



LOOKING THROUGH THE KALEIDOSCOPE

A Guide to Best Practice
in Determining Applications for Refugee
Status Based on Sexual Orientation,
Gender Identity and Intersex Grounds



Kaleidoscope
Australia

K&L GATES

Prepared by
Kaleidoscope Australia Human Rights Foundation
in collaboration with
K&L Gates LLP

Contents

1. Introduction	3
1.1 About Kaleidoscope Human Rights Foundation	3
1.2 What is the purpose of this Guide?	3
1.3 Why is this Guide needed?	3
2. Understanding sexual orientation, gender identity and intersex variation	5
2.1 What is SOGII?	5
2.2 Sexual Orientation	5
2.3 Gender Identity and/or Expression	6
2.4 Intersex people/variations	6
2.5 The right to seek asylum on the basis of SOGII	6
3. Types of persecution faced by people on the basis of SOGII	8
3.1 Introduction	8
3.2 What constitutes persecution?	8
3.3 Who can be a persecutor?	9
3.4 What conduct can amount to persecution?	10
3.5 What is the line between discrimination and persecution?	11
3.6 Mixed motive	12
3.7 Evidence of persecution	12
3.8 Objective and subjective standards	12
3.9 When has persecution been or will be experienced?	14
4. Best practice in determining applications for refugee status on grounds of SOGII	17
4.1 Introduction	17
4.2 Ascertaining credibility	17
4.3 How to deal with applicants who have not disclosed (and may still not be comfortable disclosing) their SOGII	17
4.4 Interviewing the applicant and assessing the information gathered	18
4.5 Type of information decision makers should seek from an applicant	20
4.6 Use of interpreters	21
4.7 Corroborative evidence and documentation	22
4.8 Types of information a decision maker should NOT seek from an applicant to determine an application for refugee status	22
5. Conclusion	25
6. Useful Resources	26
7. Glossary of terms	27

1. Introduction

1.1

About Kaleidoscope Human Rights Foundation?

Kaleidoscope Australia Human Rights Foundation is a not-for-profit organization founded in Australia, in 2013. It is the sister organization of Kaleidoscope Trust in the UK.

Kaleidoscope Australia promotes and protects the human rights of lesbian, gay, bisexual, transgender and intersex people, so as to enable them to live a life of dignity.

1.2

What is the purpose of this Guide?

This Guide has been developed to:

- provide reliable information regarding what constitutes best practice in determining applications for refugee status based on sexual orientation, gender identity or intersex grounds;
- assist governments to properly and fairly assess applications for refugee status made on sexual orientation, gender identity or intersex grounds;
- provide refugee advocates and NGOs with a tool to assist them to effectively represent asylum seekers in their claims.

1.3

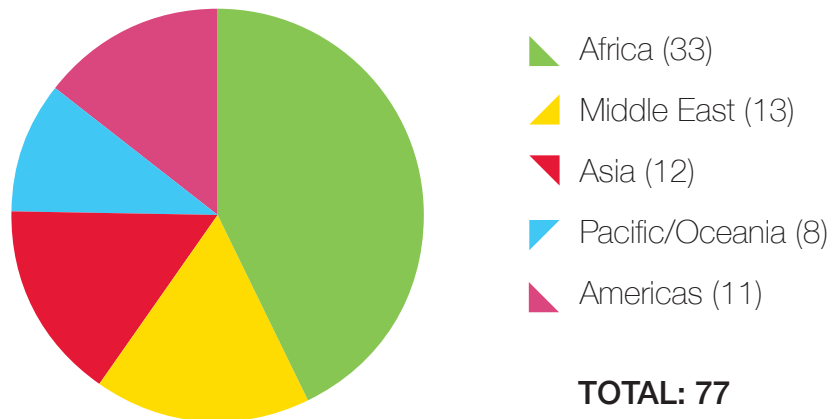
Why is this Guide needed?

The Organization for Refuge, Asylum and Migration (ORAM International) estimates that as of 2012, there were roughly 175 million lesbian, gay, bisexual, transgender and intersex individuals living in persecutory environments. Of this 175 million, ORAM estimates that only 5,000 each year are able to apply for asylum based on their sexual orientation, gender identity or intersex variation. From these asylum claims, ORAM estimates that only 2,500 are successful.

The manner in which individuals may be persecuted on the basis of Sexual Orientation, Gender Identity or Intersex (**SOGII**) grounds may include any of the following (discussed in further detail later in this Guide):

- laws criminalizing same-sex sexual conduct between consenting adults, even if irregularly or rarely enforced;
- rape or sexual assault perpetrated as punishment, 'cure' or because of a person's SOGII;
- forced psychiatric treatment, institutionalization or other efforts to 'cure' a person's SOGII;
- forced heterosexual marriage;
- blackmail by private actors in respect of the person's SOGII;
- repeated physical violence due to the person's SOGII;
- ongoing discrimination and harassment; and
- forced sex-reassignment surgery, sterilization and/or hormone therapy.

States that Criminalize Same-Sex Sexual Conduct



The UNHCR has declared that

"[a]ll people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination."

The grounds on which an individual seeks asylum are often clear, such as where they are escaping conflict or religious or ethnic persecution. Applications for refugee status on the grounds of sexual orientation, gender identity or intersex variation are more complex and, in many cases, the asylum seeker may not openly disclose their sexual orientation, gender identity or intersex variation, or instances of persecution that they have experienced as a consequence of their sexual orientation, gender identity or intersex variation.

In particular, it is important for decision makers to understand, and to have information and evidence put to them to assist them to understand, that sexual orientation, gender identity and intersex variation will manifest themselves in a myriad of different ways across different cultures, and an understanding of how sexual orientation, gender identity and intersex variation is expressed or understood in Western cultures will often not reflect the experience in non-Western cultures. Stereotypes and misunderstandings of SOGI

can have a particularly adverse impact on the assessment of applications by individuals made on SOGI grounds where assumptions are made that prejudice applicants. Such prejudicial assumptions might include, for example, where the credibility of applicants is brought into question where they may have been married or have had children.

In order to get a complete picture of an individual it is important to take into account that their beliefs, values and practices are informed by the culture from which they fled and that these may not be readily recognizable or understandable to a decision maker.

NGOs, refugee advocates and decision makers accordingly have a responsibility to look for indicators that persecution faced by an individual arises from, or includes persecution arising from, that individual's sexual orientation, gender identity or intersex variation.

This Best Practice Guide has been developed by Kaleidoscope Australia Human Rights Foundation to assist these organizations and people in making these assessments.

2. Understanding Sexual Orientation, Gender Identity and Intersex Variation

2.1

What is SOGII?

This section briefly outlines some of the terms likely to be encountered when dealing with refugee claims based on sexual orientation, gender identity or intersex variation. A comprehensive glossary of terms appears in Section 7 of this Guide.

In the context of human rights and refugees, SOGII refers to “**Sexual Orientation, Gender Identity and Intersex**.” Applications for refugee status based on SOGII grounds primarily originate from individuals who fall under, or are perceived to fall under, one or more of the following groups: (1) lesbian; (2) gay; (3) bisexual; (4) transgender; (5) and intersex people.

Not all individuals identify with one of these specific groups, and some individuals identify with more than one of these groups. There are also other groups that may be often identified with people who are considered to have similar issues to LGBTI people because of their SOGII. The understanding and treatment of individuals from these groups varies widely around the world.

What language is used in assessing claims for refugee status is extremely important because an individual’s sexual orientation, gender identity or intersex variation is often a sensitive topic, and using the wrong words may offend a person and/or negatively impact on their participation in the process. Decision makers should use the terms/personal pronouns that the asylum seeker uses for themselves.

2.2

Sexual Orientation

Identification as lesbian, gay and/or bisexual is based on an individual’s sexual orientation, that is, an individual’s physical, romantic and/or emotional attraction to a specific gender or genders. The term “**lesbian**” is used almost exclusively to refer to women who have an attraction to other women. In contrast, the term “**gay**”, although usually used to describe men who have an attraction to other men, can be used as an umbrella term to describe both men and women who are attracted to the same gender.

The term “**homosexual**” is sometimes broadly used to describe either a gay or a lesbian individual’s attraction to the same gender, but this term is now widely regarded as derogatory because it was used to describe a perceived psychiatric disorder for which people were often subjected to harmful “treatments”.

“**Bisexual**” is most often used to describe individuals who have a physical, romantic and/or emotional attraction to both men and women. However, sometimes “bisexual” is used more broadly to refer to individuals who have a physical, romantic and/or emotional attraction to the same gender and to other gender(s), not just to males and females.

2.3

Gender Identity and/or Expression

Unlike sexual orientation, which relates to an individual's feelings toward others, gender identity is about how an individual perceives their own gender. Gender expression refers to an individual's external expressions of gender, for example, through behavior, voice and speech patterns, names and pronouns used to identify oneself, clothing, grooming and social interactions.

It is always best to ask what term an individual prefers. “**Trans or Trans***” has become preferable to transgender and refers to individuals whose gender identity and/or gender expression is not typically associated with their assigned sex at birth. “**Transsexual**” is an older term that is no longer considered appropriate because like the term ‘homosexuality’ was developed by the medical and psychological communities to label it as a disorder.

“**Cross-dressing**” is term predominantly used in the West to describe a form of gender expression for individuals who dress in clothing typically worn by or associated with another gender but who typically have no intent to live full-time as the other gender. The term “cross-dresser” is used in place of the older term “**transvestite**”, which is now regarded as derogatory.

2.4

Intersex people/variation

People born with “**intersex**” variation are those who are born with atypical sex characteristics that do not fit within the stereotypical binary definitions of male or female. Intersex is a spectrum term with at least 30 or 40 intersex variations currently identified.

Intersex does not refer to a gender identity. Intersex people share the same range of sexual orientation and gender identities as non-intersex people.

Intersex variations can be identified prenatally, at birth, during the onset of puberty, when attempting to conceive, or by chance. They include a diverse range of hormonal, anatomic, genetic and chromosomal variations.

Terms such as ‘intersexual’ or ‘intersexuality’ are not favored by the intersex community. Referring to intersex variation as a ‘disorder’ is considered to be derogatory.

2.5

The right to seek asylum on the basis of SOGI

The Universal Declaration of Human Rights (**Declaration**) recognizes fundamental and inalienable rights for all persons. In adopting the Declaration, Member States of the United Nations pledged to promote universal respect for and observance of human rights and freedoms contained in the Declaration, including Article 14(1) of the Declaration:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

The obligations of Member States with respect to persons seeking asylum was codified at international law by the UN Convention on the Status of Refugees (the **Refugee Convention**) and the 1967 Protocol Relating to the Status of Refugees (the **1967 Protocol**). Together, the Refugee Convention and the 1967 Protocol form the foundation of the rights of refugees at international law.

The Convention and Protocol are supplemented by regional and state based regimes. These include European Union Directives, the African Union AU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

Article 1A(2) of the Refugee Convention defines a refugee as a person who:

“owing to 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 the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

This is a uniform definition, broadly accepted and adopted by the international community. It founds the elements on which a person may seek asylum and claim refugee status, and is the definition used throughout this Guide.

Most countries have ratified both the Refugee Convention and the 1967 Protocol. Ratification creates an international obligation to allow persons to seek asylum from persecution within the ratifying country’s jurisdiction.

It is accepted that persons seeking to claim refugee status based on SOGII are capable of being classified as a member of a particular social group for the purposes of the Refugee Convention. The attributes on which a person may seek refugee status are not mutually exclusive; there may be some overlap.

Once it is established that a person holds a protected attribute (e.g. belongs to a particular social group), an applicant must demonstrate that they hold a well-founded fear of persecution based on this attribute.

Persecution is not defined in the Refugee Convention, but is considered to encompass serious human rights violations and cumulative experiences of lesser forms of harm, which would amount to violations of human rights. This is discussed further in Section 3 of this Guide.

3. Types of persecution faced by people on the basis of SOGII

3.1

Introduction

In many parts of the world, individuals experience serious human rights abuses and other forms of persecution because they are LGBTI, or are perceived to be LGBTI. As a result, LGBTI people seek asylum in other countries to avoid persecution, which may include, police abuse, harsh penalties (including death), incarceration, drug or electroshock “treatments”, forced sex-reassignment surgery, and government inaction to prevent anti-gay violence.

3.2

What constitutes persecution?

The most extreme form of persecution of LGBTI individuals occurs when a State legislates for the punishment of individuals for their SOGII. This can be in the form of laws criminalizing same-sex sexual activity between consenting adults, often referred to in criminal codes as sodomy, buggery or acts against the order of nature.

There is no single definition of what constitutes persecution. Recognizing persecution is extremely fact-dependent and fact-specific. The United Nations High Commissioner for Refugees (**UNHCR**) has provided guidance as to what may be perceived as persecution, but currently there is no clear definition.

Persecution is generally taken to mean significant abuse or other mistreatment that is inflicted either directly by the State, or by individuals whom the State cannot or will not control, such as anti-LGBTI vigilante groups.

Persecution is more serious than simple harassment or discrimination, but different kinds of mistreatment might rise to the level of persecution, especially abuse over a long period of time.

Persecution of LGBTI individuals generally falls into three broad categories:

- **legally sanctioned persecution**: statutes, case law, penal codes, regulations or practices that punish individuals based on actual, perceived or attributed same-sex sexual conduct or gender identity, and State performed or sanctioned abuse or punishment;
- **mixed-motive persecution** in which a State persecutes LGBTI individuals for their sexuality, gender identity or intersex variation but claims it is for an unrelated ground; and
- **State complicity, silence or failure to protect individual rights** in the face of persecution of LGBTI individuals by “non-State” actors.

Case 1: Persecution arising from imputed SOGII

The Applicant, Amanfi, sought asylum on the basis of prior abuse by Ghanaian authorities on account of his imputed status as a gay man and alleged torture by a cult. Amanfi was born in Kumansi, Ghana, and was a member of the Ashanti ethnic group. He had a close relationship with his grandfather who was a “chief” of the Ashanti and who explained to him the group’s traditional practices, including cultural rituals. According to what



his grandfather told him, gay men and other individuals who committed sexual acts that were considered taboo would not be suitable to participate in cultural rituals.

A U.S. court held that imputed membership in the particular social group of same-sex attracted peoples can be grounds for an asylum claim. The Court recognized that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not LGBTI but is thought to be by the persecutor.

Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003)

3.3

Who can be a persecutor?

State persecution may be perpetrated through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military.

Individual acts, such as those by “rogue” officers, may still be considered as State persecution, especially where the officer is a member of the police or other agencies that purport to protect people.

Depending on the situation in an asylum seeker’s home State, laws criminalizing same-sex relations or expressions of a person’s gender identity are normally a sign that protection of LGBTI individuals is not available. Where the country of origin maintains such laws, it is unreasonable to expect that an individual first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, absent evidence to the contrary, that the country concerned is unable or unwilling to protect LGBTI applicants. A claimant does not need to show that they approached the authorities for protection before fleeing. Rather, they must establish that the protection was not available, or was unlikely to be available or effective upon return.

Case 2: Enforcement of discriminatory laws



The Applicant was a Pakistani national who applied for refugee status in Austria. The Applicant was born male and had not undergone gender alignment procedures but identified as a woman and had lived as such from a very young age.

The Applicant reported instances of discrimination and abuse by family, police and other members of society. She described being forced to work as a prostitute as she had no other means of employment available. She also described incidents of physical abuse and murder of other transgender persons in Pakistani society.

At first instance, the Applicant’s claim was dismissed. This was based on an analysis of Pakistani laws which showed that although “unnatural acts” were criminal offence this was rarely, if ever, enforced and the government had been taking a number of positive steps towards the protection of transgender persons including the recognition of third gender and rights to inheritance. On appeal however, the court found that the Applicant was subjected to ongoing persecution due to her effectively forced prostitution and inability to receive protection from the police. In granting refugee status to the Applicant, the court found that transgender persons were likely to be subject to social and religious persecution notwithstanding the positive steps of the government. This case highlights the importance of decision makers taking into account the social reality of LGBTI persons in their country of origin, not simply the government’s position.

*Austria Asylum Court, 29 January 2013, E1
432053-1/2013*

Even in countries where persecution on the basis of SOGII is not officially sanctioned, stigmatized individuals are nonetheless vulnerable to the attacks of homophobic or transphobic individuals or groups, including members of police forces and the armed services. In some countries, armed or violent groups, such as paramilitary and rebel groups, as well as criminal gangs and vigilantes, may specifically target individuals because of their SOGII. Because LGBTI people living under such repressive conditions are desperate to escape, they are particularly vulnerable to

human trafficking.

Persecutors may also include family members, neighbors, or the broader community. They may be either directly or indirectly involved in persecutory acts, such as intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence.

Another form of persecution arises in cases where a relevant authority is unwilling or unable to protect a victim, or prosecute a violator, in a case of violence against a person because of their SOGII.

3.4

What conduct can amount to persecution?

Persecution based on SOGII may include:

- murder;
- torture;
- sexual, physical or emotional abuse, serious threat, economic persecution;
- extortion;
- severe discrimination, harassment or ostracization;
- crimes or violence by family members;
- genital mutilation;
- forced or underage marriage, forced pregnancy and/or corrective rape;
- forced institutionalization;
- forced sex-reassignment surgery, sterilization and/or hormone therapy; and
- conversion therapies, including electroshock therapy and drug injection or hormonal therapy.

Physical, psychological and sexual violence, including rape, would generally meet the threshold level required to establish persecution.

Examples of institutionalized persecution, including laws criminalizing same-sex relations, violence, threats and abuse by authorities may include:

- legally sanctioned persecution because of sexual or gender minority status through statutes;
- case law;
- criminal laws, regulations or practices that punish an individual based on actual, perceived or attributed SOGII;
- State performed or sanctioned abuse or disparate punishment, such as whipping, lengthy imprisonment and even the death penalty; and
- State-sponsored forcible hormone therapy and genital normalizing surgeries under the guise of so-called ‘reparative therapies’.

Asylum status will generally not be granted for criminal prosecution as a result of a violation of a fairly administered law. Prosecution may be considered persecution, however, if there is disproportionately severe punishment, or where the punishment is contrary to international human rights standards.

A crime committed against a LGBTI person may not reach the level of persecution, but if the applicant can demonstrate that the crime was motivated by the perpetrator’s hatred or prejudice of LGBTI persons, and police failed to provide protection, it may constitute persecution.

Perpetrators of persecution may not recognize that their conduct is persecutory or may rationalize violence inflicted on individuals expressing their SOGI with the intention of “correcting”, “curing” or “treating” the person.

The proper focus should be on how the applicant would experience the harm, rather than on the mind-set of the perpetrator.

Case 3: Persecution does not require malignant intent

Alla Pitcherskaia, a Russian lesbian, was arrested and imprisoned several times and was forced to undergo electroshock therapy as part of “corrective” treatment for protesting the violence and discrimination that was being directed at gays and lesbians in Russia. The militia threatened her with forced institutionalization and required her to attend therapy sessions. She was prescribed sedative medication which she successfully refused. An ex-girlfriend of hers was institutionalized against her will and was subjected to electric shock treatment and other treatments meant to ‘cure’ her of her sexual orientation.

A U.S. agency denied Alla’s claim, arguing that the Russian authorities did not intend to harm or punish her. A U.S. appeals court reversed the decision, upholding a prior decision that “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”

The court expressed its view of an objective definition of persecution: “*the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.*” It observed that the persecutor’s belief in his own good intentions did not “*make it any less painful to the victim.*”

The Appellate Court ruled that it is not necessary for the persecutor to intend harm in order for unwanted medical or psychological treatment to amount to persecution as long as the victim experiences the treatment as harmful. The proper test was whether or not a reasonable person would find the suffering inflicted as offensive.

Alla Konstantinova Pitcherskaia, v. Immigration and Naturalization Service 118 F.3d 641; 1997 U.S. App. LEXIS 15050; 97 Cal. Daily Op. Service 4844; 97 Daily Journal DAR 7939

Case 4: Recognizing SOGI as giving rise to a membership of a “particular social group”

X, Y and Z were nationals of Sierra Leone, Uganda and Senegal seeking refugee status in the Netherlands on the grounds that they have a well-founded fear of persecution in their countries of origin by reason of their sexual orientation.

Under EU Directive 2004/83, which refers to the Convention Relating to the Status of Refugees, any person who, among other things, has a well founded fear of persecution for reasons of membership of a particular social group may claim refugee status. The Netherlands sought a preliminary ruling from the Court of Justice of the European Union on whether same-sex attractiveness constitutes a “particular social group”, and if so, how authorities should assess whether criminalization of same-sex activities in an applicant’s country of origin amounts to persecution.

The Court held that a person’s sexual orientation is a characteristic so fundamental to their identity that applicants should not be forced to renounce it and as such, the existence of criminal laws targeting same-sex attracted people supports a finding that those persons form a particular social group.

The Court also held that the existence of laws criminalizing consensual same-sex acts does not, in and of itself, constitute persecution. Such laws may constitute persecution if punishable by imprisonment and if that law is applied in practice. Whether it is applied in practice will be up to assessing authorities to decide upon examination of all the relevant facts.

The Court also held that it would not be reasonable to expect an applicant, in order to avoid persecution, to conceal their sexual orientation in their country of origin, or exercise restraint in expressing it, as it would be incompatible with the recognition of a characteristic fundamental to a person’s identity that the persons concerned cannot be required to renounce it.

X, Y, Z v Minister voor Immigratie en Asiel
(Court of Justice of the European Union,
C-199/12 to C-201/12, 7 November 2013)

3.5

What is the line between discrimination and persecution?

Many countries ban marriage between same-sex couples, yet asylum seekers have not been successful in gaining asylum on this ground. Many LGBTI advocates argue that bans on same-sex couples marrying should be viewed as a deprivation of a fundamental human right, which carries collateral negative consequences, such as health, economic and other effects. As prohibitions on same-sex couples marrying continue to be lifted around the world, decision makers should have an open mind to claims by refugees who seek asylum based, at least in part, on their country of origin's prohibition on same-sex couples marrying.

Generally, harassment and discrimination will not be regarded as constituting persecution. Persecution is an extreme concept that differs from general discrimination against minority groups. Persecution requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty. Yet, severe forms of discrimination will amount to persecution in some instances.

Cumulative discrimination that is increasing in severity has a higher chance of being considered persecution. For example, an inability to travel safely within a country and forced expulsion from the country may amount to persecution.

3.6

Mixed motive

Sometimes a State may punish LGBTI individuals based on actual or perceived SOGII under the pretext of another reason. This punishment, though not explicitly characterized as such, may constitute persecution because of the sexual, gender or

intersex minority status of the victim. Decision makers have applied the “mixed motives doctrine” which holds that there can be more than one motivation for persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by an applicant. The effect of this is that a claim for asylum based on persecution that arises under more than one motivation will not fail, provided that at least one of the motivations for the persecution relate to a protected attribute.

3.7

Evidence of persecution

Showing persecution

LGBTI individuals seeking asylum must show “persecution or a well-founded fear of persecution”. Applicants generally are expected to offer both “subjectively genuine” and “objectively reasonable” components as evidence of such persecution.

Demonstrating a subjectively genuine fear

The subjective component requires an applicant to demonstrate through testimony that they have a genuine fear of persecution if they are returned to their home country. This component can be particularly difficult for LGBTI applicants:

- because they may not feel they can disclose information to a government agent, who belongs to a class of persons who is often the source of abuse in the country of origin; and
- in order to demonstrate their fear of persecution, they will have to somehow prove their sexual orientation, gender identity, or intersex variation.

Past persecution creates presumption

Evidence of past persecution creates a presumption of a well-founded fear of future persecution, which must be rebutted if an application for asylum is to be rejected.

3.8

Objective and subjective standards

Objective standard

An applicant will generally be required to objectively demonstrate a reasonable fear of future persecution through credible, direct, and specific evidence. This requirement is often met by producing documentation of country conditions that show a pattern or practice of persecuting LGBTI people.

Satisfying the objective component is a difficult process for many LGBTI applicants, who must raise issues regarding government action or inaction that they have fearfully hidden in the past. Evidence of systematic persecution may exist but may not be readily available to many applicants. In addition, asylum seekers may experience great trauma and conflict because often the only way they can establish a legitimate fear of persecution is by portraying citizens of their own countries, or even members of their own families, as their persecutors.

Subjective standard

In addition to the provision of objective evidence, an applicant is generally also required to demonstrate a genuine subjective fear of persecution. An asylum seeker's candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard.

Many LGBTI individuals may not have lived openly as LGBTI in their country of origin. Applicants seeking protection based on their sexual orientation may not have had any intimate relationships with persons of the same sex. Many suppress their sexual

orientation, gender identity and/or intersex variation to avoid severe consequences of discovery, including the risk of incurring harsh criminal penalties, forced medical intervention, arbitrary house raids, discrimination, societal disapproval, or family violence or exclusion.

That an applicant may be able to avoid persecution by concealing, or being “discreet” about their LGBTI status, or has done so previously, is not a valid reason to deny refugee status.

An asylum seeker who has left their country of origin before “coming out” may still be eligible to pursue a claim of asylum based on a fear of persecution.

The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants have so far managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. In any event, it is not reasonable that a person be expected to live their life in secrecy.

It is also important to recognize that even if LGBTI individuals conceal their LGBTI status; they may still be at risk of exposure and related harm for not following expected social norms (e.g., getting married and having children). The absence of certain expected activities and behavior may identify a difference between them and other people that places them at risk of harm.

Case 5: Proving sexual orientation or gender identity

A, B and C had each applied for asylum in the Netherlands on grounds of fear of persecution in their country of origin due to their sexual orientation. The **first applicant**, after being told his claim was not credible, offered to take part in a “test,” or to perform a same-sex sexual act to prove his sexual orientation — a proposal that was rejected.

The **second applicant**'s statements on his sexual orientation were discredited as “vague, perfunctory and implausible” and lacking in “details about his emotions and his internal awareness of his sexual orientation.”



The **third applicant** only presented his sexual orientation as a basis for persecution in his second application, arguing he could not do so before leaving his country of origin. He also submitted video evidence of same-sex sexual activity he had engaged in. The Dutch decision-maker found the applicant's statement of his sexual orientation was not credible, citing the fact he had not mentioned his sexual orientation in his first application, and also because he could not explain how he became aware of being gay or mention any Dutch organizations working on the rights of LGBTI people.

The Court found that declarations by an applicant as to their sexual orientation are merely starting points in the application process and may require confirmation. However, the methods used by authorities to assess such declarations and other evidence must be consistent with the applicant's human rights. Further, the assessment must be made on an individual basis and take account of the individual situation and personal circumstances of the applicant.

The Court held an applicant's inability to answer questions based on stereotypical notions of being gay cannot constitute a sufficient reason for finding a lack of credibility.

Furthermore, questions concerning details of applicants' sexual practices are contrary to an individual's fundamental rights, particularly the right to respect of privacy and family life.

Finally, allowing evidence such as films of applicants' intimate acts or submission to possible "tests" in order to demonstrate an applicant is gay, even if proposed by an applicant, infringe human dignity.

Finally, the Court held an applicant's declared sexuality does not lack credibility simply because he did not initially rely on that as a ground of persecution.

A, B, C v Staatssecretaris van Veiligheid en Justitie (Court of Justice of the European Union, C-148/13 to C-150/13, 2 December 2014)

3.9

When has persecution been or will be experienced?

Not all LGBTI applicants may have experienced persecution in the past. Past

persecution is not a prerequisite to refugee status; the well-founded nature of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to their country of origin. An applicant does not need to show that the authorities knew about their LGBTI status before they left their home country.

An applicant may be granted asylum based on past persecution alone. If an applicant sufficiently demonstrates past persecution, they should be presumed to have a well-founded fear of persecution. The presumption of a well-founded fear of persecution, however, can be rebutted if sufficient evidence demonstrates that there has been a fundamental change in circumstances or that an applicant could reasonably relocate to another part of the country of origin.

Even without demonstration of a well-founded fear of persecution, an applicant may be granted asylum if there are compelling reasons that the applicant is unwilling or unable to return based on the severity of the past persecution if the applicant has established that there is a reasonable possibility that they may suffer other serious harm.



Case 6: Returning to the place of persecution

The Applicant was an Egyptian national who was living in Austria for study purposes. Although she had taken steps to live as a woman in Egypt, she arrived in Austria with male identity documents. She reported experiencing police assaults and social discrimination due to her gender identity. During her time in Austria she underwent gender reassignment operations, was treated with hormones and then lived as a woman in Austria.

The Applicant sought to have her Egyptian passport reissued with her female identity at the Embassy in Austria, but was told she would need to travel to Egypt to do so. The Applicant submitted evidence of other transgender persons going missing or being subjected to abuse during trips to re-issue passports, and sought asylum on the grounds that she was a member of a social group subject to persecution, being transgender persons in Egypt.



The court accepted that transsexuality in Egyptian society is often regarded as a perversion and sin, and due to this social stigma the Applicant could not reasonably expect police or official protection against attacks by private individuals. The Applicant was granted asylum in Austria.

Austria Asylum Court, 24 February 2011, A4 213316-0/2008

Threats of violence will generally not be sufficient to establish past persecution unless the threats themselves cause significant harm. Threats will be more likely to establish future persecution if the applicant can demonstrate that the group who is making the threats has the will and ability to carry them out.

An applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in their home country of persecuting LGBTI individuals. The applicant must establish that they identify as LGBTI and that fear of persecution upon return is reasonable. Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. An applicant will not have a well-founded fear of persecution if it would be reasonable for them to relocate to another part of their country.



Case 7: Assessing the risk of future persecution

The case involved a claim for asylum by a gay man from Mexico. As an initial matter, the court reiterated its recent decision that “alien homosexuals” constitute a “particular social group.”

The court then held that the applicant’s violent beating by Mexican police in 1994, constituted past persecution because the evidence showed that the police targeted the applicant as he was leaving a gay bar and, thus, the violence was based on his status as a gay male. Because past persecution creates a rebuttable presumption of future persecution, the court then considered the government’s two grounds for rebutting the presumption of future persecution: (1) the possibility of relocation; and

(2) the applicant’s return trips home to Mexico after the 1994 beating.

The court held that the relocation argument was insufficient to rebut the presumption of future persecution, since violence against same-sex attracted people in Mexico was not limited to specific geographic regions. The court also held that the past violence against the applicant raised the presumption that relocation is unreasonable, since the persecution was at the hands of the government.

The court also held that, although evidence of return trips is one factor in determining whether the presumption of future persecution has been rebutted, it has never been enough on its own to rebut a presumption of future persecution.

In light of these factors, the court held that the presumption of future persecution had not been rebutted.

Pena-Torres v. Gonzalez 128 Fed.Appx. 628, 2005 WL 943706 (C.A.9)

Assessing the “well-founded fear of being persecuted” for LGBTI individuals, needs to be fact-based, focusing on both individual and contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant, should be examined.

The “fear” element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the laws being applied to them. Where the country of origin information does not establish whether or not, or the extent, to which the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence that LGBTI persons are being persecuted.



Case 8: What is the chance of future persecution?

The case of Karouni v Gonzales involved a decision to deny the application for asylum of a gay Lebanese man living with AIDS.



Evidence provided in the case demonstrated that the Lebanese government had tried “to curb homosexual conduct through oppressive state action.” The applicant alleged that he was interrogated by armed militia members about being gay and was told by a friend that he had been “outed” to the government. The applicant feared that he would not be able to hide in Lebanon if he returned due to his status as a gay descendant of a prominent Shi’ite landowner. The judge found the applicant to be credible but nevertheless denied his application for asylum for failure to establish both past persecution and a well-founded fear of future persecution.

On appeal against this rejection of the claim, the court stated that “*to the extent that our case-law has been unclear, we affirm that all alien homosexuals are members of a ‘particular social group’.*” Importantly, the court stated that “*the sexual identities [of LGBTI persons] are so fundamental to their human identities that they should not be required to change them.*” Therefore, regardless of whether it was based on being a gay man or committing same-sex acts, the government’s persecution was on account of the applicant’s membership of a “particular social group.”

The court referred to cases which stated that even a 10% chance that an applicant would suffer persecution in the future was enough to establish a well-founded fear of persecution, and held that the evidence demonstrated this 10% chance. The court also noted that the immigration judge had found applicant to be a credible witness and that in asylum cases, no further corroboration is required “[b]ecause asylum cases are inherently difficult to prove.”

The court also held that asylum applicants need not demonstrate the exact motives for their persecution and, instead, persecution is presumed to be on account of a protected ground “*where there appears to be no other logical reason for the persecution at issue.*”

Karouni v. Gonzales 399 F.3d 1163 (9th Cir. 2005)

4. Best practice in determining applications for refugee status on grounds of SOGII

4.1

Introduction

This section is pivotal to assessing claims for asylum based on SOGII. It provides guidance as to the relevant (and irrelevant) considerations for determining whether an applicant satisfies the criteria for eligibility for refugee status.

First and foremost, and regardless of the nature or details of the claim, decision makers should ensure they approach the applicant with sensitivity and respect. It may be useful to make it clear to the applicant the purpose for which the questions are being asked (such as in order to assess the applicant's claim) and encourage the applicant to tell the decision maker if there are any questions the applicant is not comfortable answering. The decision maker may also wish to ask the applicant if they have a preferred term in respect of their SOGII, such as whether they prefer "gay" or "trans" or some other term.

4.2

Ascertaining credibility

In cases where there is no or too little country of origin information on LGBTII issues, a decision maker may need to rely on the applicant's testimony alone. In such a case, the assessment essentially becomes an issue of credibility. The assessment of credibility in such cases must be undertaken in an individualized and sensitive way.

When forming a view about the credibility of an applicant's claim, it is important that decision-makers understand the context of each

refugee claim and are aware that individual narratives may not fit easily within common experiences. Decisions on applications should not be based on stereotypical assumptions or concepts of what it means to be LGBTI. Given the multinational and multicultural context of refugee applications, it is important to recognize that there are no characteristics which universally apply to a particular application grounded on SOGII.

In assessing credibility, a decision maker may look for consistency within the applicant's narrative and examine the applicant's demeanor. Caution should be adopted in placing too much weight on these aspects of an applicant's interview without recognizing that factors such as stress, fear and trauma may significantly impact an applicant's demeanor and their memory and retelling of events.

4.3

How to deal with applicants who have not disclosed (and may still not be comfortable disclosing) their SOGII

In some cases, an applicant may not readily disclose their SOGII immediately during the application process and decision makers may find that an applicant continues to be uncomfortable disclosing their SOGII. This may be the result of the environment from which the applicant comes. An applicant may have felt compelled to conceal their SOGII in order to avoid harm, there may have been a culture of shame and embarrassment surrounding LGBTI identification and it may

have been a culture where the applicant never openly discussed their SOGII. Also, the person may have a history of not trusting ‘authorities’ and be concerned that they may be sent back once they’ve revealed their identity.

In particular, many intersex people will have never met another intersex person, let alone someone who has the same intersex variation. Secrecy and isolation is still the reality for most intersex people. Intersex people are often survivors of trauma.

This reluctance to disclose can have implications for an applicant’s credibility in making a refugee claim based on SOGII, if it leads a decision maker to infer that the applicant is not in fact LGBTI because they did not disclose it or discuss it openly. An applicant’s claim should not be found to lack credibility merely because they did not rely on or raise their SOGII on the first occasion that they were given the opportunity to set out the grounds on which they feared persecution.

NOT to ask, they do not set out questions that ARE appropriate. This best practice guide seeks to address this gap by setting out some illustrations of questions that are appropriate.

4.4

Interviewing the applicant and assessing the information gathered

It is recommended that interviewers use open-ended questioning, to enable the applicant to tell their story without being forced to answer a prescriptive set of questions, which may impede them from doing so.

Questions should be crafted in a non-judgmental manner to enable the applicant to answer without fear of confrontation.

The questions suggested on the following page are informed by the model developed by UK barrister S. Chelvan. Known as the DSSH Model it focuses on difference, stigma, shame, and harm in endeavoring to ascertain the asylum seeker’s story. This model is discussed further in the Hungarian Helsinki Committee’s 2015 Credibility Assessment in Asylum Procedures. While this and other publications provide examples of questions



Appropriate questions:

Difference

- Can you tell me how you describe your sexual orientation, gender identity or intersex variation?
- Do you know how long you have felt this way about your sexual orientation or gender identity? How did you learn about your intersex variation?
- How has this impacted on the way you live your life?
- How are your experiences different from those of your friends, family and communities?

Stigma and Shame

- Have you told anyone about your sexual orientation, gender identity or intersex variation? If so, who? What was their reaction?
- If you haven't told anyone about your sexual orientation, gender identity or intersex variation, why is this?
- Do you think other people know or have made assumptions about your sexual orientation, gender identity or intersex variations? If so, who? What was their reaction?
- Can you recall any situations that led you to believe that you were stigmatized within your community?

Harm

- What makes you think you have been persecuted, or are likely to be persecuted based on your sexual orientation, gender identity or intersex variation?
- If you have been persecuted, or have feared being persecuted, what steps did you take to keep yourself safe? And why did you choose that course of action?
- Why did you leave your country of origin?
- Why do you feel like you cannot now go back? And what is the basis for that belief?



Inappropriate areas of inquiry:

- Do not ask questions based on stereotypes, e.g. their knowledge of purported gay 'icons' such as Madonna or Oscar Wilde.
- Do not ask any questions about the applicant's sexual practices, e.g. sexually explicit questions.
- Do not request or review any evidence depicting sexual activities, e.g. videos or photographs of the applicant engaging in sexual conduct.
- Do not request or review any documentation of 'tests' used to demonstrate an applicant's sexuality, e.g. phallometric testing.

4.5

Type of information decision makers should seek from an applicant

When assessing an application for refugee status, decision makers should seek a range of information from the applicant. The information gathered should be considered as a whole and, as highlighted below, a negative response, or lack of a response to a particular area of questioning should not necessarily be considered as evidence that an applicant is not LGBTI.

Keeping this in mind, eight relevant factors decision makers may wish to explore with applicants are:

(i) Self-identification by the applicant as an LGBTI person

If an applicant self identifies as an LGBTI person, this should be taken as an indication of the applicant's SOGII.

The person may also identify with a culturally or linguistically specific term that signifies their belonging to a sexual or gender minority but does not neatly translate to the terms “lesbian”, “gay”, “bisexual” or “transgender” or “intersex”, for example “fa’afafine” is a term used in Samoa to describe the third gender and “hijra” is a term used to describe a third-gender person in South Asia, in particular India.

However, where an applicant does not readily identify as LGBTI, the decision maker should not, on this basis alone, make a determination against the applicant. There may be a social or cultural background or other reasons for this. For example, an applicant may not view their same-sex relationships as being a matter of identity. What’s more, many asylum seekers may be coming to terms with their sexual orientation, gender identity or intersex variation at the same time as making an asylum claim.

(ii) Self-realization or “coming out”

The concept of “coming out” is largely a Western concept, but may broadly be said to relate to the applicant’s coming to terms with their own SOGII, or the communication of their SOGII to others, or both. Each of these elements is relevant as a person may identify that they are LGBTI for a long time before expressing it to other people. There is no set or standard or universal process of self-realization or development of sexual orientation or gender identity. Accordingly, a decision maker should not make a determination against the applicant simply because an applicant has not communicated their SOGII to others.

Unlike sexual orientation and gender identity, intersex people will typically find out about their intersex variation from their parents or a doctor. The concept of “coming out” is therefore not applicable to intersex people. It is common for intersex variation to be viewed as a personal medical experience, rather than the basis for shared community experience of difference and stigma.

(iii) Differences experienced in childhood and non-conformity

Applicants may have experienced feeling “different” as a child. Such feelings may vary between applicants as the time when a person experiences same-sex attraction may range between middle childhood and later in life. Having no recollection of same-sex attraction in childhood or adolescence is particularly common amongst lesbians. In addition, applicants may have grown up in cultures where their SOGII is shameful or taboo resulting in experiences of disapproval, causing them to feel shame, stigmatization or isolation. Exploration of these feelings and experiences may be helpful in establishing an applicant’s identification as LGBTI.

(iv) Considering, where appropriate, gender transitioning

While undue weight should not be placed on whether a transgender applicant has undergone any medical treatment or other steps in respect of changing their outward appearance to match their gender identity, a discussion of any such steps that have been taken may be useful.

(v) Family relationships, including if the applicant is married to a person of a different gender

An applicant may be married to a person of a different gender or divorced and/or may have children. Such relationships should not be taken as evidence that a person is not LGBTI. If such circumstances raise issues of credibility, it may be appropriate to ask questions surrounding the reasons for the marriage, which could be because the applicant is bisexual, was forced into the marriage or got married as a 'cover,' in an attempt to conform. However, previous marriages may simply be evidence of the applicant discovering their sexual orientation later in life, which is particularly common for lesbians. Thus, an applicant may be able to provide a consistent and reasonable explanation for their marital status.

(vi) Romantic and sexual relationships

Romantic and sexual relationships, including relationships the applicant hopes to have in the future, may form part of their narrative. It is important to understand, however, that lack of romantic or sexual relationships in the applicant's country of origin is not necessarily an indication that they are not LGBTI. It may demonstrate that they have been seeking to avoid harm. Questioning in this area should be approached with sensitivity and focus on relationships generally rather than details of sexual activity. The personal nature of this area of questioning may mean that an applicant will be reluctant to discuss it in an

interview setting and the interviewer should avoid detailed questions about the applicant's sexual behavior.

(vii) Community relationships

It may be useful to discuss the applicant's knowledge of LGBTI contacts, groups and activities in their country of origin and the country of asylum. However, lack of knowledge of these should not be interpreted as an applicant lacking credibility, as it may be the result of the applicant not having been open about their SOGII or other factors. Assuming that an applicant will know of such organizations may be based on stereotypical assumptions, which should not be relied on.

(viii) Religion

It may be useful for a decision maker to explore how an applicant's views the relationship between their religion and their SOGII. In some cases religion may have had a significant impact on an applicant's personal experience, while in other cases it may not. Some applicants may maintain religious practices and decision makers should not conclude that this is inconsistent with the applicant being LGBTI.

Where an applicant's feelings about their SOGII and religion are discussed it should be done in a sensitive and respectful way and decision makers should not tell the applicant that their religion rejects their sexuality or gender identity.

4.6

Use of interpreters

The use of interpreters can impact the assessment of applications for refugee status on grounds of SOGII in several ways.

Interpreters can act as an impediment to disclosure of the applicant's SOGII, particularly where they come from the same ethnic

background as the applicant. Applicants may fear that the information may be passed on to others in their community, or that they will experience the same intolerance expressed in their country of origin.

Interpreters could also be unwilling to accurately translate what the applicants says in an interview. There have been instances of interpreters using abusive language against applicants, or mistranslating their statements. It is also possible that interpreters unfamiliar with LGBTI terminology will be unable to convey the applicant's testimony, such as, where an interpreter at first failed to understand that an applicant was using the word for "sick" to describe himself as gay.

Any requests of applicants regarding the cultural background of their interpreters should be respected so as to avoid fears of disclosure of their SOGII. Interpreters used in applications for refugee status ought to be trained in LGBTI sensitivity and cultural issues so that they are respectful of SOGII applicants and able to understand and convey the terminology used in such applications.

Case 9: Lost in translation

The appellant was a Pakistani citizen who arrived in Australia and applied for a protection visa.

The Refugee Review Tribunal initially considered that the appellant was being deliberately evasive and told the appellant that this could lead to a finding that he was not gay.

The Tribunal accepted the applicant's explanation that he "felt compelled to hide the truth to some extent because the interpreter was also of the same background and this made him extremely uncomfortable". The applicant was then allowed to make written submissions. On the basis of these submissions, the Tribunal accepted that the applicant was gay.

0803755 [2008] RRTA 331 (1 September 2008)

4.7

Corroborative evidence and documentation

An applicant may be in a position to provide documentation such as papers confirming membership of an LGBTI organization or similar. However, in many cases such documentation may not be available (which may be the result of the applicant seeking to avoid harm) and a lack of such evidence should not lead to a conclusion that an applicant was not subjected to persecution.

4.8

Types of information a decision maker should NOT seek from an applicant to determine an application for refugee status

In determining an application for refugee status, there are a number of areas of inquiry, considerations and tests that have historically been used. This section outlines some of those, which a decision maker should avoid on the basis that they are irrelevant, misleading or infringe upon the applicant's rights.

(i) Discretion test and internal relocation

In determining an application for refugee status, it is not a valid reason to deny refugee status on the basis that an applicant could avoid persecution if they were to live 'discreetly' in their country of origin (nor is it relevant if they have done so in the past). If a material reason for living discreetly would be to avoid the persecution that would result from living openly, then a decision maker should not consider the option of living discreetly as a valid reason for rejecting an applicant's claim.

It has been recognized that concealing or suppressing one's SOGII in order to avoid harm may amount to persecution. To require an applicant to pretend that their SOGII does not exist or suppress their identity is to "deny

[them] their fundamental right to be what they are” such as meeting a potential partner, socializing and expressing one’s sexuality or gender identity without fear of harm.

Case 10: Avoiding persecution by being discreet

The appellants were Bangladeshi citizens who arrived in Australia and applied for protection visas. While the Refugee Review Tribunal found that the appellants were gay men, who were a particular social group for the purposes of the Refugee Convention, it found that they were not refugees, as they were not in danger of being persecuted.

This conclusion was based on the fact that the applicants had not suffered any serious harm by reason of being gay while they had lived in Bangladesh, because they had conducted themselves in a “discreet manner” and would continue to do so if they returned.

The High Court of Australia found that the Tribunal was incorrect to assume that it was reasonable for gay men in Bangladesh to conform to the laws of Bangladesh society. The Tribunal should have considered whether the applicants had acted discreetly only because it was not possible to live openly as gay men in Bangladesh and whether they had a real fear of persecution.

The Tribunal was wrong to expect or require that asylum seekers take reasonable steps to avoid persecution, by, for example, living discreetly.

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71

Internal relocation within the country of origin is often not a viable option for an applicant as homophobia and the risk of persecution is often country wide, particularly in cases where same-sex sexual activity is criminalized. Relocation in such cases would mean requiring the applicant to live discreetly, which, as noted above, should not be required of an applicant. While the availability of internal relocation may be considered, decision makers should be aware that in many cases this is not a viable option and it

would accordingly be inappropriate to make a determination against an applicant on the basis that they could internally relocate.

(ii) Medical testing

Medical testing (such as phallometric testing, which purports to measure reactions to sexual stimulus) of an applicant in an attempt to determine their SOGII should never be used. Not only should it not be required but it should not be accepted even if an applicant volunteers to submit to such tests, because they interfere with an applicant’s right to privacy, are an infringement of basic human rights and are unreliable.

Medical testing of this nature fails to account for religious, cultural and emotional factors which may influence the level of arousal or attraction a person feels.

Case 11: Fitting the stereotype

Mr Herrera applied for review of a decision by the Immigration and Refugee Board of Canada that he was not a refugee. One of several reasons given for rejecting the application was that they did not believe Mr Herrera was gay because he did not have an “allure efféminée” or effeminacy.

On appeal it was held that that the Board had demonstrated a reasonable apprehension of bias. It was found that there was no reason to even mention Mr Herrera’s “effeminacy” or lack thereof in its decision, unless it was assumed that a gay man must be effeminate in appearance or behavior. As such, the Board had applied a discredited stereotype to impugn the credibility of Mr Herrera’s claim to be a gay man.

Herrera v Canada (Minister of Citizenship and Immigration) 2005 FC 1233

(iii) Stereotypes and sexual behavior: what is “gay enough”?

As noted above, decision makers should not rely on stereotypical assumptions about what it means to be LGBTI in determining an application for refugee status and should not refuse an application solely on the basis that

an applicant does not fit preconceived notions of how an LGBTI person should appear or act. This includes stereotypes involving sexual behavior, social behavior, choice of dress, mannerisms and other characteristics.

There is no one particular way people who identify as a particular sexual orientation, gender identity or intersex variation should, or do, act. For example, there are no typical:

- ways of speaking or mannerisms;
- style of dress;
- interests e.g. particular types of literature or music; and
- social activities e.g. frequenting gay clubs or participating in LGBTI internet groups.

Intersex people may or may not:

- appear visibly or audibly different from gender norms;
- identify as male or female;
- identify as both, all, between, or neither gender/s;
- connect with an LGBT or LGBTI organization;
- be post-diagnosis or have experienced medical intervention; and
- be self-accepting.

(iv) Other irrelevant considerations or inappropriate inquiries

- **Lack of identification as LGBTI in earlier stages or an application or previous applications.** As discussed above, there may be sound reasons why an applicant may not disclose their SOGII in the early stages of an application

and this should not lead to a conclusion that the applicant's claim lacks credibility.

- **Lack of documentary evidence.** If an applicant is unable to produce documentary evidence (such as photos of a person expressing their gender identity or memberships of LGBTI organizations), this alone should not lead to a conclusion that the applicant's claim lacks credibility. This may be the result of the environment from which the applicant has come where having such evidence could put them at risk of harm.
- **Disbelief that the applicant would engage in "risky" behavior** which may result in persecution. A decision maker should not conclude that an applicant is lying because the assessor finds it difficult to understand why the applicant would act a certain way knowing that it may put them at risk of persecution (such as being openly affectionate with a partner despite knowing that same-sex attractedness is criminalized).

5. Conclusion

Kaleidoscope Australia Human Rights Foundation, in conjunction with K&L Gates, have developed this Guide to assist all those working with LGBTI asylum seekers to achieve best practice when preparing or determining applications for refugee status based on sexual orientation or gender identity.

In many parts of the world the situation for LGBTI persons is worsening. In particular, there are approximately 77 countries that still criminalize consensual same-sex sexual conduct, and many are introducing new offences targeting sexual or gender minorities and/or increasing the harshness of the penalties. LGBTI people are increasingly being persecuted because of their sexual orientation or gender identity in many parts of the world. It has recently been estimated that 4 million gay men are beaten up every year, while 13 million are banned from their family home. And there is evidence that the increasing prominence of Sharī'ah law in certain countries has meant greater risk of persecution for trans persons.

Despite the fact that there has been a global push to better understand sexual orientation and gender identity as legitimate grounds for refugee status, many jurisdictions still fail to understand that LGBTI persons cannot be reduced to sexual practices.

In 2015, we have seen UK representatives claiming that while a lesbian asylum seeker had 'indulged in same-sex activity' a person 'can't be a heterosexual one day and a lesbian the next day'. In Australia we have seen an asylum seeker offering to provide sexually explicit photographs to the Refugee Review Tribunal in order to prove he is gay.

It is unlikely that we will see a reduction in the number of asylum claims based on sexual orientation and gender identity, until such time as we see a decline in homophobia and transphobia.

We trust that this Guide will enable refugee advocates, NGOs, governments and judiciaries to consider such claims accurately, sensitively and with an awareness of cultural nuances surrounding sexual orientation, gender identity and intersex variation. Just as a decision maker cannot assess a claim without correct and up-to-date country of origin information, s/he cannot competently decide a claim without an understanding of LGBTI persons and the specific nature of the persecution they face.

Kaleidoscope Australia Human Rights Foundation is happy to provide training and assistance in implementing this Guide. If you would like to avail yourself of this opportunity, or require further information regarding working with LGBTI asylum seekers, please contact us at: refugee@kaleidoscopeaustralia.com or visit our website at www.kaleidoscopeaustralia.com.

6. Useful Resources

International

1. *Gender-Related Persecution within the context of Article 1A(2) of the Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees* available at: www.unhcr.org/3d58ddef4.html
2. *UNHCR 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 Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN High Commissioner for Refugees, HCR/GIP/12/09, 23 October 2012, available at: www.refworld.org/docid/50348afc2.html
3. *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=48244e602>
4. *Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual*, Volume 2, 2015, Hungarian Helsinki Committee, available at: <http://helsinki.hu/wp-content/uploads/Credibility-Assessment-in-Asylum-Procedures-CREDO-manual.pdf>
5. *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, International Commission of Jurists, 2011, available at: www.icj.org/sogi-casebook-introduction/
6. *Human rights and intersex people*, Council of Europe Commissioner for Human rights, 2015, available at: <http://www.coe.int/t/dg4/lgbt/Documents/HR%20and%20Intersex%20People%20CoE%20Commissioner%20for%20HR.pdf>

Regional

1. *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*, September 2013, UK Lesbian & Gay Immigration Group, available at: www.uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf
2. *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*, December 2011, U.S. Citizenship and Immigration Service, available at: www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf
3. *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, Vrije Universiteit Amsterdam, available at: www.refworld.org/docid/4ebba7852.html
4. *Good Practices Related to LGBTI Asylum Applicants in Europe*, May 2014, ILGA Europe, available at: http://www.ilga-europe.org/sites/default/files/Attachments/good_practices_related_to_lgbti_asylum_applicants_in_europe_jul14_1.pdf
5. *Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim*, Version 5, 11 February 2015, UK Home Office, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404372/EXT_Asylum_Instruction_Sexual_Identity_Issues_in_the_Asylum_claim_v5_20150211.pdf

7. Glossary of Terms

The use of different terms relating to SOGII varies both nationally and internationally. The following glossary explains the terms used in this Guide.

The focus of this glossary is on Western language because it shouldn't be expected that an asylum seeker will necessarily know or identify with sexual orientation, gender identity or intersex terms from their country of origin.

Refugee Convention	The Refugee Convention on the Status of Refugees	Bisexual	Individuals who are physically, romantically and/or emotionally attracted to both men and women
Agender	'Without gender', refers to people who identify as having no gender or being without any gender identity.	CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
AIS	Androgen Insensitivity Syndrome	Cis / Cis-gender	A person who identifies with their birth assigned sex.
Androgyne	A person whose gender identity is not exclusively male or female, and who may or may not have an intersex condition	CJEU	Court of Justice of the European Union
Androgynous	A person who does not exclusively identify as male or female, irrespective of physical sex.	CRC	Convention on the Rights of the Child
Asexual	Individuals who do not feel sexual attraction to others or have a desire for sex. Different from celibate individuals, who choose to abstain from sexual activity.	Come out / coming out	May refer to the process by which one accepts one's own sexuality, gender identity, or status as an intersex person (to "come out" to oneself). May also refer to the process by which one shares one's sexuality, gender identity, or intersex status with others (to "come out" to friends, etc)
Bigender	Individuals whose gender identity and/or expression encompasses both male and female.		

Cross-dresser / cross-dressing	A term predominantly used in the West to describe individuals who wear clothing, make-up and/or accessories not traditionally associated with the sex they were assigned at birth. Often applied to heterosexual men who occasionally wear clothes, make-up and/or accessories typically associated with women.	Gender binary	A system in which sex and gender are only classified into two categories - male and female. This system is considered oppressive by many LGBTI individuals.
Drag king	Women who wear an unusually exaggerated form of male clothing for entertainment.	Gender dysphoria	Previously known as gender identity disorder, this is a medical condition, believed to be of biological origin, which results in a mismatch between the gender a person believes themselves to be and the physical sex of their body.
Drag queen	Men who wear an unusually exaggerated form of female clothing for entertainment.	Gender expression	An individual's external manifestation of gender, e.g., through behavior, voice and speech patterns, names and pronouns used to identify oneself, clothing, grooming and social interactions.
DSD	Disorders of sex development (unfavored term)	Gender identity	An individual's own internal feelings and experiences of gender, which may or may not correspond to the sex that individual was assigned at birth.
FTM / F2M	Female to male, usually refers to a trans person who started as a biological female but present themselves as male.	Gender Queer	Individuals whose gender identity and/or expression fall outside the gender binary of male and female. These individuals may identify their gender somewhere between male or female or entirely outside those categories.
Gay	A term used in some cultural settings to describe males who are attracted to males in a romantic, erotic and/or emotional sense. Not all men who engage in same-sex sexual conduct identify as gay, and as such this label should be used with caution.		

Gender reassignment surgery	A surgical procedure whereby the sex organs of a person are refashioned to that of the gender in which they identify. Also known as sex reassignment surgery or genital reconstructive surgery	IFA	Internal flight or relocation alternative. Refers to the possibility of an individual to relocate to a specific area of the home country where the risk of feared persecution would not be well-founded or where the individual could reasonably be expected to live a normal life.
Hermaphrodite	(Derogatory) An out-of-date and offensive term for an intersex person.	ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association.
Homophobia	The irrational fear or hatred of persons who identify as same-sex attracted, or who engage in behavior or hold beliefs that do not confirm to rigid sex role stereotypes.	Intersex people/ variations	Favoured terms include: intersex, intersex people, intersex variation, intersex trait. People with intersex variations are those who are born with atypical sex characteristics that do not fit within the stereotypical binary definitions of male or female. Intersex is a spectrum term with at least 30 or 40 intersex variations currently identified. Intersex does not refer to a gender identity. Intersex variations can be identified prenatally, at birth, during the onset of puberty, when attempting to conceive, or by chance. They include a diverse range of hormonal, anatomic, genetic and chromosomal variations.
Homosexual	An out-of-date term that is sometimes broadly used to describe either a gay or a lesbian individual's attraction to the same gender. This term should not be used when interviewing or describing a LGBT individual.		
Hormone therapy	The process of hormonally reassigning a person's biochemistry to match their gender identity.		
ICCPR	International Covenant on Civil and Political Rights		
ICESCR	International Covenant on Economic, Social and Cultural Rights		
		Intersex genital mutilation (IGM)	Surgeries and other cosmetic medical treatments used to 'normalize' intersex variation.

In the closet	Describes a person who keeps their sexual orientation or gender identity a secret from some or all people.	Queer	An umbrella term sometimes used to refer to the entire LGBTI community or otherwise someone who feels outside societal norms with respect to SOGII
LGBTI / LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and/or Questioning.	Questioning	The process of exploring and discovering one's own sexual orientation, gender identity, or gender expression.
Lesbian	Term used to describe female-identified people attracted romantically, erotically, and/or emotionally to other female identified people.	Sex	The assignment and classification of individuals as male or female based on their physical anatomy at birth.
MTF / M2F	Male-to-female, usually refers to a trans person who started as a biological male but present themselves as female.	Sexual Orientation	An individual's physical, romantic and/or emotional attraction to a specific gender or genders.
Non-Gendered person	A person whose core identity is neither male nor female.	Social perception	Whether a particular social group for the purposes of determining refugee status shares common characteristics that make it cognizable or sets it apart from society.
Non-Gendered Identity	The identity [of a person] is neither male nor female.		
Pansexual	A person who experiences sexual, romantic, physical, and/or spiritual attraction for members of all gender identities/expressions, not just people who fit into the standard gender binary (i.e. men and women).	SOGII	Sexual Orientation, Gender Identity and Intersex.
PGPs	Acronym for Preferred Gender Pronouns. Refers to the pronouns or set of pronouns that individuals would prefer others use to describe them. These are important when referring to LGBTI individuals whose gender identity and/or expression may fall outside the gender binary of male and female.	Sur place claim	A claim for refugee status that is based on events that happened after the application left the home country.
		Trans or Trans*	This is the preferred umbrella term. Prefix or adjective also used as an abbreviation for transgender or transsexual.

Transgender	Individuals whose gender identity and/or expression is not typically associated with their assigned sex at birth. This is a gender identity, not a sexual orientation.
Transqueer	Former term used to describe genderqueer individuals.
Transsexual	An older term that is no longer considered appropriate because like the term 'homosexuality' it was used by the medical and psychological communities to label it as a disorder.
Transvestite	(Derogatory) A term that has now been replaced with "cross-dresser". Usually refers to a man who dresses up for sexual pleasure and who does not necessarily identify with the gender they dress up as.
UNHCR	The Office of the United Nations High Commissioner for Refugees
Yogyakarta Principles	Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity



Kaleidoscope
Australia

K&L GATES

Prepared by **Kaleidoscope Australia Human Rights Foundation**
in collaboration with **K&L Gates LLP**

Design by Kimberley McCosker