



**IARLJ**

International Association of Refugee Law Judges

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**60**  
YEARS



**UNHCR – IARLJ – ELENA**

## **Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity**

**Bled, Slovenia, 10 September 2011**

### **Summary Report**

On 10 September 2011, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Association of Refugee Law Judges (IARLJ) and the European Legal Network on Asylum (ELENA) of the European Council for Refugees and Exiles (ECRE), convened an expert meeting aimed at discussing the common issues and challenges facing the judiciary and lawyers/legal representatives in examining asylum claims related to sexual orientation and gender identity.<sup>1</sup> The focus of the meeting was on the European framework and practice, however, other jurisdictions were also discussed.

The meeting was conducted under The Chatham House Rule. The following summary reflects opinions expressed in the meeting but does not necessarily reflect the views of individual participants.

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<sup>1</sup> The meeting was attended by nine judges from Australia, Belgium, Norway, Romania and United Kingdom; eight legal practitioners from Belgium, France, Germany, Norway, Sweden, The Netherlands and United Kingdom; five UNHCR and two ECRE staff members.

## 1. Introduction and overview

1. Following an introduction by the Chair, UNHCR provided a brief overview of refugee claims relating to sexual orientation and gender identity. Globally and in Europe the situation of lesbian, gay, bisexual, transgender and intersex people (LGBTI) has become a much more public issue in recent years, as have the challenges they face. There is greater awareness in many countries of asylum that people fleeing persecution on account of their sexual orientation and gender identity can qualify as refugees under the 1951 Convention relating to the Status of Refugees (1951 Convention). Today, some 40 countries around the world grant asylum on these grounds. There are many reasons for these changes. Some relate to greater openness towards LGBTI concerns generally in certain societies, including in the UN system. Some are due to sustained advocacy by human rights and LGBTI rights groups. Others can be attributed to the judiciary and litigation through which LGBTI individuals have gradually been able to assert their rights.
2. Over the years, many small steps, one case at a time, have been taken towards equality, including:
  - Explicit prohibition of discrimination in employment, goods and services (39 out of 50 countries in Europe);
  - Legal recognition of same sex couples in partnerships, marriage and adoption (22 out of 50 countries in Europe);
  - De-criminalization of same-sex relations in all European countries since 2003;
  - Publication of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) in 2007;<sup>2</sup>
  - Adoption of the first ever Human Rights Council resolution on the topic in June 2011.<sup>3</sup>
3. Notwithstanding the improvements in certain parts of the world, LGBTI individuals continue to experience rape, physical assault, honor killings, isolation, discrimination and other human rights violations. Seventy-six countries still have laws criminalizing same-sex conduct, including at least seven which have the death penalty. These laws are not only a form of state-sanctioned harm; they can also lead to impunity for non-state actors who harm LGBTI persons.
4. Every year, many LGBTI individuals are compelled to flee their home countries and seek asylum in Europe and elsewhere. There are a number of interpretational challenges in approaching asylum claims related to sexual orientation and gender

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<sup>2</sup> <http://www.yogyakartaprinciples.org>

<sup>3</sup> <http://ilga.org/ilga/static/uploads/files/2011/6/17/RESOLUTION%20L9rev1.pdf>

identity. The lack of explicit mention of sexual orientation and gender identity in the 1951 Convention has meant that these concepts have to be read into the refugee definition. Historically, the first barrier was the recognition of LGBTI individuals as a “particular social group”. Today, however, there is acceptance not only that gay men can constitute a particular social group but also that lesbian, bisexual, transgender and intersex individuals can be considered as protected groups under the 1951 Convention. Analysis has evolved from considering sexual orientation and gender identity as innate and immutable characteristics to regarding them as fundamental parts of human identity, which should be protected in the same way as, for example, political opinion or religion.

5. The discussion during the meeting focused on three main themes i.e. 1) concealment of sexual orientation and/or gender identity (the so called “discretion requirement”); 2) criminalization of same-sex relations; and 3) credibility.

## **2. Concealment of sexual orientation and/or gender identity**

6. One of the particular questions that arises in some jurisdictions is whether LGBTI asylum applicants could be lawfully required to return to living “discreetly” in their countries of origin and thereby avoid persecution. Is “discretion” something that the applicant could reasonably be expected to tolerate, not only in the context of sexual activity but in relation to matters following from, and relevant to, sexual identity in the wider sense? Participants recognized that the reference to “discretion” is an unhelpful phrase when what is being addressed is rather if and to what extent LGBTI applicants can be expected to conceal their sexual orientation or gender identity.
7. Over the past years, the concept of this so called “discretion requirement” has been contested by judges and legal practitioners alike. While many European jurisdictions still rule that asylum applicants can reasonably be expected to hide or conceal their sexual orientation to prevent persecution,<sup>4</sup> this is not a formal requirement, neither foreseen by national legislation nor by the 1951 Convention. It was also noted that while the “discretion requirement” has not formed part of the asylum analysis in the US and Canada to the same extent, there are at least some instances, mostly in lower court decisions, where this approach has been taken.
8. Participants acknowledged that over the years some countries have moved away from the practice through jurisprudential developments. The landmark decision of the High Court in Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* was the first to comprehensively address the issue of

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<sup>4</sup> COC Netherlands and Vrije University of Amsterdam, *Fleeing Homophobia, Asylum claims related to sexual orientation and gender identity in Europe*, September 2011 available at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/conference-fleeing-homophobia/index.asp>.

discretion.<sup>5</sup> It has subsequently been drawn upon in a number of Commonwealth countries in developing judicial interpretation, including in the seminal 2010 UK Supreme Court judgment in the case of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (“HJ and HT”).<sup>6</sup>

9. The new test set out in *HJ and HT*, which is now being applied by the lower courts in the UK and in other jurisdictions, was discussed at some length. The inquiry is directed to what will happen in the future if the applicant is returned to his or her own country and recognizes that some applicants may not be willing to conceal their sexuality on return. It, however, also acknowledges that there may be mixed motivations for an applicant to live “discretely” on return and requests decision-makers to make findings of fact as to the reasons for such concealment through a set of questions.<sup>7</sup> The motivation for discretion on return could be a fear of persecution or could be related to personal preferences to live that way or be

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<sup>5</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, available at: <http://www.unhcr.org/refworld/docid/3fd9eca84.html>.

<sup>6</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>.

<sup>7</sup> The test as explained by Lord Hope in para. 35 is re-produced here for ease of reference (see also para. 82):

“(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. ...

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background... The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier ... the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para. 5 will have been established. The applicant will be entitled to asylum.”

because of social pressures e.g. not wishing to distress one's parents.<sup>8</sup> The test concludes that if one of the reasons for living "discretely" on return is a fear of persecution which would follow if he/she were to live openly as gay/lesbian/bisexual, then the asylum application should be accepted. In other words, the fear of persecution only needs to be a material reason. However, if the sole reason for discretion is due to family or social pressure not amounting to persecution, then the application is rejected. Some of the participants noted that as people's motives tend to be mixed, applying the test is going to be a very difficult task for decision-makers and judges.

10. Participants recognized that even if LGBTI applicants would conceal their sexual orientation and/or gender identity upon return to the country of origin, there can still be a risk of persecution if they do not follow heterosexual norms and constructs in their daily lives. It is not just about being silent. LGBTI individuals can be singled out and placed at risk due to their non-conformity with gender norms, which identifies a difference between them and other people. This issue was considered in *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, where the UK Upper Tribunal held that single women with no male partner or children are at risk of "being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion".<sup>9</sup> It was noted that non-conformity upon return and whether someone is following heterosexual norms or not are thus key to the assessment as is the analysis of the perception of the persecutors. A link can be made with women in gender-related claims that transgress social mores in a society. The 2002 UNHCR Gender Guidelines *inter alia* note that "in many [sexual orientation] cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex".<sup>10</sup>
11. It was generally agreed that concealment of one's sexual orientation and/or gender identity upon return cannot be imposed or enforced. However, there was no consensus as to whether decision-makers can take into account that upon return a person is likely to be voluntarily "discreet". What happens if a person is deeply private in expressing his or her sexual orientation, be it in the country of origin or where they claim asylum? Some participants argued that being compelled to conceal one's sexual orientation and/or gender identity, in and of itself equals a fundamental breach of one's human rights and constitutes persecution. There is an implied harm as everyone should have the right to live freely and openly

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<sup>8</sup> See in particular, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, para. 82, Lord Rodger.

<sup>9</sup> *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, CG [2011] UKUT 00251(IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e0c3fae2.html>.

<sup>10</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*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 16.

according to their sexual identity. It would then be immaterial to the claim whether the concealment was voluntary or forced. This argument finds support in the Yogyakarta Principles which, while not binding, identify the expression of one's sexual orientation and/or gender identity as a human right.<sup>11</sup>

12. It was also discussed whether being expected to conceal one's sexual orientation/gender identity should be considered as exogenous harm (physical harm) and/or as endogenous harm (mental harm). The consideration of "discretion" as endogenous harm could, however, result in courts and tribunals in practice requiring the attainment of a high threshold of persecution dependent on the individual circumstances of the case. It may also require the applicant to show double persecution i.e. that being compelled to live "discreetly" itself amounts to persecution as well as the persecution which might follow if the applicant would live openly. It could also lead to the need for medical evidence in support of the claim, including psychological reports certifying that the applicant is suffering mental harm as a result of the concealment.
13. Some participants emphasized the need to consider "discretion" in a life span context. In sexual orientation cases, typically, the claimants are young people whose sexuality is still developing. Freed from the concealment required in the country of origin, their sexual orientation may become much more open than on arrival, making "return to discretion" an even greater problem. It may not be reasonable for someone to conceal their sexual orientation and/or gender identity and even less so for the entirety of his or her life.
14. Participants also discussed the cultural relativism that "discretion" type of argumentation often implies. Assessments are not based on the universality of human rights, but accept differences in standards of treatment between the country of refuge and of origin. LGBTI persons are expected to be "adapting to the local environment" and the socio-cultural context of the particular society is taken into account in judging what may be reasonably tolerable upon return there.
15. It was generally agreed that decision-makers and judges need to be cautious against conflating sexual identity with its expression in sexual activity. Discretion-based argumentation tends to reflect a too narrow understanding of sexual orientation and what it means to live openly as LGBTI. It was reiterated that the focus of the assessment should be on the sexual orientation of a person rather than their sexual activity, bearing in mind that one can be gay without being sexually active. Sexual orientation is about who one is and how he or she expresses it. It is not only about sexual activities.
16. It was generally agreed that asylum claims based on sexual orientation and gender identity should be assessed in the same way as other claims, e.g. political claims, for instance, it is not appropriate to request a political activist to be apolitical upon

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<sup>11</sup> Yogyakarta Principles, Principle 19, The Right to Freedom of Opinion and Expression.

return to the country of origin as this would defy the object and purpose of the 1951 Convention.<sup>12</sup>

17. In sum, what is required is a factual assessment of how the applicant may be treated if he or she were to be returned and not a normative assessment. The central question in assessing such claims should be: What would happen if he or she returned and lived openly according to his or her sexual orientation?

### **3. Criminalization of same-sex relations**

18. Criminal laws which prohibit same-sex consensual relations have been found to be both discriminatory and a violation of human rights, including the right to privacy. It is generally well established that such laws have a persecutory character when they prescribe disproportionate punishment and are enforced. Even unenforced criminal laws reflect and influence social and cultural norms which can encourage discriminatory actions, violence and other harm against LGBTI individuals. These laws may also lead to impunity for crimes committed against LGBTI individuals and prevent them from accessing state protection.
19. It was noted that criminalization in the country of origin can impact upon the assessment of international protection needs in a number of ways: a) the assessment of a well-founded fear of being persecuted (or, in the context of subsidiary protection – the risk of suffering serious harm); b) the availability of state protection in the country of origin; c) the application of the concept of “safe country of origin”; and d) the assessment of an internal flight or relocation alternative.<sup>13</sup> While State practice is varied on these issues, most EU Member States do not grant asylum on the basis of criminalization alone and it is required that the relevant legislation is also enforced in practice. In some jurisdictions, the applicant is required to show that he or she has been individually threatened with the law, i.e. the fact that a law in general is enforced is not in itself sufficient to establish a well-founded fear of persecution.
20. Participants discussed whether criminalization and/or criminal sanction alone is sufficient to establish grounds for refugee status, which is a point of contention in many jurisdictions. In other words, should there be a presumption of a well-founded fear of persecution upon return if there are criminal laws against same-sex relations in the country of origin, whether enforced or not?

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<sup>12</sup> More guidance may be received from the Court of Justice of the European Union in the joint cases of C-71/11 and C-99/11. See also UNHCR, *Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, available at: [www.unhcr.org/refworld/docid/4dfb7a082.html](http://www.unhcr.org/refworld/docid/4dfb7a082.html), at 4.3.

<sup>13</sup> 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*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>

21. UNHCR has taken the view that laws criminalizing same-sex conduct *can* be persecutory in themselves, however has not gone so far as to say there is a presumption of persecution in these cases.<sup>14</sup> Where these laws lead to prosecution and imprisonment, they can create an intolerable predicament for an LGBTI person, forcing him or her to lead a life in fear and hiding. There still needs to be an individual and holistic assessment of the claim, including the impact of the laws on the applicant.
22. The 2011 Fleeing Homophobia report<sup>15</sup> goes a step further and recommends that refugee status should be granted to LGBTI individuals originating from countries where same-sex relations or conduct are criminalized, or where general provisions of criminal law are used in order to prosecute people on account of their sexual orientation and gender identity.
23. Article 9(2)b) of the EU Qualification Directive provides that acts of persecution can *inter alia* “take the form of legal, administrative, police and/or measures which are in themselves discriminatory or which are implemented in a discriminatory manner”.<sup>16</sup> However, this must be read in the context of Article 9(1)(a) and (b) of the Directive, i.e. that acts of persecution must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights or be an accumulation of various measures. Article 4(3)(a) of the Directive further indicates that there has to be an analysis of the practice as well and that criminalization alone does not suffice for refugee status. Many participants agreed that criminal legislation cannot be considered in isolation but is one part of a holistic assessment.
24. Participants were generally of the view that a precise examination of what is meant by criminalization is required. Criminalization could refer to recent legislative measures, which are sometimes applied in practice, or old legislative instruments, which are about to be abolished. A number of States have laws on their books, which are meaningless in practice and outdated. It was however also emphasized that even if a law is not enforced at a given point in time, this does not

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<sup>14</sup> UNHCR, *Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity*, 21 November 2008, available at: <http://www.unhcr.org/refworld/docid/48abd5660.html>, paras. 17–18; UNHCR, *Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cff99a42.html>.

<sup>15</sup> COC Netherlands and Vrije University of Amsterdam, *Fleeing Homophobia, Asylum claims related to sexual orientation and gender identity in Europe*, September 2011 available at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/conference-fleeing-homophobia/index.asp>

<sup>16</sup> 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 (EU Qualification Directive). Note: The 2004 Directive has subsequently been replaced with Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

mean that the law does not reflect a continuing policy and that this is material to an asylum claim. Such laws are never redundant as long as they are on the statute books.<sup>17</sup> Some participants further noted that the risk assessment is an individual and not a group-based analysis. In other words, just because many are potentially affected by a law, the existence of that law does not automatically infer a risk to a particular individual.

25. Some participants recognized that if a law is on the books but not enforced then there *may* be no well-founded fear of persecution upon return. However, non-enforcement of criminal laws does not automatically make the country safe. The discriminatory effect of laws on the books even if not enforced cannot be underestimated and may have an impact upon the individual. Cumulatively or separately this can lead to persecution depending on the circumstances of the claim. The legal framework in a given country is only one factor to consider in a particular claim. It was further suggested that decision-makers need to assess if there is an indirect effect on the applicant as a result of this legislation, for example, non-state persecutors may be able to act with impunity. Additionally, in countries where there are no criminal laws concerning same-sex relations, there may be still be protection concerns for LGBTI persons.
26. Courts often take a fact-based approach and examine how the legislation of the country of origin is applied in practice. Participants noted that this can be a challenge as although information is available on most countries' laws, it often lacks details about their implementation. The need for accurate and up-to-date country of origin information on the legislation and practice was emphasised. Country reports need to be taken into account and international documents such as UN General Assembly resolutions to establish societal attitudes towards LGBTI persons in the relevant country (e.g. the UN General Assembly Voting Record on Sexual Orientation Inclusion, December 2010) should be accessed. The problem of gaps in country of origin information was raised particularly for lesbians who may be invisible within a given society.
27. While in principle the applicant has the duty to *present* the relevant facts of his or her case, the duty to *ascertain* and *evaluate* the facts - including country of origin information, is normally shared between the decision-maker and the applicant.<sup>18</sup> When there are laws on the statutes which criminalize same-sex relations it was argued that the burden of proof shifts from the applicant to the examining authorities to show that the laws are not enforced.

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<sup>17</sup> See e.g. *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at: <http://www.unhcr.org/refworld/docid/47fdaf7d.html>, paras. 40–41.

<sup>18</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

28. Participants concluded that it is best to avoid the language of presumption and regard the issue of criminalization as a fact-based enquiry as opposed to a formalistic enquiry. There may indeed be a risk but whether there is a risk must be assessed on the basis of the individual circumstances of the claim.

#### 4. **Credibility**

29. Participants recalled the shift from “discretion” to disbelief in refusal decisions and that first instance decisions more and more question whether a person is LGBTI as claimed. Concerns were expressed that credibility assessments are influenced by stereotypical assumptions of the way in which LGBTI applicants should look or behave. Also, adjudicators often do not have the necessary training.

30. When adjudicating claims based on sexual orientation and gender identity, tribunals and courts, who are the finders of fact, are faced with making factual findings as to whether an individual is LGBTI. It was acknowledged that this is not an easy task and touches upon the difficulties in assessing credibility in such claims. Being gay or lesbian is a matter of a broad spectrum of both identity and behaviour and affects more than an applicant’s life than their physical behaviour alone.

31. Participants noted that one issue to consider is what weight should be accorded to applicant’s self-identification as LGBTI. Often, judges would not accept the assurances of the applicant, or their gay or lesbian partner alone. Some participants were of the view that if the sexual orientation is determinative for the outcome of the case, self-identification alone is not sufficient. Tribunals and courts must make their own assessment of the facts in looking at the consistency and plausibility of the asylum applicant’s account. In a similar way to other claims, credibility assessments in LGBTI claims need to consider both internal and external consistency, plausibility and reasonableness of the assertions..

32. There is no fixed template questionnaire or list of questions which can determine an applicant’s sexual orientation. However, there are common themes which arise in the majority of claims, i.e. difference, stigma, shame and harm (“DSSH”), which can serve as a useful identity checklist in claims made by LGBTI individuals:<sup>19</sup>

- Difference refers to self-recognition or identification by others of when one is not living a heterosexual narrative, i.e. not conforming to how straight people are expected to live their lives, e.g. a man “trapped in a woman’s body” or a woman without a male partner.

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<sup>19</sup> This identity check-list has been developed by S. Chelvan, Barrister, UK. For further information about S. Chelvan, see <http://www.no5.com/areas-of-expertise/immigration-asylum-and-nationality/s-chelvan>.

- Stigma relates to a recognition that close family members, friends or the “majority” disapprove of the applicant’s conduct and/or identity. It also involves a recognition of state/cultural/religious mores/laws which are directed towards LGBTI persons.
  - Shame is another aspect, associated with stigma and isolation through the impact of being the “other” rather than being the “same”.
  - Harm relates to the specific forms of persecution that may be perpetrated upon LGBTI persons, including laws criminalizing same-sex conduct and the impact of these laws on the applicant as well as harm perpetrated by non-state actors such as mob violence and violence/killings in the name of “honor”.
33. In assessing credibility, it was noted that the focus should be on current sexual orientation rather than the past. The process of “coming out” may, depending on the individual, take many years or can sometimes occur over a very short period of time.
34. There was general consensus that offensive questions about the applicant’s sex life as a way to verify his or her sexual orientation should be avoided. It was also generally agreed that sexual identity should not be conflated with sexual activity. However, are there situations where intrusive questions are permissible? Should the questioning focus only around identity or also on conduct? It was recalled that the asylum interview by nature is inquisitive and there are neither uniform questions nor answers, however, that the guiding principle should be the respect for the human dignity of the asylum-seeker. This must always be at the forefront of the interviewer’s mind and applies to other phases of the asylum procedure as well. The focus of questions should mainly be on identity but some questions might be required for surrounding conduct as well. For example, it may sometimes be relevant to ask questions about conduct to verify specific aspects of the claim, e.g. acts of torture. Legal representatives could play an important role here in helping participants prepare for such questions. This could also help address the fact that these claims are often brought in front of the authorities late in procedures e.g. due to feelings of shame, guilt and “coming out” processes.

## **5. Other Procedural Issues**

35. Participants discussed a number of other procedural issues which may impact upon the assessment of claims relating to sexual orientation and gender identity. The need for a safe environment was emphasized. This should include respect for the principle of confidentiality and a private hearing room at the first instance interview as well as on appeal. Drinking water and tissues should be available. Putting up some signs of an LGBTI-friendly environment may also be considered.
36. Participants suggested that the option of choosing the gender of the interpreter and interviewer should be routinely asked. This question should be prefaced by an

explanation as to what will be discussed during the interview, including possible intimate issues. It was further proposed that the interviewer and interpreter do not have to have a particular sexual orientation or gender identity but should have an awareness surrounding the issues related to LGBTI asylum claims. The principle of confidentiality applies to interpreters as well. This can be important to reiterate, as in particular if the interpreter comes from the same country, the applicant might fear disclosure to his or her own community (in the host or home country).

37. The importance of training lawyers, judges and others involved in the interview or decision-making was under-scored. Participants noted that it is necessary to train interpreters on a variety of specific issues related to sexual orientation and gender identity asylum claims, e.g. terminology and attitudes. It was recommended to keep lists of properly trained and sensitized interpreters.

## **6. Summary of discussions**

38. Participants agreed that the issue of “discretion” is a settled issue in so far that decision-makers cannot expect asylum-seekers to behave in a certain way upon return i.e. enforced discretion upon return cannot be expected. The question remains as to whether a human rights approach (i.e. being forced to conceal one’s sexual orientation and/or gender identity is a human rights violation) can co-exist with the test set out in the *HJ and HT* decision (i.e. whether the underlying reason for discretion is a fear of persecution).
39. It was further concluded that whether criminalization of same-sex acts between consenting adults constitutes persecution is a factual matter dependent on the laws as well as how they are implemented in practice. Many participants cautioned against presumptions; however, as a rule of thumb, the more repression in the country of origin the less the claimant has to demonstrate to the asylum authorities.
40. In terms of credibility assessments, participants noted the tension between pure identity-based questions and a line of enquiry related to conduct. The overarching principle should be of preserving human dignity, which must be respected throughout the interview process. It is not only a matter of what questions are asked but also *how* they are asked.
41. It was agreed that procedural safeguards are needed in every asylum claim. Claims relating to sexual orientation and gender identity should be approached in the same way and e.g. allow for a choice of interpreter.