

Sexual Orientation & *Gender Identity*

Gender is generally understood as “a concept that is socially constructed. Its construction is complex and influenced by culture, religion, social and political factors, which determine the roles women and men are expected to play, the relationship between those roles, and the value that society places on those roles, which in turn attaches social standing and status. The concept of “gender” can vary within and among cultures, and over time. At the heart of gender relations is the question of power.”¹

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”.²

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. It does not necessarily mean that the individual is engaged in sexual behaviour.”³



Photo by UNHCR / Taurus

Overview

As various reports show, individuals in many parts of the world are subjected to discrimination, stigma, violence, serious human rights violations and other forms of persecution based on their sexual orientation (actual or perceived) and/or gender identity. “It is widely documented that LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behavior, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world. Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty. In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and



Photo by UNHCR

¹ “Judging gender: Asylum adjudication and issues of gender, gender identity and sexual orientation”. Keynote statement by Dr Alice Edwards, UNHCR. Available at: <http://www.unhcr.org/refworld/pdfid/509cc8252.pdf>

² Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>, at preamble.)

³ Ibid

persecution.”⁴

While a number of countries have implemented legislation recognizing and respecting the rights of the LGBTI persons (such as the right to marry), according to the International Gay and Lesbian Human Rights Commission 85 countries still have enforceable laws against sexual acts between consenting adults of the same sex. In at least five of these countries homosexual acts are punishable by death.⁵

In many societies and cultures homosexuality, bisexuality, and/or transgender behavior or persons, is considered a disease, a mental illness or moral failing, and thus various measures can be taken to try to change or alter someone’s sexual orientation and/or gender identity. Such efforts to change an individual’s sexual orientation or gender identity by force or coercion may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person. Some of the extreme methods of forcing someone to change his/her sexual orientation or gender identity include forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal

therapy. “Non-consensual medical and scientific experimentation is also explicitly identified as a form of torture or inhuman or degrading treatment under the International Covenant on Civil and Political Rights. Some intersex individuals may be forced to undergo surgery aimed at “normalcy” and, where it will be applied without their consent, this is likely to amount to persecution.”⁶

Additionally, LGBTI individuals may face a great deal of discrimination in their daily life and activities. One such example is accessing labor market or trying to maintain their employment. “Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal. For transgender individuals in particular, deprivation of employment, often combined with lack of housing and family support, may frequently force them into sex work, subjecting them to a variety of physical dangers and health risks.”⁷

Countries that have capital punishment in place for homosexual acts include:

- Iran
- Mauritania
- the Republic of Sudan
- Saudi Arabia
- Yemen

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) produces annual reports that provide **global overview of developments of LGBTI rights** in a variety of matters: decriminalization of homosexual acts; equalization of ages of consent; prohibitions of discrimination based on sexual orientation and gender identity; hate crimes based on sexual orientation and gender identity considered as aggravating circumstance; marriage and partnership rights for same-sex couples; joint adoption by same-sex couples; and laws on gender recognition after gender reassignment treatment. The 2012 report also offers a **summary of countries that still maintain legal provisions criminalizing same-sex sexual acts** between consenting adults and who engage in sexual activity in private.

The 2012 report can be found here:

<http://www.unhcr.org/refworld/pdfid/50ae380e2.pdf>

⁴ UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Available at: <http://www.unhcr.org/refworld/docid/50348afc2.html>

⁵ Data taken from the website of [International Lesbian and Gay Association](http://www.ilga.org) (ILGA)

⁶ UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9, Ibid.

⁷ Ibid

Sexual Orientation and Gender Identity in the context of International Refugee Protection

Persecution of LGBTI individuals (actual and perceived) is not a new phenomenon, and, according to the UNHCR, “there is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol.”⁸

Claims relating to sexual orientation are primarily recognized under the 1951 Convention ground of **membership of a particular social group**, but may also be linked to other grounds, such as political opinion and religion, depending on the circumstances.

According to the UNHCR, many governments have adopted or updated their policy guidance, while others have explicitly acknowledged in national legislation that **persecution on account of one’s sex/gender, and/or gender identity and/or sexual orientation, is a valid basis for refugee status**. The European Union, for example, has created a Qualifications Directive, which purposefully recognizes inter alia gender-specific forms of persecution, and that the membership of a particular social group ground includes the characteristic of sexual orientation, while gender is also mentioned.⁹

Challenges with refugee claims based on sexual orientation and gender identity

Despite the availability of numerous reports that document violation of human rights and persecution of LGBTI persons in many countries of the world, asylum seekers fleeing violence and human rights abuses on the grounds of their sexual orientation and/or gender identity still face substantial difficulties presenting their claims and receiving refugee status based on these claims.

The UNHCR has identified five main obstacles to recognizing refugee claims based on sexual orientation and gender identity:

Discretion - does the 1951 Convention protect persons who could avoid persecution by concealing (or “being discreet”) about their sexuality or gender identity?

According to the UNHCR guidelines on Sexual Orientation, an assumption that an applicant may be able to avoid persecution by concealing or by being “discreet” about his or her sexual orientation or gender identity, or has done so previously, **is not a valid reason to deny refugee status**. It further states that “person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution”.¹⁰

⁸ “Judging gender: Asylum adjudication and issues of gender, gender identity and sexual orientation”, Ibid.

⁹ Ibid

¹⁰ UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9, Ibid.

Criminalization - determining whether laws criminalizing same sex relations amount to persecution, in particular when such laws are rarely if ever enforced.

The same guidelines explains that “even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament [...] rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors.”¹¹

Sexualization - the over-emphasis by some decision-makers on sexual conduct, rather than on sexual orientation as an identity.

This could present a problem in refugee status determination because it can lead to a detailed questioning of the applicant’s sexual life that can be intrusive and humiliating and, furthermore, it also overlooks the fact that LGBTI people are often persecuted because of the threat they represent to prevailing social and cultural norms, and that “sexual orientation and gender identity are ultimately about a person’s identity, whether or not that identity is manifested through sexual acts.”¹²

Social visibility

UNHCR in its guidelines on Sexual Orientation urges decision makers “**to avoid reliance on stereotypes or assumptions**, including visible markers, or a lack thereof. This can be misleading in establishing an applicant’s membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group.”¹³ In many cases applicants may seek to avoid manifesting their characteristics in society precisely to avoid persecution.

Evidence and Credibility

Credibility is an important aspect of refugee status determination. When it comes to asylum claims on sexual orientation and gender identity grounds, credibility plays an essential role. “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. 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.”¹⁴

¹¹ UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9, Ibid.

¹² Ibid

¹³ Ibid

¹⁴ Refugee Studies Centre , *Sexual orientation in Refugee Status Determination*, April 2011, available at: <http://www.unhcr.org/refworld/pdfid/4ebb93182.pdf>

UNHCR advises that the assessment of credibility in such cases be undertaken in an individualized and sensitive way. “Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.”¹⁵

LGBTI refugees and Private Refugee Sponsorship Program

Refugees fleeing persecution on the grounds of their sexual orientation and/or gender identity and who meet the eligibility and admissibility requirements of the Canadian resettlement program can be sponsored to come to Canada under the Private Refugee Sponsorship Program. In fact, in 2011, the Citizenship and Immigration Canada (CIC) started a pilot project to help refugees fleeing persecution because of their sexual orientation. Through this pilot project, CIC partners with the [Rainbow Refugee Committee](#) to share the cost of sponsoring a refugee. The government has offered to provide up to \$100,000 in assistance to support this initiative.



Photo by Holly Bensusur

It is more difficult to identify LGBTI refugees because very often it is not safe for them to disclose their sexual orientation or gender identity even in the country of asylum and they try to keep a low profile. However, with the help of the local NGOs and international humanitarian organizations on the ground, such as the UNHCR, a number of LGBTI refugee cases have been brought to the attention of private sponsoring groups in Canada and have already arrived or are in process to be sponsored to come to Canada.

When pre-screening sponsorship cases for refugees who fled persecution on the grounds of their sexual orientation and/or gender identity, please remember that the absence of laws criminalizing homosexual acts does not automatically mean that the rights of LGBTI persons are respected; they may still face discrimination that would amount to persecution, such as stigmatization, marginalization, shaming and threats from the family members.

It is important to do a thorough country of origin research, in particular gathering information from reports produced by human rights organizations and LGBTI advocates.

¹⁵ UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9, Ibid.

Useful Information and Resources:

- 1) Rainbow Refugee Canada: <http://www.rainbowrefugee.ca/>
- 2) The Refugee and Immigration Project of the Metropolitan Community Church of Toronto (supporting inland and sponsored LGBTI refugees): <http://www.mcctoronto.com/what-we-do/social-justice/refugee-immigration-project-charter>
- 3) UN High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <http://www.unhcr.org/refworld/docid/50348afc2.html>
- 4) International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-sponsored Homophobia : A world survey of laws criminalising same-sex sexual acts between consenting adults*, May 2012, available at: <http://www.unhcr.org/refworld/docid/50ae380e2.html>
- 5) Refugee Studies Centre , *Sexual orientation in Refugee Status Determination*, April 2011, available at: <http://www.unhcr.org/refworld/docid/4ebb93182.html>

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