docid/48abd5660.html](http://www.unhcr.org/refworld/docid/48abd5660.html)
5. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees [www.unhcr.org/509136ca9.html](http://www.unhcr.org/509136ca9.html) See box p.7.
6. UNHCR (with input from ORAM), Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement, Need to Know Guidance 2, 2011 [www.unhcr.org/refworld/docid/4e6073972.html](http://www.unhcr.org/refworld/docid/4e6073972.html) .
7. June 2011 [www.unhcr.org/refworld/docid/44ef34f6887.html](http://www.unhcr.org/refworld/docid/44ef34f6887.html)
8. ORAM *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, June 2012 <http://tinyurl.com/ORAM-Opening-Doors-2012>
9. Organization for Refugee, Asylum & Migration [www.oraminternational.org](http://www.oraminternational.org)