

# **ELENA RESEARCH PAPER ON SEXUAL ORIENTATION AS A GROUND FOR RECOGNITION OF REFUGEE STATUS**

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## **1. “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” AS A GROUND FOR RECOGNITION OF REFUGEE STATUS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES**

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- A person seeking refugee status under the social group category must demonstrate that:
  1. A particular social group exists.
  2. The applicant is a member of the particular social group.
  3. The applicant has a well founded fear of persecution owing to such membership.
- There have been fewer applications for refugee status based on “membership of a particular social group” than any of the other four Convention grounds for determination of refugee status.
- The relatively low volume of applications for refugee status under the social group category has determined a relatively low volume of judicial decisions relating to the category. A lack of illuminating legislative history has meant that the definition of “a particular social group” remains ambiguous.
- The lack of a coherent definition of the social group category has been amplified by the fact that individuals often fear persecution for more than one reason, hence social group often overlaps with other Convention categories. Many applications under the category of social group are filed in conjunction with one of the other Convention categories, predominantly that of political opinion. Judicial decisions in these cases, whilst considering the category of social group in general, tend to base their decisions and conclusions on the other Convention categories.
- An increasing number of claims are being made under the social group category, resulting in an increasing number of judicial decisions concerning what constitutes “membership of a particular social group”. The result has been an expansion and broadening of “defining” factors.
- The relevance of the social group category is changing rapidly, both through the development of new precedents and the development of new asylum legislation.

## **2. SEXUAL ORIENTATION AS A GROUND FOR “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP”**

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- Sexual orientation encompasses 3 factors:
  1. sexual behaviour.
  2. sexual orientation.
  3. sexual identity.
- In 1996 it was estimated that there were 700 asylum cases worldwide, decided or pending, involving sexual orientation applications for Convention refugee status, under either “membership of a particular social group” or “political opinion” or a combination of the two.<sup>1</sup>
- Some applications for Convention refugee status on the grounds of sexual orientation are claimed under the category of political opinion, despite the fact that many homosexuals do not consider their sexual orientation to be political, **Dykon v Canada (Minister of Employment and Immigration) 1994 Sept**

**27 Imm LR 193 (FC:TC)** (See page 15). Some academics consider it could be possible to file an application under the category of religion, where homosexual status conflicts with conventional religious doctrine, compliance with which is enforced by state or private actors. No cases are known to have been filed under this category.

- Claims for Convention refugee status based on sexual orientation under the social group category emerged at the beginning of the 1980's<sup>2</sup> and still represent a small part of the total claims under "membership of a particular social group" as a whole.
- In September 1996, 60 cases in the United States had been granted Convention refugee status on the basis of sexual orientation under the social group category and around double that number had been granted Convention refugee status in other states.<sup>3</sup>
- The number of applications for asylum based on sexual orientation under "membership of a particular social group" has been growing exponentially.
- An increasing number of homosexuals have been granted asylum on humanitarian grounds rather than granted Convention status.
- Whilst women comprise the overwhelming majority of asylum seekers worldwide, there has been a conspicuous absence of sexual orientation applications by women and the granting of refugee status based on sexual orientation to women. The majority of claims based on sexual orientation have been made by male applicants.
- The issues surrounding sexual orientation as a social group category have highlighted issues such as asylum based on persecution of HIV positive persons.
- The non recognition by states of homosexual marriages has meant the absence of applications for asylum based on family reunion of gay and lesbian couples.

### **3. UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS<sup>4</sup>**

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- Paragraph 77. "A particular social group normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion, or nationality."
- Paragraph 78. "Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of its members, or the very existence of the group as such, is held to be an obstacle to the government's policies."
- Paragraph 79. "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership is sufficient ground to fear persecution."
- The handbook issues a warning that the definition of the social group category often overlaps with other criteria.
- The UNHCR position on sexual orientation as a ground for refugee status under the social group status was outlined in **Otchere and the UNHCR v SSHD 1988 Imm AR 21** (See page 14).

### **4. ACADEMIC ARGUMENT**

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- The “travaux préparatoires” provide little explanation as to why the social group category was included in the 1951 Convention. It was introduced as a late amendment by the Swedish delegate, “experience has shown that certain refugees had been persecuted because they belonged to particular social groups.....such cases existed, and it would be as well to mention them explicitly.”<sup>5</sup>
- The focus for academic debate revolves around three approaches:
  1. The “**inclusive approach**” - asserts that the drafters of the 1951 Convention meant to include all those people who could not fit into the other four grounds of the definition, thus acting as a “safety net”. This approach calls for a “broad, liberal interpretation” of the social group category.
  2. The “**exclusive approach**” - asserts that social group is not a category in itself but should be viewed in conjunction with the other categories in the definition. This approach seeks to produce tests of eligibility.
  3. The “**middle way approach**” - asserts that the social group category was not meant to be meaningless, but neither was it meant to be a catch-all.

### ARTHUR HELTON<sup>6</sup>

- Helton argues that the definition was intentionally ambiguous and was meant to provide ample room for expansion in order to offer a “safety-net” to those who fell through the other categories. “The delegates intended to guarantee safety from persecution to all refugees, without invidious or unnecessary distinctions. The “social group” category, designed to reaffirm this commitment, was adopted in the UN Convention without dissent, extending the protection of refugees far beyond what had previously been the norm....The intent of the framers of the Refugee Convention was not to address prior persecution of social groups, but rather to save individuals from future injustice. The “social group” category was meant to be a catch-all which could include all the bases for and types of persecution which any imaginative despot might conjure up.”
- He identifies four types of groups to be included:
  1. **Statistical** (share a common characteristic such as blue eyes or great height but who lack any consciousness of solidarity).
  2. **Societal** (involuntarily share certain immutable characteristics such as race, sex, linguistic background). Group members may vary enormously but share a common consciousness of solidarity stemming from treatment the group receives from society at large.
  3. **Social** (are voluntary and do not share immutable characteristics but shared interests like education recreation and culture).
  4. **Associational** (pursue / achieve a common goal e.g. unions) “the contours of a social group for purposes of refugee status are limited only by the imagination of the persecutor” (He qualifies this statement by identifying that a social group can be legally identifiable and not merely a statistical artifact. A group would thus possess either a particular attitude about society or be perceived in a particular way by society at large.

### A.GRAHL-MADSEN<sup>7</sup>

- Grahl-Madsen describes the social group category as “an afterthought”. He notes that the social group concept is broader than race, religion and ethnic background (although it can also include these categories) and asserts that the 1951 Conference added the idea of social group in order to protect against persecution based on as yet unforeseen reasons. In reviewing the five grounds for persecution he defines two groups: qualities beyond the control of individuals and those within their control. He defines social group to belong to the first category.
- He describes two types of social groups: those in which membership is voluntary, such as members of clubs or associations and those in which membership is involuntary, such as nobility or language. He adds that even though individuals can cease to belong to particular social groups, they often continue to be identified with them. Persecutors often make no distinction between present and former members of social groups.

- He identifies that persecution may occur for reasons beyond an individual's control but does not identify that persecution is justified for reasons within an individual's control.

### **GUY GOODWIN-GILL<sup>8</sup>**

- Goodwin-Gill asserts that a social group includes, "people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests".
- In contrast to Grahl-Madsen he asserts that the "shared interests, values, or background" of a social group are likely to combine qualities over which individuals have no control with matters that they can control.
- He stresses the importance of recognising groups based on "ethnic, cultural and linguistic origin; education; family background; economic activity; shared values; outlook and aspirations."
- He includes social group to include those that are based solely on accident of birth as well as those that involve individual choice.
- He notes that the existence of social groups is not only determined by internal factors that unify groups but also determined by widely shared perceptions held by society at large. These external factors that distinguish groups and indicate their existence include: widespread discrimination, legal distinctions and a documented shared history of persecution, with particular relevance to the treatment of a group by state authorities. Social groups are defined both by self perception and in their social context to society as a whole.
- He suggests that not all social groups include a numerical minority, for example women.
- He argues for an open ended definition, with the potential to expand. But membership should be seen as "clarifying certain elements in the more traditional grounds for persecution".<sup>9</sup> This approach essentially renders the particular social group superfluous since recognised groups could already be protected by one of the other four categories.<sup>10</sup>
- He focuses on:
  1. The factors that unify a group, and
  2. The factors that distinguish it from the rest of society.

### **MAUREEN GRAVES<sup>11</sup>**

- Maureen Graves concludes that it is impossible to fashion a satisfactory definition of the social group category and the best that can result is an "amorphous, all-inclusive" definition, which she views as not being useful.
- She recommends refugee recognition on a case by case basis by way of ad hoc decision-making, as opposed to the formulation of abstract social group definitions.
- She points to the danger in attempting any kind of lexicographical definition of the composition of a social group. Even if a broad definition of social group is accepted, other aspects of the status definition should narrow the pool. Claimants must still demonstrate a well-founded fear of persecution and must prove that they are indeed members of a particular social group. She believes that recognition of the fact that the refugee definition has built in limits, would perhaps allow refugee case law to evolve in a less distorted manner.
- She views her definition as a liberal common sense approach, which attempts to limit arbitrary guidelines and assess each case on its own merits.

### **JAMES HATHAWAY<sup>12</sup>**

- Hathaway contrasts what he terms the "redundancy" approach, in which the social group category is essentially rendered meaningless because it is often equated to include the other four categories, with the "safety net" approach, which views a social group as any collection of people who share some similarity of background. He rejects both views.
- He argues that the drafters of the 1951 Convention would not have adopted the amendment to include the social group category if they had viewed it as merely superfluous. Similarly, he discounts the second point of view, argued by Helton, on the grounds that "seductive from a humanitarian perspective.....it

largely eliminates the need to consider the issue of a linkage between fear of persecution and the civil or political status of the refugee applicant". He views the "safety net" as essentially boundless and expresses the need to identify limits.

- He contends that the drafters expressly chose to distinguish and demarcate the social group category from the other categories, with an eye on past history to encompass known forms of harm and not with an eye to the future to encompass as yet unanticipated forms of abuse.
- In his view three types of group can claim asylum under membership of a particular social group:
  1. Groups defined by an innate and unalterable characteristic.
  2. Groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change.
  3. Existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded....are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.
- ".....The linkage between this standard and fundamental norms of human rights correlates well with the human rights based definition of "persecution". Most important, the standard is sufficiently open ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for a claim to international protection."
- With reference to homosexuals he comments that, "Homosexual and bisexual women and men constitute a group defined by a fundamental, immutable characteristic."

## **5. COUNTRY OF ORIGIN INFORMATION**

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- In many countries, homosexual acts remain a criminal offence under national legislation.<sup>13</sup>
- Punishment for homosexual offences ranges from fines and beatings to imprisonment and execution.
  
- Some countries worthy of note include:

### **CUBA**

- Homosexuality is illegal for men and women. Under Article 303-9 of the Penal Code, homosexuals can face up to one year imprisonment for causing "public scandal".

### **INDIA**

- Homosexuality is illegal for men. Under S.337 of the Penal Code, homosexuals can face life imprisonment, beating with a lathi or fines for an "unnatural act against the order of nature".

### **IRAN**

- Certain crimes in the Penal Code of Iran, including sodomy, are regarded as crimes against God (Hadoud) and are liable to divine retribution (Qisas). These crimes carry a mandatory death sentence.<sup>14</sup> Specific provisions under Sharia law prescribe the death penalty for: sodomy (Article 140), tafhiz (homosexual conduct, without penetration) for the 4<sup>th</sup> time, having been punished for each previous offence (Article 153), lesbianism for the 4<sup>th</sup> time, having been punished for each previous offence (Article 161).
- In 1992, at least 330 people were executed in Iran, although it is unclear how many of these executions may have resulted from allegations of homosexuality. In July 1980, a man, married with six children, was stoned to death in the town of Kerman, having been convicted of homosexuality and adultery. In 1992 Dr Ali Mozaffarian was executed in Shiraz and homosexuality was used as one of the grounds for the application for the death penalty.<sup>15</sup>

### **JAMAICA**

- Homosexuality is illegal for men. Under S76-9 of the Penal Code of Jamaica, homosexuals can face up to ten years imprisonment.

## **ROMANIA**

- Up until 1995 homosexuality was illegal in Romania under Article 200 of the 1969 Penal Code, with offenders facing up to five years imprisonment. On 15 July 1994, the Constitutional Court of Romania ruled that Article 200 was “unconstitutional” in criminalising “sexual relations between freely consenting adults which were not committed in public or did not produce a public scandal.” This decision came into force in January 1995. Following this, an amendment to Article 200 of the Penal Code came into effect on 14 November 1996, introducing the term “public scandal” into the text so that “any consenting same sex relations taking place in public or producing public scandal” will be punished with imprisonment from one to five years. “In public” is defined by Article 152 of the Penal Code:  
“The deed is considered to be committed “in public” when committed:  
a) in a place that by its nature or purpose is always accessible to the public, even if no one is present there;  
b) in any other place accessible to the public, if two or more persons are present;  
c) in a place inaccessible to the public, with the intention that the deed be seen or heard and if this consequence occurs before two or more persons;  
d) in a meeting of two or more persons, except for meetings that can be considered family meetings due to the nature of the relationships between the participating persons;  
e) through any means by which the actor has knowledge that the occurrence may reach the public.”

The term “public scandal”, however, is not defined anywhere in the Romanian penal legislation. Since this partial decriminalization of homosexuality, Romania has been considered a “safe country” for homosexual asylum-seekers by many European governments. Other European countries such as the United Kingdom and the Netherlands, however, have granted asylum or permits to stay to homosexual asylum-seekers from Romania.

## **RUSSIA**

- In 1993 national legislation in the Russian Federation legalised homosexual acts from age 15. Public attitude towards homosexuals remains deeply prejudiced. Up until 1993, homosexuality was widely regarded as a form of mental illness and homosexuals faced registration by local authorities, constant arrest, interrogation and beatings by police and organised crime, forced medical examinations and treatment, detention and compulsory commitment to psychiatric institutions.<sup>16</sup>

## **ZIMBABWE**

- Zimbabwe has become increasingly hostile towards homosexuality. President Mugabe recently described homosexuals as perverts “who are worse than dogs and pigs”.<sup>17</sup>

## **6. DETERMINING WELL-FOUNDED FEAR : PROSECUTION AS PERSECUTION**

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- It is frequently the case that homosexuals are prosecuted in their countries of origin. Punishment has ranged from imprisonment (Romania 1-5 years for a consensual act in private), to forced medical intervention (such as in Russia), to execution (death by stoning in Iran).
- If a particular social group was established, it could be argued that prosecution of that social group could amount to injurious action on a Convention ground in preventing the exercise of a fundamental human right, or serious discrimination amounting to persecution.
- Policies and practices carried out by governments amounting to persecution may in fact produce social groups.

- In assessing whether the law relating to homosexual acts in the country from which an applicant has come is justifiable the UNHCR Handbook states;
- Paragraph 59: “In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory”.
- Paragraph 60: “In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in various international instruments relating to human rights.”
- Prosecution would amount to persecution if that prosecution was pretextual, accompanied by excessive punishment or administered under inadequate or arbitrary procedures.
- Prosecution can ignore human rights that underpin refugee law.
- **European Court of Human Rights in Dudgeon v UK 1982 4 EHRR 149:** The Court held that the blanket prohibition of consensual homosexual acts in private was not necessary in a democratic society for the protection of morals, public order, or the rights of others. It was left up to states, however, taking into regard local conditions, how they regulated sexual conduct other than by total prohibition.
- It has been held that laws prohibiting consensual homosexual acts in private violate the right to private life under Article 8 of the ECHR (**Norris v Ireland 1991 13 EHRR 186 / Modinos v Cyprus 1993 16 EHRR 485**) and Article 17 of the ICCPR (**Toonen v Australia**) (See page 22).

## **7. CREDIBILITY**

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- Homosexuals face additional burdens in seeking to establish the credibility of their claims, corroborate their fears of persecution and submit evidentiary information. They are often unable to provide sufficient documentation to support their allegations of persecution. **UK Appeal No. HX/0517/94 Special Adjudicator 28 April 1995:** A refugee had to undergo an anal examination by a medical doctor in order for the adjudicator to determine whether the applicant was really homosexual. A lack of documentation of persecution of homosexuals by mainstream human rights groups and a general mistrust by the courts of information produced by gay and lesbian organisations makes it relatively difficult for homosexuals to produce reliable evidence of persecution. There is a lack of pro bono legal representation. The fact that determination systems often allow adjudicators to exercise some degree of discretion means that determinations may be subject to prejudices against political or socially unpopular groups.

## **8. COUNTRY OVERVIEW:**

### **AUSTRIA**

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- There has been no consistent jurisprudence on this issue. If asylum is granted the reasoning is weak and it is usually decided on other grounds.

### **BELGIUM**

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- **Ref. 5/4.149.831 25 Nov 1994:** A male homosexual from Bangladesh was granted refugee status.

### **BULGARIA**

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- The ground of “membership of a particular social group” has not been considered for granting refugee protection.

## DENMARK

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- In addition to a reference to the refugee definition of the 1951 Refugee Convention, the Danish Aliens Act of 1983 includes a provision providing for *de facto* refugee status for aliens who do not fall within the terms of the Convention but “for reasons similar to those listed in the Convention or for other weighty reasons should not be returned to their home country.”
- Persecution for reasons of sexual orientation is not explicitly mentioned as a ground for refugee status in the Danish Aliens Act.
- There has generally been very little jurisprudence concerning the category of social group within the Refugee Convention. In a small number of cases, refugee status has been granted where the issue of sexual orientation has been taken into consideration. Generally, however, it is difficult to determine to what extent these cases have been judged purely on grounds of sexual orientation or other factors.
- There are, however, a few exceptions where refugee status has seemingly been granted solely on grounds of risk of persecution due to sexual orientation:
  - **June 11 1992 (Refugee Appeals Board):** A male homosexual from Uzbekistan was granted *de facto* refugee status.
  - **February 9 1994 (Refugee Appeals Board):** A female homosexual from Romania was granted *de facto* refugee status.
  - **March 20 1995 (Refugee Appeals Board):** A male homosexual from Iran was granted Convention refugee status.
  - **November 27 1995 (Refugee Appeals Board):** A male homosexual from Iran was granted *de facto* refugee status.

## FINLAND

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- **Dec 1992 / June 1993 in Goncharev:** A male homosexual from Russia was granted *de facto* refugee status on appeal to the Supreme Court, after he faced deportation by the Ministry of the Interior after the adjudicator had ruled that Russian sodomy law had not been enforced for over three years and his claim was therefore “manifestly unfounded”.

## FRANCE

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- There has been little jurisprudence concerning the category of social group. In many cases the issue of sexual orientation is taken into consideration but decisions are made on other factors.
- **Koloskov 17 December 1993 (Plenary session Refugee Appeals Commission):** A male homosexual from Russia was denied refugee status on the ground that “homosexuality is not sufficient enough to justify recognition as a refugee”, but was later granted status owing to a change of legislation in the Russian Federation regarding homosexuality as a criminal offence.
- **Elkebir 22 July 1994 (Plenary session Refugee Appeals Commission):** The court ruled that an Algerian woman be granted refugee status on the basis of lack of protection by the state and not membership of a social group.



- **Ourbhi 7 July 1995 (Plenary session Refugee Appeals Commission):** The court denied status to a transsexual on the grounds that transsexuals fell outside the social group scope of the Convention.

## GERMANY

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- In 1951 the Federal Republic of Germany signed the 1951 Convention, which it ratified in 1953.
- Prior to the 1951 Convention, Germany's constitution guaranteed that "persons persecuted on political grounds shall enjoy the right of asylum". This differs from the Convention in that it guarantees a right to entry but only on political grounds. However, the German Constitution Court has interpreted this to include persecution on account of race, religion, nationality and social group. (**Judgment July 2 1980 Federal Constitutional Court 54, 341 (359)** ).
- **Judgement of June 6 1984, No OVGA 91/82 As, Verwaltungsgericht Hannover:** A former government official from Ghana claimed refugee status on the ground of membership of a social group. The Hannover court focused on two elements:
  1. Was there a substantial degree of homogeneity among the individuals in the group.
  2. Was there some degree of inner structure in the group.
  - The court concluded that "individuals who did not necessarily know each other, and whose only similarity to each other was that they had committed economic crimes, did not satisfy either of the requirements."
- **Judgement April 26 1983, No IV/ I E 06244/81 Verwaltungsgericht Wiesbaden:** The case involved an asylum seeker who had not been persecuted in the past . Raised in Iran in the Islamic tradition he had been allowed several times to leave the country and return at his convenience. The regime did not know his sexual orientation. He was concerned that the government might learn of his homosexuality and imprison or even execute him for ignoring religious laws. The Federal Refugee Office rejected the claim due to lack of persecution in the past and lack of evidence that the Iranian government was likely to learn of the asylum seeker's sexual orientation. The Administrative Court of Wiesbaden rejected the approaches of the Hannover court and the Federal Refugee Office and granted refugee status finding that:
  3. The applicant should not have to refrain from homosexual activity and live inconspicuously.
  4. Persecution of newly emerging, despised social groups, as well as individuals who comprise traditional social groups, can both be recognized.
  - The Wiesbaden court, after concluding that homosexuals were severely persecuted in Iran and that, consequently, the asylum seeker would likely face persecution there, examined whether homosexuals from Iran constituted a particular social group. The court expressly rejected the idea that group members must know one another or belong to an organisation. Instead the court emphasised two issues:
    1. Whether the general population views this collection of people as a group.
    2. Whether an objective observer of society would say that the general population treats this group as undesirable.
  - Looking at the prejudice expressed against homosexuals in Iran, the pejorative labels used to describe them, and the harsh treatment suffered, the court found that Iranian society perceived homosexuals as a pariah group, and ruled that homosexuals in Iran did constitute a particular social group because they were perceived as political opponents of the Iranian government.
  - The court focused on both the internal structure of the putative group and the external preconceptions of society's view of the group. Thus undertaking an "objective observer approach".
- Because the role of precedent is not significant in the German legal system, neither of the two trial courts explained why their approach and rationale differed greatly. Nor did the courts try to distinguish the facts of the cases in order to synthesise the legal standards they had articulated. These two standards coexist in German jurisprudence.
- **1986 decision of the Bundesverwaltungsgericht (Federal Administrative Court) reported as Case Abstract IJRL/004 1989 1 International Journal of Refugee Law:** A male homosexual from Iran

claimed asylum. Examining the Third Reich's persecution of homosexuals, the court did not reach a decision as to whether homosexuals were a particular social group, but did recognize the viability of considering sexual orientation as the basis for a claim, on the assumption that homosexuality was an irreversible personal characteristic.

- **1988 decision of March 15 Bundesverwaltungsgericht (Federal Administrative Court) No 9-c-278.86, 79 BVerwGE143:** The Court granted refugee status to an Iranian on the basis that his "irreversible homosexuality" put him at risk of being sentenced to death if he were returned to Iran. The Court found that Iranian law not only punishes a person for disrupting public order and morality but also the homosexual himself because of his "irreversible and fatal homosexual tendencies." The Court held that the personal characteristics of the asylum seeker placed him in a situation of conflict with respect to his country of origin. The Court did not consider, however, that the applicant belonged to a social group for the purposes of the 1951 Refugee Convention. In general, the Court does not base its decisions to grant refugee status to homosexuals on membership of a social group as much as it does on whether the individual behaviour or characteristics of the asylum seeker could conflict with his country of origin.
- **1993 Higher Administrative Court:** An appeal lodged by a male homosexual from Romania was denied on the grounds that homosexuality as a grounds for asylum "is relevant only in cases of non reversibility."
- **VG Wurzburg (8<sup>th</sup> division) 28 November 1994, W 8 K 93.33609:** Under Paragraphs 53 of the Aliens Act, an asylum seeker who is unable to benefit from the right of asylum may not be expelled if he would be directly affected by inhumane and degrading treatment in his country of origin. In the case before it, the Court applied the impediment to expulsion under Paragraph 53, together with Article 8 of the European Convention on Human Rights to find that a homosexual asylum seeker from Romania, under threat of a five-year sentence as well as humiliating and degrading treatment upon his return there could not be expelled from Germany.

## IRELAND

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- The Refugee Act of 1996 enshrines the Convention definition of a refugee and takes a proactive position as to the composition of the social group category.
- Section 1 states "membership of a particular social group includes ...membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation."

## NETHERLANDS

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- In 1979 the Secretary of State agreed to consider homosexual persons' claims for asylum following a parliamentary resolution recognising persecution on the basis of sexual orientation as grounds for asylum. The resolution was adopted following lobbying on the behalf of three homosexuals applying for asylum.
- So called "C status" had been given to homosexual asylum seekers allowing them to stay in the Netherlands for urgent humanitarian reasons.<sup>18</sup>
- **Judgement of Aug 13 1981 Afelding.Rechtspraak (Judicial Commission of the Council of State) No A-2.1113 Rechtspraak Vluchtelingenrecht No 5 1981:** The court confirmed that it would consider asylum applications from homosexuals under the social group category, however the male homosexual from Poland was denied asylum on the grounds that he had suffered from discrimination not persecution.
- **Judgement of July 28 1983 Afelding Rechtspraak (Judicial Commission of the Council of State) Gids Vreemdelingenrecht D12-853:** The court denied asylum to a male homosexual from Chile.

- **In 1992:** Two lesbians from Iran were granted asylum.
- **In 1992:** A male homosexual from Russia was granted asylum.
- **ARRvS., 17 June 1992, R.V., 1992, 9:** The Council of State has defined persecution as being discrimination implying “a serious limitation of the means of existence.” In the case before it, the Council considered an application for refugee status from a Czech professional soldier who had been discharged from the army due to his “psychological illness” consisting in his homosexuality. The Council held that this discharge, although discriminatory, did not constitute persecution as it did not limit the applicant’s means of existence.
- **ARRvS., 26 May 1993, R.V., 1993, 4:** The fact that homosexuality is punishable by law in Russia and that the Russian authorities have a negative attitude towards homosexuals did not lead the Council to conclude that homosexuals from Russia are being persecuted there. The Council concluded, however, that homosexuals coming from certain countries could be considered to form a social group facing persecution. Accordingly, “a reasonable interpretation of [the refugee definition] implies that persecution for reason of membership of a social group also includes persecution for reason of sexual orientation.”
- **In June 1995:** A male homosexual from Iran was denied asylum.
- **On Nov 28 1995:** A male homosexual from Russia was granted asylum.
- **In May 1996:** A Romanian homosexual was granted asylum on humanitarian grounds.
- **In January 1997:** A male homosexual from Iran was granted asylum on humanitarian grounds. Sexual orientation was not accepted as a basis for social group.

During 1997, there have been a number District Court decisions, in cases involving homosexuals, referring the case back to the competent state authority on the grounds that the applicant had made a ‘sustainable claim’.

## **NORWAY**

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- Asylum decisions are not made public in Norway. There are recent reports of homosexual Iranians being granted asylum on humanitarian grounds and a Chilean and a stateless Moroccan-Israeli couple also being granted asylum, but it is unknown whether these persons were given Convention status or another humanitarian status.

## **PORTUGAL**

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- There have been no rulings in the courts on sexual orientation as a ground for refugee status. However, sexual orientation is becoming an issue in Portugal with proposals to change Article 13 of the Constitution, which relates to sexual discrimination.

## **ROMANIA**

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- There are two current cases involving Iranian nationals, who claim persecution due to sexual orientation, which have not yet been concluded.

## **SPAIN**

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- There have been no rulings in the courts on sexual orientation as a ground for refugee status. However, several persons have been granted refugee status or residence permits on humanitarian grounds.

## SWEDEN

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- The Swedish Aliens Act of January 1997 provides specific protection for “those who risk severe punishment or very serious persecution on the grounds of their sex or of homosexuality”. This, however, is not refugee status.
- Prior to this amendment of the Aliens Act, Sweden was relatively restrictive towards Convention applications based on homosexuality but homosexuals were granted leave to remain on humanitarian grounds.
- **Decision of Feb 1995 Statens Invandrarverk (Swedish Immigration Board ) No 9502-0114:** An Iranian male homosexual was denied asylum.
- **Decision of Feb 1995 Statens Invandrarverk (Swedish Immigration Board) No 9502-0015:** An Algerian male homosexual was denied asylum, despite being cited on “death lists”.
- **Decision of Mar 11 1996 Utlänningsnämnden (Alien Appeals Board) No UN 95-5815:** An Iranian male homosexual was denied asylum. A new application has been submitted in this case and in December 1996, the Utlänningsnämnden (UN) requested that the government provide guidance in cases involving homosexuals. In its statement to the government the UN noted that it had received criticism for its assessment of the situation in Iran and, in particular, the situation of homosexuals in Iran. It also sought guidance concerning the general importance of the certification of ‘suicide risk’ by doctors, psychologists etc. in cases involving homosexuals.
- **Decision of 10 August 1996 Utlänningsnämnden (Alien Appeals Board):** an Iranian male homosexual was denied asylum on the grounds that simply being a homosexual would not result in a risk of persecution.
- **Decision of 31 October 1996 Utlänningsnämnden (Alien Appeals Board):** a Cuban homosexual alleged that if he were expelled to Cuba, he would not be able to return to see his Swedish partner as the Cuban authorities would not give him permission to leave Cuba for that purpose. In reaching a decision, the Aliens Appeals Board took into account Cuban state’s views on homosexuality and granted permission of residence.

## SWITZERLAND

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- The social group category has not yet been the subject of a case before the Appeals Commission. There is no jurisprudence on sexual orientation as a ground for refugee status.

## UNITED KINGDOM

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- The 1951 Convention definition was not explicitly incorporated into the Immigration Act of 1971 but was in the 1993 Asylum and Immigration Appeals Act. Refugee determination is supplemented by immigration rules and regulations, which include specific procedural and substantive criteria, formulated by the Home Secretary.
- In the UK, the Home Office Refugee Unit hears asylum claims, appeals are made to an Adjudicator and then the Immigration Appeals Tribunal (IAT).
- Jurisprudence in the UK has been confusing. Decisions by the special adjudicators, concerning applications based on homosexuality under the social group category, have swung either way.
- The Immigration Appeal Tribunal (IAT) has considered the homosexual question with regards to the social group category a number of times:

- **Otchere and the UNHCR v SSHD 1988 Imm AR 21:** Otchere claimed asylum due to being a past member of military intelligence in Ghana. The UNHCR stated “in the view of the High Commissioner there were a number of criteria that need to be considered:
  1. The group must be distinct as an identity within the broader society and definable by characteristics shared by its members.
  2. Common characteristics or uniting factors could be various; ethnic, cultural or linguistic, or educational; they could include family, economic activity, shared experiences, or shared values, outlook, or aspirations.
  3. The attitude of other members of society to the group.
- It was agreed that the characteristics must exist independently of the fact of persecution, but nevertheless the characteristics must play a significant role in persecution. The persecution must be feared, or exist, on account of the characteristics. There must, of course, be evidence of persecution and simple membership of a group was not enough. The High Commissioner would consider that members of a group do not have to share all the characteristics shared above.”
- “In the opinion of the UNHCR, therefore, based on our interpretation of the refugee definition and on existing state practice, the lesbians and gay men who can show that they have a well-founded fear of persecution due to their sexual orientation fall within the refugee definition found in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.”
- **Shewaish (IAT No 6091) 11 October 1988:** A male homosexual from Iran raised the question of his homosexuality only when applying for leave to appeal to the Immigration Appeal Tribunal. The point was dismissed without representation.
- **R v Secretary of State for the Home Department, Ex Parte Binbasi July 20 1989 (IMM AR 595 (QBD)):** A male homosexual from Turkish Cyprus was denied refugee status on the grounds that per se homosexuals could not constitute a social group within the meaning of the refugee definition. Indications were given that Binbasi could avoid persecution by exercising restraint, because it was found that inactive homosexuals did not face discrimination in Cyprus. The court remained confused on the definition of certain terms, including the question of discretion and the level of discrimination required to constitute persecution.
- **Golchin v SSHD (7623) 1991 5 Immigration and Nationality Law and Practice 97):** The IAT found that homosexuals per se do not form a social group. The IAT did not accept that the drafters of the Convention had in their minds persecution suffered under the Nazis when adding particular social group to the definition, despite the fact that the Convention was written to deal with the post war refugee problem. Noting, that this contradicted findings by the German Federal Courts that homosexuals could claim to be a persecuted group in the light of the internment of homosexuals in concentration camps and the findings of the US Immigration and Naturalisation Service that the 1951 Convention was developed with a view to protecting those who had been persecuted by the Nazis, the IAT found that consistency of interpretation of the Convention between signatory states was not necessary, arguing that it was up to each country to decide asylum policy in its own way.
- The IAT equated the meaning of social group with that of a minority group and went on to exclude homosexuals from the definition “We think that there is a close approximation of social group to minority group as the term is used in the Convention. Both terms, we think, require characteristics of an historical and cultural nature which homosexuals as a class cannot claim.”
- The IAT went on to say, “looking for some guidance to the definition of minority groups, there should be some historical element in a social group which predetermines membership of it, capable of affiliating succeeding generations; it is not enough, in our view, for association to arise by way of inclination.” Nor could a social group be identified by identifying the distinguishing characteristics of a set. Homosexuals were therefore found not to be a social group.
- In reference to the Netherlands and Germany the court remarked that they “have a different approach to the parameters within which they are prepared to grant refugee status.”

- “To say that the class of homosexuals has no history or culture is to disregard millennia of debate about the nature and place of homosexuals in society.”<sup>19</sup> The historical element leading to affiliation of successors is argued by some on the basis that homosexuals have existed in all societies in all ages, making the class of homosexuals self-generating by natural occurrence.
- The decision is clearly contradictory. If sexual orientation is a matter of choice then it is a political decision and Golchin should have succeeded on the grounds of suppression of a political opinion; if it is not a choice, but innate, then he would have come under the IAT definition of a minority group.
- The IAT thus essentially rendered the category of social group nugatory, as it had no other meaning than that of race or nationality.
  
- **Vraciu v SSHD ( IAT No 11559) NOV 1994:** The IAT found that a male homosexual from Romania did belong to a social group. The tribunal looked at domestic law to decide whether homosexuals were afforded a civil or political status. “It would seem to us to be unarguable that in the society of the UK, it has not been accepted that sexual orientation has not been recognised as identifying a person within a group having meaning in society. Homosexuals are treated differently according to the criminal law, there is a great discussion as to the advisability of homosexuals in the armed forces. There is no doubt that there is both an internal and external recognition of those who are sexually orientated in such a way as to form a “group” so identified by that characteristic.”
- The tribunal favoured the “immutable characteristic test” and expressly disagreed with the requirement of the applicant to produce historical and cultural characteristics.
- “The meaning assigned to particular social group.....should take into account general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests....identify three possible 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.
  3. Groups associated by a former voluntary status, unalterable due to its historic permanence.
- “The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation.”
- The court added that “prosecution may amount to persecution depending on the focus of the prosecution.”
  
- **Jacques (IAT No 11580) NOV 22 1994:** In a decision decided the day after Vraciu, a differently constituted tribunal found that homosexuals in Jamaica did not constitute a social group. It did not accept that Golchin was wrongly decided.
  1. The convention does not entitle a person to asylum whenever he fears persecution if returned to his own country. Had it intended it could and would have said so. Instead, asylum was confined to those who could show a well founded fear of persecution on one of a number of specific grounds, set out in Article 1(A) (2).
  2. To give the phrase “membership of a particular social group” too broad an interpretation would conflict with the object identified in (1).
  3. The other Convention reasons (race, religion, nationality and political opinion) reflect a civil or political status. Membership of a particular social group should be interpreted ejusdem generis.
  4. The concept of social group must have been intended to apply to social groups which exist independently of persecution. Otherwise the limited scope of the Convention would be defeated: there would be a social group, and so a right to asylum, whenever a number of persons fear persecution for a reason common to them.
  
- **SSHD V Savchenkov (1996) Imm AR 28:** The Court of Appeal allowed the Secretary of State’s appeal against the decision of the IAT, that those who refused to engage in criminal activity in Russia could be considered members of a particular social group. (It was common ground before the Court of Appeal that there was persuasive authority from the USA and Canada (**Canada Attorney General v Ward 1993 (4DLR 103 ; 1993 2 RCS 689)** and academic authority in the form of Hathaway’s analysis

that the definition of a particular social group was to be construed “ejusdem generis“ with the other grounds of the definition. In other words, membership of a particular social group denoted a civil or political status which is an immutable characteristic either beyond the power of the individual to change (akin to race) or so fundamental to one’s identity or conscience that one should not be forced to change it (akin to religion or political opinion).

- Savchenkov failed to show that he was of a particular social group because a citizen of a democracy had a duty to obey the law and it was therefore impermissible to say that performing this duty put one in a special social position, endowed with a civil or political status. This test was first propounded in the US Board of Appeals case in 1985, **in Matter of Acosta** (See page 16), and upheld in **Ward** (See page 15), where the Canadian Supreme Court explicitly approved of this test.
- **Gelab v Immigration Officer Heathrow No HX/75712/94 at 2 SEPT 5 1995:** A male homosexual from Syria was granted refugee status on political grounds only, although it was accepted that sexual orientation would increase the risk of severe ill-treatment.
- **Sadegh No HX/75394/95 (Adjudicator OCTOBER 1995):** A male homosexual from Iran was granted asylum on the grounds of social group membership.
- More recently the UK Home Office position towards homosexual asylum seekers has been evolving from a blanket policy of denial to an acceptance of the Canadian Supreme Court approach. **In a letter to David Alton MP dated January 1996, Minister of State Ann Widdecombe** wrote in reference to the social group category “We interpret this provision in the Convention as follows :
  1. the group is defined by some innate or unchangeable characteristic of its members analogous to race, religion, nationality or political opinion, for example their sex, linguistic background, tribe, family or class which the individual cannot change or should not be required to change; and
  2. there must be real risk of persecution by reason of the person’s membership of the group.
- Whilst claims based on homosexuality might satisfy 1 within this definition, the requirements of 2 would also have to be met in the individual case.”
- In other words the Home Office accepts the “ejusdem generis“ approach to the definition of social group which was adopted in Ward and approved in Savchenkov.

## CANADA

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- In 1969 Canada ratified the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.
- The Immigration Act of 1985 includes the Convention definition and also certain limited groups that do not satisfy convention status.
- In 1989 an organisational framework was established under the Immigration and Refugee Board of the Convention Refugee Determination Division (CRDD) with appeals to the Federal Court of Appeal.
- Canada has been quite progressive in its acceptance of the social group term as a broad description.
- Federal Court of Appeal decisions in addition to those by the Immigration and Refugee Board and its predecessor the Immigration Appeal Board have accepted social groups defined by sexual orientation involving homosexuals.
- The Immigration and Refugee Board of Canada has recognised the following as social groups: Freemasons in Cuba **CRDD T89-03344, Feb 5, 1990**, members of the capitalist class **CRDD T89-00106, June 7, 1989**, members of the landlord class **CRDD T89-02116, May 23, 1989**, Salvadorian farmers living in areas of military operations by both government and guerrilla forces **CRDD T89-02579, Dec 8, 1989**, draft evaders and deserters from military forces whose actions have been condemned by the international community **CRDD T89-03954, Mar 16, 1990**, Tamils from Sri Lanka **IRB M89-01213, June 1989**.

- **Richard Cid Requena Cruz, Immigration Appeal Board Decision T83-10559, CLIC Notes 95.10 April 8 1986 at 5 per G.Vidal:** “The board is of the opinion that the ground “membership of a particular social group” is a ground which must be given a broad and liberal interpretation in order to protect groups and individuals who do not necessarily have political, religious, or racial ties at the root of their fear of persecution. Otherwise, this ground of “social group” would be of very little value.”
- **Timothy Veysey v Commissioner of the Correctional Service 1989 29 FTR 74(TD) appeal against this judgement dismissed by Federal Court of Appeal Decision A-557-89, May 31, 1990:** This case established the basis for treating sexual orientation as an immutable characteristic capable of defining a social group. A case involving a breach of the right to equality owing to the refusal by prison officers to allow conjugal visitations to homosexual spouses as they would heterosexual spouses.
- **Re. UW No U91-03331 Oct 7 1991 CRDD No 501:** A male homosexual from Uruguay was denied refugee status.
- **Jorge Alberto Inaudi CRDD No T-91-04459 (IRB April 4 1992):** A male homosexual from Argentina was granted refugee status. The Immigration and Refugee Board accepted in a split decision that homosexuals do come under the social group definition. The Board based its definitions on the Oxford dictionary which defines social as “capable of being associated or united” and a group as “a number of persons classed together on account of a certain degree of similarity.”
- The Board concluded that “because homosexuals are attracted to persons of their own gender they are members of a particular social group. As homosexuality is an immutable characteristic, that alone suffices to place homosexuals in a particular social group. Even if homosexuality was a voluntary condition, it is one so fundamental to a persons identity that a claimant ought not be compelled to change. What must be shown by an individual is that he is at risk of persecution because he is a member of a particular social group, in this case the homosexual group.”
- **Elaskov CRDD M91-12609 June 2 1992:** A male homosexual from Russia was granted refugee status granted on evidence that persecution of homosexuals in Russia was institutionalised.
- **X (W.B) CRDD T92-03949 August 18 1992:** A male homosexual from Brazil, who was also HIV positive, was refused refugee status on the basis of documentary evidence that male homosexuality in Brazil was both lawful and tolerated.
- None of these judgments contained analysis of the elements that define a social group. In recognition of this admission the Immigration Refugee Board released a position paper containing an analytical framework to guide decision makers who review claims of persecution based on membership in a social group. (**Membership in a Particular Social Group as a Basis for a Well- Founded Fear of Persecution. Ottawa Canada March 1992**).
- It suggested a two part test with multiple sub parts:
  - 1) **Internal characteristics**
    - a) Organising characteristic might be innate such as gender or race.
    - b) The shared characteristic might be immutable, though not innate such as a common past economic or social status that cannot be changed.
    - c) The shared characteristic might be fundamental to the member’s identity or to their human dignity such as religious affiliation.
  - 2) **External characteristics**
    - a) Those outside the group perceive them as threatening danger.
    - b) Perceptions about the very existence of the group.
    - c) Belief in the existence of a group real of imagined.



- Both characteristics are expressly viewed as alternatives.
- **CRDD M93-04717 June 10 1993:** A male homosexual from Cuba was granted refugee status after establishing past discrimination together with evidence that penalties for unlawful departure might be more severe for homosexuals than for others.
- **February 24 1994 IRB M92-08129:** A lesbian from Costa Rica was granted refugee status under the social group category having been beaten by the police.
- **Ward V Canada (Attorney General) 1993 2SCR 689, 731 (Can SC):** The court found that sexual orientation can be a basis for finding a social group. The court recognised 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.
  - The court found that sexual orientation was innate or unchangeable but this list was not meant to be exhaustive. “The drafters decision to list these bases was intended to function as another built-in limitation to the obligations of the signatory states.”
- **Dykon v Canada (Minister of Employment and Immigration) 1994 25 Imm LR 193 (FC:TC):** A male heterosexual from the Ukraine was refused refugee status on the basis that “There was no evidence presented that the claimant was in fact a homosexual, only that he was perceived as one by some people.” On review the Federal Court found that it was “totally irrelevant” as to whether he was in fact a homosexual or not and he was granted refugee status.
- **No V93-01711 July 4 1994:** A transgendered person from Iran was granted asylum on perceived political opinion, as transgenderism was found to be in opposition to the Iranian government.
- **Ortigosa No T94-06899 Jan 23 1995:** A male homosexual from Venezuela was granted refugee status as part of a social group.
- **Re. L (O.V) No A93-81408 1995 CRDD No 4 at 4, 15-16 March 23 1995:** A male homosexual from Russia was granted refugee status on the grounds that Russian sodomy laws amounted to persecution.
- **Oviedo No T94-07129 August 14 1995:** A transgendered person from Venezuela was accepted as part of a social group.
- **March 1 1996:** Two male homosexuals from Mexico were granted refugee status.
- In September 1996, a bisexual male from Iran was granted refugee status. No written decision was issued. There was a problem of perception that a bisexual could pass as a heterosexual. Transsexuals were viewed as having a particular problem that their gender identity may be immutable but their particular gender, or sex may not.

## **UNITED STATES OF AMERICA**

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- Asylum decisions are heard by individual asylum officers, with administrative appeal to an immigration judge, and later to the Board of Immigration Appeals , Federal Courts of Appeals and the Supreme Court.
- The 1980 Refugee Act intended to conform to the Convention and included the social group category. However, Congress did not focus on the term and gave no explicit indication of its definition, understanding of the purpose, meaning, or intended scope of the term. There was a general contention that the statutory refugee definition, including the social group provision, should be interpreted broadly.

The purpose underlying the Act was generous; to expand the recognition of refugees and to standardize the refugee processing procedures.

- The Immigration Act of 1990 eliminated sections of the Immigration and Nationality Act of 1952 which was used to preclude homosexuals on medical grounds as “mental defectives or afflicted with a constitutional psychopathic therapy.” Since the Act, homosexual claims for asylum have been gathering momentum.
- **Matter of Acosta, Int. Dec 2986 Board of Immigration Appeals BIA 1985:** This case set the standard for social group eligibility under the “common, immutable characteristic test”. Taxi drivers in El Salvador were found to share a common immutable characteristic. The Board found that “the meaning assigned to particular social group.....should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests....identify three possible categories:
  1. Groups defined by an innate or unalterable characteristic;
  2. Groups whose members voluntarily associate for reasons 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.(Excluded therefore are groups which are defined by a characteristic that is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights. (Hathaway)
- Applying the doctrine of ejusdem generis, we interpret the phrase “membership of a particular social group” to mean persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one, such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis. However, whatever the common characteristic that defines the group, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution....”
- **Ananeh-Firempong (INS 766 F.2d 621 (1<sup>st</sup> Circuit 1985):** This case established a similar test to Acosta, where several potential social groups were identified based on characteristics that are “beyond the power of the individual to change.”
- **Toboso-Alfonso ( Toboso, A23 220 644 . Feb 3 1986 / reviewed by the Board of Immigration Appeals Mar 12 1990):** A male homosexual from Cuba was found to suffer a pattern of discrimination and persecution due to a common immutable characteristic. The Board found in a split decision of 3/2 that homosexuals did form a social group and that the applicant would be persecuted if he returned. The focus of the decision in terms of membership was on being a homosexual and not on the activity of the homosexual.
- The ruling establishes that homosexuals are members of a social group under US law (The Immigration and Naturalisation Service had argued that “socially deviated behaviour” could not be a basis for finding a social group within the contemplation of the Immigration and Nationality Act and that such a conclusion “would be tantamount to awarding discretionary relief (the granting of asylum) to those involved in behaviour that is not only socially deviant in nature, but in violation of the laws and regulations of the country as well.”). It suggests that Acosta is the proper definition of a social group and assumes homosexuals meet that test. It conducts its analysis from the persecutor’s perspective. It rejects the dichotomy between prosecution and persecution.
- In June 1994 the US Attorney-General Janet Reno declared the Board of Immigration Appeals decision relating to Toboso-Alfonso as “a precedent in all proceedings involving the same issue or issues.” Affirming that “an individual who has been identified as a homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group.”<sup>20</sup>

- **Sanchez-Trujillo V INS (801 F.2d 1571 (9<sup>th</sup> Circuit 1986):** The court addressed the definition of a particular social group. The Board of Immigration had held that the plight of two San Salvadorian men did not constitute membership of a particular social group within the meaning of the Refugee Act 1980. The court grappled with the phrase “particular social group“, interpreting it to narrow the definition of social group. They examined:
  1. Legislative History, described as “generally uninformative on this point”.
  2. United States Case Law, noting that there was “a dearth of judicial authority construing the meaning of particular social group”. Discussing only one previous case that of **Ananeh-Firempong ( 766 F.2d 621 1<sup>st</sup> Circuit 1985)** and concluding that “whatever the merits of the First Circuit’s decision under the circumstances of the case, the decision provides no guidance as to the outer limits of the social group category.”
  3. With regard to the UNHCR handbook, the court found that it provided “little assistance in arriving at a workable definition of particular social group.”
  - Finding none of these sources useful the court embarked upon its own statutory construction, concluding with the construction of a four pronged test. Its initial premise was that social group was a broad and flexible category. Describing a particular social group to include, “people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discreet social group.“
  - The court found that the applicants did constitute a group but not a particular one. Groups could be identified by examining such factors as group size and discretion, group homogeneity and cohesiveness, groups as readily definable or major segments.
  - However there was a lack of application of the principles enunciated by the court. “The term does not encompass every broadly defined segment of the population, even if a certain demographic division does have some statistical relevance.” The decision has been criticised as logically flawed, inconsistent with international standards, arbitrary and unduly restrictive.
  
- **De Valle v INS (901 F.2d 787 (9<sup>th</sup> Circuit 1990):** Another panel of the Ninth Circuit found that differences were too extreme and was disturbed by the size and heterogeneity of the asserted group.
  
- **Gomez v INS, 947 F.2d 660 ( 2<sup>nd</sup> Circuit 1991):** The decision introduced the notion of an “external component”, or “social context”. “A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor or in the eyes of the outside world in general.” The court contended that there was no outer limit on group size but ruled out groups that are even partially defined by broad-based characteristics such as youth or gender. It recognised governments official intent to persecute.
  
- **Re Tenorio No A72 093 558 (EOIR Immigration Court, July 26, 1993):** A male homosexual from Brazil was granted refugee status on the basis of having been attacked outside a nightclub in Brazil and that he would be subjected to persecution because of his sexual orientation if he was returned to Brazil. The court combined the Acosta and Sanchez-Trujillo tests and asserted that “there exists a voluntary associational relationship among the members, and a common characteristic that is fundamental to their identity as a member of a social group. Sexual orientation is arguably an immutable characteristic and one which an asylum applicant should not be compelled to change. Thus, homosexuals are considered to be members of a particular social group.”
- The case also established that a single attack, however brutal, could account for a well-founded fear.
  
- **INS grants asylum to Gay Mexican 71 Interpreter releases 490 April 11 1994):** The INS granted refugee status to a male homosexual from Mexico because he established a well-founded fear on account of his homosexuality. This decision was subsequently accepted by the Immigration and Nationality Service as establishing that in certain circumstances “particular social group“ can be defined by homosexual orientation“.

- **Re Pitcherskaia ( No A72-149-932 Immigration Court June 13 1994):** A lesbian from Russia, who had been constantly arrested, expelled from school and jobs and threatened with forced medical intervention to force her to change her sexual orientation, was denied refugee status on the grounds that the Russian government had attempted to “cure” her and not “punish” her.
- **INS grants asylum to Turkish Gay man 71 interpreter Releases 1515 Nov 14 1994.**
- **INS grants political asylum to gay Venezuelan man 72 Interpreter Releases 430 March 27 1995.**
- **Re Chau (No A71-039-582 at 2 6-7 Immigration Court June 14 1993 1997):** A bisexual male from Hong Kong sought refugee status claiming he was in fear of forced medical intervention amounting to persecution in anticipation of the takeover of Hong Kong by China. Although social group membership was not contested he was denied refugee status on the grounds that medical intervention qualified only as “discrimination”.

## AUSTRALIA

- Australia signed the 1951 Convention in 1954 and the 1967 Protocol in 1973 and incorporated it into national legislation in the Migration Acts of 1958 and 1990.
- The primary determination of refugee cases is by a case officer from the Department of Refugee Status, section of the Department of Immigration and Ethnic Affairs, with appeals to the Refugee Tribunal and then the judiciary. (The Refugee Review Tribunal replaced the Refugee Status Review Committee).
- **Morato v Minister of Immigration, Local Government and Ethnic Affairs 111ALR 417 Fed Ct Austl 1992:** A member of a social group had to “belong to or be identified with a recognisable or cognisable group within a society that shares some interest or experience in common.” The case referred to the “relative immutability of sexual orientation” and the “stigmatisation throughout history of those who depart from accepted sexual norms.” The tribunal concluded that homosexuals are “recognisable and cognisable for the community of their social, recreational and other interests such as health and their protection from the forms of harassment they have traditionally faced within most societies.”
- **Chan v Minister for Immigration and Ethnic Affairs 1989 169 CLR 379 (HCA) Refugee Appeal No 2254/94 Re HB 21 September 1994:** The court upheld the appeal of a male homosexual from Iran whose father had discovered his sexual orientation and granted refugee status.
- **N93/00593 1 February 1994 Sydney:** A male homosexual from Fiji was refused refugee status on the grounds that treatment feared under sodomy laws did not amount to persecution.
- **N93/2240 21 February 1994 Sydney:** A male homosexual Iranian was granted refugee status after finding that homosexuals did constitute a particular social group.
- **No NG 327 of 1994 FED no 1024/94 Immigration Law:** A Chinese couple claimed asylum based on persecution due to forced sterilization. The tribunal found that there was “an historical beginning to the defining of this group “which was defined by the government itself.” “In the view of the tribunal there is no sustainable basis for importing into refugee law a requirement in relation to the core rights of homosexuals that is different from that which applies, say, to heterosexuals, or to persons holding religious convictions.....Although it is arguable as to what actually constitutes core rights, there seems no doubt that they would include the right to openly acknowledge one’s sexual identity and to behave in ways that do not amount effectively to the renunciation of that fundamental characteristic.”

- **RRT No N93/00846 Decision 8 March 1994 Sydney:** A male homosexual from China was granted refugee status because his serious monogamous long-standing relationship placed him particularly at risk. “This social group is a recognisable or cognisable group within a society that shares some interest or experience in common when certain societies, including the Australian and the Chinese choose to identify the group by that immutable characteristic, homosexual or tongxinglian in Chinese...”
- **Toonen v Australia 1994 ( communication number 488/1992 CCPR/C/50/D/488/1992 4 April 1994):** It was found that Australia had arbitrarily violated the rights of a Tasmanian male homosexual under Articles 17(1) and 2(1) of the International Covenant on Civil and Political Rights.
- **RRT No V95/02999 Decision 22 April 1995 Melbourne:** A female lesbian from China was refused refugee status on the grounds that, whilst it was held that homosexuals do constitute a social group, the applicant did not face persecution because she was not a practising homosexual.
- **RRT No N94/06573 Decision May 11 1995:** A male homosexual from Zimbabwe was granted refugee status on the grounds that sodomy laws did amount to persecution and serious non violent discrimination was also persecution.
- **RRT No BN94/03199 Decision of July 7 1995:** A male homosexual from China was granted refugee status because his sexual orientation had become prominent whilst he was living in Australia and he would face persecution if returned.
- **RRT No N94/05400 Decision of September 28 1995:** The case involved Bangladesh Islamic law prohibiting “carnal intercourse against the order of nature” However the issue of prosecution was sidestepped by the non selective application of this law and concentration on a number of factors cumulatively amounting to persecution.
- **RRT No V95/03188 Decision of October 12 1995:** A male homosexual from China was denied refugee status. Whilst it was “reasonable to expect a homosexual to avoid persecution by being discreet in his conduct where this discretion does not involve giving up this right”. The precedent of **Toonen** guaranteed a right to private consensual sex, but nothing more.
- **Decision of 25 January 1996 RRT No N95/08735 at 6-7:** A male homosexual from Brazil was denied refugee status because of lack of evidence of homosexual persecution in Brazil.
- **RRT No V95/03527 Decision February 9 1996:** A male homosexual from Poland had objective fear of discrimination and that it would be “unacceptable to require a homosexual person that he or she live a hidden, inconspicuous life in order to avoid a prospect of serious harm.”

## **NEW ZEALAND**

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- **Appeal No 1312/93 of the Refugee Status Section of the New Zealand Immigration Service:** A male homosexual from Iran was granted refugee status having claimed membership of a particular social group due to his homosexuality and political opinion due to belonging to the Tudeh Party. The court found that in Iran certain crimes are considered as crimes against God (Hadoud) and carry a mandatory death sentence, including; sodomy (Article 140), tafhiz (homosexual conduct without penetration ) for the 4<sup>th</sup> time (Article 153), lesbianism for the 4<sup>th</sup> time (Article 161).

- **Refugee Appeal No 3/91 Re ZWD 20 October 1992 59-85:** The appeals authority granted refugee status to a male homosexual from Iran. This case represents the principal interpretation of a particular social group.

## **SOUTH AFRICA**

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- The South African Department of Home Affairs granted asylum on the grounds of discretionary humanitarian relief but not Convention status to a male homosexual from Ghana.
  - **Case IJRL/010 1989 1 International Journal of Refugee Law 246, the Afdeling Rechtspraak van de Raad van State (Judicial Division of the Council of State):** In a decision given in 1982, the Judicial Division considered a social group claim by a polish male homosexual. The division found that “persecution on account of membership of a particular social group, reasonably interpreted can include persecution on account of sexual disposition”. In this case the evidence established discrimination.
  - While it is possible to be granted refugee status on the grounds of being a homosexual, as of 1993 no cases had succeeded on this ground.
  - South Africa has become the first state to include sexual orientation in the anti-discrimination provisions of its constitution.
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## 9. APPENDIX

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### BOOKS AND WEBSITES CONTAINING INFORMATION RELATING TO GAY/LESBIAN IMMIGRATION AND REFUGEE ISSUES

- **Third Pink Book of The International Lesbian and Gay Association**  
(Buffalo, NY: Prometheus Books, 1993). Includes a world survey on the legal position of homosexuals).

- **Asylum Based on Sexual Orientation: A Resource Guide**  
(International Gay and Lesbian Human Rights Commission and Lambda Legal Defense, 1996). ISBN: 1884955002.

- **Romania**

#### **Legal Memorandum of the International Human Rights Law Group submitted to the Romanian Constitutional Court on the Application of International Human Rights Standards to the Constitutionality of Article 200 of the Romanian Criminal Code**

(International Human Rights Law Group)

Web site at <http://www.raglb.org.uk/> (Romania Online Action for Gay men, Lesbians and Bisexuals)

- **Australia**

Web site at <http://www.austlii.edu.au> This web site contains materials from the Australian Ministry for Immigration and Multicultural Affairs and decisions of the Refugee Review Tribunal.

- **United States**

Web sites at: <http://www.lgirtf.org/> ( US-based Lesbian and Gay Immigration Rights Task Force); <http://www.iglhrc.org/> (US-based International Lesbian and Gay Human Rights Commission, which has an Asylum Project); <http://www.aila.org/> (The American Immigration Lawyers Association);and <http://www.usdoj.gov/ins> (the US Immigration and Naturalization Service).

- **Denmark**

Web sites at: <http://www.drc.dk> (the Danish Refugee Council, which has a link to the US-Department of State Country Reports and [asyldk@login.dknet.dk](mailto:asyldk@login.dknet.dk) (dealing more specifically with gay/lesbian refugee issues).

- **General**

Web sites at <http://www.qrd.org/qrd/www/world/immigration/> (dealing exclusively with gay/lesbian immigration issues), <[asylum@iglhrc.org](mailto:asylum@iglhrc.org)> (contact asylum coordinator Sydney Levy) and <[qi@abacus.oxy.edu](mailto:qi@abacus.oxy.edu)> (Queer Immigration).

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<sup>1</sup> International Gay and Lesbian Human Rights Commission. A Resource Guide 1996

<sup>2</sup> The first case was in the Netherlands **Judgement of Aug 13 1981 Afelding.Rechtspraak (Judicial Commission of the Council of State) No A-2.1113 Rechtspraak Vluchtelingenrecht No 5 1981**

<sup>3</sup> International Gay and Lesbian Human Rights Commission. A Resource Guide 1996

<sup>4</sup> The UNHCR Handbook for Determining Refugee Status 1979

<sup>5</sup> Mr Petren, Swedish delegate UN DOC.A/CONF.2 / SR.3 14 Nov 1951

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<sup>6</sup> A. Helton, Persecution on account of Membership in a Social Group as a Basis for Refugee Definition 1983. Columbia Human Rights Law Review 15.

<sup>7</sup> Atle Grahl-Madsen, The status of Refugees in International Law, 1966, 219-220.

<sup>8</sup> Guy Goodwin-Gill The Refugee in International Law

<sup>9</sup> Guy Goodwin-Gill Entry and Exclusion of Refugees ; The Obligations of States and the Protection Function of the Office of the UNHCR 1980 Michigan International Law Studies 291

<sup>10</sup> P. Sexton political Refugees, Nonrefoulement and State Practice; A Comparative Study

<sup>11</sup> Maureen Graves From definition to exploration : Social groups and political asylum eligibility 26 San Diego Law Review 739,748 n 51 1989

<sup>12</sup> James Hathaway The Law of Refugee Status Butterworths 1991

<sup>13</sup> Breaking the Silence. Human Rights Violations based on Sexual Orientation, Appendix Amnesty international 1994. (Gives a country by country guide to national legislation on homosexual acts)

<sup>14</sup> When the State Kills...The Death Penalty V Human Rights, Amnesty International 1989, 149,150.

<sup>15</sup> Breaking the Silence: Human Rights Violations Based on Sexual Orientation, Amnesty International 1994, 33.

<sup>16</sup> **Matter of Pitchershaia No 95-70887 (US 9<sup>th</sup> Circuit 1996)**

<sup>17</sup> Reuters Feb 25 1997, Chris Chinaka.

<sup>18</sup> Kees Waaldijk and Clapham (eds) “ the legal situation in member states” Homosexuality A European Community Issue 1993 71,126

<sup>19</sup> symposium to section 28

<sup>20</sup>71 Interpreter releases 859 July 1 1994