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***In the case of "X" before the Swedish Migration  
Agency***

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**Expert Legal Opinion provided by the  
International Commission of Jurists**

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February 2016

## Expert Legal Opinion in the case of “X” before the Swedish Migration Agency provided by the International Commission of Jurists

### Background on and relevant legal expertise of the International Commission of Jurists

1. In January 2016, the International Commission of Jurists (ICJ) provided the present expert legal opinion to the applicant’s legal counsel in the case of “X” before the Swedish Migration Agency with a view to assisting them in assessing “X”’s asylum claim. The applicant’s counsel filed the present document together with his submissions in the applicant’s case with the Swedish refugee status determination authorities.
2. The ICJ is an international non-governmental organization (NGO) working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems throughout the world and has national sections and affiliated organizations in all regions of the world.<sup>1</sup> The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union.
3. Alone and jointly with other NGOs, the ICJ has intervened in numerous cases before the European Court of Human Rights arising from asylum applications, including of particular relevance to the Swedish authorities’ determination of the present case, *F.G. v. Sweden* (application no. 43611/11);<sup>2</sup> *A.T. v. Sweden* (application no. 78701/14);<sup>3</sup> *O.M. v. Hungary* (application no. 9912/15);<sup>4</sup> and *A.N. v. France* (application no. 12956/15).<sup>5</sup> In addition, the Grand Chamber of the European Court of Human Rights granted the ICJ permission to make written submissions in the case of *M.E. v. Sweden* (application no. 71398/12), in which eventually the Grand Chamber handed down a striking out judgment on 8 April 2015. Previously, in fact, the ICJ, together with other NGOs, had submitted a third-party intervention in *M.E. v. Sweden*, when the Fifth Section of the European Court of Human Rights was determining the case.<sup>6</sup>
4. Furthermore, the ICJ has published two commentaries of relevance to the Swedish authorities’ determination of the present case in connection with the opinion of Advocate General Sharpston<sup>7</sup>

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<sup>1</sup> For additional information, see <http://www.icj.org/commission/>.

<sup>2</sup> See [ICJ and others joint intervention in \*F.G. v. Sweden\*](#) of 10 October 2014.

<sup>3</sup> See [ICJ and others joint intervention in \*A.T. v. Sweden\*](#) of 19 May 2015.

<sup>4</sup> See [ICJ and others joint intervention in \*O.M. v. Hungary\*](#) of 21 October 2015.

<sup>5</sup> See [ICJ’s Third party intervention in the case of \*A.N. v. France\* before the European Court of Human Rights](#) of 8 July 2015.

<sup>6</sup> See ICJ’s statement [European Court of Human Rights’ judgment inconsistent with refugee law](#) of 26 June 2014.

<sup>7</sup> See [Observations by Amnesty International and the International Commission of Jurists on the case \*X, Y and Z v. Minister voor Immigratie, Integratie en Asiel \(C-199/12, C-200/12 and C-201/12\)\* following the Opinion of Advocate General Sharpston of 11 July 2013](#), published on 2 October 2013.

and the judgment of the Court of Justice of the European Union,<sup>8</sup> respectively, in the joint cases of *X, Y and Z v. Minister voor Immigratie en Asiel*. The ICJ has also published some brief observations concerning the case of *A, B and C v. Staatssecretaris van Veiligheid en Justitie*.<sup>9</sup>

5. In addition, in 2014 the ICJ convened two expert roundtables on claims to refugee status based on sexual orientation and/or gender identity.<sup>10</sup> Participants to the said expert roundtables included asylum judges and lawyers, officials from national refugee status determination authorities, the Office of the UN High Commissioner for Refugees and the Office of the UN High Commissioner for Human Rights, asylum academics and staff members from a number of non-governmental organizations.
6. The above-mentioned third-party interventions before the European Court of Human Rights, the aforementioned commentaries and the other publications mentioned above, as well as the contributions from the participants to the said expert roundtables have informed the content of the then forthcoming ICJ's "[Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners' Guide – Practitioners' Guide No. 11](#)", which the organization published in February 2016. This publication is a practitioners' guide to claims to refugee status for reasons of sexual orientation and/or gender identity in the context of the refugee definition in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees.<sup>11</sup>

## Terminology

7. This expert legal opinion uses the concepts of sexual orientation and gender identity (hereafter: SOGI) as described in the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity.<sup>12</sup>
8. This expert legal opinion also adopts the definition of the terms gay and bisexual outlined in the 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 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.<sup>13</sup>

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<sup>8</sup> See [X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel](#), published on 3 June 2014.

<sup>9</sup> See [EU Court's ruling on asylum claims based on sexual orientation](#) of 2 December 2014.

<sup>10</sup> See [ICJ convenes expert roundtable on asylum claims based on sexual orientation, gender identity or expression](#), published on 27 June 2014, and [ICJ convenes second expert roundtable on asylum claims based on sexual orientation and/or gender identity](#), published on 3 October 2014.

<sup>11</sup> [The 1951 Convention Relating to the Status of Refugees](#), 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention or the Convention), as amended by [the Protocol Relating to the Status of Refugees](#), 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: the Protocol or 1967 Protocol).

<sup>12</sup> The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was [The Yogyakarta Principles](#) on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply. The Yogyakarta Principles describe sexual orientation and gender identity, respectively, as follows: "[s]exual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender"; "[g]ender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms". Both UN Treaty Bodies and the Special Procedures of the UN Human Rights Council have referred to the Yogyakarta Principles; see, e.g., the UN Committee against Torture's Concluding Observations, [CAT/C/FIN/CO/5-6](#), 29 June 2011: Finland, para. 24; the Interim report of the Special Rapporteur on torture, [A/68/295](#), 9 August 2013, para. 70.

<sup>13</sup> Relevant for present purposes are the definition of gay man/homosexual man: "Gay is often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be

9. While this expert legal opinion mentions lesbian, gay, bisexual, transgender and intersex (LGBTI) people, it should also be read to refer to other people who face persecution on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics, including those who may identify with other terms.

## Introduction

10. The ICJ understands that the case in the context of which this expert legal opinion is being submitted concerns a *sur place* application for refugee status under the Refugee Convention based on a well-founded fear of persecution for reasons of the applicant's membership of a particular social group, namely one defined by his sexual orientation, be it homosexual or bisexual.

11. Incidentally, there is broad acknowledgment that, however numerous within any given society they might be, gay men<sup>14</sup> and bisexuals<sup>15</sup> constitute 'particular social groups' for the purposes of the refugee definition in Article 1A(2) of the Refugee Convention.<sup>16</sup> Indeed, as the UNHCR SOGI Guidelines note:

"[r]efugee claims based on sexual orientation and/or gender identity are most commonly recognized under the 'membership of a particular social group' ground."<sup>17</sup>

12. In light of the above, this expert legal opinion discusses and focuses on the concept of *sur place* claims to refugee status in European and international refugee law based on a well-founded fear of persecution for reasons of real or imputed SOGI. The content of the present expert legal opinion is largely drawn from the aforementioned, [ICJ's Practitioners' Guide on Refugee Status Claims Based on Sexual Orientation and Gender Identity](#), and, in particular, its final chapter, i.e. "Chapter Eight: *sur place* refugee claims".

13. The UNHCR Handbook provides the following definition of a refugee *sur place*:

"[a] person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee '*sur place*'. "<sup>18</sup>

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used to describe both gay men and women (lesbians)"; and bisexual: "*Bisexual* describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes", see the 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 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees](#), 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines), para. 10.

<sup>14</sup> E.g., [Matter of Toboso-Alfonso](#), United States Board of Immigration Appeals, 12 March 1990; [Refugee Appeal No. 1312/93, Re GJ, No 1312/93](#), New Zealand: Refugee Status Appeals Authority, 30 August 1995; Germany, VG Schleswig-Holstein 21 November 2006, 4 A 244/05; [Arrêt n° 50 967](#), N° 50 967, Belgium: *Conseil du Contentieux des Etrangers*, 9 November 2010; France, *Cour nationale du droit d'asile* (CNDA), 23 décembre 2010, *M. K., n° 08014099, C*, reported in CNDA, *Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile: Contentieux de réfugiés, Année 2010*, February 2012, CNDA, 10 janvier 2011, *M.N., No. 09012710*; and [HJ \(Iran\) and HT \(Cameroon\) v. Secretary of State for the Home Department](#), [2010] UKSC 31, United Kingdom Supreme Court, 7 July 2010.

<sup>15</sup> E.g., [VRAW v Minister for Immigration and Multicultural and indigenous Affairs](#) [2004] FCA 1133, Australia, Federal Court, 3 Sept. 2004; [Decision T98-04159, T98-04159](#), Immigration and Refugee Board of Canada, 13 March 2000; [HJ \(Iran\) and HT \(Cameroon\)](#). However, note that, on occasion, refugee status decision-makers have struggled with the idea that bi-sexuality demonstrates an innate or unchangeable characteristic on the basis that the individual's sexuality is 'fluid'- see Sean Rehaag, [Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada](#), McGill Law Journal, Vol. 53, p. 59, 2008.

<sup>16</sup> The [UNHCR SOGI Guidelines](#), para. 46.

<sup>17</sup> The [UNHCR SOGI Guidelines](#), para. 40.

<sup>18</sup> See the 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](#), Reissued Geneva, December 2011, HCR/1P/4/ENG/REV. 3, (hereafter: the UNHCR Handbook), para. 94.

14. Indeed, the Refugee Convention, by virtue of the requirement within the refugee definition in Article 1A(2) that the individual concerned “is outside the country of his nationality [...] or who, not having a nationality and being outside the country of his former habitual residence”,<sup>19</sup> protects refugees *sur place* on an equal footing with those who cross a border after the risk of being persecuted is already apparent. It ensures that all persons who are compelled to remain outside their country of origin, as they fear persecution on the basis of at least one of the Convention grounds, enjoy equally the benefit of surrogate international protection of refugee law.<sup>20</sup>
15. A person may become a refugee *sur place* in two broad sets of circumstances:
- i) as a result of events occurring in the home country since the applicant’s departure (type 1);<sup>21</sup> or
  - ii) as a result of the applicant’s activities/behaviour in the country of asylum (type 2).<sup>22</sup>

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<sup>19</sup> Refugee Convention, Article 1A(2). Article 1A(2) of the Refugee Convention refers to refugees’ “country of [...] nationality [...] or [...] country of [...] former habitual residence”, in the case of stateless refugees. The drafters of the Refugee Convention defined the phrase ‘country of former habitual residence’ as “the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned”, see the [UNHCR Handbook](#), para. 103. Hereafter, any reference to ‘country of nationality’ or ‘country of origin’ or ‘home country’, unless otherwise indicated, should be read to include also ‘the country of former habitual residence’ in the case of stateless refugees.

<sup>20</sup> Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, p. 75, and in particular, the footnotes therein referring to relevant jurisprudence endorsing this interpretation.

<sup>21</sup> The [UNHCR Handbook](#), para. 95.

<sup>22</sup> The [UNHCR Handbook](#), para. 96.

## Establishing sexual orientation and gender identity

16. Long-held stereotypes have frequently led to inappropriate, intrusive and often abusive questioning by asylum interviewers and refugee status decision-makers and have been used to dismiss asylum claims based on SOGI.
17. Conversely, the recognition that SOGI is not necessarily or simply about sexual practices or proclivities has been a welcome development in this area of the law of refugee status. This has led to an understanding that SOGI and matters flowing from and relevant to SOGI are complex issues that may manifest themselves differently for each individual and require sensitive handling that respects human rights, including, in particular, the right to respect for human dignity, the right to private and family life,<sup>23</sup> and the principle of non-discrimination.

18. As the UNHCR SOGI Guidelines clarify:

"[s]exual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex. Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one's sexual orientation is determined by, *inter alia*, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation. While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person's lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants."<sup>24</sup>

19. Claims to refugee status under the Refugee Convention involving actual or imputed SOGI may include applicants who:

- i) identify as gay, lesbian or bisexual;
- ii) have a SOGI imputed to them regardless of whether they possess that characteristic and whether the persecutor or society involved distinguishes between sexual orientation, gender identity and sex;
- iii) are transgender, including when the transgender applicant identifies as heterosexual but he or she may be perceived as gay or lesbian;
- iv) are 'closeted';
- v) test positive for HIV regardless of their sexual orientation;
- vi) are viewed as 'effeminate' or 'masculine' but identify as heterosexual; and
- vii) are ostracized by society because they are intersex.<sup>25</sup>

20. The UNHCR SOGI Guidelines clarify that:

"[a]scertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualised and sensitive way."<sup>26</sup>

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<sup>23</sup> See, e.g., the Judgment of the Grand Chamber of the Court of Justice of the European Union of 2 December 2014 in the Joined Cases C-148/13 to C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie* (hereafter: *A, B and C*), para. 53. The judgment arose from a Dutch Council of State's request for a preliminary ruling in cases referred to as A, B and C, which, in turn, arose from three applications for asylum in the Netherlands by three men claiming a well-founded fear of persecution in their countries of origin based on their declared same-sex sexual orientation. The Dutch authorities rejected each asylum claim on the basis that each applicant had failed to prove his same-sex sexual orientation.

<sup>24</sup> The [UNHCR SOGI Guidelines](#), para. 9.

<sup>25</sup> U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, Combined Training Course, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, training module, [RAIO Template Rev. 11/16/2011](#), 3.1.1 Possession or Imputed Possession of a Protected Characteristic, p. 15.

<sup>26</sup> The [UNHCR SOGI Guidelines](#), para. 62.

21. Of particular relevance in SOGI-based refugee claims is an understanding that the applicant's testimony may be the only evidence available to establish his or her SOGI. The level of detail and specificity of the applicant's account are relevant not only to establish what has happened to the individual concerned but also, for example, to ascertain whether the individual concerned identifies as LGBTI and, if so, when and how s/he realized this, something that s/he may not have been able to acknowledge whether openly or at all in her or his home country.
22. Emotional trauma, stigma, internalized homophobia, fear and/or mistrust of authorities, feelings of shame, cultural implications, age, level of education, personal awareness and many other factors could lead to a level of inconsistency in the account and/or explain the person's inability to provide detail.<sup>27</sup>

### Current SOGI identity

23. For the purposes of determining a SOGI-based asylum claim under the Refugee Convention, as with any claim under the Convention, the relevant time to assess whether the applicant has a well-founded fear of persecution is the time at which the refugee status determination takes place,<sup>28</sup> which is also when the refugee applicant's SOGI should be determined.
24. Accordingly, in *NR (Jamaica) v. Secretary of State for the Home Department*, the Court of Appeal of England and Wales held that: "[i]t is of course her sexual orientation at the time of the hearing which is important."<sup>29</sup>

### Self-identification

25. The UNHCR SOGI Guidelines advise that:

"[s]elf-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity."<sup>30</sup>

26. However, "what it means to 'be' L, G, B, T or I is contested, and 'being' L, G, B, T or I has different meanings to different people: it may be about identification, or about feelings of attraction, or about acts, or about any combination of these. In addition, in some countries other identities, such as MSM – men having sex with men – are used precisely in an effort to deal with/evade homophobia by not using a gay identity. The terms lesbian, gay, bisexual, trans and intersex may be terms which are completely alien to an asylum seeker who can only associate her or his identity with negative terms to describe sexual or gender identity."<sup>31</sup>
27. In any event, "[s]exual orientation and gender identity are a matter of self identification, not a matter of medicine, psychiatry or psychology",<sup>32</sup> and, in fact, "[s]exuality (or consciousness of sexuality) may alter over time and persons may realise that sexuality at different times".<sup>33</sup>
28. As the UNHCR SOGI Guidelines further advise:

<sup>27</sup> [Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim Version 5.0](#), 11 February 2015, United Kingdom, Home Office, 5.1 Credibility - consideration of the claim, p. 24.

<sup>28</sup> See, *inter alia*, [Chan Yee Kin v. Minister for Immigration and Ethnic Affairs](#); [Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs](#); [Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs](#), Australia: High Court, 12 September 1989, para. 17; [Senathirajah Ravichandran v. Secretary of State for the Home Department](#) [1995] EWCA Civ 16, United Kingdom: Court of Appeal (England and Wales), 11 October 1995, speech of Simon Brown LJ.

<sup>29</sup> *NR (Jamaica) v. Secretary of State for the Home Department*, [2009] EWCA Civ 856, United Kingdom: Court of Appeal (England and Wales), 5 August 2009, para. 24; see, also, [Pires Santana v. Canada \(Citizenship and Immigration\)](#), 2007 FC 519, 15 May 2007.

<sup>30</sup> The [UNHCR SOGI Guidelines](#), para. 63.i.

<sup>31</sup> Vrije Universiteit Amsterdam, Sabine Jansen and Thomas Spijkeboer: [Fleeing Homophobia](#), Asylum Claims Related to Sexual Orientation and Gender Identity in Europe, September 2011, p. 54 (hereafter: *Fleeing Homophobia* report).

<sup>32</sup> [Fleeing Homophobia](#) report, p. 9.

<sup>33</sup> *R (AA) v Secretary of State for the Home Department* [2015] EWHC 888 (Admin), 1 April 2015, the High Court of England and Wales, para. 31.

"[t]he expression 'coming out' can mean both an LGBTI person's coming to terms with his or her own LGBTI identity and/or the individual communicating his or her identity to others [...] Some people know that they are LGBTI for a long time before, for example, they actually pursue relationships with other people, and/or they express their identity openly. Some, for example, may engage in sexual activity (with same-sex and/or other-sex partners) before assigning a clear label to their sexual orientation."<sup>34</sup>

29. Self-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity.<sup>35</sup> In her Opinion in the case of *A, B and C* before the Court of Justice of the European Union, Advocate General Sharpston endorsed the UNHCR's authoritative view that, in the context of assessing asylum claims based on a fear of persecution on grounds of sexual orientation, the applicants' own definition of their sexual orientation should form the starting point.<sup>36</sup>

30. In turn, in its judgment in *A, B and C*, the Court of Justice of the European Union, held that that the applicants' declarations as to their sexual orientation constitute "merely the starting point" in the process of assessment of the facts and circumstances of their claims, and that, depending on the circumstances, such statements with respect to their sexual orientation may require confirmation.<sup>37</sup>

31. The UNHCR SOGI Guidelines also advise that:

"[n]ot all applicants will self-identify with the LGBTI terminology and constructs [...] or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim. For example, bisexuals are often categorized in the adjudication of refugee claims as either gay, lesbian or heterosexual, intersex individuals may not identify as LGBTI at all (they may not see their condition as part of their identity, for example) and men who have sex with men do not always identify as gay. It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and [...] present different aspects of the identity of each person."<sup>38</sup>

32. The ICJ also considers that the *lack* of self-identification should not necessarily be taken as an indicator that the person *does not have* or will *not be perceived as having* a relevant SOGI.

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<sup>34</sup> The [UNHCR SOGI Guidelines](#), para. 63 iii.

<sup>35</sup> The [UNHCR SOGI Guidelines](#), para. 63 i.

<sup>36</sup> [Opinion of Advocate General Sharpston](#), Joined cases C-148, C149 and C-150/13, *A, B and C*, 17 July 2014, para. 40.

<sup>37</sup> *A, B and C*, paras 48-52.

<sup>38</sup> The [UNHCR SOGI Guidelines](#), para. 11.



## Barriers to self-identification

33. As it has long been recognized in the medical community, barriers to self-identification such as shame, stigma, internalized homophobia and other factors can lead to individuals refusing to self-identify their SOGI.<sup>39</sup> Other concomitant elements may also constitute barriers to self-identifications.

34. As the UNHCR SOGI Guidelines advise:

“[t]he social and cultural background of the applicant may affect how the person self-identifies. Some LGB individuals, for example, may harbor deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as LGBTI. This alone should not rule out that the applicant could have a claim based on sexual orientation or gender identity where other indicators are present.”<sup>40</sup>

## Sexual behaviour v. sexual orientation

35. A person’s sexual orientation is not just about her or his sexual conduct or behaviour or a certain proclivity, nor is specific sexual behaviour required for a person to have a particular sexual orientation. Activities to find and attract partners for physical and emotional intimacy, affection and sexual contact may all form part of a person’s sexual orientation.<sup>41</sup>

36. The following cases illustrate those points. In *Shameti v. Canada*,<sup>42</sup> the adjudicator did not believe that the claimant, a homosexual man from Albania, was gay. The Federal Court, however, held that the adjudicator’s belief that “in order for a person to prove his or her homosexuality as the basis for a claim of protection, it is necessary for that person to have engaged in homosexual conduct” was a fundamental error and therefore decided to set aside the adjudicator’s original decision and remit the case for redetermination.

37. In *Kornienko v. Canada*,<sup>43</sup> the Immigration and Refugee Board had rejected the applicant’s claim because it had not believed that claimant, a man from Ukraine, was a homosexual on the basis that he had not had any sexual or romantic encounters in several years. Giving judgment in an application for judicial review of the dismissal of Mr. Kornienko’s refugee claim, the Federal Court underscored that the Board’s belief that “gay men are promiscuous and that anyone who is not sexually active is unlikely to be ‘truly gay’” was a form of stereotyping and constituted a reviewable error; it went to the heart of the Board’s credibility finding and warranted the setting aside of Board’s decision.

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<sup>39</sup> “Fear of potential losses (e.g., family, friends, career, spiritual community) as well as vulnerability to harassment, discrimination, and violence may contribute to an individual’s fear of self-identification as lesbian, gay, or bisexual”, [Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients](#), American Psychological Association, Guideline 3, p. 14.

<sup>40</sup> The [UNHCR SOGI Guidelines](#), para. 63.i.

<sup>41</sup> See, e.g., the Hungarian Helsinki Committee, [Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual, Volume 2](#), 2015, p. 64.

<sup>42</sup> [Shameti v. Canada \(Citizenship and Immigration\)](#), 2008 FC 665, 26 May 2008; 168 ACWS (3d) 603.

<sup>43</sup> [Kornienko v. Canada \(Citizenship and Immigration\)](#), 2012 FC 1419, 4 December 2012.

## Heterosexual relationships, behaviour, etc. v. having an LGBT identity

38. The UNHCR SOGI Guidelines advise that, “an applicant may be married, or divorced and/or have children. These factors by themselves do not mean that the applicant is not LGBTI.”<sup>44</sup>
39. Often lesbian and gay applicants will have had heterosexual relationships in their countries of origin. Such relationships may have produced children. As it is common in some countries for lesbian and gay people to have heterosexual relationships to hide their sexuality or because they have no real ‘choice’, such matters are not determinative of their sexual orientation/identity.
40. In *Leke v. Canada*,<sup>45</sup> for example, the claimant, a homosexual man from Nigeria, had a wife with whom he had two children and was an ordained Christian pastor. He also had relationships with other men. The claimant was caught by his landlord with another man and was beaten. His male partner was arrested. The claimant fled to Canada where he settled in a predominantly gay district of Toronto and joined a community center, which serves members of the LGBTI community in the city. The Immigration and Refugee Board did not find the claimant to be a homosexual on grounds that he had children; it also ignored documentary evidence that it is common for homosexuals to lead double lives in Nigeria in order to conceal their sexual orientation. The Federal Court, giving judgment in an application for judicial review of the Board’s decision, held that the misapplication of facts and the reliance on homosexual stereotypes were errors that warranted the setting aside of the Board’s decision.

## Must there be proof of one’s SOGI at a particular time in life?

41. As the UNHCR SOGI Guidelines advise:

“[w]hile for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person's lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants.”<sup>46</sup>

42. People’s attraction to and relationship with one another -- whether heterosexual, homosexual or bisexual -- may occur at any time during one’s lifetime. In light of this, various judgments in Canada, among other authorities, have correctly criticized refugee status decision-makers for taking the view that most people realize or explore their sexual orientation in their teens or early twenties.

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<sup>44</sup> The [UNHCR SOGI Guidelines](#), para. 63 vi. See also “[s]ome gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children”, para. 10, under heading Gay men.

<sup>45</sup> [Leke v. Canada \(Citizenship and Immigration\)](#) 2007 FC 848, 22 August 2007; 159 ACWS (3d) 866, “[t]he evidence [...] established that the applicant led a double life. He lived an openly normal life in the image of his father as an ordained pastor, with a wife and two young sons on the one hand. All the while however, he was carrying on in secret a series of homosexual relationships in Nigeria until caught in the act. And the applicant testified that he led this double life because of his fears of homophobia in Nigeria and that he fled his country only after he was caught and beaten for having sexual relations with a man”, para. 18. Notwithstanding the evidence that homosexuals in Nigeria are forced to live double lives for fear of the consequences of living openly in same-sex relationships, the Immigration and Refugee Board had found that “it was highly improbable that a homosexual would father two sons”, para. 10. The Federal Court eventually held that: “the Board erred in fact or in law in concluding that the applicant did not establish his sexual orientation and would therefore not be at risk of cruel and unusual treatment or punishment should he return to Nigeria”, para. 34. See, also, [Kailiki Eringo v. Canada \(Citizenship and Immigration\)](#) 2006 FC 1488, 13 December 2006; 157 ACWS (3d) 813, where the Federal Court held that: “[t]he applicant’s testimony regarding his situation is entirely consistent with the documentary evidence demonstrating that homosexuals must hide their situation, often by marrying, to avoid persecution in Kenya”, para. 12.

<sup>46</sup> The [UNHCR SOGI Guidelines](#), para. 9. See also [Application No. 76175](#), No. 76175, New Zealand: Refugee Status Appeals Authority, 30 April 2008, para. 92.

43. In *Dosmakova v. Canada*,<sup>47</sup> the claimant, a fifty-six-year-old woman from Kazakhstan, began an affair with another woman while being married to a man. She feared reprisal from the negative attitudes towards homosexuality and the law against such relationships. The adjudicator had found it implausible that the claimant was a lesbian as “most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties...” The Federal Court however ruled that implausibility findings must not be made on the basis of stereotypical attitudes.

44. Adolescence and early adulthood have also often been invoked to reject an applicant’s claimed SOGI on the basis that young people’s sexuality is not immutable and that same-sex relationships early on in life can be part and parcel of a transient phase. In an Australian case the court commented:

“[t]he Tribunal accepts that the Applicant may have enjoyed sexual play with other males when he was a teenager... However, the Tribunal is not prepared to accept on the evidence before it that this was anything but a transient, youthful phase.”<sup>48</sup>

45. It is equally possible that people who may have ‘experimented’ in childhood are in fact bisexual or went on to suppress their SOGI owing to societal pressure and/or feelings of shame or stigma.

### Is sexual orientation innate or fixed very early in life?

46. The view that homosexuality is by its nature “innate” is neither verifiable nor quantifiable. In fact, across a wide range of scientific disciplines, including psychology and in the social science fields, there is no consensus that sexual orientation is the exclusive product of social conditions or, conversely, that it is innate or fixed very early in life.<sup>49</sup>

47. In *Lipdjio v. Canada*,<sup>50</sup> the claimant, a woman from Cameroon, had been raped at age 17 and stated that this trauma led to her lesbian sexual orientation. The Immigration and Refugee Board had not believed that the claimant was a lesbian because she had discovered her sexual orientation following a sexual assault, rather than admitting it was innate. The Federal Court, however, pointed out that the Board’s conclusion was neither verifiable nor quantifiable. The Federal Court held that the Board erred when it stated that it had specialized knowledge that: “homosexuality is innate.” It concluded that the Board’s position on the innate nature of homosexuality directly affected the entire assessment of the claimant’s credibility and therefore her claim, and thus could not stand.

### Bisexuality v. immutability

48. Bisexual refugee applicants have experienced specific difficulties establishing their sexual identity/orientation as an innate and immutable characteristic for the purposes of Article 1A(2) of the Refugee Convention due to asylum interviewers’ and refugee status decision-makers’ often stereotypical, exclusively binary understanding of sexual orientation as either heterosexual or homosexual.<sup>51</sup>

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<sup>47</sup> [Dusmakova v. Canada \(Citizenship and Immigration\)](#) 2007 FC 1357, 21 December 2007; 168 ACWS 93d) 367, the Federal Court held that the Immigration and Refugee Board’s finding that “most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties” (para. 11) had been made on the “basis of stereotypical attitudes or projected behavior that is unsupported by the evidence” (para. 12) and was patently unreasonable (para. 13).

<sup>48</sup> RRTA No. 5/50659 [2005] RRTA 207, 17 May 2005, cited in Phil C.W. Chan, *Protection of Sexual Minorities Since Stonewall: Progress and Stalemate in Developed and Developing Countries*, Routledge, Sep 13, 2013, p. 294.

<sup>49</sup> There is no consensus among scientists about the exact reasons that an individual develops a particular sexual orientation. See, the American Psychological Association, [Sexual Orientation & Homosexuality Answers to Your Questions For a Better Understanding](#).

<sup>50</sup> [Lipdjio v. Canada \(Citizenship and Immigration\)](#), 2011 FC 28, 12 January 2011.

<sup>51</sup> In [Matter of Acosta](#), A-24159781, United States Board of Immigration Appeals, 1 March 1985, the US Board of Immigration Appeals stated that a particular social group for the purposes of the Refugee Convention was one distinguished by: “an immutable characteristic ... [a characteristic] that either is beyond the power of an

49. It should also be noted that, on occasion, refugee status decision-makers have struggled with the idea that bisexuality can be an immutable characteristic on the basis that the concerned individual's sexual orientation is in fact 'flexible and fluid'.<sup>52</sup> With respect to these claims, therefore, it is more apposite to focus on the evidence about the bisexual applicant's well-founded fear of persecution on the grounds of "traditional gender roles and compulsory heterosexuality", rather than concentrating on the refugee claimant's sexual identity.<sup>53</sup>

### Sur place SOGI-based refugee claims

50. The following is a non-exhaustive list of circumstances that may give rise to an entitlement to refugee status recognition in the context of *sur place* claims based on real or imputed SOGI:

- i) a change of circumstances in the home country -- through, for example, the introduction of persecutory measures -- such that the refugee applicant, on return, would now have a well-founded fear of being persecuted on account of SOGI (type 1);<sup>54</sup>
- ii) the intensification of a pre-existing situation in the home country.<sup>55</sup> In Nigeria and Uganda, for example, the situation has significantly worsened for LGBTI individuals over the last few years such that, while LGBTI people may not previously have qualified for refugee status on grounds of their real or imputed SOGI, they may now do so (type 1);<sup>56</sup>

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individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed."

<sup>52</sup> The [UNHCR SOGI Guidelines](#) advise that, "[b]isexuality is a unique identity, which requires an examination in its own right. In some countries persecution may be directed expressly at gay or lesbian conduct, but nevertheless encompass acts [against] individuals who identify as bisexual. Bisexuals often describe their sexual orientation as 'fluid' or 'flexible'", para. 10, under the heading: Bisexual.

<sup>53</sup> See, Sean Rehaag, [Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada](#), McGill Law Journal, Vol. 53, p. 59, 2008.

<sup>54</sup> For example, in January 2011 Malawi amended S137 of the Penal Code (gross indecency law) to extend its potential reach to criminalize lesbian women, see the Human Dignity Trust, [Criminalisation of Homosexuality](#), Malawi.

<sup>55</sup> On this point, see, for example, Lord Hope's speech in [HJ \(Iran\) v Secretary of State for the Home Department](#), "... More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years' imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they had committed a crime against the country's culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief [...] The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time..... the problem ... seems likely to grow and to remain with us for many years. **In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries.** It is crucially important that they are provided with the protection that they are entitled to under the Convention...", at paras 2-3, (**emphasis added**).

<sup>56</sup> In a backlash that galvanized opposition against a more visible and outspoken LGBT community, adding to the already existing criminalization of consensual same-sex activity in private, same-sex marriage was made a crime in Nigeria in January 2014 when President Goodluck Jonathan signed the Same Sex Marriage (Prohibition) Bill into law. In February 2014 Uganda introduced the Anti-Homosexuality Act, 2014, which, among other things, made it a criminal offence for people to discuss and be open about their sexuality; the Act was in force between 24 February and 1 August 2014, when the Constitutional Court of Uganda declared the Act invalid, as Parliament had adopted it without the required quorum (see, Constitutional Court (Uganda), [Oloka-Onyango & 9 Ors v Attorney General](#), [2014] UGCC 14, Constitutional Petition No. 8 of 2014 (1 August 2014)). For more information, see the ICJ's statement [Nigeria and Uganda: new laws herald further persecution based on sexual orientation and gender identity](#), issued on 27 February 2014, as well as the [ICJ's submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of Uganda's initial periodic report](#), issued on 12 May 2015.

- iii) the individual's own actions abroad may cause him or her to be at risk. For example, if the person has become an activist for LGBTI rights and this has come to the attention of the authorities in the home country (type 2); or
- iv) given the freedom to do so, the applicant may have developed an understanding of her or his own sexuality and/or gender identity or begun to express it in such a way that would give rise to a real risk persecutory harm if returned (type 2).

51. The UNHCR SOGI Guidelines further clarify the relevance of *sur place* claims to refugee claims based on SOGI as follows:

"[a] *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure. *Sur place* claims may also arise due to changes in the personal identity or gender expression of the applicant after his or her arrival in the country of asylum. It should be noted that some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*. Many such claims arise where an LGBTI individual engages in political activism or media work or their sexual orientation is exposed by someone else."<sup>57</sup>

52. In light of the above, the ICJ emphasizes that *sur place* refugee claims may have particular resonance in the context of SOGI-based refugee claims where applicants from very repressive societies may have been subjected to powerful social constraints and experienced internalized homophobia as a result. Equally, *sur place* claims may be particularly relevant in SOGI-based refugee claims when the *sur place* applicants may have arrived in the country of asylum as children, and/or have developed an awareness of their SOGI only after departure from their home country.

53. Relevant case-law under the Refugee Convention broadly accepts and indeed confirms that a person may become a refugee *sur place*.<sup>58</sup> For example, in *Kyambadde v Canada*,<sup>59</sup> the Federal Court of Canada defined a refugee *sur place* as a person who is not a refugee when he left his country of origin but becomes a refugee at a later date, which can arise from changes within his country or due to an action of the individual while outside his country of origin.<sup>60</sup>

54. Furthermore, in respect of political cases it has long been accepted that *sur place* refugee claims can and do arise. In the context of assessing whether such claims are well-founded, the UNHCR's advice is as follows:

"[a]n applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political

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<sup>57</sup> See the [UNHCR SOGI Guidelines](#), para. 57, footnotes in original omitted.

<sup>58</sup> See, e.g., the [UNHCR Handbook](#), paras 94-6; [recast Qualification Directive](#), Article 5; Interpretation of the Convention Refugee Definition in Case Law, Immigration and Refugee Board of Canada, [5.6. SUR PLACE CLAIMS AND WELL-FOUNDED FEAR; \*Asfaw v. Canada \(Minister of Citizenship and Immigration\)\*](#) (F.C.T.D., no. IMM-5552-99), July 18, 2000, para. 4.

<sup>59</sup> [Kyambadde v Canada \(Minister of Citizenship and Immigration\)](#), 2008 FC 1307, 337 FTR 93, November 24, 2008, *inter alia*, para. 15.

<sup>60</sup> The claim concerned a homosexual man from Uganda, who, among other things, in application for judicial review to the Federal Court submitted that a *sur place* refugee claim should have been considered since he was a gay activist in Canada and he would be at risk if forced to return to Uganda where homosexuals are vilified and sexual rights activists are subject to harassment.

dispositions would have to face if he returned. This applies particularly to the so called refugee 'sur place'.<sup>61</sup>

55. Similar considerations apply by analogy in SOGI-based refugee claims.<sup>62</sup> However, the ICJ is aware that issues relating to post-arrival activities may give rise to particular challenges in the context of asylum claims on SOGI grounds. The matters raised under the headings below seek to highlight such potential challenges and suggest ways of addressing them.

### Creation of risk by the applicant

56. Where refugee applicants may have previously been 'safe' in their home country, their own actions in the host country could lead to a situation where they would face a real risk of being persecuted on return. For LGBTI refugee applicants such circumstances could include, for example, a realization or development of their SOGI, an unwillingness to remain closeted or LGBTI activism.

57. In this context, the UNHCR has made it clear that its view is that:

"the 'sur place' analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision. Rather, as in every case, what is required is that the elements of the refugee definition are in fact fulfilled. The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection is unavailable to persons whose claims for asylum are the result of actions abroad."<sup>63</sup>

### A good faith requirement?

58. In certain cases, it may well be accepted that the *sur place* refugee applicant has engaged in same-sex conduct or political activism relevant to SOGI but the refugee status decision-maker may find that such activity or conduct was undertaken in "bad faith" and reject the claim on that basis.<sup>64</sup>

59. Both Australia<sup>65</sup> and New Zealand<sup>66</sup> have a 'bad faith' statutory exclusion for *sur place* refugee claims in their domestic laws. In contrast, jurisprudence in the UK has explicitly rejected the requirement of good faith.<sup>67</sup>

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<sup>61</sup> The [UNHCR Handbook](#), para. 83.

<sup>62</sup> The [UNHCR SOGI Guidelines](#), para. 57.

<sup>63</sup> See, for example, [UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted \(COM\(2009\)551, 21 October 2009\)](#), July 2010, p. 16

<sup>64</sup> See, for example, [R \(AA\) v Secretary of State for the Home Department](#) [2015] EWHC 888 (Admin) 1 April 2015, concerning a Nigerian woman and a LGBT activist who claimed asylum in the UK, where the High Court of England and Wales reviewed the First-tier Tribunal's findings that the applicant had a history of deception and deceit and concluded that her lesbian sexuality was not genuine and had been fabricated in order to claim asylum. The High Court found that the applicant's same-sex relationships and her adoption of lesbian customs and dress were purely part of the fabrication to gain refugee status, thus she was not a member of a 'particular social group' entitled to protection. However, the Court failed to provide any reasons for this finding. Moreover, even if it were true that the applicant herself was not a lesbian, and that she had simply "fabricated" her lesbian sexuality by having sex with women when she was in fact heterosexual, the Court did not give any consideration as to whether others may in any event perceive her as a lesbian woman (NB: permission to appeal to the Court of Appeal has been granted).

<sup>65</sup> Migration Act 1958 section 91R(3)(as amended); however, note that the Courts have mitigated the effect of this section, see e.g. [SZJZN v Minister for Immigration and Citizenship](#) [2008] FCA 519, 18 April 2008.

<sup>66</sup> Immigration Act 2009 section 134(3).

<sup>67</sup> [Danian v Secretary of State for the Home Department](#) [1999] EWCA Civ 3000, 28 October 1999, where Brooks LJ stated: "I do not accept the Tribunal's conclusion that a refugee *sur place* who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may

60. As a matter of principle, there is nothing in the Refugee Convention itself justifying exclusion of a person from refugee status on these grounds.<sup>68</sup> The exclusion clauses in Article 1F of the Refugee Convention, enumerating the circumstances in which people are excluded from the Convention's protection,<sup>69</sup> notwithstanding the fact that they would otherwise fulfill all the relevant requirements of Article 1A(2), do not include bad faith.<sup>70</sup>
61. Often, however, when *sur place* refugee applicants are found to have acted in 'bad faith' (e.g. in cases where it is held that the individuals concerned have 'manufactured' their SOGI for the purposes of claiming asylum), refugee status decision-makers dismiss these claims on credibility grounds or because of a failure to establish the fear's well-foundedness on the basis that on return the agents of persecution would know that the applicants' LGBT identity had been 'fabricated' for self-serving purposes.
62. However, the ICJ emphasizes that even in cases where refugee claimants may have actually lied about their SOGI and/or otherwise have acted in 'bad faith', the ultimate question remains the same, namely, whether the individuals concerned would in any event be at risk on return owing to the persecutor's perception of their SOGI.<sup>71</sup> Furthermore, once an applicant has engaged in 'bad faith' activities and these give rise to a real risk of serious harm, she or he is unlikely not to possess the relevant subjective fear even if her or his original intention in carrying out the said

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take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered"; see also, [YB \(Eritrea\) v Secretary of State for the Home Department](#) [2008] EWCA Civ 360, 15 April 2008.

<sup>68</sup> See also the UNHCR's position mentioned above that, "the '*sur place*' analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision [...]. The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances," [UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted \(COM\(2009\)551\)](#), p. 16.

<sup>69</sup> Article 1F of the Refugee Convention reads as follows: "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations." Furthermore, UNHCR's view is that, "[t]he exclusion clauses in the 1951 Convention are exhaustive", see [UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#), HCR/GIP/03/05, 4 September 2003 para. 3.

<sup>70</sup> "Article 1 sets out the well-known definition of 'refugee' [...]. It then mentions the cases in which the Convention is not to apply at all (Articles 1D-F), for example in the case of a person who has committed a crime against humanity (Article 1F(a)). There is no reference in Article 1 to a person who has acted in bad faith in relation to his asylum claim", per Brooks LJ, [Danian v Secretary of State for the Home Department](#) [1999] EWCA Civ 3000, 28 October 1999.

<sup>71</sup> See, e.g., [Mostafa Ejtehadian v. Canada \(Minister of Citizenship and Immigration\)](#) [2007] FC 158, 12 February 2007, where the Canadian Federal Court held that, "[t]he IRB's [Immigration and Refugee Board] articulation of the test in a *sur-place* claim is incorrect. In a refugee *sur-place* claim, credible evidence of a claimant's activities while in Canada that are likely to substantiate any potential harm upon return must be expressly considered by the IRB even if the motivation behind the activities is non-genuine: *Mbokoso v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1806 (QL). The IRB's negative decision is based on a finding that the Applicant's conversion is not genuine, and 'nothing more than an alternative means to remain in Canada and claim refugee status.' The IRB accepted that the Applicant had converted and that he was even ordained as a priest in the Mormon faith. The IRB also accepted the documentary evidence to the effect that apostates are persecuted in Iran. In assessing the Applicant's risks of return, in the context of a *sur-place* claim, it is necessary to consider the credible evidence of his activities while in Canada, independently from his motives for conversion. Even if the Applicant's motives for conversion are not genuine, as found by the IRB here, the consequential imputation of apostasy to the Applicant by the authorities in Iran may nonetheless be sufficient to bring him within the scope of the convention definition. See *Ghasemian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266, at paragraphs 21-23, and *Ngongo c. Canada (M.C.I.)*, [1999] A.C. F. No 1627 (C.F.) (QL)", para. 11.

activities, etc. may have not been genuine. In such cases, the ICJ's advice is to concentrate on the evidence about the risk the applicant faces on return.

63. As an aside, with regard to the risk of manipulation, it is important to recognize that, as observed by Justice French in the Full Federal Court of Australia,

"[t]he solution to the difficulties generated by abuse of the system by applicants [does] not lie ... in propounding some broad principle of abuse of the system or attempt to pervert the course of justice in order to justify a breach of the requesting country's international obligations".<sup>72</sup>

### Subsequent, i.e. repeat, claims

64. In the EU, Article 5(3) of the recast Qualification Directive provides:

"[w]ithout prejudice to the Geneva Convention, Member States may determine that an applicant who files **a subsequent application** shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin."<sup>73</sup>

65. The ICJ notes that this provision, which the UNHCR has strongly criticized,<sup>74</sup> applies only in respect of subsequent asylum claims and therefore does not apply to a person who is or has been present on the territory in another capacity (such as student, visitor, business person).

66. In asylum cases involving SOGI matters, Article 5(3) of the recast Qualification Directive must also be read consistently with case-law of the Court of Justice of the European Union noting that,

"having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset."<sup>75</sup>

67. Therefore, claims involving SOGI where refugee applicants have delayed disclosing the SOGI basis of their claim should not be rejected solely on the grounds of SOGI only being disclosed in a subsequent asylum claim.

68. *A fortiori*, this is true for asylum applicants who first applied for international protection prior to entering adolescence, "a period characterized by rapid physical, cognitive and social changes,

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<sup>72</sup> *Minister for Immigration and Multicultural Affairs v. Mohammed*, (2000) 98 FCR 405 (Aus. FCC, 5 May 2000), at 417 [34], per French J. Cited at Hathaway and Foster, p. 80.

<sup>73</sup> Article 5(3), [recast Qualification Directive](#), **emphasis added**.

<sup>74</sup> UNHCR's Comment on article 5(3) is that "[t]here may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of 'manufacturing' an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article 4(3)(d) of the Directive. In UNHCR's view, such an analysis does not require an assessment of whether the asylum-seeker acted in 'bad faith' but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase 'without prejudice to the Geneva Convention' in Article 5(3) would therefore require such an approach", see [UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted](#) (COM (2009) 551, 21 October 2009), 29 July 2010, page 17.

<sup>75</sup> Judgment of the Court (Grand Chamber) of 2 December 2014, *A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Vreliqheid en Justitie*, para. 69. NB both A's and C's refugee claims involved second (i.e. subsequent) asylum applications.



including sexual and reproductive maturation”, whose challenges include “developing an individual identity and dealing with one’s sexuality”.<sup>76</sup> In this regard, “coming out”, i.e. discovering, acknowledging and revealing one’s lesbian, gay or bisexual orientation, is a process that may involve several phases. Vivienne Cass’s oft-cited landmark article on the subject, presenting a theoretical psychological model for homosexual identity formation, defines six stages.<sup>77</sup> While Cass’s model has been criticized by other scholars, among other reasons for being rooted in the assumption that gay persons come to their first acknowledgment of same-sex attraction with a negative predisposition towards being gay and then more slowly come to accept their sexuality, most psychological models also describe different stages, which take place over a (shorter or longer) period of time.<sup>78</sup>

69. In the context subsequent refugee claims *sur place* based on SOGI, however, it is important for applicants to clarify the reasons why they did not raise their SOGI during their first claim. A typical explanation may be that the individual concerned arrived in the country of asylum as a minor where s/he had not yet developed any awareness in respect of SOGI.

### Delay in disclosing one’s SOGI

70. *Sur place* refugee claims are often refused on the grounds of delay in claiming asylum. The judgment of the Court of Justice of the European Union in *A, B and C* mentioned above is also relevant with respect to the issue of delay as it concerns, *inter alia*, the issue of delay in the context of SOGI-based claims.

71. Adverse judgements should not generally be drawn from someone not having declared their SOGI at the screening phase or in the early stages of their asylum interview.<sup>79</sup>

72. In an application for an injunction relating to a bisexual refugee applicant who had failed to claim asylum for a period of seven years, the High Court of England and Wales recognized that, while there were many instances of evidence that might reasonably have been expected, the medical evidence dealt with torture and gave an explanation for the late disclosure:

“...Dr Cohen also provided an explanation for the fact that somebody who had been through such an experience would not mention it for the length of time that the claimant had remained silent about it”.<sup>80</sup>

73. Where there has been a delay in claiming asylum or raising SOGI in the claim, the reasons for this should be explored with the applicant.

74. Additionally, where an applicant has had lawful residence in the country of asylum, e.g. as a student, the fact that they did not claim asylum on arrival should not be held against them. As stated in Canada:

“[i]t does seem to me that a desire to emigrate and fear of persecution in one’s country [are not] ...mutually exclusive. If one can depart the place where one fears persecution by lawful emigration, that would seem an eminently satisfactory resolution. That a person has sought to emigrate strikes me as a feeble basis for questioning the credibility of that person’s evidence of fear of persecution at home”.<sup>81</sup>

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<sup>76</sup> Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4 (2003), para. 2.

<sup>77</sup> Vivienne Cass, ‘Homosexual Identity Formation: A Theoretical Model’, 4 *Journal of Homosexuality* (1979). She distinguishes six stages: 1) identity confusion; 2) identity comparison; 3) identity tolerance; 4) identity acceptance; 5) identity pride; and 6) identity synthesis.

<sup>78</sup> For a brief introduction to the literature, please see Sarah Holmes, ‘Coming out: Psychology’, in: Timothy Murphy, *Reader’s Guide to Lesbian and Gay Studies*, p. 151-152.

<sup>79</sup> The [UNHCR SOGI Guidelines](#), para. 59.

<sup>80</sup> *R. (on the application of Cham) v Secretary of State for the Home Department* [2014] EWHC 4569 (Admin), 11 December 2014, para. 15 (available on Westlaw).

<sup>81</sup> *Orelie v. Canada (Minister of Employment and Immigration)* [1992] 1 FC 592, para. 611.

## Conclusion

In light of the various matters raised in this expert legal opinion, the ICJ considers that the following issues may warrant consideration when dealing with *sur place* SOGI-based refugee claims:

- i) is the claim connected to events that have occurred in the home country post departure? (type 1); or
- ii) is the claim related to the applicant's activities/behaviour in the country of asylum? (type 2).

In respect of type 1 claims:

- i) what is the change in circumstances and what evidence is there of this? E.g. new laws or practices specifically targeting LGBTI individuals;
- ii) how is the change of circumstance going to affect the individual?

In respect of type 2 claims:

- i) if the applicant has only gained awareness of her/his SOGI in the host country, how did this come about?
- ii) what prevented the applicant from being aware of or expressing her/his SOGI in the home country?
- iii) if it is a case of late disclosure, why did the applicant not raise these matters before?
- iv) in a case of increased political activism related to SOGI, why has the applicant become involved in such activities?
- v) even if the applicant has fabricated her/his SOGI, and/or acted in 'bad faith', e.g. in relation to political activities connected with SOGI, would the applicant now abandon the SOGI/activities if removed to the home country?
- vi) would the applicant's activities *sur place* in any event put her or him at risk? Consider in particular whether such activities would have come to the attention of the authorities in the home country.

Geneva, Switzerland, 12 January 2016