



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of 2018Du34558 regarding claims for refugee status
based on sexual orientation and gender identity**

Introduction

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ in relation to the case 2018Du34558, in which matter an application for leave to appeal is currently before the Supreme Court of Korea.
2. UNHCR has a direct interest in this matter, as the subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.² According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”³ This supervisory responsibility is reiterated in Article 35(1)⁴ of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)⁵ and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).⁶
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol. Such guidelines include the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“UNHCR Handbook”),⁷ which was subsequently complemented by a number of *Guidelines on International Protection*.⁸

¹ These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law: UN General Assembly (“UNGA”), *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

² UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, December 1950, A/RES/428, <http://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>.

³ *Ibid.*, para 8(a)

⁴ According to Article 35(1) of the 1951 Convention, States undertake to co-operate with UNHCR and “shall facilitate its [UNHCR’s] duty of supervising the application of the provisions of the Convention”.

⁵ *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS No. 2545, <http://www.unhcr.org/3b66c2aa10.pdf>.

⁶ *Ibid.*

⁷ UNHCR, *Handbook*, December 2011, HCR/IP/ENG/REV. 3, <http://www.unhcr.org/3d58e13b4.pdf>. The UNHCR Handbook and Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁸ See in particular, *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*

4. The UNHCR Handbook has been found by the Supreme Courts of Canada, the United Kingdom, and of the United States to be a “highly relevant authority”,⁹ a “highly persuasive authority”,¹⁰ providing “significant guidance”,¹¹ and “should be accorded considerable weight”, in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention”.¹² UNHCR’s Handbook and Guidelines have also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, in reflecting “subsequent practice in the application of the treaty”.¹³
5. UNHCR provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within the 1951 Convention and has a history of third party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR’s “*unique and unrivalled expertise*”¹⁴ on particular legal issues. As the international body set up to monitor the implementation of the 1951 Convention, UNHCR has been granted intervener status in numerous jurisdictions all over the world, including the European Court of Human Rights and the Court of Justice of the European Union, the US Supreme Court, the Supreme Court of Norway, the Supreme Court of the United Kingdom (as well as the former House of Lords), the German Federal Constitutional Court and the Supreme Court of Canada among others.
6. This submission is also provided pursuant to Article 29 of the Refugee Act (2013) which provides that the “Minister of Justice shall cooperate when UNHCR makes requests...on the matters in the following sub-paragraphs: ... [c]ompliance with and implementation of the Refugee Convention and Protocol”. It further provides that “[a]t the request of UNHCR, the Minister of Justice shall cooperate with UNHCR so that UNHCR may carry

Protocol relating to the Status of Refugees, (“SOGI Guidelines”) 23 October 2012, HCR/GIP/12/01, <http://www.refworld.org/docid/50348afc2.html>.

⁹ *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html paras. 46 and 119; *Canada (Attorney General) v. Ward*, (“*Ward*”), [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, pp. 713-714, http://www.refworld.org/cases,CAN_SC,3ae6b673c.html.

¹⁰ *R v. Secretary of State for the Home Department, Ex parte Adan*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, http://www.refworld.org/cases,GBR_HL,3ae6b73b0.html.

¹¹ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, U.S. Supreme Court, 9 March 1987, <http://www.refworld.org/cases,USSCT,3ae6b68d10.html>.

¹² *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, http://www.refworld.org/cases,UK_SC,50b89fd62.html, para. 36. Similarly, the Handbook has been found “particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice”. *R v. Secretary of State for the Home Department, Ex parte Robinson*, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, para. 11, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b72c0.html.

¹³ *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html, para. 71.

¹⁴ *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, United Kingdom: Supreme Court, 19 February 2014, para.72, http://www.refworld.org/cases,UK_SC,5304d1354.html.

out the work stated in the following sub-paragraphs [...] [s]ubmit opinions on determinations of refugee status or appeals”.¹⁵

7. It is widely documented that in some countries, Lesbian, Gay, Bisexual, Transgender and Intersex (“LGBTI”)¹⁶ individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of rights to assembly, expression and information, and/or discrimination in employment, health and education. Many countries maintain criminal laws with severe consequences for persons engaged in consensual same-sex relations.¹⁷ In these and other countries, the authorities may be unable or unwilling to protect LGBTI individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.¹⁸
8. Against this background, UNHCR expresses its views below on the issues arising in the present case, in order to assist the Supreme Court of Korea in its deliberations. In this submission, UNHCR provides its interpretation of the relevant principles of international refugee and human rights law that govern refugee claims based on sexual orientation and/or gender identity.
9. UNHCR submits this *amicus curiae* to provide neutral and expert information on the interpretation of the international refugee law concepts before it. UNHCR will only seek to address issues of legal principle arising from these points and will not address or comment on the particular facts of the claim or positions taken by the parties.

Protection of LGBTI individuals in international and regional human rights law

10. Sexual orientation is far more than sexual conduct or a sexual act, it is fundamental to a person’s identity, who they are, how they live in society and how they express who they

¹⁵ Republic of Korea: Law No 11298 of 2012, Refugee Act, <http://www.refworld.org/docid/4fd5cd5a2.html>.

¹⁶ UNHCR has opted to use the term “LGBTI individuals”, which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity, irrespective of their exact orientation and/or identity. The term “homosexual” tends to make lesbians invisible, does not encompass bisexuals, transgender and intersex people, and may be considered offensive. However, not all applicants will self-identify with LGBTI terminology and constructs, or may be unaware of these labels. For example, Egyptian men who have sex with men do not necessarily consider themselves to be “homosexual” and do not necessarily refer to themselves in those terms.

¹⁷ See, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), “State-sponsored Homophobia, A World Survey of laws prohibiting same-sex activity between consenting adults”, May, 2017, http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf

¹⁸ UNHCR, SOGI Guidelines, para. 2.

are.¹⁹ As the Yogyakarta Principles²⁰ on the application of international human rights law in relation to sexual orientation and gender identity (“the Yogyakarta Principles”) state, “each person’s self-defined sexual orientation and sexual identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”²¹

11. Article 1 of the Universal Declaration of Human Rights provides that “all human beings are born free and equal in dignity and rights”, and Article 2 declares that “everyone is entitled to all the rights and freedoms set forth in this Declaration”.²² All people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.²³
12. Although the international human rights treaties do not explicitly recognise the right to equality on the basis of sexual orientation, in 1994 the UN Human Rights Committee held in the landmark decision *Toonen v. Australia*, that the International Covenant on Civil and Political Rights (“ICCPR”) prohibits discrimination²⁴ on the grounds of sexual orientation.²⁵ The terms “sex” and “other status” contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and/or gender identity.²⁶

¹⁹ See, for instance, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; [2003] HCA 71, Australia: High Court, 9 December 2003, para. 81, (“*Appellant S395/2002*”), http://www.refworld.org/cases,AUS_HC,3fd9eca84.html; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, paras. 52-53; 76-78, (“*HJ (Iran)*”), http://www.refworld.org/cases,UK_SC,4c3456752.html; and *Lawrence, et al. v. Texas*, U.S. Supreme Court, 26 June 2003, which found “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”, p. 6. <http://www.refworld.org/cases,USSCT,3f21381d4.html>.

²⁰ In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply: International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, <http://www.refworld.org/docid/48244e602.html>.

²¹ *Ibid.*, p. 11.

²² UNGA, *Universal Declaration of Human Rights*, December 1948, <http://www.refworld.org/docid/3ae6b3712c.html>.

²³ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, <http://www.refworld.org/docid/4ef092022.html>.

²⁴ “[D]iscrimination’ as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” UN Human Rights Committee, CCPR General Comments No. 18: Non-discrimination, 10 November 1989, <http://www.refworld.org/docid/453883fa8.html>.

²⁵ *Toonen v. Australia*, CCPR/C/50/D/488/1992, 4 April 1994, <http://www.refworld.org/docid/48298b8d2.html>. Several other UN human rights treaty bodies have subsequently affirmed this and have also recognized that gender identity is among the prohibited grounds of discrimination. International and national courts and tribunals have also found that laws criminalizing same-sex relations violate other human rights, including the right to privacy and family life.

²⁶ See UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity”, 17 November 2011, para. 7, <http://www.unhcr.org/refworld/docid/4ef092022.html>.

13. Regional human rights instruments also prohibit discrimination on the basis of sexual orientation.²⁷ For example, in the European Union, the Charter of Fundamental Rights of the European Union explicitly prohibits discrimination on the basis of sexual orientation.²⁸ Articles 10 and 19 of the TFEU provide that the European Union shall aim to combat discrimination based on, *inter alia*, sex and sexual orientation, and may take appropriate action to combat such discrimination.²⁹ The European Court of Human Rights (“ECtHR”) has also held that sexual orientation is a prohibited ground of discrimination under Article 14 of the ECHR, and that laws criminalizing same-sex relations are contrary to the ECHR.³⁰ The ECtHR has also found violations of Article 14 on the basis of alleged discrimination on grounds of sexual orientation, in conjunction with Article 8 of the ECHR, the right to respect for private and family life.³¹ The principle of non-discrimination on the basis of sexual orientation has also been recognized in a number of Council of Europe documents,³² and many European countries have explicitly prohibited discrimination in employment, goods and services.
14. As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Convention and international refugee law,³³ the refugee definition must be interpreted and applied with due regard to them, including the prohibition on discrimination on the basis of sexual orientation and gender identity.

Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention

²⁷ See, Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2721 (XLII-O/12), 4 June 2012, <https://www.oas.org/en/iachr/lgtbi/docs/GA%20Res%20%202721.pdf>.

²⁸ European Union, *Charter of Fundamental Rights of the European Union*, Official Journal of the European Communities, December 2000 (2000/C 364/01), <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>, Article 21. Gender identity is not explicitly mentioned but since the list of grounds is not exhaustive, it is open for the inclusion of other grounds that give rise to differential or discriminatory treatment.

²⁹ TFEU, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

³⁰ See ECtHR, *Dudgeon v. UK*, Application No. 7525/76, 22 October 1981, <http://www.refworld.org/cases,ECHR,47fdfaf7d.html>; *Norris v Ireland*, Application No. 10581/83, ECtHR, 26 October 1988, <http://www.refworld.org/cases,ECHR,48abd5a2d.html>, *Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999; *Modinos v. Cyprus*, Application no. 7/1992/352/426, ECtHR, 23 March 1993, <http://www.unhcr.org/refworld/docid/402a21a04.html>.

³¹ *Smith and Grady v. United Kingdom* (1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58408>, *Sutherland v. United Kingdom* (1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59354>, *Karner v. Austria*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263>, (2003), *EB v. France* (2008), http://www.asil.org/pdfs/ilib080125_1.pdf, *Schalk and Kopf v. Austria* (2010) http://www.menschenrechte.ac.at/uploads/media/Schalk_und_Kopf_gg_OEsterreich_Urteil_01.pdf.

³² Council of Europe's Committee of Ministers Recommendation CM/Rec (2010) on measures to combat discrimination on grounds of sexual orientation or gender identity, <https://wcd.coe.int/ViewDoc.jsp?id=1606669>; Recommendation 1915 (2010) of the Parliamentary Assembly on Discrimination on the basis of sexual orientation and gender identity, <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/erec1915.htm>; Resolution 1728 (2010) of the Parliamentary Assembly on Discrimination on the basis of sexual orientation and gender identity, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>. In addition, Article 4 (3) of the Council of Europe Convention on violence against women and domestic violence, 11 May 2010, CETS No. 210, <http://www.conventions.coe.int/Treaty/EN/Treaties/Word/210.doc> prohibits discrimination on the basis of both sexual orientation and gender identity.

³³ 1951 Convention, Preambular para. 1, Article 3.

15. As the SOGI *Guidelines* make clear, a proper analysis of whether an LGBTI applicant is a refugee must begin with the premise that LGBTI individuals deserve – and are entitled under international law – to live free of persecution as who they are.³⁴ Thus the guidelines recognize that people fleeing persecution for reasons for their sexual orientation and/or gender identity can qualify as refugees under the *1951 Convention* and its *1967 Protocol*.³⁵ More specifically, the SOGI *Guidelines* explain that “[a]n applicant’s sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms.”³⁶
16. UNHCR notes that the term “membership of a particular social group” should be read in “an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”³⁷ UNHCR’s Social Group Guidelines provide legal interpretative guidance on assessing claims of persons who fear being persecuted for reasons of their membership of a particular social group, including groups defined by the members’ sexual orientation and/or gender identity.
17. As noted in the Social Group Guidelines, States have adopted two main approaches to defining a particular social group consistent with the 1951 Convention: (i) the “protected characteristics” approach and (ii) the “social perception” approach. UNHCR’s Guidelines acknowledge the validity of each approach and attempts to thus accommodate both as alternative approaches in a standard definition:
- “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 of one’s human rights.”*³⁸
18. The Guidelines therefore make it clear that in UNHCR’s view, only one of the two approaches needs to be met in order to satisfy the particular social group definition. In assessing a person’s sexual orientation and/or gender identity decision-makers should avoid reliance on stereotypes or assumptions, including in relation to visible markers, or a lack thereof. These can be misleading in establishing an applicant’s membership of a

³⁴ UNHCR, SOGI Guidelines, para. 12.

³⁵ UNHCR, SOGI Guidelines, para. 1.

³⁶ UNHCR, SOGI Guidelines, para. 13.

³⁷ UNHCR, *Guidelines on International Protection No. 2: “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*, (“Social Group Guidelines”), 7 May 2002, HCR/GIP/02/02, para. 3, <http://www.refworld.org/docid/3d36f23f4.html>.

³⁸ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, <http://www.refworld.org/docid/3d36f1c64.html>.

particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a precondition for recognition of the group.³⁹ In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid attracting persecution.⁴⁰

19. In addition to the grounds of membership of a social group, individuals of diverse SOGI may also base their claim on other grounds of the Convention definition depending on the political, religious and cultural context of the claim. Where for example, an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.⁴¹

Forward-looking nature of the assessing risk of persecution

20. Although the concept of “persecution” is not expressly defined in the 1951 Convention, it can be considered to involve serious human rights violations, including threat to life or freedom, as well as other kinds of serious harm.⁴² In addition, lesser forms of harm may cumulatively constitute persecution.⁴³ Various acts or omissions which, taken separately, do not amount to persecution, may have the combined effect of seriously violating one or several of the applicant’s human rights. This would be considered persecution on “cumulative grounds”. Discrimination is a common element in the experiences of many

³⁹ *Judgment No. 634565 /08015025, C*, France, CNDA, 7 July 2009, *Contentieux des réfugiés: Jurisprudence du Conseil d’État et de la CNDA - Année 2009*, 26 October 2010, recognizing as a refugee a Tunisian who had neither claimed nor manifested his homosexuality openly: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 58–59; AC Frankfurt/Oder, judgment of 11 November 2010, VG 4 K 772/10.A, (Germany), http://www.asyl.net/fileadmin/user_upload/dokumente/18015.pdf.

⁴⁰ UNHCR, *HJ (Iran) v. SSHD - Case for the first intervener (United Nations High Commissioner for Refugees)*, 19 April 2010, <http://www.refworld.org/docid/4bd1abbc2.html>, para. 26 ff; *Gatimi et al. v. Holder, Attorney General*, US, No. 08-3197, (7th Cir. 2009), 20 August 2009, <http://www.unhcr.org/refworld/docid/4aba40332.html>.

⁴¹ UNHCR, *Guidelines on Gender-Related Persecution*, para. 25. Egypt’s Muslim Brotherhood, the country’s oldest and largest Islamist organization, which is reported to have support among a large part of Egyptian society, has repeatedly spoken out against the rights of individuals of diverse sexual orientations and/or gender identities. In a March 2013 statement the Muslim Brotherhood referred to “granting equal rights to homosexuals” as one amongst a set of “destructive tools” that would “subvert the entire society” and “undermine the family as an important institution”. See, *Muslim Brotherhood Statement Denouncing UN Women Declaration for Violating Sharia Principles*, 14 March 2013, <http://www.ikhwanweb.com/article.php?id=30731>. Other Islamist and Salafist political organizations reportedly also oppose any developments perceived as threatening to the religious and moral values of Islam. See, *Daily News Egypt, Al-Nour Party Changes Position on Article 219*, 16 September 2013, <http://www.dailynewsegypt.com/2013/09/16/al-nour-party-changes-position-on-article-219/>; *Daily News Egypt, Islamists Criticise Constituent Assembly*, 22 September 2013, <http://www.dailynewsegypt.com/2013/09/22/islamists-criticise-constituent-assembly/>. Regarding the applicability of the Convention ground ‘political opinion’, see UNHCR, *SOGI Guidelines*, para. 50.

⁴² J. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp 104-105 and 112, approved in *Horvath v. Secretary of State for Home Department*, UK House of Lords (Judicial Committee), 6 July 2000, http://www.refworld.org/cases,GBR_HL,3ae6b6e04.html.

⁴³ UNHCR, *Handbook*, paras. 53-55.

LGBTI individuals. Discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.⁴⁴ Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to objective evidence, including country of origin information⁴⁵ as well as the overall circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.⁴⁶

21. The refugee definition, in the sense of the 1951 Convention, **is forward-looking**. The wording “well-founded fear” does not require past persecution, although past persecution can be considered an indicator of the well-foundedness of continued fear.⁴⁷ International refugee protection is preventive in its nature and therefore a person does not need to wait until she or he has been detected and persecuted before she or he can claim refugee status.⁴⁸
22. It is important to note that not all LGBTI applicants may have experienced persecution in the past (see further below paragraphs 31-40 on concealment as persecution). Past persecution is not a prerequisite for refugee status under the 1951 Convention and, in fact, the well-foundedness of the fear of persecution is a prospective test, to be based on the assessment of the predicament that the applicant would have to face if returned to the country or origin.⁴⁹ The applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of

⁴⁴ UNHCR, Handbook, paras. 54-55. See also, *Kadri v. Mukasey*, US, Nos. 06-2599 & 07-1754, (1st Cir. 2008), 30 September 2008, http://www.refworld.org/cases,USA_CA_1,498b0a212.html.

⁴⁵ Belgium, Council of State, *XX v. CGVS*, Nr. 164.283, 31 October 2010, <http://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-state-31-october-2010-nr-164283>.

⁴⁶ UNHCR Handbook, paras. 51-53. See also, CNDA, 23 décembre 2010, M.K., n°08014099, C, reported in CNDA, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile: Contentieux de réfugiés, Année 2010, 18 May 2012, (France), which refers to the rejection by his family leading to social isolation including in terms of access to employment, <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Fr%20050%2008014099.pdf>, paras. 83-84.

⁴⁷ “It may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word ‘fear’ refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.” UNHCR Handbook, para. 45.

⁴⁸ In *Re C, Refugee Appeal No. 70366/97*, the New Zealand Refugee Status Appeals Authority held Article 1A(2) ‘require[s] a forward-looking or anticipatory, objective assessment of risk, not an examination of past persecution with a view to determining, whether on humanitarian grounds, a person who has suffered atrocious persecution in the past (but who no longer faces a risk of persecution) should be required to return to the country origin.’; http://www.refworld.org/cases,NZL_RSAA,3ae6b73f14.html. In *Karanakaran v Secretary of State for the Home Department*, Lord Justice Sedley found: ‘[w]hat matters throughout is that the applicant’s autobiographical account is only part of the picture. People who have not yet suffered actual persecution (one thinks of many Jews who fled Nazi Germany just in time) may have a very well-founded fear of persecution should they remain’. [2000] EWCA Civ. 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000, para. 15, http://www.refworld.org/cases,GBR_CA_CIV,47bc14622.html.

⁴⁹ See e.g. *HJ (Iran)*, note 31 above; *Bromfield v. Mukasey*, US, 543 F.3d 1070, 1076-77 (9th Cir. 2008); *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, http://www.refworld.org/cases,AUS_RRT,4f8410a52.html, para. 91.

origin.⁵⁰ “As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return.”⁵¹

23. The UNHCR Handbook points out that:

*“In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”*⁵²
(emphasis added)

*[A]n applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.*⁵³

24. Many LGBTI applicants come from countries of origin in which consensual same-sex relations between adults are criminalized. Where prosecution and harsh punishments are imposed, such as the death penalty, prison terms,⁵⁴ or severe corporal punishment, including flogging, their persecutory character is particularly evident. Even in countries (like Egypt) where consensual same-sex relations are not criminalised by specific provisions, other laws, for example, public morality or public order laws (e.g. loitering), may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution.⁵⁵ Moreover, the existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors, as well as promote political rhetoric⁵⁶ that can expose

⁵⁰ UNHCR, *Handbook*, at para. 83; Austria: E3314.390-1/2008 (Iran), 31.03.2009, available in German at: www.ris.bka.gv.at/AsylGH/.

⁵¹ UNHCR, SOGI Guidelines, para 36.

⁵² Handbook, para. 42.

⁵³ Handbook, para 45.

⁵⁴ See ILGA, State-sponsored Homophobia report, note 17 above. According to 76 Crimes, the largest reported number of arrests of LGBT people has been in Egypt, where a crackdown has been under way since 2013 as part of a larger government effort to arrest and harass political opponents, human rights defenders and journalists. In late-2016, LGBT community leaders estimate that as many as 500 LGBT people have been sent to prison. <https://76crimes.com/2016/05/11/u-s-newspaper-to-egypt-stop-anti-lgbt-arrests/>. See also paragraphs 25-29 in these submissions.

⁵⁵ See e.g. *RRT Case No 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, paras. 89, 96, <http://www.refworld.org/docid/4f8410a52.html>; *RRT Case No. 071862642*, [2008] RRTA 40, Australia, Refugee Review Tribunal, 19 February 2008, <http://www.refworld.org/docid/4811a7192.html>.

⁵⁶ Egyptian media organizations are reported to be responsible for fuelling prejudice, hatred, discrimination and abuse against individuals of diverse sexual orientations and/or gender identities; one editor claimed that the media were acting “under instructions” from the State in this regard. See, Buzz Feed, *Egyptian Government “Instructions” Have Led Media To Boost Anti-Gay Coverage, Editor Says*, 20 January 2015, <http://www.buzzfeed.com/lesterfeder/egyptian-government-has-told-media-to-boost-anti-gay-coverage>; Index on

LGBTI individuals to risks of persecutory harm. They can also hinder LGBTI individuals from seeking and obtaining State protection.⁵⁷

Concealment of sexual orientation and/or gender identity in order to avoid persecution

25. Sexual orientation and gender identity are fundamental aspects of human identity which cannot be changed or which an individual should not be forced to change;⁵⁸ so that LGBTI asylum applicants are members of a particular social group.⁵⁹ It is inconsistent with the protective purpose of the 1951 Convention and with the surrogacy principle⁶⁰ to deny refugee status on the basis that a person could conceal⁶¹ a protected characteristic such as sexual orientation or gender identity.⁶²
26. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many LGBTI asylum applicants will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval,⁶³ or exclusion from the family.⁶⁴

Censorship, *Gay Egyptians Living in "Constant Fear" as Crackdown from Authorities and Media Worsens*, 6 January 2015, <http://www.indexonensorship.org/2015/01/gay-egyptians-living-constant-fear-crackdown-authorities-media-worsens/>; A Paper Bird, *Dozens Arrested for "Perversion" in a Huge Raid in Cairo*, 8 December 2014, <http://paper-bird.net/2014/12/08/dozens-arrested-cairo/>.

⁵⁷ UNHCR, SOGI Guidelines, para. 27. See also paras. 34-36 regarding agents of persecution.

⁵⁸ *HJ (Iran)*, note 31 above, Lord Rodger JSC at para. 76, cited with approval the observation of the New Zealand Refugee Status Appeal Authority in *Re GJ* [1998] INLR 387, that ‘sexual orientation is **either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed**’; see also SOGI Guidelines para. 12: ‘sexual orientation and/or gender are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up.’

⁵⁹ UNHCR, SOGI Guidelines para. 44ff; Ward, note 9 above, p. 739; *X, Y and Z v Minister voor Immigratie en Asiel*, (Netherlands), C-199/12 - C-201/12, 7 November 2013, <http://www.refworld.org/cases,E CJ,527b94b14.html>, para 49.

⁶⁰ *The Law of Refugee Status*, Hathaway and Foster, Cambridge University Press, 2nd Edition, 2014, p.288; see also *R v Immigration Appeal Tribunal ex p Shah and Islam* [1999] 2 AC 629, p.653§§E-F; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, p.495§C.

⁶¹ As Lord Hope JSC said in *HJ (Iran)* at para. 22, of the alternative term ‘discretion’, ‘this euphemistic expression does not tell the whole truth’; and see Lord Collins JSC at para. 101, ‘the use of words such as “discretion” and “discreetly” tends to obscure the point that what is really involved is concealment of sexual orientation’.

⁶² *HJ (Iran)*, paras. 18 and 54; *X, Y and Z v Minister voor Immigratie en Asiel*, note 78 above, para.75; *Bundesrepublik Deutschland (Germany) v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, 5 September 2012, <http://www.refworld.org/cases,E CJ,505ace862.html>, paras. 78-79; *MSM (Somalia) v. Secretary of State for the Home Department*, C5/2015/3380, United Kingdom: Court of Appeal (England and Wales), 12 July 2016, <http://www.refworld.org/cases,GBR CA CIV,578780534.html>, para. 44.

⁶³ One popular Egyptian prime-time television host reportedly declared that “[h]omosexuality is a crime that is as terrible as terrorism.” USA Today, *Egypt's Latest Crackdown on Gays Creates Fear in LGBT Community*, 18 October 2017, <https://www.usatoday.com/story/news/world/2017/10/18/egypts-latest-crackdown-gays-creates-fear-lgbt-community/772889001/>; The Guardian, *LGBT People in Egypt Targeted in Wave of Arrests and Violence*, 8 October 2017, <https://www.theguardian.com/world/2017/oct/08/lgbt-people-egypt-targeted-wave-arrests-violence>.

⁶⁴ Egyptian society reportedly views individual expressions of diverse sexual orientations as both contrary and threatening to social, cultural, and religious values. Expressions of diverse sexual orientations are widely

27. That an applicant may be able to avoid persecution by concealing or exercising “restraint” with respect to his or her sexual orientation and/or gender identity, or has done so previously, is not a valid reason to deny refugee status. LGBTI individuals are entitled to freedom of expression and association in the same way as others.⁶⁵ As the High Court of Australia held in *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, “[p]ersecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.”⁶⁶
28. In the view of the UK Supreme Court, requiring an applicant to conceal his or her sexual orientation and/or gender identity would be “unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution”.⁶⁷ As Lord Rodger stated in *HJ (Iran)*:

“... the rationale of the 1951 Convention is that “people should be allowed to live their lives free from the fear of serious harm coming to them because of their race, religion, nationality, membership of a particular social group or political opinion.”⁶⁸

“If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection

considered as affronts to strictly defined gender norms and a threat to moral values and public order. See, The Independent, *Human Rights Groups Urge Egypt to Halt Crackdown on LGBT People After Rainbow Flag Waved at Concert*, 30 September 2017, <http://www.independent.co.uk/news/world/africa/egypt-gay-arrests-lgbt-flag-concert-human-rights-watch-amnesty-homosexuality-a7976026.html>; The New York Times, *Why Is the Egyptian Government So Afraid of a Rainbow Flag?*, 26 October 2017, <https://www.nytimes.com/2017/10/26/opinion/egypt-gay-lgbt-rights.html>. In May 2016, in a global survey of attitudes towards individuals of diverse SOGI, 73 per cent of Egyptian participants responded that they would feel either very or somewhat uncomfortable if a neighbour were gay or lesbian. Of the 53 countries involved in the survey, Egypt was one of the countries expressing the strongest discomfort, together with Algeria and Morocco. ILGA, *The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with Logo*, 17 May 2016, http://ilga.org/downloads/07_THE_ILGA_RIWI_2016_GLOBAL_ATTITUDES_SURVEY_ON_LGBTI_PEOPLE.pdf, p. 10. Furthermore, 44 per cent of Egyptians surveyed by ILGA said they agreed that “being LGBTI should be a crime” (32 per cent said they strongly agreed, while 12 per cent said they somewhat agreed). *Ibid.*, p. 5. In 2013, only 3 per cent of Egyptian respondents to a survey on “global acceptance of homosexuality” felt that homosexuality should be accepted by society. Pew Research Global Attitudes Project, *Global Acceptance of Homosexuality*, 4 June 2013, <http://www.pewglobal.org/2013/06/04/global-acceptance-of-homosexuality/>.

⁶⁵ *HJ (Iran)*, note 31 above, paras. 11, 14 and 78. See also, *M.A v. Minister for Justice and Law Reform, and others*, [2010] IEHC 519, Ireland: High Court, 2 December 2010, <http://www.refworld.org/docid/4f2a5f992.html>, where the Court held, at para. 19, that: “Homosexuals are entitled to freedom of association with others of the same sexual orientation and to freedom of self-expression in matters that affect their sexuality. It is a breach of fundamental rights to compel a homosexual person to present that their sexuality does not exist or that the behavior by which it manifest itself and be suppressed.” See further, France: CNDA, 7 juillet 2009, C, n° 634565, <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-7-july-2009-mr-c-n°634565>, Finland: *Supreme Administrative Court Decision of 13 January 2012*, KHO:2012:1, http://www.refworld.org/cases,FIN_SAC.4f3cdf7e2.html.

⁶⁶ *Appellant S395/2002*, note 31 above; *Refugee Appeal No. 74665, New Zealand: Refugee Status Appeals Authority*, 7 July 2004, http://www.refworld.org/cases,NZL_RSAA,42234ca54.html.

⁶⁷ *HJ (Iran)*, note 31 above, para. 76.

⁶⁸ *Ibid.*, para. 52.

that the Convention is intended to secure for him'. *The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country.*"⁶⁹

29. This principle has also been affirmed by the Court of Justice of the European Union (CJEU) in *X, Y and Z (v. The Netherlands)*,⁷⁰ where the Court held that a person:

“must be granted refugee status, [...] where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution [...]. *The fact that he could avoid that risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.*”⁷¹

30. These same considerations are equally valid if the asylum claim is based on one of the other grounds enshrined in the refugee definition of the 1951 Convention.⁷² Thus, the CJEU found in the case of in *Y and Z (v. Germany)*,⁷³ in the context of asylum based on religion as follows:

78. None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status.

*79. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. **The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.***⁷⁴ [emphasis added]

31. In addition to the CJEU judgments quoted above, the principle that a person in need of international protection cannot be required to conceal their protected identity or be required to take steps which would deprive him or her of the very protection that the Convention is intended to secure, has been upheld by a number of superior and national

⁶⁹ *Ibid.*, para. 110.

⁷⁰ CJEU, *X, Y and Z v Minister voor Immigratie en Asiel*, (Netherlands), note 78 above.

⁷¹ *Ibid.*, para. 75.

⁷² UNHCR, *UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, *Bundesrepublik Deutschland (Germany) v. Y and Z*, para. 4.3.2. <http://www.refworld.org/docid/4dfb7a082.html>.

⁷³ CJEU, *Bundesrepublik Deutschland (Germany) v. Y and Z*, note 81 above.

⁷⁴ *Ibid.* paras. 78-79.

Courts internationally, in the context of sexual orientation claims,⁷⁵ political opinion (including having no political opinion)⁷⁶ and imputed political opinion claims on the basis of the applicant's profession (or MPSG).⁷⁷

32. Thus, the question to be considered is what predicament the applicant would face if he or she were returned to the country of origin. In UNHCR's view, this requires an objective and fact-specific examination of the nature of the applicant's predicament and whether this amounts to persecution. The role of the decision-maker is to assess risk, namely, whether the fear of persecution is well-founded, and not demand conduct or pronounce upon what the applicant should and should not do.

33. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetimes. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion.⁷⁸

34. Moreover, even if LGBTI individuals conceal their sexual orientation and/or gender identity they may still be at risk of exposure and related harm for not conforming to heterosexual social norms, such as getting married and having children. The absence of certain expected activities and behaviour may identify a difference between them and other people and may place them at risk of harm.⁷⁹ Thus, an individual's prospects of *successful* future concealment should be approached very cautiously. Furthermore, concealment entails the suppression of a fundamental aspect of a person's identity and may be impossible for the individual to tolerate and sustain.⁸⁰ Perfect concealment is near

⁷⁵ See, *Appellant S395/2002* and *HJ (Iran)*, note 31 above. See also *Fosu Atta v. Canada (Citizenship and Immigration)*, 2008 FC 1135, Canada: Federal Court, 8 October 2008, http://www.refworld.org/cases,CAN_FC.5a8da8e54.html.

⁷⁶ See, *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, http://www.refworld.org/cases,UK_SC.500fdacb2.html. See also, *NACM v Minister for Immigration and Multicultural and Indigenous Affairs*, Federal Court of Australia, <http://www.refworld.org/pdfid/4f4e60c52.pdf>, [2003] FCA 1554 which held that "The only way to avoid (in this case, to have avoided) the persecution would be to deny oneself the expression of the political opinion. But that is to ask of a committed person that he or she deny what accepted notions of human dignity assert need not be denied. Such is exactly what international human rights law seeks to guard against. The right to hold an opinion is nothing if there is no right lawfully to express it, including by acting on it." at para. 57.

⁷⁷ See, *MSM (Somalia)*, note 81 above. See also, *Minister for Immigration and Border Protection v SZSCA*, where the Australian Federal Court decided in that an individual cannot be required to change his or her profession in order to avoid persecution by reason of imputed political opinion: [2013] FCAFC 155 (10 December 2013), http://www.refworld.org/cases,AUS_FC.531998214.html.

⁷⁸ *SW (Jamaica) v. Secretary of State for the Home Department*, CG [2011] UKUT 00251(IAC), UK Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, paras. 3-4, http://www.refworld.org/cases,GBR_UTIAC.4e0c3fae2.html; *Appellant S395/2002*, note 31 above, paras. 56-58.

⁷⁹ *SW (Jamaica) v. Secretary of State for the Home Department*, note 96 above.

⁸⁰ See, for example, the UNHCR Handbook, para. 82, which refers, analogously, to political opinion: 'There may [...] be situations where the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities'.

impossible in any event,⁸¹ the risk of disclosure being frequently beyond the control of the applicant⁸² as noted above.

Generalised persecutory environment through the use of criminal laws to target LGBTI individuals and pervasive homophobia

35. Although Egypt’s Penal Code does not expressly prohibit consensual same-sex relations,⁸³ Egyptian law does have provisions on public morality and public order, and individuals of diverse SOGI have reportedly been arrested on charges including “inciting debauchery”, “debauchery”, “prostitution”, “insulting public morals”, and “violating the teachings of religion” or “contempt of religion”,⁸⁴ under the Egyptian Penal Code and the 1961 Anti-Prostitution Law.⁸⁵ According to local observers, between 2013 and October 2017 there

⁸¹ See Dauvergne, Catherine, Millbank, Jenni, ‘Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) 25(1) Sydney Law Review 97, who wrote that ‘Moreover, the discretion requirement is also, in many contexts, impossible in fact. The question of being ‘out’ is never answered once and for all, it is a decision made over and over, each day and in each new social situation. ...Many lesbian and gay asylum seekers from countries as varied as Malaysia, India, Bangladesh and Iran, testify that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes — and takes all possible steps — to remain closeted does, in fact, become increasingly ‘visible’ with the passage of time’ [emphasis added].

⁸² ‘[T]he perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise.’ Appellant S395/2002, note 31 above, para. 56.

⁸³ Egypt: Penal Code, No. 58 of 1937, August 1937, as amended, <http://www.refworld.org/docid/3f827fc44.html>. (Note that the unofficial English translation made available on Refworld only includes amendments up to 1992. The Arabic version made available there includes amendments up to 2003. For later amendments, see http://www.ilo.ch/dyn/natlex/natlex4.detail?p_lang=en&p_isn=57560.) See also, ILGA, *State-Sponsored Homophobia, A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, May 2017, http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf, pp. 85-86.

⁸⁴ Article 98 F: “Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdaining and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace.” Egypt: Penal Code, No. 58 of 1937, August 1937, as amended, <http://www.refworld.org/docid/3f827fc44.html>.

⁸⁵ “Solidarity With Egypt LGBTQ+, an advocacy group, said it had recorded 114 criminal investigations involving 274 LGBT individuals launched between the end of 2013 and November 2016, 66 of which involved the authorities’ use of social media.” HRW, *World Report 2017-Egypt*, 12 January 2017, <http://www.refworld.org/docid/587b584ac.html>. “Fifteen people are set to stand trial in Egypt, accused of ‘acts of debauchery’. [...] They will stand trial at a misdemeanour court, arrested for ‘violating the teachings of religion and public morals’.” Pink News, *15 People Stand Trial for ‘Debauchery’ in Egypt After ‘Anal Examinations’*, 1 October 2017, <http://www.pinknews.co.uk/2017/10/01/15-people-stand-trial-for-debauchery-in-egypt-after-anal-examinations/>. See also, BBC, *Egypt Singer Jailed for ‘Inciting Debauchery’ in Music Video*, 12 December 2017, <http://www.bbc.com/news/world-middle-east-42328428>; United States Department of State, *2016 Country Reports on Human Rights Practices: Egypt*, 3 March 2017, <http://www.refworld.org/docid/58ec8a4113.html>; Freedom House, *Freedom on the Net 2016: Egypt*, 14 November 2016, <http://www.refworld.org/docid/5834009713.html>; EIPR, *Outrageous Prison Terms for So-Called “Debauchery Cases” Orchestrated Vice Police Campaign Against Gay and Transgender People Continues*, 30 April 2016, <https://eipr.org/en/press/2016/04/outrageous-prison-terms-so-called-%E2%80%9Cdebauchery-cases%E2%80%9D-orchestrated-vice-police-campaign>; Mada Masr, *11 Sentenced to 3-12 Years in Prison for Homosexuality*, 29 April 2016, <https://www.madamasr.com/en/2016/04/29/feature/politics/11-sentenced-to-3-12-years-in-prison-for-homosexuality/>; HRW, *For Political Gain, Sisi Targets LGBT Community*, 10 December 2014, <http://www.hrw.org/news/2014/12/10/dispatches-political-gain-sisi-targets-lgbt-community>; A Paper Bird, *Two Trials, Two Travesties*, 1 November 2014, <http://paper-bird.net/2014/11/01/two-trials-two-travesties/>.

were at least 300 arrests of individuals (perceived to be) of diverse SOGI on debauchery charges.⁸⁶

36. Article 178 of the Penal Code, which prohibits the publication of images and other signs that are deemed to be against public morals, has reportedly been “used to criminalize even non-sexual internet advertisements posted by gay men”.⁸⁷ Article 278 of the Penal Code criminalizes the commission of a “scandalous act” in public; while the Penal Code does not define what constitutes such an act, the provision has reportedly been used against gay men on the basis of online activities.⁸⁸

37. Article 9(c) of the 1961 Anti-Prostitution Law prohibits engagement in habitual “debauchery” (*fujur*) or prostitution; debauchery is not clearly defined by the law.⁸⁹ In a

⁸⁶ “We know of at least 300 whom police arrested for ‘debauchery’ since [2013], and there are probably hundreds more.” Ahmed Al Hady and Scott Long, *International LGBTQ Advocates Must Take Action Against the Queer Crackdown in Egypt*, 6 October 2017, http://www.slate.com/blogs/outward/2017/10/06/egypt_s_crackdown_on_lgbtq_people_demands_an_international_response.html.

⁸⁷ HRW, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, 1 March 2004, <http://www.refworld.org/docid/41528c524.html>, p. 137. See also, A Paper Bird, *Two Trials, Two Travesties*, 1 November 2014, <http://paper-bird.net/2014/11/01/two-trials-two-travesties/>. Article 178: “Whoever makes or holds, for the purpose of trade, distribution, leasing, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other objects or pictures in general, if they **are against public morals**, shall be punished with detention for a period not exceeding two years and a fine of not less than five thousand pounds and not exceeding ten thousand pounds or either penalty.” Egypt: Penal Code, No. 58 of 1937, August 1937, as amended, <http://www.refworld.org/docid/3f827fc44.html>.

⁸⁸ Article 278: “Whoever commits in public a scandalous act against pudency shall be punished with detention for a period not exceeding one year or a fine not exceeding three hundred pounds.” Egypt: Penal Code, No. 58 of 1937, August 1937, as amended, <http://www.refworld.org/docid/3f827fc44.html>. “The provision has remained unchanged since first appearing as article 256 of the Criminal Code of 1883. Prosecutors have used it in at least one case against a defendant entrapped over the Internet. The Court of Cassation has left wide scope for defining the acts entailed, holding that ‘the assessment of such acts differs among contexts and atmospheres and the susceptibility of people's sense of shame.’” HRW, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, 1 March 2004, <http://www.refworld.org/docid/41528c524.html>.

⁸⁹ Article 9: “Punishment by imprisonment for a period not less than three months and not exceeding three years and a fine not less than 25 LE and not exceeding 300 LE in the Egyptian administration and not less than 250 Lira and not exceeding 3000 Lira in the Syrian administration or one of these two punishments applies in the following cases: (a) Whoever lets or offers in whatever fashion a residence or place run for the purpose of debauchery or prostitution, or for the purpose of housing one or more persons, if they are to his knowledge practicing debauchery or prostitution. (b) Whoever owns or manages a furnished residence or furnished rooms or premises open to the public and who facilitates the practice of debauchery or prostitution, either by admitting persons so engaged or by allowing on his premises incitement to debauchery or prostitution. (c) Whoever habitually engages in debauchery or prostitution.

Upon the apprehension of a person in the last category, it is permitted to send him for a medical examination. If it is discovered that he is carrying an infectious venereal disease, it is permitted to detain him in a therapeutic institute until his cure is completed.

It is permitted to determine that the convicted person be placed, upon completion of his sentence, in a special reformatory until the administrative agency orders his release. This judgment is obligatory in cases of recidivism, and the period spent in the reformatory is not allowed to be more than three years.” Egypt, Law No. 10/1961 on the Combating of Prostitution, 1961, <http://www.refworld.org/docid/5492d8784.html>. Human rights activists report that this law was “originally meant to penalize prostitution [but] swelled, during its drafting, into a sweeping instrument punishing ‘promiscuity’ in general. The law is now clearly understood to criminalize consensual, non-commercial homosexual conduct, under the name of ‘debauchery’ (*fujur*) – in provisions which work comparably to so-called ‘sodomy laws’ in other jurisdictions”. HRW, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, 1 March 2004, <http://www.refworld.org/docid/41528c524.html>, p. 3; see also

1975 ruling, the country's highest court reportedly expressly defined *fujur* as non-commercial, consensual sex between two people of the same sex; this ruling is reportedly repeatedly cited by prosecutors and courts today.⁹⁰ Individuals found guilty of an offence under Article 9(c) face imprisonment for a period of between three months and three years and a fine of between 25 and 300 LE.⁹¹ Moreover, individuals convicted of an offence under Article 9(c) may be placed, upon completion of their sentence, in a "special reformatory" for a period of up to three years.⁹² Incitement to engage in debauchery or in prostitution is criminalized pursuant to Article 1(a) of the Anti-Prostitution Law, with a punishment of imprisonment for a period of between one and three years and a fine between 100 and 300 LE.⁹³ The Anti-Prostitution Law also criminalizes the management of premises for the purposes of debauchery or prostitution, or the cooperation "in any way whatsoever in their management".⁹⁴ Some men found guilty of debauchery have also reportedly been sentenced to imprisonment with hard labour.⁹⁵

38. The Anti-Prostitution Law further provides that those who have been found guilty of one of the offences under the Act may be placed under police observation for a period equivalent to the length of the imposed imprisonment period; judges reportedly routinely impose periods of "police observation" in debauchery cases.⁹⁶ Despite the fact that the Penal Code provides for one penalty for one act, even if that act constitutes multiple crimes, in debauchery cases courts have reportedly imposed multiple penalties for a single act.⁹⁷

pp. 13-16. See also, Daily News Egypt, *Activists Launch Legal Guide for Homosexuals in Egypt*, 30 October 2014, <http://www.dailynewsegypt.com/2014/10/30/activists-launch-legal-guide-homosexuals-egypt/>.

⁹⁰ A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>. See also, HRW, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, 1 March 2004, <http://www.refworld.org/docid/41528c524.html>, p. 3.

⁹¹ 2014 Constitution, Article 9, note 60 above.

⁹² *Ibid.*

⁹³ Egypt, *Law No. 10/1961 on the Combating of Prostitution*, 1961, <http://www.refworld.org/docid/5492d8784.html>, Article 1.

⁹⁴ *Ibid.*, Article 8.

⁹⁵ On 25 September 2014, six men were convicted of debauchery and sentenced to two years in prison and hard labour on the basis that they had advertised their apartment on Facebook as a place for gay men to have sex. FIDH, *Exposing State Hypocrisy: Sexual Violence by Security Forces in Egypt*, 19 May 2015, <http://www.refworld.org/docid/55701aac4.html>, p. 18; BBC, *Egypt Jails Four Men for Gay Acts*, 8 April 2014, <http://www.bbc.com/news/world-middle-east-26934432>.

⁹⁶ Article 15: "As a consequence of a judgment of guilty in one of the crimes stipulated in this law, the convicted person may be placed under observation by the police for a period equivalent to the length of the sentence. This is without infringement of the special laws regarding homelessness." Egypt, *Law No. 10/1961 on the Combating of Prostitution*, 1961, <http://www.refworld.org/docid/5492d8784.html>. Police observation under article 15 of the anti-prostitution law reportedly entails an obligation to spend "every night from dusk to dawn in a police station". See also, A Paper Bird, *Two Trials, Two Travesties*, 1 November 2014, <http://paper-bird.net/2014/11/01/two-trials-two-travesties/>. HRW notes that such supervision "is more than mere probation: it is virtually an extension of the prison sentence". HRW, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, 1 March 2004, <http://www.refworld.org/docid/41528c524.html>, p. 141.

⁹⁷ Article 32 (Plurality of Penalties): "If the same deed forms multiple crimes, the crime with a stricter penalty and the judgement inflicting that penalty shall alone be considered. If several crimes are committed for the same purpose and are so interconnected that they are indivisible, they shall all be considered one crime and a ruling shall be passed inflicting the penalty that is prescribed for the most serious of these crimes." Egypt: *Penal Code*, No. 58 of 1937, August 1937, as amended, <http://www.refworld.org/docid/3f827fc44.html>. "In the current crackdown, judges have tacked on multiple convictions under related provisions to give cumulative prison sentences as high as twelve years." A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>. On 24 April 2016, "an Agouza misdemeanor court convicted 11 men of debauchery, incitement to debauchery,

39. In October 2017, more than 60 members of Egypt’s Parliament reportedly introduced a bill explicitly to criminalize consensual same-sex sexual acts, as well as “inciting” homosexuality, with punishments of up to five years imprisonment for either crime, and up to 15 years if a person is convicted on multiple charges under different provisions of the law.⁹⁸ Article 2 of the Bill criminalizes “perverted sexual relations” between “any two or more persons, either male or female, in any public or private place”.⁹⁹ The Bill prohibits the public promotion or advertising of any “homosexual gathering”, whether through audio or video publications or via social media, with a penalty of three years imprisonment.¹⁰⁰ Furthermore, the Bill prohibits the carrying, manufacturing or selling of any “symbol or code for homosexuals”.¹⁰¹

40. When introducing the Bill, MP Riad Abdel Sattar, from the Free Egyptians Party, reportedly emphasized the importance of spreading “the true religious awareness and alert[ing] society to the seriousness of homosexuality.”¹⁰² In his speech he reportedly stressed that “moral deviance” is “no less dangerous than violence and terrorism. It is even more dangerous to society.”¹⁰³ Human rights activists note that the scope of the Bill is broader, and its sentences harsher, compared to the current laws on *fujur*: the Bill

and other charges, sentencing three of the 11 to 12 years in prison, three to nine years, one to six years, and four to three years. [...] On May 29, an appeals court acquitted one of the defendants and reduced the others' sentences to one-year's imprisonment.” United States Department of State, *2016 Country Reports on Human Rights Practices: Egypt*, 3 March 2017, <http://www.refworld.org/docid/58ec8a4113.html>. “In 2014, the Nasr City Misdemeanor Court issued sentences of 8 to 12 in prison in several cases for the same charge of ‘habitual debauchery’.” EIPR, *Outrageous Prison Terms for So-Called “Debauchery Cases” Orchestrated Vice Police Campaign Against Gay and Transgender People Continues*, 30 April 2016, <https://eipr.org/en/press/2016/04/outrageous-prison-terms-so-called-%E2%80%9Cdebauchery-cases%E2%80%9D-orchestrated-vice-police-campaign>.

⁹⁸ According to an unofficial English translation of the Bill submitted in late October 2017, Article 1 provides: “Homosexuals [*mithliyeen*] shall refer to any sexual relationship between the same sex, either two or more males or two or more females.” A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>. “Riad Abdel Sattar, an MP from the liberal “Free Egyptians” party proposed the new law after collecting at least 67 signatures from members of parliament. The draft bill is expected to be reviewed and discussed by the parliament during its current session and if voted for, it will be sent to the president for sign off”. Amnesty International USA, *Egypt: Draft Bill to Criminalize Same-Sex Relations Amid Unprecedented Homophobic Crackdown*, 8 November 2017, <https://www.amnestyusa.org/press-releases/egypt-draft-bill-to-criminalize-same-sex-relations-amid-unprecedented-homophobic-crackdown/>; USA Today, *Egypt's Latest Crackdown on Gays Creates Fear in LGBT Community*, 18 October 2017, <https://www.usatoday.com/story/news/world/2017/10/18/egypts-latest-crackdown-gays-creates-fear-lgbt-community/772889001/>; Human Rights Campaign, *HRC Statement on Proposed Egyptian Legislation Criminalizing LGBTQ Community and Allies*, 26 October 2017, <https://www.hrc.org/press/hrc-statement-on-proposed-egyptian-legislation-criminalizing-lgbtq-communit>.

⁹⁹ An unofficial English translation of the Bill submitted in late October 2017 is available at: A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>, Article 2.

¹⁰⁰ According to Amnesty International USA, the bill also includes a clause that “licenses the authorities to publicly ‘shame’ individuals convicted under the draft law by publishing their names and sentences in two widely read national newspapers.” Amnesty International USA, *Egypt: Draft Bill to Criminalize Same-Sex Relations amid Unprecedented Homophobic Crackdown*, 8 November 2017, <https://www.amnestyusa.org/press-releases/egypt-draft-bill-to-criminalize-same-sex-relations-amid-unprecedented-homophobic-crackdown/>. A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>.

¹⁰¹ An unofficial English translation of the Bill submitted in late October 2017 is available at: A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>.

¹⁰² A Paper Bird, *As If: On Alaa Abd el Fattah*, 24 October 2017, <https://paper-bird.net/category/human-rights-2/>.

¹⁰³ Ibid.

“criminalizes virtually any discussion, conversation, meeting, or article of attire that might in some way encourage or even involve homosexuality”.¹⁰⁴

Conclusion

41. UNHCR provides this submission in order to assist the Supreme Court of Korea to interpret the legal definition of a refugee as set out in the 1951 Convention Relating to the Status of Refugees, a definition which is reflected in Article 2.1 of the Refugee Act 2013, in accordance with prevailing international standards for refugee status determination and to provide an overview of authoritative international jurisprudence on the application of refugee law to claims relating to sexual orientation and gender identity.

42. In summary, UNHCR submits that:

- International human rights law provides for equality of LGBTI individuals and protection against discrimination on the grounds of sexual orientation and/or gender identity. LGBTI individuals are entitled to live openly in society as who they are and cannot be compelled to hide their identity;
- Membership of a particular social group can be understood to encompass either that the applicant belongs to a group of persons who share a certain immutable or innate characteristics which cannot be altered or which it would be unreasonable to expect an applicant to alter, or that the applicant is a member of a distinct group with shared characteristics which is recognised as a social group by the broader society in the applicants home country. It is UNHCR’s position that either approach can be used to establish that the applicant is a member of a particular social group within the meaning of Article 1A(2) of the 1951 Convention.
- A wide variety of acts or omissions, separately or cumulatively, may give rise to a serious violation of an LGBTI individual’s human rights and amount to substantial prejudice to that individual and may amount to persecution within the meaning of the 1951 Refugee Convention;
- The question of an individual’s risk of persecution is essentially a forward-looking assessment as to the risks to the person on return to their country. The 1951 Convention protects those who – at the time of the decision – are at risk of persecution in their country of origin, regardless of whether they have already suffered persecution;
- It is not reasonable to deny refugee protection to an LGBTI individual on the grounds that the individual should be compelled to conceal his or her sexual orientation or gender identity in order to avoid the persecutory conduct in his or her home country.

¹⁰⁴ Ibid.

To require an individual to hide a core aspect of their identity indefinitely would undermine the very rights that refugee protection is intended to protect.

- Assessing the “well-founded fear of being persecuted” needs to be fact-based, focusing on both the objective individual and the contextual circumstances of the case.

UNHCR
26 February 2018