

ILGA - EUROPE MALTA 2009

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Asylum seekers: Building on best practice to
promote access to safety in the UK

LGBTI ASYLUM CLAIMS AND THE DIRECTIVE

- A: *Who is a refugee?*
- B: *What is sexual-orientation and gender identity?*
- C: The Hathaway definition of persecution in line with human rights
- D: Criminalisation of sex and human rights (ECHR perspective)
- E: Definition of Persecution and the 2004 Minimum Standards Directive (2004/83/EC) (MSD)
- F: What can we do next?

A: THE DEFINITION OF A REFUGEE?

“For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who:

...

(2) ... owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of protection of that country”

1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol (“the Refugee Convention”) Article 1(A)

***Sexual identity is
more than just sexual conduct***

B: WHAT IS SEXUAL-ORIENTATION AND GENDER IDENTITY- THE YOGYAKARTA PRINCIPLES

(2007):

“Sexual orientation is understood to refer to each 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.”

“Is this a normal life? Would the court for example hold that a heterosexual person’s fundamental human rights were not infringed if, for “safety’s sake” they had to pretend to be gay in every area of their professional, personal, and social life, in every public place, by not living with their partner of choice, never showing affection to their partner or identifying themselves as a couple to friends or family, and only pursuing their heterosexual “lifestyle” by having swift and furtive sex with strangers or prostitutes in a public park? Is such desperate secrecy and deception, undertaken in fear, for months, years, or decades, a normal life?”

Dauvergne and Millbank in “Applicants S 396/2002 and S 395/2002, a gay refugee couple from Bangladesh” 25 Sydney Law Review 97 (2003)

UN Joint Statement on Sexual Orientation and
Gender Identity (18th December 2008)

[11] We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.

The UNHCR Guidance Note on Sexual Orientation and Gender Identity state (November 2008) [12].

“Being compelled to forsake or conceal one’s sexual orientation and gender identity, where instigated or condoned by the State, may amount to persecution. LGBT persons who live in fear of being publicly identified will often, as a result, conceal their sexual orientation 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 violating the right to privacy, but may also infringe on the right to freedom of opinion and expression.”

“Persecution:

In many countries homosexual acts are criminalized:

- *Homosexual acts illegal (80 countries)*
- *Homosexual acts punishable with death penalty (5 countries and parts of Nigeria and Somalia)*

A prohibition is not in itself a reason for asylum. The applicant must prove, that he or she is individually persecuted by the authorities.”

[emphasis added]

Søren Laurson and Mary Lisa Jayaseelan, “Disturbing knowledge: Decisions from asylum cases as documentation of persecution of LGBT-persons” (July 28, 2009) page 3.

C: THE HATHAWAY DEFINITION OF

~~PERSECUTION AND HUMAN RIGHTS:~~

- ✘ Persecution = Fear for a Convention reason (ie Particular Social Group) + Lack of State Protection
- ✘ *The sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community*

The definition of persecution includes an indefensible violation of second category rights. Professor Hathaway, in defining what constitutes second category rights states (at pages 109-110, ~~The Law of Refugee Status (1991)~~):

“Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR, but form which states may derogate during a “public emergency which threatens the life of the nation and the existence of which is officially proclaimed”. These include ... the right to equal protection for all, including ... minorities; the protection of personal and family privacy and integrity; ... liberty of opinion, expression ... The failure to ensure any of these rights will generally constitute a violation of the state’s basic duty of protection, unless it is demonstrated that the government’s derogation was strictly required by the existence of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way. Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.”

[emphasis added]

ECHR HUMAN RIGHTS

- ✘ European Convention on Human Rights and Fundamental Freedoms (1950) (ECHR)
- ✘ Article 8 (1) *Everyone has the right to respect for his private and family life, his home and his correspondence*
- ✘ Article 10 (1) *Everyone has the right to freedom of expression*
- ✘ Article 14 *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex.*

ARTICLE 8 ECHR- PRIVATE LIFE

- ✘ “Elements such as for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 ...private and family life may include other means of personal identification and of linking to a family ... Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world”
- ✘ *S and Marper v the United Kingdom* (Application nos. 30562/04 and 30566/04) (4 December 2008) (DNA register case)

✘ **Expulsion cases: The flagrancy test**

✘ *The destruction of the very essence of the right guaranteed by that article*

(Mamatkulov and Askarov v Turkey (2005) 41
EHRR 494, 537)

✘ Article 8 and Criminalisation of sex:

✘ *Dudgeon v the UK (1981) 4 EHRR 149*

The maintenance in force of the impugned legislation constitutes a continuing interference ... The very existence of the legislation continuously and directly affects his private life."

Non-implementation does not detract from

whether there is a basis for the violation of a
core human right...

(see also *Norris v Ireland* (1988) and *Modinos v*
Cyprus (1993) – differing measures, political
and societal)

Article 14 and non-discrimination (*Karner v*
Austria (2003))

ARTICLE 10: FREEDOM OF EXPRESSION

The Court will not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the 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.

(Smith and Grady v UK)

E: THE DEFINITION OF PERSECUTION AND THE 2004 MINIMUM STANDARDS DIRECTIVE

Article 9 of the 2004 Refugee Minimum Standards Directive
(2004/83/EC):

Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

- ✘ Article 9 (1) (a) = Intensity – Article 3 threshold – ill-treatment/torture – see also *The Greek Case 1969*) Treatment or punishment which causes the individual to act against his will or conscience = degrading treatment
- ✘ 9 (1) (b) – in a “similar manner” – duration – effected for a lifetime (see *Dudgeon*)
- ✘ Article 10 – Reasons for Persecution
- ✘ ... (d) Particular Social Group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States.
- ✘ Gender related aspects *might* be considered, without by themselves alone creating a presumption for the applicability of this Article.

✘ Particular Social Group – Refugee Convention
reason for persecution-

- ✘ PSG definition ... a sharing of an innate characteristic, or common background .. that is so fundamental to identity that a person should not be forced to renounce it; and
- ✘ That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. (Article 10 (d))

What is protected is what is not criminalised in a member state i.e. Private adult consensual sex is therefore “protected” .

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
- (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

- ✘ Therefore by cross-referencing to what is protected within ~~PSG (ie consensual adult private conduct in EU member state)~~,
- ✘ to what is also a discriminatory legal measure (criminalisation in the country of origin)
- ✘ which lasts a lifetime (no evidence of law being repealed),
- ✘ and is indefensible (not due to a national emergency),
- ✘then there exists persecution.

- ✘ Article 10 (d) MSD flows from Article 8/10/14 ECHR core rights which result in engagement with Article 9 (2) (b) and 1 (b) MSD and the *Hathaway* definition of persecution.

F: WHAT CAN WE DO NEXT?

- ✘ *JM (Uganda) and OO (Sudan) v Secretary of State for the Home Department* (2009) (18th November 2009 – English Court of Appeal)
- ✘ *Litigation strategies – raise indefensible violation of core human rights that feed into the Refugee Convention – convey message that identity is more than just conduct.*
- ✘ *European Commission Proposal Paper* (October 2009)
Gender “might” to “should be given due consideration” (Article 10d) “act” rather than “acts” (Article 9 (1) (a)) Article 9 (3) “or the absence of protection from such acts” (against no-state agent harm).

✘ *“Does it amount to persecution, according to these broad tests, if the clandestine character of homosexual activity which there has been in the past and will be on return in the future, is itself the product of fear engendered by discriminatory legislation or policing which itself violates the individual’s human rights?”*

Lord Justice Sedley *J v Secretary of State for the Home Department* [2006] EWCA Civ 107 (para 7, 31st January 2006, grant of permission).

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