



FLEEING PERSECUTION: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION IN THE UNITED KINGDOM AND THE NETHERLANDS

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Dedication

I dedicate this thesis to the Mighty God who has fulfilled my dreams. He has indeed kept His covenant with me and He has seen me through. He has shown his faithfulness and unfailing love to me. He did not bring me this far to let me down. His Word said He is with me always until the very end of time has good plans and not evil. He has been instrumental to my success and for that I give Him all the Glory and Adoration.

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Foreword

In February 2011, I watched a BBC documentary by title 'The World's Worst Place to Be Gay? '. The documentary was presented by DJ Scot Mills. The documentary explores anti-gay attitudes in Uganda. It depicts the treatment of gay people, i.e. gay people are forced to live in slums, rejected by their families and friends and at risk of violence. It showed the kind of cold treatments given to gay people by the public. The presenter interviewed one of the prominent people in Uganda who happened to be a Member of Parliament. In his interview, he stated that homosexuals do not deserve to live.

I was appalled by the situation in Uganda because such things are not known or seen in the western society. The documentary made me to become aware of the reality lifestyle of gay people who themselves are treated like aliens in their own country. Although there are some human rights websites which report on the persecution of gay people around the world such as the Amnesty International, Human Rights Watch and the international Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), I realized that this situation has been going on in a while but has been ignored by most people. Some gays and lesbians seek asylum in more gay-friendly countries, like the Netherlands and the United Kingdom.

Finding out the reasons why gay people are treated like an outcast in their countries, I found out that being attracted to the same –sex is seen to be a taboo. Apart from that, it is seen to be against many religions and cultural practices of some countries and law makers in these countries make laws to reflect on their tradition and culture. This makes being gay or lesbian illegal. In addition, I read some testimonies of gay people which I think they are vulnerable and their human rights are not respected by friends and the authority.

The reason I chose to write this thesis comes from the interest to analyze international legal standards that are in place to govern the protection of lesbian, gay, bisexual, transgender (LGBT) individuals who are persecuted and the protection they can get. Furthermore, I chose to write this thesis as it shows that the UK is one of the countries that LGBT individuals seek asylum, but, a report published by the UK Lesbian & Gay Immigration Group (UKLGIG) in April 2010, "Failing the Grade", shows evidence of a higher refusal rate for lesbian and gay asylum cases compared to other asylum cases. The report stated that 98-99% of lesbian and gay asylum applications are refused at the initial stages, compared to 73% for

other asylum applications¹. This makes it interesting for me to examine this topic as some of the countries that are seen to be gay-friendly countries are not actually friendly as it seems.

I hope that the information that will be presented could help create awareness about the existence of systematic abuse of LGBT people globally and reveal the limited international human rights instruments in relation to sexual orientation or gender identity in refugee status determination. Persecution and discrimination against LGBT people should be addressed and an adoption of uniform and standard international legislations for LGBT asylum applicants globally. Our contemporary societies have become much more tolerant and familiar with this type of sexuality than it used to be. There is still abuse and discrimination against LGBT individuals which can only be tackled through legislation.

¹ UKLIG, *'Falling the Grade: Home Office initial decisions on Lesbian and Gay claims for Asylum'* (2010). Available at: <http://www.uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLIG%20April%202010.pdf> accessed 12 August 2013

Introduction

Only a few number of countries in the world recognized homosexuals as part of their society and fewer bestow full human rights on their homosexual citizens². Homosexuals have been described as invisible, People without Rights, and deviant³. In some 76 countries, having a partner of the same sex is a criminal offence. People are being arrested, singled out for physical attack, being tortured and even killed just for being in a loving relationship said the United Nations Human Rights Commissioner, MS Navi Pillay⁴. It is the state responsibility to protect its citizens in their jurisdiction. Unfortunately, history has shown that states are the worst perpetrators of human rights abusing their own citizens⁵.

A BBC World Service investigation revealed that law enforcement agencies in Iraq are involved in systematic persecution in Iraq⁶. Persecution of homosexuals is not only done in Muslim countries, but it can also be seen in Africa, Asia (including Middle East), Latin America and Caribbean and Oceania. Africa coordinator for the International Gay and Lesbian Human Rights Commission said that 'it has never been harder for gays and lesbians on the continent'⁷.

The United Nations General Assembly on December 2008⁸, called on member states to end discrimination on all grounds including sexual orientation. Of the sixty-six countries that supported the statement, only six were in favour to end discrimination against homosexuals. This makes more than two-thirds African countries have laws criminalising homosexual acts. Some lucky homosexuals, who get the chance to flee from their countries, try to seek refuge and apply for international protection in the United Kingdom and the Netherlands where same-sex relationship is not prohibited by law. I chose these countries because the Dutch asylum policy includes persecution for reasons of sexual orientation

² Susan Dicklitch, Berwood Yost, Bryan M Dougan, 'Building A Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals' (2012) 34 (2) Human Rights Quarterly <http://muse.jhu.edu/journals/human_rights_quarterly/v034/34.2.dicklitch.html> accessed 27 October 2012

³ Ibid

⁴ United Nations Regional Information Center for Western Europe, *UN High Commissioner for Human Rights Navi Pillay talks about the Human Cost of Homophobia and Transphobia* (2012). Available at: <http://www.unric.org/en/latest-un-buzz/27518-un-high-commissioner-for-human-rights-navi-pillay-talks-about-the-human-cost-of-homophobia-and-transphobia> accessed 27 October 2012

⁵ Susan Dicklitch, Berwood Yost, Bryan M Dougan, 'Building A Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals' (2012) 34 (2) Human Rights Quarterly <http://muse.jhu.edu/journals/human_rights_quarterly/v034/34.2.dicklitch.html> accessed 27 October 2012

⁶ BBC News World, 'BBC investigation reveals police persecution of gays in Iraq' (12 September 2012). Available at: <http://www.bbc.co.uk/news/world-19570870> . accessed 27 October 2012

⁷ International Gay and Lesbian Human Rights Commission, Available at: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/iglhrcinthenews/1303.html>. accessed 27 October 2012

⁸ Human Rights Watch, 'UN: General Assembly Statement Affirms Rights for All' (18 December 2008). Available at: <http://lawfam.oxfordjournals.org/content/23/3/277.full.pdf+html> accessed 29 October 2012

as grounds for granting asylum⁹ and also the government has stated that it will not send gay and lesbian asylum seekers to a country where they face the risk of torture or execution¹⁰. Likewise in the United Kingdom, the coalition government pledged to stop the deportation of asylum seekers who have to leave particular countries because of their sexual identity¹¹. Apart from that, both the United Kingdom and the Netherlands are part of the highest five countries in the European Union who granted asylum in 2011 with UK registered 14 000 and the Netherlands 8 400¹². This makes the Netherlands and the United Kingdom popular asylum seeker destinations.

DEFINITION OF THE KIND OF CRIMES / BEHAVIOUR ASSOCIATED WITH LGBT PEOPLE AND OTHER RELEVANCE ISSUES

In order to fully understand the kind of treatment given to LGBT, it is necessary to define certain basic crimes that are relevant to this issue. However, it should be noted that these are not universal definitions as different bodies and countries define them differently. However, the different definitions are always similar.

i. Criminalisation

Many countries have laws which are incompatible with international human rights standards which fuel homophobia¹³. In 2005, Article 31 of the Uganda's Constitution was amended by inserting clause 2(a) to prohibit marriage between persons of the same sex. Also, Articles 162, 163 and 165 of the Kenyan Penal Codes also prohibit homosexuality. Convictions can carry a minimum of five years and maximum of

⁹ ILGA Europe, 'The Netherlands'. Available at:http://www.ilga-europe.org/home/issues/asylum_in_europe/country_by_country/nl accessed 10 April 2013

¹⁰ Human Rights Watch, 'Netherlands: Asylum Rights Granted to Lesbian and Gay Iranians'. Available at:<http://www.hrw.org/news/2006/10/18/netherlands-asylum-rights-granted-lesbian-and-gay-iranians> accessed 10 April 2013

¹¹ Direct GovUK, 'The Coalition: our Programme for Government'. Para 12. Available at:http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf accessed 11 April 2013

¹² EUROSTAT, 'EU Member States granted Protection to 84 100 Asylum Seekers in 2011' 96/2012. Available at:http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-19062012-BP/EN/3-19062012-BP-EN.PDF accessed 2 May 2013

¹³ United Nations Human Rights Office of the High Commissioner, 'Laws Criminalizing Homosexuality are Incompatible with International Human Rights Standards and Fuel Homophobia'. Available at:<http://www.ohchr.org/EN/NewsEvents/Pages/Homophobia.aspx> accessed 14 March 2013

fourteen years imprisonment. Where it is committed without consent, the penalty is twenty one years imprisonment¹⁴. In Barbados, Article 9 of the Sexual Offences Act 1993 states that, a person who commits buggery (anal intercourse) is liable to imprisonment for 10 years if both parties are over 16 years¹⁵. Similarly in Jamaica, Articles 76 and 77 Offences Against the Person 1864 makes homosexuality an 'abominable crime of buggery' punishable by 10 years of imprisonment with hard labour¹⁶. Under section 377 of Pakistan Penal Code (Act XLC of 1860), homosexuality is not mentioned explicitly but states that canal intercourse against the order of nature is punishable by a fine or imprisonment from 2 years to life¹⁷. The Penal Code of Solomon Islands (Section 160) makes homosexuals liable to 14 years imprisonment¹⁸.

ii. Torture

The definition of torture is taken from the United Nations Convention against Torture, it defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'¹⁹. States acknowledge that torture is one of the most serious crimes states or individuals can commit, and those accused of committing torture attract enormous stigma. This is because torture undermines the very core of human rights, the dignity and equality of every human being. It is about asserting power and control; about inflicting pain and despair

¹⁴ The Official Law Reports of the Republic of Kenya, 'The Penal Code Chapter 63 2009'. Available at: <http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf> accessed 29 October 2012

¹⁵ United Nations Human Rights Office of the High Commissioner, 'Chapter 154, Sexual Offences Act 1993'. Available at: <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lgbti2.pdf> accessed 14 March 2013

¹⁶ Offences Against The Person Act 1864, 'Articles 76 and 77'. Available at: <http://www.ecc.gov.jm/Downloads/Child-Laws/The%20Offences%20Against%20the%20Person%20Act%20-%201864.pdf> accessed 12 March 2013

¹⁷ Pakistan Penal Code, 'Section 377'. Available at: <http://www.pakistan.org/pakistan/legislation/1860/actXLVof1860.html> accessed 12 March 2013

¹⁸ Solomon Islands Penal Codes, 'Section 160'. Available at: http://www.paclii.org/sb/legis/consol_act/pc66/ accessed 12 March 2013

¹⁹ United Nations Convention against Torture, Cruel, Inhuman or Degrading Punishment 1984. Available at: <http://www.un.org/documents/ga/res/39/a39r046.htm> accessed 12 March 2013

and about destroying a person's identity and sense of self²⁰. Many acts of violence against LGBT individuals occur with explicit or implied consent of public officials. Surprisingly, these perpetrators are the authorities including the police and security force, and public officials do not take serious investigation into homophobic acts. Laws that criminalize homosexuality not only allow for torture and ill-treatment by state officials but are often used by non-state actors to justify abuse²¹. Furthermore, because homosexuality acts is criminalized by law, it will be difficult or impossible for victims to seek help without putting themselves at risk of secondary victimization²².

The Special Rapporteur on torture Sir Nigel Rodley in 2001, highlighted the mistreatment faced by prisoners and detainees based on their gender identity or sexual orientation are disproportionately subject to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations. He emphasized that discrimination on the grounds of sexual orientation or gender identity can contribute to the process of dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place²³.

iii. Physical Assault

Physical assault takes place when an individual or a group provokes and attacks a person physically, with or without the use of a weapon, or threatens to hurt that person. Examples of physical assault include death threat, stalking, insult, inflicting injuries on the LGBT individuals and attacks²⁴.

Physical assault is the most common hate crime committed against LGBT people²⁵. This type of

²⁰ Redress and Amnesty International, '*Gender and Torture: Conference Report*'. Available at: <http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf> accessed 18 March 2013

²¹ Ibid

²² Ibid

²³ United Nations General Assembly, '*Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*' (A/56/156) 3 July 2001, at Para. 19. Available at: <http://www.un.org/documents/ga/docs/56/a56156.pdf> accessed 12 March 2013

²⁴ Prevent Violence at Work, '*Definition of Physical Assault*'. Available at: <http://www.prevention-violence.com/en/int-121.asp> accessed 20 March 2013

²⁵ Michelle A Marzullo and Alyn j Libman, '*Research Overview: Hate Crimes and Violence against Lesbian, Gay, Bisexual and Transgender People*'. Available at: http://www.hrc.org/files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople_2009.pdf accessed 12 March 2013

crime is not only associated with LGBT people but also human rights defenders who are working to stop the abuse of the LGBT people²⁶.

Most of the assaults that happened to the LGBT people are normally with weapons which result in impairing condition such as head trauma and multi-fracture injuries²⁷. There have been several attacks on LGBT people around the world. They are attacked individually or in a group at public places such as gay pubs. For example, four gays were subject to anti-gay slur and physical assault in Louisiana²⁸. A similar situation also happened in Cameroon where Paul and a friend who is quite effeminate were poked with iron rod in a bar while the barman called others and assaulted them. They were about to be burned alive when the police arrived at the scene and took them to the police station²⁹. Another example is the attack on a gay-friendly club in Moscow in which four people had head injuries, two hospitalized and others have bruises and minor injuries³⁰. Also in Armenia, LGBT individuals are victims of psychological and physical abuse when they serve in the Armenian army and they experienced hate speech from their large cities³¹.

iv. Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance considered it to be 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or

²⁶ Amnesty International, 'Transforming Pain into Hope: Human Rights Defenders in the Americas'. Available at: <http://www.amnesty.org/en/library/asset/AMR01/006/2012/en/17203aa8-9881-42b5-8635-8be0150c846a/amr010062012en.pdf> accessed 21 March 2013

²⁷ Edward Dunbar, 'Race, Gender, and Sexual Orientation in Hate Crime Victimization: Identity Politics or Identity Risk?' (2006) 21 (3) Violence and Victims. Available at: <http://docserver.ingentaconnect.com/deliver/connect/springer/08866708/v21n3/s4.pdf?expires=1363802543&id=73418269&titleid=75001825&acname=Universiteit+van+Tilburg+%28aka+Tilburg+University%29&checksum=10D597675C818F8BBA40BA9E28A9AA23> > accessed 20 March 2013

²⁸ Advocate.com, 'Gay Men assaulted at Streisand Movie in Louisiana'. Available at: <http://www.advocate.com/crime/2013/01/16/gay-men-assaulted-streisand-movie-louisiana> accessed 20 March 2013

²⁹ Radio Netherlands Worldwide: Africa, 'Cameroonian Gays Illegally Arrested and Detained'. (4 May 2012). Available at: <http://www.rnw.nl/africa/article/cameroonian-gays-illegally-arrested-and-detained> accessed 21 March 2013

³⁰ Human Rights Watch, 'Russia: Investigate Attack on Gay-Friendly Bar'. Available at: <http://www.hrw.org/news/2012/10/12/russia-investigate-attack-gay-friendly-bar> accessed 20 March 2013

³¹ United Nations Human Rights Office of the High Commissioner, 'Human Rights Violations of Lesbian, Gay, Bisexual, Transgender (LGBT) People in Armenia: A Shadow Report' July 2012, Geneva. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_Armenia_HRC105.pdf accessed 21 March 2013

acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law³². In some countries, individuals are arrested and detained just because they are suspected to be gay or they are gay. Recently, police detained 3 gays in Moscow during a protest against planned anti-gay legislation³³. Cameroonian gay illegally arrested and detained for two days on the charges of homosexuality. In his two days in detention, his right to food was denied. Arbitrary arrest and detention of homosexuals are common in Cameroon as a result of them being effeminate and in many situations there is no crime, no witness and no plaintiff³⁴.

v. Discrimination in Access to Goods and Services

The right to equality and non-discrimination are enshrined in many international and regional human rights documents. These rights are seen to be fundamental to all but LGBT individuals around the world struggles to achieve equality at all levels. LGBT individual regularly face discrimination in access to education, employment, healthcare, housing³⁵ and in criminal cases where they have been victims of violent crimes³⁶.

- a) Justice: access to justice is essential right since it ensures that other rights are effective and implemented³⁷. LGBT people can be denied justice because of their sexual orientation. In 2009, a man who was attacked by robbers and thugs in Cameroon. When police arrived, the attackers told the police he is homosexual and they were released but detained the victim for a week. Another guy alleged to be homosexual was beaten on the street and the police failed to

³² The International Convention for the Protection of All Persons from Enforced Disappearance 2010. Available at: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> accessed 21 March 2013

³³ Rianovosti, 'Gays Detained After Unsanctioned Rally on Red Square' (20 January 2013). Available at: <http://en.rian.ru/russia/20120120/170858664.html> accessed 21 March 2013

³⁴ Radio Netherlands Worldwide: Africa, 'Cameroonian Gays Illegally Arrested and Detained'. (4 May 2012). Available at: <http://www.rnw.nl/africa/article/cameroonian-gays-illegally-arrested-and-detained> accessed 21 March 2013

³⁵ United Nations Human Rights Office of the High Commissioner, 'Human Rights Violations of Lesbian, Gay, Bisexual, Transgender (LGBT) People in Armenia: A Shadow Report' July 2012, Geneva. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_Armenia_HRC105.pdf accessed 21 March 2013

³⁶ Human Rights Watch, 'Forbidden: Institutionalizing Discrimination Against Gays and Lesbians in Burundi'. Available at: http://www.hrw.org/sites/default/files/reports/burundi0709_brochure_web.pdf accessed 22 March 2013

³⁷ EQUALJUS, 'Handbook on the Protection of LGBT People'. Available at: http://www.equal-jus.eu/sites/equal-jus.eu/files/Handbook%20on%20the%20protection%20of%20LGBT%20people%20-%20high%20resolution_0.pdf accessed 22 March 2013

investigate the case. A head police officer in Turkey was indicted for ill-treatment against nine transgender women. The victim was unfairly treated as prosecution was discontinued under the term 'amnesty'³⁸.

- b) Access to health care: LGBT people access to health is limited by wide range of factors. Such as LGBT people own fears of discrimination if they disclose their sexual orientation to a healthcare worker and may result in poor treatment. It was found that health centers in Cameroon turned away clients on basis of their sexual orientation and LGBT people are often afraid to seek services³⁹. Similarly in Armenia, many doctors discriminate against LGBT individual by refusing to treat them because of their perceived sexual orientation. Furthermore, gay men are discriminated against when donating blood because men who have sex with men are barred from donating blood⁴⁰.
- c) Access to employment: the case of discrimination in employment on ground of gender identity is also associated with LGBT people. Russian LGBT Network has reported discrimination associated with transsexual women. In 2010, one transsexual woman was dismissed after sex reassignment surgery by the firm director on the reason that 'such workers are dishonour to the firm'⁴¹. LGBT individuals are fired by their employers because of their sexual identity in Armenia and employers do not hire them⁴².
- d) Access to education: in many countries, LGBT people are denied access to relevant information which is necessary in making choices to the type of schools suitable for them and they may be refused access to schools or when they are bullied in schools no is action is taken by teachers or the school management⁴³. In Guatemala, a transgender was refused entry into one of the

³⁸ Amnesty International, 'Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality'. Available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf> accessed 22 March 2013

³⁹ Human Rights Watch, 'UPR Submission: Cameroon'. (October 2012). Available at: http://www.hrw.org/sites/default/files/related_material/2012%2010%20Cameroon%20LGBT%20UPR%20ENGLISH%20-%20FINAL.pdf accessed 22 March 2013

⁴⁰ United Nations Human Rights Office of the High Commissioner, 'Human Rights Violations of Lesbian, Gay, Bisexual, Transgender (LGBT) People in Armenia: A Shadow Report' July 2012, Geneva. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_Armenia_HRC105.pdf accessed 26 March 2013

⁴¹ United Nations Human Rights Office of the High Commissioner, 'Inter-Regional Social Movement 'Russian LGBT Network: An Alternative Report, Discrimination on the grounds of Sexual Orientation and Gender Identity in Health Care, Education, Employment and Social Security in the Russian Federation'. Available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/IRSM_RussianFederation_CESCR46_en.pdf accessed 25 March 2013

⁴² Ibid no 37

⁴³ The Global Alliance for LGBT Education (GALE), 'Strengthening the Right to Education for LGBT People 2011-2014'. Available at: <http://www.lgbt->

technical schools because the institution regulations established that they could not take students like her but 'men and woman' only⁴⁴.

- e) Restrictions of freedom of expression and association: human rights abuses based on sexual orientation include the restriction of freedom of association and expression. In 2008, the Supreme Court of Turkey asked for a closure of the Turkish Lesbian Gay Bisexual Transgender solidarity (it is an organization that defends the rights of LGBT people) organization since its objectives were against Turkish 'moral values and family structure'⁴⁵. Russian Parliament has supported a bill 'propaganda for homosexuality among minors' which denies or ban LGBT individuals their freedom of expression. The proposed law is punishable with fines for up to 500,000 roubles (US\$ 16,200)⁴⁶.

vi. Definition of terms

The terminology used here is taken from the Yogyakarta Principles. Accordingly, for the purpose of this paper, 'Sexual Orientation' is used to refer to a '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.

'Gender Identity' refer to 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 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 mannerisms⁴⁷.

[education.info/doc/GALE_policy/GALE_Project_Strengthening_The_Right_to_Education_for_LGBT_2011-2014.pdf](http://www.unhcr.org/refugees/info/doc/GALE_policy/GALE_Project_Strengthening_The_Right_to_Education_for_LGBT_2011-2014.pdf) accessed 27 March 2013

⁴⁴ The International Gay and Lesbian Human Rights Commission, '*Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) people in Guatemala: A Shadow Report*'. (New York, March 2012). Available at: <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/566-1.pdf> accessed 27 March 2013.

⁴⁵ Amnesty International, '*Turkey urged to respect LGBT people's Right to Freedom of Association*'. Available at: <http://www.amnesty.org/en/appeals-for-action/turkey-urged-respect-lgbt-right-freedom-of-association> accessed 3 April 2013

⁴⁶ Amnesty International, '*Russia's Anti-Gay 'Propaganda Law' Assault on Freedom of Expression*'. Available at: <http://www.amnesty.org/en/for-media/press-releases/russia-s-anti-gay-propaganda-law-assault-freedom-expression-2013-01-25> accessed 3 April 2013

⁴⁷ The Yogyakarta Principles. Available at: http://www.rfsl.se/public/yogyakarta_principles.pdf . Accessed 10 April 2013

LGBT stands for Lesbian, Gay, Bisexual and Transgender.

THE STRUCTURE AND PURPOSE OF THIS WORK

Throughout this thesis, focus is made to how lesbian, gay, bisexual and transgender (LGBT) individuals fleeing persecution to claim asylum in the Netherlands and the United Kingdom. LGBT people encounter forms of violence or hate crimes depending on the country of origin which include torture, assault, abuse, hatred speech or insults.

Chapter one deals with the international human rights instruments LGBT persons can use in refugee status claims on the grounds of persecution. It talks about the instruments ground on which LGBT refugee claims is based on namely 'membership of a particular group'. It also addresses the role and interpretation of persecution in LGBT refugee claims.

Chapter two focuses on the level of protection that is offered to LGBT persons fleeing persecution in the Netherlands and the United Kingdom and the difficulties they experienced in the asylum applications. Both countries in the past have offered protection to LGBT persons fleeing persecution.

Chapter three which is the final chapter shall base mainly on viewing the different treatment of being lesbian, gay, bisexual and transgender with some examples across the globe to give a better understanding of the types of discrimination associated with them.

The study into the persecution of homosexuals is relevant because it involves a wide range of human rights abuses from being tortured to verbal assault. The study makes us understand that there is existence of international human rights laws that gives basic fundamental human rights to all but none of them specifically mentioned sexual orientation. Secondly, this study creates awareness of the existence of this phenomenon and educates people about the reality of the problems surrounding LGBT people on this subject matter. Although this kind of treatment is a growing worldwide problem, many people do not want to talk about it because of its sensitivity. Thus an in-depth study on this topic will create a much needed intervention into current advocacy on behalf of the lesbian, gay, bisexual and transgender asylum claims. Thirdly, global examples on the legislations that criminalize homosexual activity with reference to some countries and the type of discrimination or disadvantages faced by them will give us an understanding of the situation faced by LGBT people in their respective countries. In addition, this thesis is relevant because it talks about the issue of international human rights

documents which do not mention sexual orientation as a protected ground for persecuted LGBT people in asylum claims, and this is a point which calls both national and international attention to include or amend legislations that directly gives them protection.

The central question which acts as a guidance for this research is as follows:

“What standard of protection is offered by the UK and Netherlands to persons fleeing persecution on the basis of their sexual identity?”

The central research question is further broken down into sub-questions which include:

1. What standard of protection can the person fleeing persecution rely on in the UK and the Netherlands?
2. What is the level of protection given to persecuted LGBT people in the Netherlands and United Kingdom?
3. What are the challenges and difficulties in LGBT asylum application?

The answers to these research questions which form the different chapters of this research are based on some research methods which were used in carrying out this research. These methods are described in the paragraph below.

RESEARCH METHODS

First of all, a Desk study of legal literature such as articles, journals and books on the persecution of LGBT individuals, international refugee guidelines, related asylum claims, related cases before the European Court of Human Rights, crimes or behavior against LGBT people as well as other related fields was carried out. The aim was to get a background knowledge, as well as in-depth information about reasons why individuals are persecuted because of their sexual orientation and to find out what legislations have been put in place to fight the problem. Another aim was to unravel the myth behind such treatments. It should however be noted that literature on persecution of LGBT individuals and asylum claims is limited. This is because the problem has not yet had enough global attention and a lot of research is still to be done on the subject.

Internet websites about persecution of homosexuals, legislations and other related issues were also used. Also for this paper, the website's engine has been used to find cases related to the concept of 'sexual orientation' and 'asylum' claims in the United Kingdom and the Netherlands. Related cases that are brought before the European Court of Human Rights were searched through the HUDOC database. The cases are used to highlight certain aspects with respect to the development of their subsequent history and treatment to show the progress in LGBT people asylum claims. Other relevant cases related to this topic will also be used.

Chapter 1- A GENERAL VIEW OF INTERNATIONAL HUMAN RIGHTS LAWS THAT CAN HELP GRANT ASYLUM BASED ON SEXUAL ORIENTATION

1.1 1951 Convention relating to the Status of Refugees

First, we have to look at the Refugee Convention because it is the universal and primary source of refugee based claims. Refugees are the most vulnerable in the world⁴⁸. The United Nations Convention Relating to the Status of Refugees 1951 and its 1967 Protocol help to give them protection. The Convention clarifies the rights of refugees and the obligations of the 148 States that are party to one or both of these instruments. The Convention is the centerpiece of international refugee protection today⁴⁹. It is the only international agreement covering the most important aspects of a refugee's life⁵⁰. The Convention was entered into force on 22 April 1954, and it has been subject to only one amendment which is the 1967 Protocol. The Protocol removes the geographic and temporal limits of the 1957 Convention⁵¹. The 1967 Protocol removed the limitations and gave the Convention a universal coverage.

⁴⁸ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Available at: <http://www.unhcr.org/4ec262df9.html> accessed 10 May 2012

⁴⁹ United Nations General Assembly Resolution, *Draft Convention relating to the Status of Refugees*, 14 December 1950, A/RES/429, available at: <http://www.unhcr.org/refworld/docid/3b00f08a27.html> accessed 10 May 2012

⁵⁰ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, *'Signing on could make a Difference'*. Available at: <http://www.unhcr.org/3bbdb0954.html>. accessed 18 November 2012

⁵¹ UNHCR, *'Article 1 (2)' Convention and Protocol Relating to the Status of Refugees*, available at: <http://www.unhcr.org/3b66c2aa10.html> accessed 10 May 2012

The Convention has been supplemented by refugee and subsidiary protection regimes in several regions as well as the progressive development of international human rights law⁵². The Convention has a single definition of the term “refugee” in Article 1. Refugee in the Convention is emphasized on the protection of persons from political or other forms of persecution. According to the Convention, a refugee is ‘someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion’⁵³.

Looking at the wording of the definition of what the Convention give, it is clear that sexual orientation, sex or gender is not mentioned as a protected ground. Membership of a particular social group is the ground with the least clarity, because of this it has found its place alongside the other four Convention grounds (race, religion, nationality and political opinion) allowing for a full application of the refugee definition⁵⁴. Interpretation of the phrase varies in different jurisdictions⁵⁵. Also, the *travaux préparatoires* provided little explanation why social group was included. The Swedish delegate to the 1951 Conference stated that, social group cases existed and that the Convention should mention them explicitly⁵⁶. One sphere in which the membership of a particular social group which has gained much attention lately is the gender related persecution. Sexual orientation was accepted as the basis of membership of a particular social group claim in most of refugee receiving nations by the mid -1990s⁵⁷. A number of cases have contributed to the recent meaning of ‘membership of a particular social group’ such as *Canada (Attorney-General) v Ward*⁵⁸ and *A v Minister for Immigration and Ethnic Affairs*⁵⁹. In *Canada (Attorney -General) v. Ward (1993)*, the Supreme Court established a meaning to ‘particular

⁵² *ibid*

⁵³ *ibid*

⁵⁴ T. Alexander Aleinikoff. (2003) ‘Protected Characteristics and social perceptions: an Analysis of the meaning of Membership of a Particular of a Particular Social Group’ in E. Feller, V. Turk and F Nicholson (eds.) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge, Cambridge University Press, pp 263-312

⁵⁵ UN High Commissioner for Refugees, ‘*Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*’. Available at: <http://www.refworld.org/cgi-bin/telex/vtx/rwmain?docid=3b20a3914> accessed 23 April 2013

⁵⁶ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn (OUP,2007)

⁵⁷ Jenny Millbank, ‘*From Discretion to Disbelief: Recent Trends in Refugee Determinations on the basis of Sexual Orientation in Australia and the United Kingdom*’ (2009) 13 (2-3) *The International Journal of Human Rights*, pp391-414. Available at: < <http://www.tandfonline.com/doi/pdf/10.1080/13642980902758218> > accessed 23 April 2013

⁵⁸ *Canada (Attorney-General) v. Ward* [1993] 2 SCR 689, Canada: Supreme Court, 30 June 1993.

⁵⁹ *A v Minister of Immigration and Ethnic Affairs* [1997] 142 ALR 331, Australia: High Court, 24 February 1997

social group' which built on the cases of *Mayers*⁶⁰, *Cheung*⁶¹ and *Matter of Acosta*⁶² and suggests three categories:

*(1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence*⁶³.

In contrast, the case of *A v. Minister for Immigration and Ethnic Affairs* in Australia gave 'a particular social group' a broad interpretation as:

*"a collection of persons who share a certain characteristics or elements which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it as cognisable group within their society"*⁶⁴.

It is important to note that membership of a particular social group on its own will not be sufficient to establish a claim under the Convention. The existence of the social group only becomes relevant in this context if the feared of persecution is for reason of the claimant's membership of the group⁶⁵. With the two definitions from the above cases, the *United Nations High Commissioner for Refugees (UNHCR) Guidelines* on international protection for Membership of a Particular Social Group believes that the two approaches has to be converted into a single standard definition that includes both dominant approaches:

"a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise

⁶⁰ *Mayers v. Canada (Minister of Employment and Immigration)*, [1992] 97 D.L.R. (4th) 729

⁶¹ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, Federal Court of Appeal, 1 April 1993

⁶² *Matter of Acosta, Interim Decision 2986, A-24159781, United States Board of Immigration Appeals*, 1 March 1985, para.233. available at: <http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf> accessed 25 April 2013

⁶³ *Canada (Attorney-General) v. Ward*, above no.58

⁶⁴ *A v. Minister of Immigration and Ethnic Affairs*, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b7180> accessed 25 April 2013

⁶⁵ *Refugee Appeal No. 1312/93, Re GJ, No 1312/93, New Zealand: Refugee Status Appeals Authority*, 30 August 1995. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b6938> accessed 25 April 2013

of one's human rights"⁶⁶. UNHCR states that the definition includes characteristics which are historical and therefore cannot be changed even though it is changeable, changing it is not necessary because they are closely linked to the identity of the person or an expression of fundamental human rights⁶⁷.

While there is no obligation under international law to grant asylum to refugees, states are still bound by the principle of non-refoulement as it is stated in Article 33 of the 1951 Convention. This principle provides that no refugee shall be returned to any territory where his or her life or freedom would be threatened on account of race, religion, nationality and membership of a particular social group or political opinion. Also whereby States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger⁶⁸. The principle is now considered to be customary international law and no reservations or derogation can be made to it⁶⁹.

The obligations of State parties increased as time went by⁷⁰. Each signatory state interprets its obligations under the Convention differently in terms of how it defines the language of this law in relation to its national refugee claims. As the United Kingdom and the Netherlands are signatory to the Convention, this means that both countries have a legal obligation to consider all applications for asylum made inside their countries.

The Convention lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favorable treatments, which includes access to courts, work and the provision for travelling documentation in a passport form.

In sexual orientation cases, the interpretation of persecution depends on the decision makers. This is because, persecution for the purpose of refugee status determination is nowhere defined in international law. Additionally, the Convention does not legally define persecution⁷¹ and there is no

⁶⁶ UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (2002) HCR/GIP/02/02. Available at: <http://www.unhcr.org/3d58de2da.html> accessed 25 April 2013

⁶⁷ Ibid

⁶⁸ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007. Available at: <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=45f17a1a4> accessed 25 April 2013

⁶⁹ Ibid

⁷⁰ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP, 1996) 2nd edn. PP 307-311

⁷¹ UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', above no.55

universally accepted definition of persecution⁷². The *UNHCR Guidance Note* provided a definition of persecution based on case of *Iran v. Secretary of the State* and it stated that:

*Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant*⁷³.

The requirement for the fear of persecution to be well-founded requires an objective and subjective assessment. The element of fear is a state of mind and a subjective condition added to the qualification of 'well-founded'. This indicates that it is not only the frame of mind of the person concerned that determines his refugee status, but the frame of mind must be supported by an objective situation to determine whether well-founded fear exists, both elements must be taken into consideration⁷⁴.

Persecution of people for the reason of their sexual identity is not a new phenomenon. It is only in recent years that a growing number of asylum claims has been made by lesbian, gay, bisexual, and transgender (LGBT) individuals. This has necessitated greater awareness among decision-makers of the specific experiences of LGBT asylum-seekers and a deeper examination of the question involved⁷⁵.

1.2 European Convention on Human Rights

The European Convention on Human Rights together with its fourteen Protocols guarantees for the most part, civil and political rights⁷⁶. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was drafted by the Council of Europe in 1950 and entered into force in 1953. The central objective for the ECHR is to provide an independent judicial process at Strasbourg (European Court of Human Rights) which can determine if there has been a breach to the Convention by

⁷² UNHCR, *Handbook on Procedures and Criteria for Determining Refugees Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1. available at:

<http://www.unhcr.org/3d58e13b4.html> accessed 1 May 2013

⁷³ *R (Iran) & Ors v. Secretary of State for Home Department* [2005] EWCA Civ 982 in *UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. Para. 10. Available at: <http://www.refworld.org/cgi-bin/telex/vtx/rwmain?docid=48abd5660> accessed 1 May 2013

⁷⁴ *Ibid* no 71, Para 38

⁷⁵ United Nations High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating To Sexual Orientation and Gender Identity* (Geneva, 21 November 2008). Available at:

<http://www.unhcr.org/refworld/pdfid/48abd5660.pdf> accessed 29 October 2012

⁷⁶ Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 5edn (OUP, 2010) P.8

a member state⁷⁷. The ECHR has no express provision relating to asylum and it might therefore seem to be of marginal relevance to those seeking asylum. This is far from the case. The substantial body of jurisprudence that has emerged from the Convention organs between 1989 and 2009 now sets the standards for the rights of asylum seekers all across Europe⁷⁸.

1.2.1 The Scope of Article 3 in Relation to LGBT individuals Fleeing Persecution

One of the characteristics of asylum seekers is the assurance that they will not be returned to their country of origin. The European Convention has developed in such a way that the Convention has granted protection to asylum seekers on the basis of Article 3. Article 3 has proven to be useful to asylum seekers because it includes the protection of those threatened with extradition⁷⁹. Article 3 of the Convention reads that '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*'⁸⁰. The prohibition against torture is absolute and fundamental and also, it has achieved the status of a peremptory norm, or *jus cogens*, in international law⁸¹. The United Kingdom and the Netherlands are party to the Convention and they bound by the provisions of Article 3. Signing and ratifying means Member States are required to meet the obligations contained in the Convention. The United Kingdom has incorporated the Convention in its Human Rights Acts 1998 and the Netherlands on the other hand, has a monist system making international laws incorporated into their national law immediately they ratified it. This is binding on all Member States and it is also a customary international law, it is expected that everyone has the right to be free from torture, inhuman and degrading treatment and punishment. This right is unqualified and does not allow any derogation.

Article 3 imposes both positive and negative obligations all Member States which includes the Netherlands and the United Kingdom to ensure that individuals are not subjected to torture or inhuman or degrading treatment or punishment (which includes private actors) and an obligation to conduct an

⁷⁷ Steve Greer, 'Europe' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law*, (OUP, 2010) pp454-478

⁷⁸ Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files, No.9 (Council of Europe Publishing, 2010) pp 19

⁷⁹ Colin J Harvey, '*Dissident Voices: Refugees, Human Rights and Asylum in Europe*' (2000) 9 (3) Social & Legal Studies, <<http://sls.sagepub.com/content/9/3/367.full.pdf+html>> accessed 25 May 2013

⁸⁰ The European Convention on Human Rights 1950, 'Article 3'. Available at:http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf accessed 31 October 2012

⁸¹ David Pievsky '*Focus on ECHR, Article 3*' (2005) 10 Jud. Rev 169, Law Journal Library. Available at: <http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/judire10&men_hide=false&men_tab=citnav&collection=journals&page=169#169> accessed 14 May 2013

appropriate investigation into cases relating to ill-treatment. This appears to be particularly important where vulnerable individuals such as LGBT people are concerned⁸². Article 3 raises a threshold question on the type of treatments that can be seen to be torture or inhuman or degrading treatment, the extent of Member States positive obligation to prevent the ill-treatment and in immigration cases where the person is likely to be tortured if removed to their country of origin⁸³.

1.2.2 Article 3 on Extraterritorial Effect

The right to asylum is not protected or stated either in the Convention or its Protocols. However, expulsion, deportation or extradition by a Contracting State of an alien may give rise to issues under Article 3 of the Convention. This engages the responsibility of States under the Convention, where substantial grounds have shown for believing that the person in question, if expelled, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country⁸⁴. Lesbian, Gay, Bisexual and Transgender individuals who are within the jurisdiction of the United Kingdom and the Netherlands are to be protected not to be returned to their various countries where they will be ill-treated.

The protection against refoulement which is granted by Article 3 of ECHR is seen as broader than the protection which is stated in the 1957 Refugee Convention. This is because the Refugee Convention is seen as universal Convention whiles the ECHR protects any person who is within the jurisdiction of a state party to the ECHR⁸⁵. The most developed non-refoulement jurisprudence of the Court is in relation to Article 3⁸⁶. Article 3 in certain circumstances can have an extra-territorial effect⁸⁷. The principle was first shown in the case of *Soering v. United Kingdom*⁸⁸. In the *Soering* case, the United Kingdom was held responsible by the Court for intending to extradite a person to the United States who will be subjected to ill-treatment of the threat of the death row and this will be in breach of Article 3. Article 3 can therefore protect LGBT individuals risking persecution in their country of origin where substantial grounds have been shown for believing that the person concerned will face a real risk of being subject to torture or to inhuman or degrading treatment if extradited.

⁸² Ibid

⁸³ Ibid

⁸⁴ Stated by the Court in the Case of *F v. United Kingdom*, App no 17341/03 as to the Decision of Admissibility

⁸⁵ Ibid no 81

⁸⁶ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn (OUP,2007)

⁸⁷ Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 4edn (OUP, 2006) P.88

⁸⁸ *Soering v United Kingdom* (App no 14038/88) Strasbourg, 7 July 1989

Similarly, to the case of *Chahal*⁸⁹, a Sikh and India national but live in the United Kingdom was arrested on the grounds of conspiring to the kill the then Prime Minister Rajiv Ghandhi. He was later released because of the lack of evidence. The Home Secretary decided to deport him to India where he was a citizen. The majority concluded it would be at a very risk for *Chahal* if he should be deported and would be subjected to ill-treatment and the UK would be in breach of Article 3.

The type of treatment as to whether it falls within the Scope of Article 3 is based on one of the case laws of the Court. The Strasbourg Court stated that ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where the type of treatment humiliates or debases an individual who shows a lack of respect for, or diminishing, his or her dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. This can be seen as degrading and fall within the probation of Article 3⁹⁰. The Court's description of ill-treatment makes it easier for their claims under Article 3.

In sexual orientation refugee claims the applicant must be able to prove that he or she has been subjected to persecution because of his or her sexuality either by the authorities of their country of origin or private actors. In many cases they may be arrested and ill-treated in the hands of the authorities, but the reasons of their arrest are not made known to them. This makes it difficult for the victim to get evidence to support his or her claim. Such as the first LGBT asylum case brought under Article 3, the case of *I.I.N v the Netherlands*⁹¹, where an Iranian national said to have been twice arrested during a demonstration. He further claimed a policeman has seen him kissing a male friend in an alley. He was forced to sign a stamen which declared that he was a homosexual and that he had been caught in *flagrante delicto*. The European Court of Human Rights rejected the claim based on Article 3. The Court found no proof that kissing a male friend has resulted in any criminal proceedings brought against him. Even though Iranian criminal law criminalizes homosexuality, the Court relied on the official report on Iran between 2001 and 2014 by the United Kingdom and Danish authorities which shows that there has been no convictions for private homosexual practices or relationships.

Applicants in sexual orientation cases have to be examined on individual basis taking into consideration the criminalization of homosexuality acts in their country of origin, rather than Court making decisions based on official reports on countries. Further investigations should have been done especially in cases

⁸⁹ *Chahal v. United Kingdom* (App no 22414/93) Strasbourg, 15 November 1996

⁹⁰ *Ibid* no 81

⁹¹ *I.I.N. v the Netherlands*, (App no 2035/04) Third Section Decision As to the Admissibility, Sitting 9 December 2004

where an applicant says he or she has been ill-treated. In the case of *Mr. I.I.N* it was alleged that he has been raped by a policeman on three occasions, first when he was arrested and twice when he was asked to report himself at the station. Some part of his statement made on how he was ill-treated was seen to be irrelevant to the Court, as the Court stated insisted that 'they are not persuaded that he will be at real risk of falling foul of the authorities on that ground' if he is returned to Iran⁹².

Looking at the case of *Selmouni v. France*⁹³, the Court stated that physical and psychological abuse in a police station is a violation of Article 3. Also the *UNHCR Guidelines* mentioned that rape is recognized as a form of torture, leaving 'deep psychological scars on the victim'. Furthermore, rape is also seen to be intimidation, degradation, humiliation, discrimination, punishment, control or destruction and a violation of a personal dignity⁹⁴. It will be important for the Court to evaluate the opinion and feelings of an applicant individually rather than making assumptions based on the experiences or previous cases because each applicant has his or her psychological makeup⁹⁵.

1.2.3 Article 8

Article 8 of ECHR has two parts, and it reads that, 1. *'Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'*⁹⁶. The right to marry and found a family is also protected under Article 12 separately and Article 5 Protocol 7 also adds to the rights in Article 12 ECHR⁹⁷. The rights protected by Article 8 and 12, and Article 5 of Protocol 7, are somewhat disparate⁹⁸. I will focus on the aspect of

⁹² Ibid

⁹³ *Selmouni v. France*, (App no. 25803/94) Judgment 28 July 1999

⁹⁴ UNHCHR, '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'. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=50348afc2> accessed 23 May 2013

⁹⁵ RAIIO, U.S. 'Citizenship and Immigration Services'. Available at: <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 23 May 2013

⁹⁶ Article 8, ECHR 1950

⁹⁷ Ibid no.86 p241

⁹⁸ Ibid

private life and family life on Article 8 because those are the part relevant as far migration and LGBT issues are concerned.

Article 8 prohibits arbitrary interferences by the State to respect family and private life of migrants residing on their territory (which can be labeled as a negative obligation) and also enables family ties to develop and take appropriate measures to reunite the family (labeled as positive obligation). Article 8 requires more from a states than a merely approach⁹⁹. It is open-ended provisions of the Convention¹⁰⁰. The Court in its case laws has developed the notion of private life. In expulsion cases, the right to private life is often considered together with the right to family life¹⁰¹.

To start with the case laws under Article 8, the first case to look at is the case of *Dudgeon v. United Kingdom*¹⁰² where the applicant alleged that the existence of laws criminalising homosexual acts between two consenting adults in Northern Ireland violated his right to respect for his private life under Article 8. The ECtHR established that laws criminalizing homosexuality is contrary to the right to private life. The applicant alleged that both Article 8 and 14 has been breached. The Court did not examine Article 14 since the Court found a breach of Article 8 and concluded that it is sufficient to conclude that there is a violation to the right to private of a person whom these laws might be applicable to. This is the first successful gay before the Court but then the Court has not gone further with its development on case laws in relation to LGBT persons.

Article 8 is relevant to the LGBT individuals seeking to challenge deportation on the ground that it will deprive them of their family right¹⁰³. The right to respect private and family life provides some protection against expulsion of asylum seekers with a family in the host of country¹⁰⁴. The Court has no specific definition for private life, but the case of *Niemietz v Germany*¹⁰⁵ made the Court to come up with a brief descriptive of private life which is seen to be an 'inner circle' whereby the individual choose to live his or her own personal life with no interference from the people outside not to intrude into that

⁹⁹ Pieter Boeles et al, *European Migration Law* (Intersentia, 2009) p.144

¹⁰⁰ Ibid no.86 p241

¹⁰¹ Pieter Boeles et al, *European Migration Law* (Intersentia, 2009) p.148

¹⁰² *Dudgeon v. United Kingdom* (Application no. 7525/76) 22 October 1981

¹⁰³ Ibid no 86

¹⁰⁴ Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence'(2012) 4(1) GJIL

<<http://www.heinonline.org/HOL/Page?handle=hein.journals/gojil4&id=195&collection=journals&index=journals/gojil>> accessed 23 May 2013

¹⁰⁵ *Niemietz v Germany* (Application no 13710/88) Strasbourg, 16 December 1992

circle¹⁰⁶. In the case of *Al-Nashif and others v Bulgaria*¹⁰⁷ the Court in its judgment gave a general characterization of the concept of family life as well stating that the existence of family life depends 'upon the reality in practice of close personal ties'¹⁰⁸.

However, the first case brought under Article 8 in relation to LGBT expulsion was *F v. United Kingdom*¹⁰⁹; the applicant is an Iranian citizen who entered the United Kingdom illegally. He claimed asylum on the reason of persecution based on his sexual identity. He was held in prison for three months and four days and later released because of the payment of bribes by his family who feared that he would face the death penalty as a homosexual. He relied on Article 8 and Iranian law that prohibits adult consensual activity. The applicant complains that he would face the risk of extra-judicial execution and torture and ill-treatment as homosexual if expelled. In his submission, he stated that sexual identity was the most intimate part of private life and that the existence of criminalizing adult consensual acts violated Article 8. The ECtHR decided that removal of *Mr. F* to Iran does not violate Article 8. The Court held that 'on a purely pragmatic basis, it cannot be required that an expelling Contracting State on return an alien to a country which is in full and effective enforcement of all the things and freedoms set in the Convention'.

Again, the Court did not examine the individual in the context of his statement about how he was ill-treated back in Iran rather the Court used the sources which did not show any evidence of trials or criminal proceedings brought against any adult on homosexuality activities in Iran and the Danish report which stated that there is no execution of homosexuals because if it were then it would be expected to be known by the homosexual community. It is well known that a prison term on account of engaging in same-sex sexual activities constitutes an act of persecution, and such acts are sufficiently serious by nature which is in breach of human rights laws such as deprivation of liberty.

¹⁰⁶ Pieter Boeles et al, *European Migration Law* (Intersentia, 2009) Strasbourg, 20 June 2002

¹⁰⁷ *Al-Nashif and others v Bulgaria* (Application no. 50963/99)

¹⁰⁸ Stated in Pieter Boeles et al, *European Migration Law*, pp.146

¹⁰⁹ *F v. United Kingdom* (Application no. 17341/03) 22 June 2004

1.3 European Union

LGBT persons try to flee persecution from their countries where their human rights are abused to find international protection by invoking refugee law and asking for asylum¹¹⁰. The European Union (EU) adopted an Asylum Procedures Directive in December 2005 which created a Common European Asylum System (CEAS) at the first phase. This applies to only third country nationals and stateless person. The CEAS was constructed in two stages. The first stage which was meant to start before 1 May 2004, consist of instruments which lays down minimum standards allowing Member States to holds on to national procedures and interpretations of certain concept and to deviate in favour of the individual seeking asylum and the second stage on the other hand was to start after 2004 was to restrict discretion offered to Member States to arrive at a common asylum procedure and a uniform asylum status¹¹¹. The rules of CEAS are part of the legal orders of the European Community and Member States and their courts are bound to apply¹¹².

The CEAS grants right to have asylum claim processed which is in accordance with the minimum procedural standards and the right to be granted a refugee status or subsidiary protection status when the conditions are met. The legal basis is sets out in Article 78 of Treaty on the Functioning of the European Union (TFEU). Article 78 TFEU has two paragraphs, the first paragraph talks about how the Union will offer subsidiary and temporal protection to people from third-country and follow the principle of non-refoulement and must be in accordance with the 1951 Geneva Convention for Refugees and its 1967 Protocol and the second paragraph lays down several measures to adopt to harmonize a common minimum standard for asylum application¹¹³.

Under Council Directive 2004/83/EC of April 29, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive” or

¹¹⁰ International Commission of Jurists (ICJ) *Sexual Orientation, Gender and International Human Rights Law-A Practitioners Guide*, 2009, Practitioners Guide N.4. available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4a783aed2> accessed 28 May 2013

¹¹¹ Pieter Boeles et al, *European Migration Law* (Intersentia, 2009)

¹¹² Ibid

¹¹³ The European Union, ‘Article 78 Treaty on the Functioning of the European Union’ (OJ C83/47). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> accessed 7 November 2012

“Directive”)¹¹⁴, has made some great development by including LGBT asylum seekers rather than taking the gender-neutral refugee definition.

To start with, the Qualification Directive has clarified the non-recognition of LGBT persons as belonging to a ‘particular social group’ compared to other international refugee laws. Article 10 (1) (d) of the Directive includes sexual orientation and gender related aspect as possible to be characterized as belonging to a ‘particular social group’¹¹⁵. Also, Article 9 (2) (b to d) of the Qualification Directive lay down the element of refugee definition in relation to ‘persecution’ which states that discriminatory state measures are a possible form of ‘persecution’¹¹⁶. As of 2008, both the United Kingdom and the Netherlands have considered sexual orientation as a source of persecution for the purpose of granting refugee status¹¹⁷. A research by the European Union Agency for Fundamental Rights shows that since 2009 the United Kingdom and the Netherlands have granted asylum to LGBT persons¹¹⁸ although they sometimes face difficulties in the asylum seeking process.

Finally, the Qualification Directive states that consultations with the United Nations High Commissioner for Refugees (UNHCR) may provide may provide guidance for Member States when determining refugee status according to Article 1 of the 1951 Convention and its 1967 Protocol¹¹⁹.

Directive 2011/95/EU of 13 December 2011 is the second phase of the CEAS aims to go beyond the establishment of the minimum standard and possibility for individual Member States to introduce more

¹¹⁴ Council Directive 2004/83/EC of 29 April 2004 on *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the content of the Protection Granted*. (OJ L304, 30/09/2004) Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> accessed 28 May 2013

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ European Union Agency for Fundamental Rights, *‘Homophobia, Transphobia and Discrimination on grounds of Sexual Orientation and Gender Identity in the EU Member States’*, (2010). Available at: http://fra.europa.eu/sites/default/files/fra_uploads/1659-FRA-homophobia-synthesis-report-2011_EN.pdf accessed 28 May 2013

¹¹⁸ European Union Agency for Fundamental Rights, *‘Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II- The Social Situation’* (2009). Available at: http://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf accessed 28 May 2013 and Sabine Jansen and Thomas Spikerboer, *‘Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’* (VU University, 2011). Available at: http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN_tcm22-232205.pdf accessed 28 May 2013

¹¹⁹ Ibid no122

favourable rules at national level¹²⁰. The directive sets out the criteria on how decision-makers can decide on whether an individual should be recognized as a refugee. The criteria to determine who qualifies for refugee status is Article 2 (d) of the Directive and is drawn from the 1951 Geneva Convention. Both definitions require an evidence of persecution. The definition in the 2011 Directive goes further with providing a new protection status entitled 'subsidiary protection' Article 2 (f) which is granted to individuals who do not qualify as refugees, but if there are substantial grounds that the individual is at a real risk of suffering harm if returned to the country of origin.

In addition Article 6 of the Directive clarifies the actors of persecution and serious harm since sexual orientation or gender identity persecution can come from many sources that may or may not be associated with the State. In countries where states have enforced laws on the criminalization of homosexuality then states are directly seen to be the main source of persecution¹²¹ and others face persecution from their friends and family. One good thing about the Directive is that Article 9 (2) recognizes that gender –specific acts fall within the concept of persecution¹²² and this can be relevant in cases of persecution of LGBT persons.

1.4 Soft Law

There are few soft laws on the rights of LGBT globally. I will focus on the Montreal Declaration and the Yogyakarta Principles. These laws are not legally binding they are sets up by human rights experts who LGBT activists who wants to get across the problems that are faced by people because of their sexual identity. The experts on the Yogyakarta Principles agree that it reflect the existing state of international

¹²⁰ Council Directive 2011/95/EU of 13 December 2011 on *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons as Beneficiaries of International Protection, for a uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for content of Protection Granted (recast)* (OJ 337/9, 20.12.2011). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF> accessed 28 May 2013

¹²¹ Ibid

¹²² Ibid

human rights law in relation to issues concerning sexual orientation and gender identity. As stated in the document itself, the Principles aim to affirm already binding legal standards¹²³.

The Declaration of Montreal was written by Joke Swiebel, a longtime LGBT activist and former Dutch Member of the European Parliament¹²⁴. The Declaration was presented at the International Conference on LGBT Human Rights, which was seen as the largest conference on LGBT human rights in Montreal, Canada July 2006. One of the proposals includes the creation of United Nations convention on the elimination of all forms of sexual orientation and gender identity discrimination¹²⁵. The Montreal Declaration is to summarize the core issues of the international LGBT movement in the broadest possible terms in order to make the document important in a global level and in all parts of the world¹²⁶. There are other purposes of the Declaration of Montreal these are to be used as a tool of advocacy according to national and local circumstances, campaigning tool by lobbyists and organizations and as a benchmark for future conferences¹²⁷. The Declaration is endorsed by some governmental bodies such as the House of Commons in Canada and some political parties¹²⁸.

The Declaration of Montreal also talked about the global issues that are affecting LGBT people such as asylum. For example in the Part 2 of the Declaration it state that '*LGBT persons who have a well-founded fear of persecution, by state or non-state actors, based on their sexual orientation or gender identity, must find similar protection within the framework of the 1951 Geneva Refugee Convention*'¹²⁹. The Declaration urges national governments to implement laws that grants asylum to LGBT people are persecuted in their national laws¹³⁰. There are no articles or paragraphs but five points of lists that explains the changes that the Declaration wants to have effect globally.

Another influential document is the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, was founded by human rights experts

¹²³ The Yogyakarta Principles, Preamble

¹²⁴ Kelly Kollman and Matthew Waites, '*The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction*' (2009) 15(1) Contemporary Politics

<<http://www.tandfonline.com/doi/abs/10.1080/13569770802674188#tabModule>> accessed 12 November 2012

¹²⁵ Ibid

¹²⁶ Declaration of Montreal, '*International Conference on LGBT Human Rights of the 1st World Outgames on 29 July 2006*'. Available at: <http://www.declarationofmontreal.org/declaration/index.html> accessed 12 November 2012

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ International Conference on LGBT Human Rights, '*Declaration of Montreal (2006)*'. Available at: <http://www.declarationofmontreal.org/declaration/DeclarationofMontreal.pdf> accessed 13 November 2012

¹³⁰ Ibid

from diverse regions and backgrounds in Indonesia on November 2006¹³¹. The Principles are set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birthright¹³². There are no articles and paragraphs like the Montreal Declaration but has 29 Principles and 29 signatories including former UN High Commissioner for Human Rights, Mary Robinson¹³³.

Principle 23 states that 'Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity'¹³⁴. It urges States not to expel a person to a State where it is likely to be persecuted on the basis of sexual orientation or gender identity. Both the Declaration of Montreal and Yogyakarta Principles are based on international legal norms that already existed but have emphasized more on using 'sexual orientation' and 'gender identity'.

The principles are non-binding law that helps in interpretation of international human rights treaties which are binding on signatory States¹³⁵. In 2008, the UNHCR published 18-page Guidance note. Guidance Notes seek to clarify applicable law and legal standards that can provide guidance and protection for asylum-seekers. The Guidance Note made reference to the Yogyakarta Principles as a form of non-binding document which serves as guidance on how sexual orientation and gender identity can be basis of a well-founded fear of persecution¹³⁶. Additionally, in October 2009, the Division of International Protection Services of the United Nations High Commissioner for Refugees published a

¹³¹ "The Yogyakarta Principles", 2006, Available at: http://www.yogyakartaprinciples.org/principles_en.htm accessed 13 November 2012

¹³² Ibid

¹³³ Kelly Kollman and Matthew Waites, 'The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction' (2009) 15(1) *Contemporary Politics* <<<http://www.tandfonline.com/doi/abs/10.1080/13569770802674188#tabModule>> accessed 13 November 2012

¹³⁴ 'The Yogyakarta Principles', 2006, Principle 23. Available at: http://www.yogyakartaprinciples.org/principles_en.htm accessed 13 November 2012

¹³⁵ Paula L. Ettelbrick, Esq., Alia Trabucco Zerán 'The impact of the Yogyakarta Principles on the International Human Rights Law Development', 'A Study of November 2007 – June 2010', Final Report

¹³⁶ Ibid

collection of instruments relevant to sexual orientation and gender identity to be used in refugee claims. The Division included Yogyakarta Principle and pointed it out as non-binding international instrument¹³⁷.

The Principles has also been supported by some institutions and human rights NGOs. The European Parliament together with Belgian Senate and Liberal International Party endorsed the use of the Principles with the influence of Human Rights Watch¹³⁸. The Dutch government has subscribed to the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity¹³⁹ and voted in favour of resolutions endorsing them¹⁴⁰. The Principles appears to have less significance in the United Kingdom because the law and practice of the UK on sexual orientation and gender identity meets the standards of the Principles or exceeds them. However, in 2008, the UK foreign office adopted a 'toolkit' to assist it embassies in the promotion of LGBT rights and the UK welcomed the Principles as an important contribution to help increase understanding of these issues¹⁴¹.

¹³⁷ Ibid

¹³⁸ HRW, 'European Parliament, Belgian Senate, and Liberal International Party Endorse Yogyakarta Principles' Available at: <http://www.hrw.org/news/2008/06/09/european-parliament-belgian-senate-and-liberal-international-party-endorse-yogyakart> accessed 29 May 2013

¹³⁹ Kingdom of the Netherlands, 'The Netherlands is Advocating for Gay Rights in the Human Rights Council' Available at: <http://geneva.nlmission.org/news/2012/02/the-netherlands-is-advocating-for-gay-rights-in-the-human-rights-council.html> accessed 29 May 2013

¹⁴⁰ The Yogyakarta Principles, Available at: <http://lgbt.polis.house.gov/pdf/BorisDittrich62308.pdf> accessed 29 May 2013

¹⁴¹ Ibid no 137

CHAPTER 2: SEXUAL ORIENTATION REFUGEE DETERMINATION IN THE UNITED KINGDOM AND THE NETHERLANDS

2.1 The United Kingdom

Paragraph 339J of the Immigration Rules require the assessment of an asylum claim, eligibility for grant of humanitarian protection or human rights claim to be carried on an individual, objective and impartial basis. Other considerations that will be taken into account is the individual position and personal circumstances of the applicant such as background, gender and age to assess whether the applicant has been or could be exposed would amount to persecution or serious harm if he returned to the country of origin¹⁴². As we have seen in chapter one, the United Kingdom has an obligation under the 1951 Geneva Convention, the European Convention on Human Rights (ECHR) and the EU Qualification Directive which sets out the minimum standards for protection not to return a person to a country or territory where they are at risk of persecution.

The European Council Directives (2004/83/EC) of 29 April 2004 and (2011/95/EU) of 13 December 2011, contains definitions certain terms within the 1951 Convention. Council Directive (2004/83/EC) of 29 April 2004, was transposed into the UK law through the Refugee or Persons in Need of the International Protection (Qualification) Regulations 2006 and changes to the immigration rules, and applies to asylum and human rights claims since 9 October 2006¹⁴³. Acts and reasons of persecution are legally defined by the Directive.

To qualify for refugee status, an applicant must satisfy the criteria set out in the 1951 Convention. The key elements of the criteria are:

A well-founded of fear: Asylum applicant in the UK must show that their fear of being persecuted in the home country is justified. This is usually based upon showing that he or she has been persecuted in the past. The applicant must show that he or she has been persecuted in the past or has escaped before experiencing persecution and there is a possibility he or she will face danger on return.

¹⁴² UK Home Office, 'Paragraph 339J of the Immigration Rules'. Available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/> accessed 4 June 2013

¹⁴³ UK Home Office, 'Gender Issues in the Asylum Claim'. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/gender-issue-in-the-asylum.pdf?view=Binary> accessed 4 June 2013

Persecution: For a person to fear what the law considers to be persecution he or she must face really serious harm. Persecution can be in the form of physical danger such as beatings, torture, death or detention and long-term imprisonment¹⁴⁴.

Persecution Based on Sexuality: The applicants have to show that they have been persecuted in their countries specifically because of their sexual orientation.

A Failure of Protection: The applicant must show that there is no protection against persecution in their own country. Citizens of a country are meant to be protected by the police and take reasonable steps to punish those that seek to persecute LGBT persons.

For some reason(s) many LGBT refugees have difficulties fitting into the legal definition of refugee of the 1951 Geneva Convention. For a long time the main obstacles was the fact that sexual orientation or gender people are not mentioned amongst the reasons for persecution for which people can claim refugee status. LGBT people persecuted for the reason for their sexual orientation or gender identity will need to fit within the existing Refugee Convention grounds in order to receive protection under the 1951 Refugee Convention¹⁴⁵.

For many years decision makers in the UK have refused to accept that those fleeing persecution on the basis of sexual orientation were even capable of being refugees under the terms of the Refugee Convention¹⁴⁶. Although countries such as Germany, USA, Canada, New Zealand, The Netherlands and Australia accepted sexual orientation and gender identity as aspect of the particular social group category of the Refugee Convention in the 1980s and 1990s, the UK had problems regarding the interpretation of membership of a particular social group¹⁴⁷. Since 1999 British decision-makers have continued to show a reluctance to make findings on *Refugee Convention* grounds. Provisions in the Human Rights Act (1998) makes it unlawful for public authority to act in a way incompatible with a right arising under the ECHR became operative in October 2000¹⁴⁸. Since that time the LGBT refugee decisions in Britain have not focused on refugee protection, but on the claims to non-refoulement due to potential

¹⁴⁴ Stonewall, 'Asylum and Humanitarian Protection for Lesbian, Gay and Bisexual (LGB) People'. Available at: http://www.stonewall.org.uk/documents/stoasylum_guide.pdf accessed 4 June 2013

¹⁴⁵ Anisa de Jong, *ICAR Navigation Guide: Lesbian, Gay, Bisexual and Transgender (LGBT) Refugees and Asylum Seekers* (September 2003). Available at: <http://www.icar.org.uk/navgd/gbt.pdf> accessed 4 June 2013

¹⁴⁶ Jenni Millbank, 'A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003' (2005) *Social & Legal Studies*. Available at: <http://sls.sagepub.com/content/14/1/115.full.pdf+html> accessed 4 June 2013

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

breach of ECHR provisions such as Article 8¹⁴⁹. The UK decision makers finally followed the principles that emerged from the judgments in several cases namely, *Shah and Islam*¹⁵⁰, *K and Fornah*¹⁵¹, the Court Appeal judgments in *Ivanauskiene*¹⁵², *Skenderaj*¹⁵³ and *Montoya*¹⁵⁴ and the Qualification Regulations 2006 when deciding whether a particular social group exists in a particular country¹⁵⁵. The most significant case is *Shah and Islam* since it is the first case persecution based on gender discrimination in which a definition of social group was established by the House of Lords.

Shah and Islam were married Pakistan women who left their homes and their country to escape domestic violence. They were at risk of falsely accused to have committed adultery back in Pakistan. They feared the risk of persecution if they are found to be guilty of sexual immorality. They therefore claimed protection under the 1951 Geneva Convention. As discussed above, a person can claim a refugee status must show he or she has a 'well-founded of fear' of persecution for the reasons of race, religion, nationality, membership of a particular social group. The doctrine of *ejusdem generis* was seen to have played a very useful interpretative role of particular social group in the case of *Shah and Islam* for the House of Lords¹⁵⁶. *Ejusdem generis* literally means 'of the same kind' and is a rule of construction that is helpful in the construction of a general phrase used in an enumeration with specific words which should be interpreted in a manner consistent with the specific words¹⁵⁷.

In their separate opinion, Lord Hoffman, Lord Steyn and Lord Hope agreed that 'particular social group' could be defined as 'Pakistani women'. This is because women shared the same immutable characteristic of gender, they formed a distinct group in society and they faced a widespread of discrimination in their fundamental rights in which the state fail to protect them and also, are not entitled to the same rights as men. Similarly, to the case of *Fornah*, the House of Lords did not consider

¹⁴⁹ Ibid

¹⁵⁰ *Islam v Secretary of State for the Home Department; R v Immigration Tribunal and Another Ex Parte Shah* [1999] UKHL 20, 25 March 2009

¹⁵¹ *K and Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006

¹⁵² *Ivanauskiene v Special Adjudicator* [2001] EWCA Civ 1271, 31 July 2001

¹⁵³ *Skenderaj* [2002] EWCA Civ 567, 26 April 2002

¹⁵⁴ *Montoya* [2002] EWCA Civ 620, 9 May 2002

¹⁵⁵ UK Home Office, 'Considering Asylum Claims and Assessing Credibility'. Available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanadecidingtheclaim/guidance/considering-protection-.pdf?view=Binary> accessed 5 June 2013

¹⁵⁶ T. Alexander Aleinkoff, 'Membership of a Particular Social Group: Analysis and Proposed Conclusion' (Background Paper for 'Track Two' of the Global Consultations). Available at:

<http://www.unhcr.org/3b83b1c54.pdf> accessed 5 June 2013

¹⁵⁷ Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Development relating to 'Membership of a Particular social Group'* (2012), Division of International Protection. Available at: <http://www.refworld.org/pdfid/4f7d94722.pdf> accessed 5 June 2013

that 'young women in Sierra Leone' constituted a particular social group, but accepted that 'uninitiated' or 'intact' women in Sierra Leone did form a particular social group.

In international jurisprudence there are two approaches in determining whether particular social group exists. This was highlighted by Baroness Hale in the case of *Fornah*¹⁵⁸. The first approach is the 'protected characteristic' which requires the group to share immutable characteristics or characteristics that is fundamental to the human dignity that it should not be denied. The second approach is based on an Australian case law is the 'social perception' approach is when a group is identified by a common characteristic which makes them be recognized as a group and sets them apart from society as a whole¹⁵⁹. These approaches have helped in the development of LGBT asylum seekers since it is now easier to know that LGBT people formed a particular social ground under the Refugee Convention.

Country of Origin Information (COI) is crucial for the determination of asylum claims, as it forms the objective evidence upon which the decision-maker can decide whether the claim is credible¹⁶⁰. The information is integral to asylum decision-making in the UK at all stages of the Refugee Status Determination (RSD) process. In cases of LGBT applications, decision-makers look at enforced legislation(s) that criminalises homosexuality in their countries, the lack of police protection because in some countries they are ill-treated by the police for reasons of their sexual identity and this can amount to persecution. Whereby the laws are not enforced then it is not seen to be persecution as the Court of Appeal ruled in the cases of *JM (Uganda) and OO (Sudan)*¹⁶¹ that unenforced criminalization did not amount to persecution and this ruling has been followed by the courts as an indicator of safe refoulement¹⁶². LGBT applicant therefore has to support his or her application, especially where he or she has a proof of persecution in their country of origin. On the contrary, it is difficult to access some information about LGBTs in some countries of origin because of their poor human rights position making them not to get enough evidence to support their applications.

¹⁵⁸ The case of K and Fornah 2006, para 99

¹⁵⁹ Ibid

¹⁶⁰ Sabine Jansen and Thomas Spijkerboer, 'Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (VU University, 2011)

¹⁶¹ *JM (Uganda) and OO (Sudan) v Secretary of State of Home Department* [2009] EWCA Civ 1432, 18 November 2009; [2010] All ER (D) 17 June 2010

¹⁶² European Union Agency for Fundamental Rights, 'Flash Report: Update to the Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation [United Kingdom]' 2010. Available at: <http://www.nottingham.ac.uk/hrlc/documents/publications/ehrl/uk-report-homophobiaupdatefinalclean.pdf> accessed 6 June 2013

In our society, it is expected of an individual regardless of your sexuality to seek protection from national authorities against homophobic and transphobic violence. But this is not always the case as LGBT people are arrested because of their sexuality. This goes on in many countries, especially where homosexuality act is criminalised. The case of *DW (Jamaica)* is a Jamaican man who was accused of being gay. The appellant has been living in Jamaica until he departed to the United Kingdom. On two occasions he has suffered abused by strangers on the street. The appellant said he refused to report both incidents to the police because they would not provide any protection since the police are corrupt and homophobic. Also, most of the people in Jamaica are homophobic; therefore it is not safe for him if he is returned¹⁶³. The Tribunal referred to the country of origin information which showed that protection generally would not be available to gay people in Jamaica. The appellant was granted asylum on the grounds that he will be at risk of homophobic intolerance, harassment and ill-treatment when returned¹⁶⁴. In addition, the case of *SW (Jamaica)* with similar facts as *DW (Jamaica)* the appellant was granted asylum not to be returned to Jamaica as the country is a deeply homophobic society¹⁶⁵.

Another homosexual asylum application which has gone to the extent of international bodies and human rights organizations influencing the decision of the Home Office is the case of Seyed Mehdi Kazemi. He was a 20 year old Iranian gay who is wanted in Iran for sodomy. He applied for asylum in the UK because he feared he will be at risk of imprisonment, harsh corporal punishment and probably been hung if he is deported to Teheran. The Home Office turned down his application; because he feared deportation from the UK, he tried escaping to Canada but was stopped on the German border and transferred to the Netherlands (normally in favour of granting asylum to Iranian homosexuals)¹⁶⁶. The intervention of the European Parliament (EP) helped because the EP approved an urgent resolution for Mehdi Kazemi's case¹⁶⁷ where it was signed by 142 MPs from the House of Commons and 62 Lords¹⁶⁸.

¹⁶³ *DW (Jamaica) v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168, 28 November, 2005

¹⁶⁴ *Ibid*

¹⁶⁵ *SW (Jamaica) v Secretary of State for Home Department*, CG [2011] UKUT 00251, 24 June 2011

¹⁶⁶ Everyone Group for International Cooperation on Human Rights Culture, *Mehdi Kazemi has been granted Asylum in the United Kingdom*' (20 May, 2008). Available at:

http://www.everyonegroup.com/everyone/mainpage/entries/2008/5/20_Mehdi_Kazemi_has_been_granted_asylum_in_the_United_Kingdom.html accessed 3 July 2013

¹⁶⁷ European Parliament, *'Joint Motion for a Resolution'* 12 March 2008. Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P6-RC-2008-0111&language=EN> accessed 3 July 2013.

¹⁶⁸ Everyone Group for International Cooperation on Human Rights Culture, *Mehdi Kazemi has been granted Asylum in the United Kingdom*' (20 May 2008). Available at:

http://www.everyonegroup.com/everyone/mainpage/entries/2008/5/20_Mehdi_Kazemi_has_been_granted_asylum_in_the_United_Kingdom.html accessed 3 July 2013

The Home Office reviewed his application and later granted him asylum. Apart from this, the Home Office has granted asylum to LGBT applicant who will be at risk of persecution if returned to their country of origin¹⁶⁹.

2.1.1 The Discretion Problem

The UK Border Agency staff and judges often conclude that gay people can return to their home country and no longer be at risk if they discreet about their sexual activity or identity. This approach has been condemned by the United Nations High Commissioner for Refugees (UNHCR)¹⁷⁰. The UK has offered asylum to LGBT persons but then there are many LGBT asylum applications that their right to protection have been refused. The UK government used to have no specific guidance or training for decision-makers for claims brought on the grounds of sexual orientation. It was only in 2010 following a combination of judicial, civil society and political pressures that specific policy guidance was speedily issued and significant progress was seen¹⁷¹. Before this time, individuals who claimed asylum in the UK on account of their sexual orientation were considered not to be in need of international protection if it would be 'reasonable' for them to be 'discreet' on their return to their home country.

LGBT people who leave their country to seek refuge and apply for international protection in the UK, are often rejected with the reasoning that they have nothing to fear in their country of origin as long as they remain discreet. At its baldest, discretion reasoning entailed a 'reasonable expectation that people should, to the extent that is possible, co-operate in their own protection' by exercising 'self-restraint' such as avoiding any behaviour that would identify them as gay, never telling anyone they were gay, only expressing their sexuality by having anonymous sex in public places, pretending that their partner is a 'flat mate' or indeed remaining celibate¹⁷². Discretion reasoning has been applied even in cases where the applicant has stated that they do not wish to, or intend to, be discreet if returned to their home country.

¹⁶⁹ James Meikel, 'Gay Asylum Seekers Win Protection from Deportation' (7 July 2010). *The Guardian*, Available at: <http://www.guardian.co.uk/uk/2010/jul/07/gay-asylum-seekers-rights-deportation> accessed 3 July 2013

¹⁷⁰ Nathaniel Miles, 'No Going Back: Lesbian and Gay People and the Asylum System' (Stonewell, 2009)

¹⁷¹ Amanda Gray and Alexandra McDowall, 'LGBT Protection in the UK: from Discretion to Belief?'. Available at: <http://www.fmreview.org/sogi/gray-mcdowall> accessed 2 July 2013

¹⁷² Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2/3) *International Journal of Human Rights*. Available at: <http://www.tandfonline.com/doi/pdf/10.1080/13642980902758218> accessed 9 July 2013

The case of *Jain*¹⁷³ is a gay man from India who presented his case to the authorities and argued that he faced persecution in his country of origin because, among other things, gay sex is criminalized there. The Court of Appeal accepted that the Tribunal's findings were consistent with the Appellant being handed over to the police if he lives openly as homosexual and being at risk of brutality in their hands did not disturb the Tribunal decision to deny protection. Despite the claimant's own evidence that he wanted to live openly because he was unable to live a normal lifestyle. The Tribunal determined that he would be discreet and therefore safe from harm. The decision-makers employ the violence of the law to force applicants back into their home country closets¹⁷⁴.

Another case where the Appellant was told by the Court to discreet his sexuality is the case of *XY*¹⁷⁵. The Appellant is an Iranian homosexual who claimed to be at risk of persecution if returned to his country of origin. In his case, the Tribunal had not expressly considered that the appellant could tolerate the fact that he can conduct his sexual life when returned to Iran. This is because he carried on with his sexual relationship until he came to the UK on the fear of persecution because his partner was arrested. His case was dismissed by the Court of Appeal on the grounds that the Iran authorities were not aware of his sexual activity and he was able to live a discreet lifestyle with his partner. Therefore, it is possible for him to conduct his sexual relationship upon his return to Iran since he has done it before. This was also seen in the Court of Appeal cases *J v Secretary of State*¹⁷⁶, *Z v Secretary of State*¹⁷⁷ and *J v Secretary of State*¹⁷⁸.

The case of *HJ (Iran) and HT (Cameroon)*¹⁷⁹ concerned two gay men, who entered the UK to claim asylum on the grounds of homosexuality. They had claimed asylum on the basis that they would face persecution in Iran and Cameroon because of their sexual orientation. The case was previously turned down by the Court of Appeal on the basis that they would hide their sexual orientation if returned. The Iranian applicant would not come to the attention of the authorities and it would be reasonable for the Cameroonian to internally relocate to avoid discovery and repetition of the assault he had suffered. The Court of Appeal found that, taking into account the situation in the country of origin, it would be

¹⁷³ *Jain v Secretary of State for the Home Department* [1999] EWCA, Civ 3009, 6 October 1999

¹⁷⁴ Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2/3) *International Journal of Human Rights*. Available at: <http://www.tandfonline.com/doi/pdf/10.1080/13642980902758218> accessed 9 July 2013

¹⁷⁵ *XY (Iran) v Secretary of State for Home Department* [2008] EWCA Civ 911, 31 July 2008

¹⁷⁶ *J v Secretary of State for Home Department* [2007] Imm AR 73

¹⁷⁷ *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, 2 December 2004

¹⁷⁸ *J v Secretary of State for Home Department* [2006] EWCA Civ 1238, 26 July 2006

¹⁷⁹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, 7 July 2013

'reasonably tolerable' for both applicants to conceal their sexual identity¹⁸⁰. The central question of the appeal was to see whether the men on their return could reasonably be expected to discreet their sexuality. The Supreme Court issued a landmark judgment extending the scope of asylum protections for lesbian and gay refugees in this case¹⁸¹. The judgment is beneficial to LGBT asylum applicants because the approach to act discreetly of one's sexual orientation has been scrapped. In the judgment, Lord Roger JSC with whom Lords Walker and Collins and Sir John Dyson JJSC agreed, the underlying of the 1951 Geneva Convention is "*that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution*"¹⁸². The Court further stated that if a person's home state fails to afford him the protection necessary to live in that way, the country of asylum must do so¹⁸³. The Court followed the test of the Court of Appeal which was formulated by Maurice Kay LJ and Buxton LJ in *J v SSHD* (2007), where Phil LJ said it was wrong in principle for a person to suppress his identity in order to avoid suffering severe harm and it is inconsistent with the interpretation of Article 1A (2) of the 1951 Geneva Convention.

The judgment was unanimous, finding that gay and lesbian asylum seekers should be granted refugee status if going back to their country of origin would result in them being forced to hide their sexuality. After the judgment the UK government reacted quickly. Specific guidance and training for decision-makers on how to approach asylum claims based on sexual orientation and sexuality identity were rolled out by the UK Border Agency by the end of 2010¹⁸⁴. In May 2010, the UK's Coalition government committed publicly to ensure that no gay or lesbian asylum seeker would be returned to their country of origin if they risk persecution. The government stated that "we will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender

¹⁸⁰ European Database of Asylum Law (EDAL), '*UK-Supreme Court, 7 July 2010, HJ (Iran) v Secretary of the Home Department [2010] UKSC 31*'. Available at: <http://www.asylumlawdatabase.eu/en/case-law/uk-%E2%80%93-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31> accessed 11 July 2013

¹⁸¹ Ryan Goodman, '*Asylum and the Concealment of the Sexual Orientation: Where not to draw the Line*'. Available at: <http://nyujilp.org/wp-content/uploads/2010/06/44.2-Goodman.pdf> accessed 11 July 2013

¹⁸² *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, 7 July 2013

¹⁸³ *Ibid* para 65

¹⁸⁴ Amanda Gray and Alexandra McDowall, '*LGBT Protection in the UK: from Discretion to Belief?*'. Available at: <http://www.fmreview.org/sogi/gray-mcdowall> accessed 2 July 2013

identification puts them at proven risk of imprisonment, torture or execution”¹⁸⁵. This shows the progress the UK has made on refugee protection for LGBT people.

2.2 The Netherlands

To begin with the section on the Netherlands, it is noteworthy to remind ourselves of the monist system in the country as mentioned above in the previous chapter. International law operates automatically and as such within the national legal system. Therefore, the Netherlands adheres to the 1951 Refugee Convention as it is the primary legal document that serves as guidelines for refugees. According to the Convention, state parties are prohibited from expelling or returning a refugee to a country (non-refoulement) where his or her life or freedom would be threatened. Additionally, protection against non-refoulement is granted under Article 3 of ECHR. The Netherlands has been at the forefront in developing policies for rights for lesbian and gay people. The Netherlands is the first country to legalize same-sex marriage in 2001. In terms of making progress on issues relating to transgender people, however, the government admits that this has not been given the same attention¹⁸⁶. The applications of LGBT asylum seekers in the Netherlands amount to approximately 200 per year¹⁸⁷. In the Netherlands, applications for asylum are generally judged on the basis of a number of criteria. First, whether the asylum-seeker has displayed more than marginal activities in the country he or she is fleeing and that he or she has thereby focused the negative attention of the authorities or himself or herself. Second, it must be clear that the government in the asylum-seeker’s country of origin cannot or will not offer protection, and that he or she has a fear of persecution because of his or her race, religion, nationality, political beliefs or because you belong to a certain social group. Furthermore, fear of persecution must also apply to the future, that is, not only has the fear been well-founded in the past, but the asylum-seeker must have a well-founded fear that he or she will be persecuted upon return to his or her country of origin. On the other hand, Article 29 (1b) of the Aliens Act 2000 allows LGBT persons to show substantial grounds for believing that he or she faces a real risk of being subjected to torture or inhuman

¹⁸⁵ HM Government, *The Coalition: Our Programme for the Government* (2010). Available at: http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf accessed 11 July 2013

¹⁸⁶ Sonia Onufer Corrêa and Vitit Muntarbhorn, ‘An Activist’s Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ (August 2010). Available at: http://www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf accessed 12 July 2013

¹⁸⁷ IND Informatie-en Analysecentrum, *“Evaluatie Gendergerelateerde Vreemdelingenbeleid in Nederland”*, The Hague, Ministry of Justice, 2008.

degrading treatment or punishment upon return in the meaning of Article 3 of the ECHR¹⁸⁸. The department that handles the asylum applications is the Netherlands Immigration and Naturalization Service (IND)¹⁸⁹.

The case of *RV*¹⁹⁰ is the first case law in the Netherlands whereby the decision of the Court brought about persecution for reasons of membership of a particular social group in the sense of Article 1A of the 1951 Refugee Convention relating to the Status of Refugees. The appellant was a homosexual Polish national whose application was rejected by the State Secretary of Justice in 1980. The reason for this decision was that the appellant had no well-founded fear of persecution, since official reports had proved that homosexuality was not criminalized in Poland. The Secretary of State acknowledged that gay people were victims of discrimination in Poland but did not consider this to be persecution. The case was appealed to the Division of the Council of State where it was ruled that “it was sufficiently plausible that the appellant was exposed to discrimination by the authorities in his country of origin”¹⁹¹. The ruling was incorporated into the *Vreemdelingencirculaire* (Aliens Circular) C1/4.2.10.2¹⁹². The Netherlands is also the first country to recognize sexual orientation as a persecution ground as early as 1981 which makes it clear that the Netherlands have been offering protection for LGBT persons fleeing from their country than the United Kingdom.

Similarly to the UK that take into consideration the country of origin information of LGBT asylum seeker applicant before granting an asylum. LGBT people in the Netherlands can seek asylum under humanitarian reasons stated under Article 29 1 (C) Aliens Act. This concern persons who do not qualify for protection under the 1951 Refugee Convention or subsidiary protection, but for whom the Minister considers there to be pressing humanitarian reasons that it cannot be required of the LGBT asylum seeker to return to his country of origin. Iranian LGBT asylum applicants have been granted protection

¹⁸⁸ Rick Lawson et al, ‘*Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation-Netherlands*’ (2008). Available at: http://fra.europa.eu/sites/default/files/fra_uploads/331-FRA-hdgs0-NR_NL.pdf accessed 12 July 2013

¹⁸⁹ Immigration and Naturalization Service, ‘*Asylum*’. Available at: <http://www.ind.nl/en/Residence-Wizard/asylum/Pages/default.aspx> accessed 11 July 2013

¹⁹⁰ *Afdeling Rechtspraak Raad van State* [Judicial Division of the Council of State] 13 August 1981, No. A-2.1113, *RV* 1981, 5.

¹⁹¹ Rick Lawson et al, ‘*Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation-Netherlands*’ (2008). Available at: http://fra.europa.eu/sites/default/files/fra_uploads/331-FRA-hdgs0-NR_NL.pdf accessed 12 July 2013

¹⁹² Rick Lawson et al, ‘*Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation-Netherlands*’ (2008). Available at: http://fra.europa.eu/sites/default/files/fra_uploads/331-FRA-hdgs0-NR_NL.pdf accessed 12 July 2013

for humanitarian reasons since 18 October 2006¹⁹³. Furthermore, the Dutch government recognized that lesbian and gay Iranians are a “special group” facing persecution at home and they deserve protection in the Netherlands¹⁹⁴.

The criminalization of homosexuality in the country of origin is seen to be sufficient grounds for asylum in the Netherlands in some of its cases. This was seen in an applicant from Tanzania who submitted his country of origin information that stated that several homosexuals have been arrested and the general climate towards homosexuals has deteriorated. The applicant was granted asylum on this reason¹⁹⁵. An LGBT applicant from Indian was offered asylum because of enforced criminalization in India¹⁹⁶ with reference to the US State Department Report which proves that section 377 of the Indian Penal Code is not a dead letter. This section suppresses the rights of sexual minority. On a regular basis this provision is used for police raids against homosexuals and for threatening gay people with arrest when they come to report acts of violence¹⁹⁷. Apart from this, the Netherlands has granted asylum to people fleeing persecution from their country on the basis of their sexual identity¹⁹⁸.

Also in the 2009 policy guidelines, it states that “whenever homosexual acts are criminalized in the country of origin, the applicant is not required to have to invoke the protection of the authorities there¹⁹⁹. In addition, this policy is incorporated into some policy guidelines concerning specific countries which LGBT persons are not supposed to turn to the police for protection. These countries are Afghanistan, Democratic Republic of Congo, Guinea, Iraq, Ivory Coast, Nepal, Nigeria, Sierra Leone, Sri Lanka and Syria. It should be noted that in some of these countries, homosexual acts are not criminalized, for instance Ivory Coat and Nepal²⁰⁰. This is a good practice on the Netherlands as it does not require asylum seekers from countries that have criminalised homosexuality acts to seek police protection against homophobic persecution compared to the United Kingdom where laws criminalising of homosexual acts are not sufficient for the applicant.

¹⁹³ Ibid

¹⁹⁴ Human Rights Watch, ‘Netherlands: Asylum Rights Granted to Lesbian and Gay Iranians’ (2006). Available at: <http://www.hrw.org/news/2006/10/18/netherlands-asylum-rights-granted-lesbian-and-gay-iranians> accessed 12 July 2013

¹⁹⁵ Rechtbank (Regional Court) Haarlem 2 March 2010, 10/5782

¹⁹⁶ Rechtbank (Regional Court) Den Haag 11 November 2009, 09/13455

¹⁹⁷ Sabine Jansen and Thomas Spijkerboer, ‘Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’ (VU University, 2011).

¹⁹⁸ Movement For Justice, ‘Victory-Kalanzi Marvin Richard Granted Asylum’ (22 March 2012). Available at: <http://www.movementforjustice.org/2012/03/free-kalanzi-marvin-richard/> accessed 12 July 2013

¹⁹⁹ Aliens Circular 2000 C2/2.102

²⁰⁰ Ibid

2.2.1 Discretion Problem

The Netherlands formally abolished the discretion requirement in its 2007 policy guidelines but it is still applied in individual cases, with the approval of the judiciary. The Netherlands incorporated the abandonment of the 'discretion requirement' in the Aliens Circular for homosexuals and stated that "people with a homosexual preference are not required to hide this preference upon return in the country of origin"²⁰¹. The policy guidelines are an improved step to abolish the discretion problem, however in some cases the discretion requirement is still used. In the cases of a Sierra Leone lesbian who had a hidden her sexuality in her home country came to the Netherlands and did not want to conceal her sexual orientation again. The Council of State accepted the argument and stated that "*the fact that in the Netherlands the applicant used the possibilities and rights of Dutch society does not imply that she will be unable to accommodate upon return, even if that would require a certain restraint towards society*", adding "although sexual orientation is a crucial element of one's personality, this does not imply that it cannot be expected that she lives her private life in Sierra Leone in the same way as before she left for the Netherlands, just because she cannot leave her sexual orientation in Sierra Leone publicly. It is also not contrary to Article 8 ECHR to expecting this from her, for the mere reason that she has not adduced facts or circumstances indicating that in Sierra Leone she has not been able or will not be able to give a meaningful interpretation to her homosexual orientation"²⁰².

Another case which is pending in the court is a Palestinian gay from the United Arab Emirates (UAE). He had secretly engaged in same-sex relationships and his claim was rejected because "he had lived in the UAE for many years without any problems". In his stamen, he mentioned the ill-treatment he had faced back in his home country was not believed since the authorities in the UAE were not aware of his sexual orientation. The appellate court considered that "asylum authorities should have explained either why expecting the applicant to engage in relationships secretly was not contrary to the policy, or why someone who expresses his homosexuality in the UAE less secretly does not have a well-founded fear of persecution". The appeal was allowed²⁰³. However, instead of making new decisions at the Council of State reasoning: 'because he moved in homosexual circles, he did not hide his sexual orientation *absolutely* and he therefore can be expected to express *that part of his identity* in the same way as before. The fact that he cannot do this in a *fully open* way, similarly as in the Netherlands, does not

²⁰¹ Vreemdelingencirculaire (Aliens Circular) 2000 C2/2.10.2.

²⁰² Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State) 11 May 2011, 201011782/1/V1

²⁰³ Court Arnhem, 25 October 2011, No. 11/9826

mean that the policy that it cannot be expected to hide one's sexual orientation is not followed..... (homo) sexual relationships specifically belong to the private sphere and no violation of treaty obligation occurs, when such a relationship cannot be exercised (without restrictions) in the *public domain*²⁰⁴. The UAE is one of the countries where homosexuality is criminalized and homosexuals are seen to be at risk. The police arrested and sentenced 25 men to a five years imprisonment on conviction of homosexuality and also be given hormone therapy if they consent²⁰⁵. The Court should consider the fact that homosexuality is criminalised and that homosexuals are ill-treated so there is a possibility that, this applicant will face future persecution even if he decides to discreet his sexuality.

CONCLUSION

The cases brought before the Court shows that, the authorities of the Netherlands and the UK rely on the country of origin information in reaching out a decision in all cases. Nevertheless, the majority of the information held is not detailed since in most circumstances persecution of lesbian, gay, bisexual or transgender are either not reported to the authorities or not known which makes it difficult for them in their asylum process. In some cases, applicants are told return back to their home country to relocate and discreet their sexual orientation in order to prevent them from being harmed even though there has been measures to tackle this issue. The Netherlands can go further abolishing this rule completely than applying it in some cases.

To conclude this chapter, people fleeing persecution from countries where homosexuality acts are criminalised should be entitled to subsidiary or refugee protection. However, criminalisation of homosexuality acts in a country should be sufficient grounds for the authorities to see it as a form of persecution rather than looking for evidence of persecution which is difficult to prove.

²⁰⁴ Stated in NYU Journal of International Law and Politics, '*Discretion in the Netherlands: Sabine Jansen Responds to Jenni Millbank & Guglielmo Verdirame*' Panel 3 of the NYU JILP Vol. 44:2 Online Symposium. Available at: <http://opiniojuris.org/2012/03/09/discretion-in-the-netherlands-sabine-jansen-responds-to-jenni-millbank-guglielmo-verdirame/> accessed 12 July 2013

²⁰⁵ US Department of State, '*Forced Medical Treatment of UAE Homosexuals*' (28 November 2005)BBC, 'US Condemns UAE Gay Men Arrests'(29 October 2005) Available at: <http://www.asylumlaw.org/docs/sexualminorities/UAEforcedtreatment112805.pdf> accessed 12 July 2013

CHAPTER 3: THE CHALLENGES AND DIFFICULTIES IN THE ASYLUM PROCESS

In recent years, there have been significant advances in the treatment of LGBT asylum seekers in the UK and the Netherlands even though there have been improvements in policies, they still face barriers and challenges in their application process. Some of these policies set up by the authorities are just seen on paper but it does not comply with its own regulation in practice. Asylum claims based on persecution related to LGBT persons are particularly difficult to file, argue and win even with substantial evidence of persecution and ill-treatment²⁰⁶. LGBT asylum seekers have to go to the extreme lengths to meet the immigration officials' requirements that they prove their sexuality or else to be return to their various countries of origin where they are likely to face persecution. Apart from the general credibility assessment of the account of their sexual orientation or gender identity of the applicant there is wide divergence of issues where decision makers take into consideration. Such as witness statements, the type of questioning methods used in the interview process and assumed knowledge and behavior of the applicant.

3.1 Credibility Assessment

The general provision to start with is the Article 4 Qualification Directive²⁰⁷ which deals with the assessment of facts and the circumstances and paragraphs 195-205 of the UNHCR Handbook²⁰⁸. These standards indicate that applications should be examined closely for the problems asylum seekers may have in submitting evidence. The Qualification Directive provides that Member State shall ensure that interviews are competent and to take account of personal or general circumstances surrounding the application, including the applicant's culture or vulnerability and the UNCHR Handbook mentioned that there is a possibility that the applicant may feel apprehensive towards any authority which can include the interpreter, and emphasis that it is necessary for the examiner to gain the confidence of the applicants in order to assist them in putting forward their case and in fully explaining their opinions and feelings²⁰⁹.

²⁰⁶ Swetha Sridhran, *The Difficulties of US Asylum Claims Based on Sexual Orientation* Migration Information. Available at: <http://www.migrationinformation.org/USfocus/display.cfm?ID=700> accessed 17 July 2013

²⁰⁷ Council Directive 2004/83/EC of 29 April 2004, 'Article 4' Official Journal L304, 30/09/2004 p. 0012-0023.

²⁰⁸ UNCHR Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/REV. 1

²⁰⁹ Stated in Sabine Jansen and Thomas Spijkerboer, *Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (VU University, 2011).

Precisely, the *UNHCR Guidance Note* on Refugee Claims relating to sexual orientation stated that:

Self-identification as LGBT should be taken as an indication of the individual's sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation, and/or there is a lack of sufficiently specific country of origin information, the decision-maker will have to rely on that person's testimony alone. If the applicant's account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The handbook further states that:

In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular "flamboyant" or feminine demeanour in gay men, or "butch" or masculine appearance in lesbian women. Similarly, a person should not automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes. Enquiries as to the applicant's realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant's credibility.

And lastly:

It is important that LGBT applicants are interviewed by trained officials who are well informed about the specific problems LGBT persons face. The same applies for interpreters present at the interview. Relevant ways to increase officials' awareness, include short targeted trainings, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, accessing websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure²¹⁰.

3.2 How Do You Prove Sexuality?

²¹⁰ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, (2008).

A research conducted by Stonewell (the UK's campaigning charity for lesbians, gays and bisexuals) shows that many LGBT asylum seekers feel ashamed of their sexual orientation. This is because LGBT asylum seekers are from other countries where they could face serious harm if they were to live openly. When they feel ashamed of their sexual identity, it is difficult for them to tell the British authorities about the kind of problem they were facing in their home country since they find it hard to trust people²¹¹. On the other hand, COC Netherlands an organisation that has been advocating the rights of LGBT since 1946 also mentioned that asylum seekers are not likely to claim to be gay or lesbian. Homosexuality is seen to be a taboo in the countries they are fleeing persecution so is not something they would be inclined to resort to. This would make their lives in the asylum centers extremely difficult²¹².

Claiming asylum are often compounded for LGBT people if they are asked to prove their sexual orientation and are often not believed, especially if they have children or have been married before. Also if LGBT asylum seekers reveal their sexuality later in the process, it is assumed that this is being used to strengthen the case and that they are lying²¹³. In the UK, the case of AB²¹⁴ is an applicant from Pakistan originally applied on the basis of being a lesbian and later made a fresh claim as a Trans man, which he was denied by the UK Home Office with respect to disbelief regarding the Trans identity. It took over a year for the UK Home Office to refer to the applicant as 'him' instead of 'her'. In February 2011, the Home Office accepted that Trans men from Pakistan are 'at risk group', and offered him refugee status²¹⁵. Also in the Netherlands, an applicant's gender identity was supported by a letter from the VU University Medical Centre, which appears that the applicant has a "serious gender identity disorder". This evidence was seen to be essential in the court decision as it helped to quash a negative previous asylum decision²¹⁶.

²¹¹ Stonewell, 'Challenges Facing Gay Asylum Seekers'. Available at: http://www.youngstonewall.org.uk/know_your_rights/immigration_and_asylum/challenges_facing_gay_asylum_seekers/default.aspx accessed 17 July 2013

²¹² Klas den Tek, 'Gay Asylum Seekers not Gay Enough'. Available at: <http://www.rnw.nl/english/article/gay-asylum-seekers-not-gay-enough> accessed 17 July 2013

²¹³ The Women Resource Centre, 'Lesbian and Bisexual Women in the Asylum System' (2013). Available at: http://thewomensresourcecentre.org.uk/wp-content/uploads/Appendix-9_Lesbian-and-bisexual-women-in-the-asylum-system_FINAL2.pdf accessed 12 July 2013

²¹⁴ AB (Pakistan) (Unreported, 2009) Administrative Court.

²¹⁵ Sabine Jansen and Thomas Spijkerboer, 'Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (VU University, 2011).

²¹⁶ Rechtbank (Regional Court) Den Bosch, 30 December 2009, nr.09/7231

3.3 Sexually Explicit Questions

The British officials working on asylum cases may not fully understand LGBT issues and the different situations for gay people around the world. They might focus a lot on sexual activity or asking sexually explicit questions thinking it is a proof about the applicant sexual identity. One lesbian from Ugandan was asked by a British Immigration judge trying to determine if she is really a lesbian asked her whether she had ever read any works by author Oscar Wilde²¹⁷. The officials usually asked questions thinking that they had a similar lifestyle with someone who have been in the UK. Another Jamaican asylum seeker woman was also told by an Immigration judge that he did not believe she was gay because 'she does not look like a lesbian' and asked her if 'she uses a sex toy'. Additionally, a Pakistani lesbian was also asked 'the types of clubs she usually attends' by an Immigration judge²¹⁸. These types of questions are dehumanizing which can affect the applicant memory, testimony because these questions cannot establish the applicant sexual identity.

3.4 Stereotypical Notions and Behaviour

Another challenge LGBT asylum seeker will face in the UK is during the interview with the UK Border Agency whereby the officials are stereotypical in making up a decision. The officials deny LGBT asylum seekers protection because during the interview they appeared too typically straight and often the applicant are expected to act, dress and speak in a certain way which conform to the Western notions of sexuality. For instance, lesbians have been rejected for not seeming butch enough, and gay men have been asked if they frequented parks for sex. One lesbian who was interviewed by the UKBA said they have in their mind this stereotypical woman with short hair and no make-up. A similar situation is said to have been reported in the Netherlands²¹⁹. In a Dutch case law, during the asylum interview, an Iranian

²¹⁷ Mark Duell, 'Have you ever read any Oscar Wilde? : Lesbian Asylum Seekers accuse judges of asking 'incentive' questions to prove their sexuality' (4 April 2013) *Daily Mail*. Available at: <http://www.dailymail.co.uk/news/article-2303917/Lesbian-asylum-seekers-accuse-judges-asking-insensitive-questions-prove-sexuality.html> accessed 17 July 2013

²¹⁸ Ibid

²¹⁹ Sabine Jansen and Thomas Spijkerboer, 'Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (VU University, 2011).

applicant had already been made to declare that he and his friend had been caught while they were naked in the bed of his friend; that they were sitting; and that they were having sex. The account was found not credible by the asylum authorities because the answer to the question in which position exactly he was caught with his friend was evasive. The Regional Court quashed this decision, ruling that it cannot be required of the applicant to give further details in order to be found credible on the point of his homosexuality²²⁰. This deeply held assumption about how far a lesbian ought to act in a certain way undermines any effective and protective asylum system²²¹.

3.5 Presence of Interpreters

In the process of the interview, many asylum seekers have also found the presence of interpreters can sometimes be detrimental to their application. The asylum seeker is allowed to choose the gender of their interpreter, and the interpreter should be aware of cultural or religious sensitiveness. However, the interpreters in the UK receive no training on LGBT issues and there are no imminent plans to address this. The presence of an interpreter from their home country can cause fear. For example this may be particularly hard for Muslim women if the interpreter is Muslim themselves. In many refugee communities in the UK, homophobia is as common as it back in their country of origin, and often interpreters are a representation of this. There have been instances where interpreters have used abusive language against the asylum seeker, or mistranslated their statements. The statement given must be accurate because the decision is given based upon the precision and coherence of the witness statement. British officials are trained to spot changes in the information provided by the asylum seeker if there is inconsistency or mistranslations, then the whole claim may be jeopardised and can even result in refusing protection to the LGBT asylum applicant²²².

²²⁰ Rechtbank (Regional Court) Haarlem 8 December 2009, 08/40650, the IND appealed at the Council of State, still pending. Stated in Sabine Jansen and Thomas Spijkerboer, 'Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (VU University, 2011)

²²¹ Charlotte Mathysse, *'Barriers to Justice in the UK'*. Available at: <http://www.fmreview.org/sogi/mathysse> accessed 17 July 2013

²²² Ibid

3.6 CONCLUSION

This chapter shows the difficulty in proving the sexuality of LGBT asylum before the immigration authorities of the United Kingdom and the Netherlands. Unfortunately, the LGBT asylum seeker is expected to act in a certain way or answer questions according to what the immigration officer expects. When the answers are contrary to what the officer expected to hear, then it can affect the asylum application as the applicant is seen to be telling lies.

To conclude this chapter, it is no doubt that the LGBT asylum seeker gets intimated or has fear during the interview process, and because of this 98 percent of the people applying for asylum claiming persecution because of their sexual orientation are rejected at the initial stage²²³

²²³ Ibid no 1

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 RECOMMENDATION

Recommendations have been set up by some international bodies to further intensify the fight against the persecution of LGBT people around the world. These recommendations given are:

The new version of European Union law on asylum procedures contains notable improvements for LGBT asylum seekers. The new Directive now foresees that some asylum seekers “may be in need of special procedural guarantees due to their age, gender, sexual orientation or gender identity. Now Member States must assess whether the applicant is in need of special procedural guarantees. Also, Member States must make sure the LGBT applicants’ special needs are met, including if they are identified as such or later during the asylum procedures²²⁴. It is important to note that, the rules apply to the Netherlands not the United Kingdom²²⁵. This is because the UK has a dualist legal system (a system which separates national and international law) which means treaty law has to be enacted explicitly by the UK Parliament into national law in order to have effect.

In 2011 the UK Border Agency announced a new asylum consideration training course on sexual orientation for their staff. The new training is set to improve the experience of claiming asylum in the UK based on sexual orientation²²⁶.

In the Netherlands, the Immigration Minister Gert Leers announced that he would change asylum rules to ensure that LGBT asylum seekers who are refused asylum are not forced ‘back into the closet’ upon return. A new paragraph was therefore added to the relevant regulation in 2012. He further states that he would change the regulations, so that LGBT asylum seekers will no longer be refused asylum solely because they raise their sexual orientation or gender identity later in the asylum procedure²²⁷.

²²⁴ Council of Europe, ‘Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection (recast)’ 8260/13, Brussels 31 May 2013

²²⁵ The European Parliament’s Intergroup on LGBT Rights, ‘New EU Asylum Rules Will Better Protect LGBT People’ (2013). Available at: <http://www.lgbt-ep.eu/press-releases/new-eu-asylum-rules-will-better-protect-lgbt-people/> accessed 18 July 2013.

²²⁶ UK Border Agency News, ‘Issue 5’ January 2011. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/ukba-news/uk-border-news-jan-11.pdf?view=Binary> accessed 18 July 2013

²²⁷ ILGA Europe, ‘The Netherlands’ (Annual Review 2013) Available at: http://www.ilga-europe.org/home/guide_europe/country_by_country/the_netherlands/review_2013 accessed 12 August 2013

The Dutch Court of State referred a question to the Court of Justice of the European Union (CJEU) in August 2012 asking for a preliminary ruling on the interpretation of European Union law concerning the requirement of 'living discreetly' often discussed in LGB asylum cases, and the effect of criminalisation of same-sex sexual activity in the country of origin²²⁸.

The Dutch government announced that it will open its doors to LGBT Iraqis, after declaring the country unsafe for homosexuals. The Immigration Minister said that it is impossible for anyone to be openly gay in the country without risking one's safety²²⁹.

In the United Kingdom, the Supreme Court ruling in the case of HJ (Iran) and HT (Cameroon) now prevents a person to suppress or deny their sexuality if returned to their home country. The Home Secretary Theresa May welcomed the decision saying 'I do not believe it is acceptable to send people home and expect them to hide their sexuality to avoid persecution'²³⁰.

CONCLUSION

Lesbian, gay, bisexual and transgender people in countries that have criminalised homosexuality acts are ill-treated. The punishment varies from imprisonment to death penalty. This paper has analysed sexual orientation in refugee status determination on the grounds of persecution and how decision makers have dealt with LGBT asylum applicants, how the Convention definition has been applied to LGBT refugees, and finally the challenges and problems facing LGBT refugees in their claims in the Netherlands and the United Kingdom.

The LGBT person tries to flee persecution and seek for asylum in the Netherlands and the United Kingdom because both countries are seen to be gay friendly. It has shown that sexual orientation based refugee cases go through a lot of challenges. Decision-makers are normally faced with a situation in which they must decide on the fate of the LGBT asylum seeker, based on very little evidence attained to support the asylum application. It is difficult for the applicant to prove a well-founded fear and also the

²²⁸ Ibid

²²⁹ Ibid

²³⁰ UNHCR, '*UNHCR call upon States to Recognise the needs of People Persecuted on grounds of Sexual Orientation or Gender Identity*' (October 2010). Available at: <http://www.unhcr.org.uk/resources/monthly-updates/october-2010/lgbt.html> accessed 19 July 2013

tools decision makers use to assess the claimant's credibility are of very limited use. Decision-makers cannot rely on objective evidence, as in most cases, there is none or little. Therefore, they are left empty-handed and make decisions based on their own understanding rather than examining the applicant's situation individually. Often LGBT asylum seekers are turned down at the initial stage.

The 1951 Convention Relating to the Status of Refugees and 1967 Protocol constitute the primary source of international refugee law. The Convention defines a refugee as a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The Convention mandates signatory states to grant asylum to a person in need of refugee protection. The Netherlands and the United Kingdom accepted that LGBT persons may be considered to form 'membership of a particular group'. Although both countries have agreed that LGBT people constitute membership of a group, there are cases where decision-makers avoid these standards.

Furthermore, the paper has shown the interpretation of persecution in sexuality based refugee claims which posed challenges for decision makers. The determination of whether certain criminal laws, especially if there is no evidence of their enforcement and discriminatory acts amount to persecution is often very problematic to make claims. Usually there is little or no information on the type of ill-treatment faced by the lesbian and transgender people because country of origin information held is about the abuse of gay people. This is extremely difficult for decision makers. This has resulted in the applicant asked to be his protector by acting discreetly, a stance that contradicts jurisprudence on the 1951 Geneva Convention. It also ignores the consequences that the applicant may encounter in the future if his sexuality is revealed. Sexuality training, as the United Kingdom government has scheduled to provide for its staffs can assist decision makers in understanding the impact of actual homophobia experience of persecution and the refugee status determination process and could be a starting point to address the assumptions and stereotypes on which many decisions are made.

The non-refoulement principle is the cornerstone of the asylum and of international refugee law. The principle has played an important role in refugee claims for LGBT people. It is recognised in Article 33 of the Refugee Convention. This principle reflects the commitment of the Netherlands and the United Kingdom to ensure that all persons are entitled to the enjoyment of human rights, including rights to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returns to a country where

he faces persecution or danger²³¹. Non-refoulement principle constitutes a rule of international customary law, which is non-derogable and no reservation is permitted. This principle is also reflected in Article 3 of the European Convention of Human Rights which is the prohibition of ill-treatment. Article 3 of the ECHR can sometimes provide a measure of assistance to the Refugee Convention. Article 3 provides an absolute and unconditional guarantee against expulsion of LGBT people. It also has an extraterritorial effect. One significant feature about Article 3 is the LGBT individual does not need to prove 'beyond reasonable doubt' that the alleged ill-treatment has occurred, but rather that there exists a real risk that he or she will be exposed to such treatment if he or she is returned home. Article 3 goes beyond the 1951 Geneva Convention and also has an extraterritorial effect feature which prevent LGBT from returning to their home country. Sexual orientation asylum cases under Article 3 needs to be examined individually especially where the applicant has alleged that he or she has been ill-treated this include any direct threat in their home country. The Court can go further with its examination of the existence of laws and regulations of their country of origin²³². This is because all the LGBT the Court relied on official report which has no records of convictions of any homosexual acts in the countries in LGBT cases.

Article 8, the right to private life has also played an important role in sexual orientation based refugee claims. The *Dudgeon* case was seen to be a platform for LGBT people since it is the first case where the Courts established that laws prohibiting homosexual acts between two consenting adults where the Court violated the ECHR. Similarly to how the Court dealt with Article 3 cases on LGBT people, the Court failed to examine the cases individually and relied on official reports and ignored the statement from the applicant where it was alleged that his right to private life has been breached by the authorities even though in the Court established that laws criminalising homosexuality acts are in breach ones private life.

In conclusion, it is necessary to notice that the main problem facing the LGBT refugee claims lies in the unwillingness of courts or incompetent authorities to consider the laws criminalising homosexual acts as cause of persecution. This paper has shown that there is an overall need for more research into the question of how the refugee status can be done on the grounds of sexual orientation in a respectable

²³¹ United Nations High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, (November 1997). Available at: <http://www.refworld.org/docid/438c6d972.html> accessed 25 July 2013

²³² Sabine Jansen and Thomas Spijkerboer, '*Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*' (VU University, 2011).

and appropriate way for LGBT applicants as decision makers or adjudicators are in need of national guidelines and resources to tackle this issue.

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