



UNHCR Guidelines – Sexual Orientation

1 The United Nations High Commissioner for Refugees (UNHCR) published on 23 October 2012 a new set of Guidelines on International Protection relating specifically to claims to refugee status based on sexual orientation under the 1951 Convention on the Status of Refugees. These Guidelines supplement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status issued for the guidance of decision takers in countries which are signatories to the 1951 Convention. The Handbook does not have the force of law but in practice is heavily relied on by civil servants and judges taking decisions on asylum applications and appeals.

2 The justification for the new guidelines is that although persecution of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals is not a new phenomenon, the numbers of asylum applications on grounds of persecution on this account have increased and resulted in a greater awareness of the problem in host countries. I quote from paragraph 2 of the Guidelines:

“It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of indecent or immoral behaviour, 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 persecution.”

3 In 2010 the subject of homosexuals and asylum was considered in an important judgment of the Supreme Court, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31, which is discussed in Legal Briefing Paper MW 193. That judgment led to substantial revision of the Home Office guidelines on LGBTI cases, which are discussed in Legal Briefing Paper MW 213. The main question before the Supreme Court was whether decision takers could take into account in considering asylum applications from persons claiming to fear persecution in their countries of origin on account of their sexual orientation the possibility that they might be able to conceal from their fellow citizens the nature of that orientation. The Supreme Court overruled earlier decisions to the contrary and held in unequivocal terms, to quote from the judgment of one of the judges, Lord Hope:

“To compel a homosexual person to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself cannot be suppressed, is to deny him the fundamental right to be who he is. Homosexuals are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight.”

4 On the basis of the Supreme Court's judgment an individual who is to succeed in an asylum claim on the grounds of his sexual orientation must satisfy the decision taker on the following matters:

1. He falls within one or other of the categories covered by LGBTGI, i.e. he really is a homosexual or whatever.
2. If he is returned to his country of origin there is a reasonable degree of likelihood that he will face persecution because of his sexual orientation, from the state or from non-state actors.
3. In the latter case he cannot reasonably expect protection from the state against non-state actors because the state is unwilling or unable to provide it.
4. He is unwilling to live discreetly and conceal his sexual orientation.
5. The political and social system of his country of origin falls short of the degree of openness which the individual would enjoy in the United Kingdom.

5 The new guidelines include a section on concealment of sexual orientation and in paragraph 32 adopt a rather more tentative approach to this than that of the Supreme Court.

"...[T]he question to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the countryand whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences.....[E]ven if applicants may so far have managed to avoid harm through concealment... circumstances may change over time and secrecy may not be an option for the entirety of their lifetime."

6 This seems to me to warrant a more evidence based approach to determining the issue than is required by the Supreme Court's ruling, according to which, to quote the judgment of another of the judges hearing the case, Lord Rodgers, "gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of consequences." The Guidelines prescribe a cautious and sympathetic approach in considering the situation in which the applicant will find himself if returned to his country of origin and do not expressly rule out considering the possibility of maintaining secrecy over an applicant's sexual orientation.

7 A reasonable interpretation of the Supreme Court's ruling is that an applicant will be entitled to a grant of asylum if he can demonstrate that the attitude of the authorities and society in his country of origin is less liberal than that which nowadays prevails in the United Kingdom. (See point 5 in paragraph 4 above.) The application of the new Guidelines would represent a slightly more indulgent regime, but so far as UKBA caseworkers and immigration judges in the UK are concerned, the law they must follow is that laid down by the Supreme Court.

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