

## The UNHCR'S Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity

By [Nicole LaViolette](#)

### Introduction



The human rights situation of sexual minorities around the world continues to be alarming. Many countries maintain severe criminal penalties for consensual sex between persons of the same sex, including the death penalty.<sup>[1]</sup> In several countries, restrictions have been imposed on the freedoms of expression and association of sexual minorities, while in others homosexuality and transexuality are perceived as crimes against religion, sexually deviant and immoral behaviours, mental disorders, or unacceptable challenges to gender-specific roles.<sup>[2]</sup> Such egregious human rights violations have led some lesbian, gay, bisexual, and transgender (LGBT) people to seek refuge in countries with better human rights protection. While this movement of refugees essentially began in the early 1990s, it is only recently that the United Nations High Commissioner for Refugees (UNHCR) has directly addressed the issue by releasing in November 2008 the *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*<sup>[3]</sup> (Guidance Note).

### Background

The international community codified the rights and status of refugees in two international instruments: the 1951 *UN Convention relating to the Status of Refugees* (the Convention),<sup>[4]</sup> and the 1967 *Protocol relating to the Status of Refugees*.<sup>[5]</sup> By signing the Convention and its Protocol, States have accepted the main obligation that flows from the international instrument, which mandates that signatory states will not return any individual to a territory where his or her life or freedom will be threatened. However, the legal responsibility to provide protection applies only if a person meets the definition of a refugee as provided for in the Convention. Persons seeking asylum must satisfy two main legal tests: (1) they must demonstrate a well-founded fear of persecution; and (2) they must substantiate that the persecution they fear is on account of their race, religion, nationality, political opinion, or membership in a particular social group. In addition, refugee protection is conferred only if the claimant succeeds in showing that the country of nationality or habitual residence is unwilling or unable to offer

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protection.

Several States have interpreted the Convention to extend asylum and refugee protection to women and men fleeing persecution based on their sexual orientation and gender identity. Since the early 1990s, decision-makers in countries such as Canada, the United States, the United Kingdom, Germany, New Zealand, Australia, Finland, Belgium, and the Netherlands have granted refugee status to individuals who fear persecution based on their sexual orientation or gender identity.<sup>[6]</sup>

## Overview of the UNHCR'S Guidance Note

Under the 1951 Convention, the UNHCR is responsible for monitoring the application of the treaty by member States. In order to do so, the UNHCR provides interpretations of the legal norms set out in the international refugee protection regime. The Guidance Note format is one of several soft law tools used by the UNHCR to provide persuasive legal interpretations to governments, decision-makers, practitioners, and UNHCR staff carrying out refugee status determination in the field. The UNHCR also publishes a *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>[7]</sup> (Handbook) in addition to a series of *Guidelines on International Protection (Guidelines)*. According to the UNHCR, Guidance Notes “do not necessarily follow the same extensive drafting process” as other interpretive publications and they “should be read in conjunction with the relevant Guidelines on International Protection.<sup>[8]</sup> In the case of the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, the relevant Guideline is the *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>[9]</sup>

While less authoritative than the *Handbook* or *Guidelines*, Guidance Notes are very often the first attempt by the UNHCR to deal with emerging thematic and legal issues. This is true of the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* which, according to the UNHCR, seeks to clarify the law and legal standards applicable to sexual minority refugee claimants. In addition to being the UNHCR's first analysis of sexual orientation and gender identity in the context of refugee protection, the Note also represents one of very few United Nations legal examinations of the situation of sexual minorities.<sup>[10]</sup>

With the release of the Guidance Note, the UNHCR has finally recognized that sexual minorities have encountered a specific set of problems in having the refugee definition applied to their claims. The international agency suggests in its analysis that the growing number of refugee claims made by lesbian, gay, bisexual and transgender individuals “necessitate[s] greater awareness among decision-makers of the specific experiences of LGBT asylum-seekers”<sup>[11]</sup>.

In the Guidance Note, the UNHCR sets out to examine legal questions essential to any determination of refugee status and highlights the ways in which the refugee law analysis needs to account for the specific situation of gay, lesbian, bisexual and transgender refugees. While some significant issues may have been overlooked by the UNHCR, a number of relevant

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questions that have arisen in national jurisprudence on sexual orientation and gender identity claims are nonetheless examined.

### *Well-Founded Fear*

Whether a claimant has a well-founded fear of persecution is a complex factual and legal issue. Sexual orientation or gender identity refugee claims can often turn on the legitimacy of a claimant's well-founded fear of persecution. The UNHCR recognizes in the Guidance Note that adjudicators are increasingly interested in assessing the impact of laws criminalizing homosexual conduct and in determining whether gay, lesbian, bisexual or transgender claimants fear discrimination rather than persecution.

The Guidance Note is clear that decision-makers are required to analyse the scope, impact and enforcement of laws that criminalize same-sex conduct.<sup>[12]</sup> Rather than focussing on the actual number of prosecutions, what is required is specific information about how criminal sanctions reinforce persecutory social environments and destroy opportunities for sexual minorities to seek protection from state authorities. Criminal laws, whether enforced or not, can result in LGBT people abstaining from same-sex relationships or applying severe restrictions to their social life and personal identity in order to prevent arrests, extra-legal detention, harassment, extortion or prosecutions. The UNHCR also underlines that in countries where homosexual practices are not criminalized other laws may be directed at suppressing homosexuality, such as sanctions relating to public morality.<sup>[13]</sup>

The refugee law requirement that the harm feared by a refugee claimant be serious has led to a distinction between persecution, on one hand, and discrimination, on the other. While not specifically mentioned in the Guidance Note, there is an increasing tendency for decision-makers to focus their analysis on whether a sexual minority claimant would be subjected to persecution or to the less serious harm of discrimination. One reason for the increased relevance of this distinction is the fact that in several countries, the social, political, and legal situation of sexual minorities has been changing. While some countries continue to seriously repress homosexuality, bisexuality and transexuality, other countries are becoming more accepting of sexual diversity. The Guidance Note clearly acknowledges that persecution can be manifested by a series of discriminatory acts and that sexual minorities may face a series of discriminatory measures that cumulatively cause substantial prejudice.<sup>[14]</sup>

The UNHCR also deals directly with a contentious issue that has surfaced directly or implicitly in the national jurisprudence of several States. A distinction has been made between discreet and non discreet homosexuals, and some decision-makers have suggested that sexual minority refugee claimants could be required to take reasonable steps to avoid persecutory harm by conducting their personal lives discreetly. The Guidance Note is clear that being compelled to forsake or conceal one's sexual orientation and gender identity may amount to persecution.<sup>[15]</sup> In addition, the UNHCR underlines that it is never a condition of protection that a claimant be required to take steps to conceal either their political opinions, religious beliefs, membership in a particular social group, or their race or nationality to

avoid persecution. In fact, the Guidance Note states that insisting on discretion would “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>[16]</sup> The UNHCR essentially concludes it is immaterial whether the conduct of the claimant discloses his or her identity as a homosexual and attracts the attention of the agents of persecution.

### *Convention Grounds*

When claims were first adjudicated in the early 1990s, decision-makers in several States debated whether sexual minorities fit any of the criteria set out in the Convention definition of refugee. The UNHCR acknowledges that in many countries this question was appropriately resolved by extending refugee status to sexual minorities primarily because of the persecution individuals feared they would be subjected to as members of a particular social group. The Note further suggests that sexual orientation or gender identity cases may also be analysed in relation to other Convention grounds such as political opinion or religion, though most claims have been considered within the “membership of a particular social group” ground.<sup>[17]</sup>

### *Internal Flight/Relocation Alternative*

The concept of “internal relocation alternative”, or “internal flight alternative” (IFA) has become integral to the determination of whether a claimant is a Convention refugee. In assessing whether a refugee’s fear of persecution is well-founded, decision-makers determine whether the claimants can avail themselves of a safe place in the country of origin. Refugee protection will be denied if a claimant did not exhaust all possibilities of reaching safety in an area within the claimant’s own country before seeking international protection.

IFAs are increasingly being assessed in claims based on sexual orientation and gender identity. Social, political, and legal progress is sometimes highly localized in a state; more tolerant destinations may therefore constitute an IFA for gay men, lesbians, bisexuals, or transgender persons. In addition, meaningful protection in a different area of the country may indeed be available to a claimant when he or she is being persecuted by a non-governmental entity acting independently of any governmental control or support.

The Guidance Note recognizes the relevance of this issue in relation to sexual minority claims and briefly deals with IFAs by suggesting that “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>[18]</sup> The UNHCR urges decision-makers to probe the actual reality of state protection in another location before concluding that an IFA is available in refugee claims based on sexual orientation and gender identity. The UNHCR also counsels that the presence of non-governmental organizations dedicated to gay, lesbian, bisexual and transgender rights and issues cannot of itself constitute sufficient protection from persecution in an IFA.<sup>[19]</sup>

### *Credibility*

Since gay, lesbian, bisexual and transgender claimants generally assert that they are members of a 'particular social group', one of the legal elements to be satisfied is the claimant's membership in that group. Assessing the veracity of the claimant's sexual orientation or gender identity is a very difficult, sensitive and complex task in the context of an administrative or quasi-judicial hearing.<sup>[20]</sup> In particular, the very private and intimate nature of an individual's sexual orientation or gender identity poses real challenges for adjudicators, who are nonetheless required to examine the claimants' personal lives and relationships.<sup>[21]</sup>

### *Sur Place* Claims

Some claimants may not have identified as gay or lesbian before their arrival in the country of refuge, or consciously decided not to act on their sexual orientation in their country of origin. The fear of persecution may arise while they are in the country of refuge, if they have now come out or come to terms with their sexuality. Such a situation would make a claimant a refugee *sur place*. Decision-makers must keep in mind that gay men and lesbians who are refugees *sur place* will not have personally experienced persecution, and their knowledge of gay and lesbian activities in their country of origin may be limited. The UNHCR urges decision-makers to carefully consider all the circumstances of *sur place* claims in assessing whether a sexual minority claimant has a well-founded fear of persecution on return.<sup>[22]</sup>

### Evaluation and Outlook

The UNHCR's decision to release its first analysis of refugee claims based on sexual orientation and gender identity should be welcomed. It is significant that the UNHCR has finally recognized that sexual minorities have encountered a specific set of problems in having the refugee definition applied to their claims. Given the UNHCR's mandate to monitor the application of the 1951 Convention, the publication of the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* is entirely appropriate and in fact long overdue.

It is hoped however that the UNHCR will consider the Guidance Note as a work in progress. Several relevant issues are overlooked. For example, the Guidance Note makes no mention of independent country information. Sexual minorities must meet the same evidentiary burden as all other refugee claimants. Independent country information produced by international human rights organizations plays an important role in meeting this burden. However, in the case of gay, lesbian, bisexual, and transgender claimants, existing country documentation still fails to provide the kind of information refugees need to support their claims.<sup>[23]</sup> The Guidance Note fails to fully explore other issues. For instance, state protection is dealt with in a cursory manner even though it is becoming a determinative issue in many sexual minority claims.<sup>[24]</sup> Bisexuality is inadequately analysed;<sup>[25]</sup> questions about credibility are not fully canvassed;<sup>[26]</sup> and the importance of a gender analysis is only briefly mentioned in relation to lesbian claimants despite its relevance in some gay, bisexual and transgender cases.<sup>[27]</sup>

While the Guidance Note should not be viewed as a full and complete

analysis of refugee claims based on sexual orientation and gender identity, it provides a first and necessary interpretive road map for decision-makers responsible for determining such claims. At the very least, the document will provide a basis for further commentary on the many issues facing gay, lesbian, bisexual and transgender refugees.

## About the Author

Nicole LaViolette is Vice Dean and Associate Professor of Law at the University of Ottawa, Canada. Her scholarly research is devoted mainly to international human rights, international humanitarian law, and the rights of refugees. She has recently published an article entitled "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" in a 2009 issue of the *International Journal of Human Rights*.

## Endnotes

[1] For a survey of laws prohibiting same-sex sexual conduct, see DANIEL OTTOSSON, INT'L LESBIAN AND GAY ASS'N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS (2008), available at [http://www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2008.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf) (last visited July 13, 2009). See also Press Release, Int'l Lesbian and Gay Ass'n, World Day against Death Penalty: 7 Countries Still Put People to Death for Same-Sex Acts, (Oct. 10, 2007).

[2] See Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 82 HUM. RTS. L. REV. 207 (2008). See also Human Rights First, *Homophobia: 2007 Hate Crime Survey* 5-6 (2007), available at <http://www.humanrightsfirst.info/pdf/07601-discrim-hate-crimes-web.pdf> (last visited July 13, 2009); Human Rights Watch, *Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide* (2009).

[3] U.N. High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (Nov. 21, 2008), available at <http://www.unhcr.org/refworld/docid/48abd5660.html> (last visited July 13, 2009) [hereinafter Guidance Note].

[4] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

[5] Protocol Relating to the Status of Refugees, Dec. 16, 1967, 606 U.N.T.S. 267. The Protocol renders international protection for refugees universal, since the Convention covered only persons whose reason to flee was linked to an event that occurred in Europe prior to 1951.

[6] For a general survey of countries that grant asylum to sexual minorities, see European Council on Refugees and Exiles, ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status, available at <http://www.ecre.org/files/orient.pdf> (last visited July 13, 2009).

[7] U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Jan. 1, 1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (last visited July 13, 2009).

[8] Guidance Note, *supra* note 3, at 2.

[9] U.N. High Commissioner for Refugees, *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 (May 7, 2002), available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html> (last visited July 13, 2009).

[10] For an overview of developments at the United Nations in relation to sexual minorities, see O’Flaherty & Fisher, *supra* note 2.

[11] Guidance Note, *supra* note 3, ¶ 1. The decision-makers referred to would include anyone in independent tribunals, governments or at the UNHCR responsible for carrying out refugee status determinations.

[12] Guidance Note, *supra* note 3, ¶¶ 17-22.

[13] *Id.* ¶ 17.

[14] *Id.* ¶ 11.

[15] *Id.* ¶¶ 12, 25.

[16] *Id.* ¶ 26, citing *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) ¶¶ 113.

[17] *Id.* ¶¶ 29-32.

[18] *Id.* ¶ 34.

[19] *Id.*

[20] The Guidance Note warns against relying on stereotypical perceptions of gay men and lesbians in determining their membership in the particular social group. The stereotyping of lesbians and gay men, based on mannerisms, dress, appearance and manner of speaking, is often the basis for discriminatory treatment of individuals and should be avoided in the assessment of gay, lesbian, bisexual and transgender claims.

[21] Claimants themselves will sometimes provide supporting evidence of their sexual orientation, including asking their partners, families or friends to testify at the refugee hearing; providing photographs or videos of partners or activities in the gay, lesbian, bisexual, or transgender communities; submitting letters or proof of membership in gay, lesbian, bisexual, and transgender organizations; and presenting medical and psychological reports. But as the Guidance Note suggests, claimants may not be able to

provide conclusive documentary or witness evidence to confirm their sexual orientation and as a result, adjudicators struggled with this aspect of sexual minority claims. The UNHCR notes that in the absence of such proof, “the decision-maker will have to rely on the claimant’s testimony alone.” If the testimony is credible, the claimant should be given the benefit of the doubt. *Id.* ¶ 35.

[22] *Id.* ¶¶ 39-40.

[23] See Nicole LaViolette, *Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process*, 13 INT’L J. HUM. RTS. 437 (2009).

[24] *Id.* at 454-459.

[25] See Sean Rehaag, *Bisexuals Need Not Apply: a Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia*, 13 INT’L J. HUM. RTS. 415 (2009); Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 McGill L.J. 59 (2008).

[26] See Jenni Millbank, *‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT’L J. REFUGEE L. 1 (2009).

[27] See Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT’L J. REFUGEE L. 1 (2007).