THE ROLE OF RIGHTS IN ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION

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In refugee claims non-citizens of a State are able to make a rights-based claim against that State; that claim may be made precisely *because* of their non-citizenship. It is at its very core an *outsider* human rights claim. Although the preamble to the Convention Relating to the Status of Refugees 1951 (Refugee Convention)[1] states a commitment to the equal enjoyment of fundamental human rights, the notion that refugee law forms part of international human rights law remains deeply contested.[2] This contest is perhaps more sharply felt as States become increasingly reluctant to surrender sovereignty (or the appearance of sovereignty) in immigration and refugee matters.[3]

It is now widely accepted that lesbians, gay men[4] and transgendered people may make refugee claims on the grounds of their membership of the 'particular

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1 Convention Relating to the Status of Refugees 1951, 189 UNTS 150, as amended by the Protocol Relating to the Status of Refugees 1967, 606 UNTS 267.

2 See Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 108-12; Anker, 'Boundaries in the Field of Human Rights: Refugee Law, Gender and the Human Rights Paradigm', (2002) 15 *Harvard Human Rights Journal* 133; Haines, 'Gender Related Persecution' in Feller, Turk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 319; Daley and Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence', (2000) 12 *International Journal of Refugee Law* 148; and Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law', (2000) 69 *Nordic Journal of International Law* 117.

3 See, for example, Dauvergne, 'Challenges to Sovereignty: Migration Laws for the 21st Century', *UNHCR Working Paper 92* (Geneva: UNHCR, 2003); and Troeller, 'Refugees in Contemporary International Relations: Reconciling State and Individual Sovereignty', *UNHCR Working Paper 85* (Geneva: UNHCR, 2003).

4 In this work I do not claim any universalised experience of sexual identity. Yet applicants are united in that their same-sex attractions and relationships have meant that they were subject to violence or to the real possibility of violence; so their experience of sexuality, however articulated, has had real material consequences. I use lesbian and gay as convenient shorthand, and as a political organising principle, knowing full well that these terms are not necessarily meaningful in non-Western cultures.

social group' category of the Refugee Convention.[5] Claims to protection made by lesbians and gay men based on sexual orientation extend the outsider nature of the refugee claim and its relationship to human rights. To claim 'core' human rights for lesbians and gay men is paradoxical given the marginality of sexual minorities in human rights jurisprudence to date. Sexual orientation has only very recently been acknowledged as a valid *loci* of human rights in international law[6] and is typically still far from widely accepted as the basis for equality claims in many refugee receiving nations.

Deborah Anker argues that: 'Determinations of refugee status entail contextualized, practical applications of human rights norms'.[7] This article is particularly concerned with the role of human rights norms in refugee cases involving lesbian and gay asylum seekers. It will focus upon the case law developing in the UK, drawing comparisons with Australia and Canada. I argue that the lack of a human rights framework, in general, combined with an underdeveloped analysis of sexual orientation as a human rights issue has led to some extremely regressive refugee determinations, particularly in the UK but to a lesser extent within Australia also.

Canada provides a useful comparison to both the UK and Australia in that its domestic legal system is far more accustomed to analysing sexual orientation claims within a rights based framework. In 1985 the equality provisions of the Canadian Charter of Rights and Freedoms took effect[8] and in 1995 the Supreme Court of Canada held that sexual orientation was an analogous ground of discrimination

[5] The legal definition of a refugee is drawn from the Refugee Convention and adopted into domestic law of receiving nations. Article 1(A)(2) of the Convention defines a refugee as any person who:

> ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

For an overview of the 'particular social group category' and sexuality in the UK, Canada, USA, New Zealand and Australia, see Walker, 'Sexuality and Refugee Status in Australia', (2000) 12 *International Journal of Refugee Law* 175. See also Symes, *Caselaw on the Refugee Convention: The United Kingdom's Interpretation in Light of the International Authorities* (London: Refugee Legal Centre, 2000); McGhee, 'Persecution and Social Group Status', (2001) 14 *Journal of Refugee Studies* 20; Council of the European Union, Proposal for a Council Directive on Minimum Standards For The Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, 12 September 2001, COM (2001) 510.

[6] Morgan, 'Queering International Human Rights Law', in Stychin and Herman (eds), *Sexuality in the Legal Arena* (London: Athlone, 2000) 208; and Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998) at 115-44.

[7] Anker, supra n. 2 at 138.

[8] Although the Charter as a whole came into effect in 1982 as part of a package of reforms contained in legislation called the Constitution Act 1982, the equality rights section of the Charter (section 15) came into effect in 1985. This three year delay gave governments time to bring their laws into line with the equality rights in section 15.

under the Charter.[9] A wealth of claims brought during the 1990s and early 2000s meant that the Supreme Court of Canada and Provincial Appellate Courts considered a wide range of claims by lesbians and gay men to equal treatment, particularly as couples and families, in areas such as: employment benefits,[10] access to family law dispute regimes,[11] adoption,[12] retirement benefits[13] and most recently marriage.[14] While in early cases Canadian Courts were quick to hold that discrimination was justifiable[15] this trend was not followed.[16] In a remarkably short time the Canadian Courts have built up a considerable body of equality jurisprudence around sexual orientation.

While there have been statutory anti-discrimination provisions covering sexual orientation in Australia since 1982, such legislative provisions have varied considerably across Australian states (for instance Western Australia only introduced such provisions in 2002)[17] and they are of limited operation. Such laws cannot be used to challenge other statutory provisions which discriminate on the basis of sexual orientation, such as those which exclude same-sex couples from state benefits.[18] These regimes cover only discriminatory conduct which is unauthorised by statute, in areas such as employment and the provision of goods and services. Claims are usually brought against employers or individuals and often result in the payment of small monetary compensation. These regimes have been little used by lesbians and gay men, who moreover have met with fairly low success rates compared to other categories of claimant.[19]

9 *Egan v Canada* [1995] 2 SCR 513.

10 *Canada (Attorney General) v Mossop* [1993] 1 SCR 554.

11 *M v H* [1999] 2 SCR 3.

12 *Re K* (1995) 23 OR (3d) 679 (Ontario Court Provincial Division).

13 *Rosenberg v Canada (Attorney General)* (1998) 38 OR (3d) 577 (Ontario Court of Appeal).

14 *Hendricks c Québec* [2002] JQ No 3816 (Cour Supérieure du Québec); *Halpern v Canada* (2003) 65 OR (3d) 161 (Ontario Court of Appeal); *EGALE Canada Inc v Canada (Attorney General)* (2003) 238 DLR (4th) 416 (British Columbia Court of Appeal). The Supreme Court of Canada is currently considering the constitutionality of a Federal Bill to grant same-sex marriage. The matter was heard from 6-8 October 2004 and judgment is reserved. See Supreme Court of Canada Matter 29866, *In the Matter of a Reference by the Governor in Council Concerning the Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes, as set out in Order in Council P.C. 2003-1055, dated 16 July 2003 (Can.).*

15 Section 1 of the Charter allows 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In *Egan v Canada* this was held to save discrimination against same-sex couples in the granting of social benefits.

16 In *Vriend v Alberta* [1998] 1 SCR 496 and then in *M v H*, supra n. 11, violations of s 15 of the Charter were not saved by s 1.

17 See *Acts Amendment (Lesbian and Gay Law Reform) Act 2002 and the Acts Amendment (Equality of Status) Act 2002*. Note that much of the early anti-discrimination legislation enacted across Australia was itself was quite regressive, for instance by excluding 'work with children': see Chapman, 'The Messages of Subordination Contained in Anti-Discrimination Statutes', in Mason and Tomsen (eds), *Homophobic Violence* (Sydney: Hawkins Press, 1997) 58; Morgan, 'Still in the Closet: The Heterosexism of Equal Opportunity Law', (1996) 1 *Critical InQueeries* 119.

18 Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex Couples - Report of Examination of Federal Legislation* (Sydney: HREOC, 1999).

19 Mason and Chapman, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction', (1999) 21 *Sydney Law Review* 525.

While there is now widespread legal recognition of lesbian and gay relationships in much Australian law, like more recent reforms in the UK[20] - and in stark contrast to Canada - this has been achieved through a piecemeal legislative process, not through court based equality challenges.[21] Thus few matters have been brought to judicial review and as a consequence, judicial analysis of sexual orientation rights claims in Australia has been scant in the extreme.[22]

Until December 2003, the UK had no anti-discrimination protection for lesbians and gay men, either against government or non-government action.[23] In Britain the few judicial considerations of equality rights and sexual orientation until 2003 were therefore limited to statutory interpretation analysis.[24] It is also noteworthy that from 1988 to 2003 expressly discriminatory legislation operated in Britain to prohibit local government and educational authorities from 'promoting' homosexuality.[25] Since 2002 the commencement of the Human Rights Act 1998 brings European Convention on Human Rights (ECHR) considerations into domestic law-making and administrative action. This indirectly extends some human rights protections to lesbians, gay men and transgendered individuals. However the process is both slow and circuitous as it relies upon a case by case application of the ECHR to determine which rights apply (and how broadly) to lesbians and gay men.

This paper does not propose that constitutional equality guarantees are a panacea for discrimination on the basis of sexuality (or indeed on any other basis). Nor do I argue that there is necessarily a direct and demonstrable impact upon refugee decision-making in the countries under discussion.[26] Rather, I suggest that a greater

[20] Between 2002 and 2004, various pieces of legislation introduced in Britain afforded same-sex couples certain rights – such as eligibility to apply for joint adoption (Adoption and Children Act 2002); and the right to request paid parental leave or flexible working hours if they have responsibility for the upbringing of a child (Employment Act 2002). The Civil Partnership Bill 2004, which creates a new legal status that would allow same-sex couples to register in order to gain formal recognition of their relationship, was introduced into the House of Lords on 30 March 2004. The Bill can be viewed at http://www.publications.parliament.uk/pa/pabills.htm. The Bill could become law, assuming it is not delayed at any stage, in late 2005.

[21] Millbank and Graycar, 'The Bride Wore Pink ... to the Property (Relationships) Act', (2000) 17 *Canadian Journal of Family Law* 227.

[22] Millbank and Morgan, 'Let Them Eat Cake and Ice Cream: Wanting Something "More" from the Relationship Recognition Menu', in Wintemute and Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Oxford: Hart, 2001) 295.

[23] On 1 December 2003, the Employment Equality (Sexual Orientation) Regulations 2003 came into force. These regulations prohibit discrimination on the ground of sexual orientation in the arenas of employment and vocational training.

[24] *Harrogate Borough Council v Simpson* [1986] 2 FLR 91; *Fitzpatrick v Sterling Housing Association Limited* [2001] 1 AC 27; and *In re W (A Minor)* [1997] 3 All ER 620.

[25] See, for example, Cooper, *Sexing the City: Lesbian and Gay Politics Within the Activist State* (London: Rivers Oram Press, 1994) at 126-45; Stychin, *Law's Desires: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 38-54; Smith, *New Right Discourse on Race and Sexuality in Britain 1968-1990* (Cambridge: Cambridge University Press, 1994) at 183-239; Waites, 'Regulation of Sexuality: Age of Consent, Section 28 and Sex Education', (2001) 54 *Parliamentary Affairs* 495.

[26] Note also the limited role of the Canadian Charter in ensuring procedural fairness in refugee determinations in Canada: see e.g. Heckman, 'Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law', (2003) 15 *International Journal of Refugee Law* 212.

familiarity with lesbian and gay claims across a range of areas in tandem with a deeper and longer standing engagement with equality analysis has meant that Canadian decision-makers, unlike those in Australia and especially those in the UK, have been more ready to connect sexual orientation claims with human rights norms. This, in turn, has had a pervasive impact upon what decision-makers are prepared to construe as persecutory in sexuality based claims.

In the first part of the article, I consider the use of human rights principles and norms to develop refugee law, then briefly outline developments in sexual orientation claims in international human rights law, before examining how these developments have appeared in the decided cases on refugee status and sexuality. The second part of the paper explores the effects of a pervasive lack of human rights analysis in refugee cases, focusing particularly on decision-makers' inability to see either extreme social repression or criminal sanctions as persecutory in nature.

WHAT DO HUMAN RIGHTS HAVE TO DO WITH IT?

Refugee scholars have argued that refugee law is part of a twofold international approach to human rights. On the one hand there are broad pro-active international instruments setting up human rights norms, reporting and compliance bodies and compliance mechanisms through the United Nations. On the other hand, there is the 'remedial' role played by refugee law in protecting those who have fled abuses when such mechanisms have failed to ensure adequate human rights standards are met.[27] Yet refugee law is distinguishable from international human rights law because it has been developed and implemented primarily as *domestic* law and evolved in signatory countries in markedly different ways. Notably there is no set process for refugee determinations under the Convention, and receiving countries have interpreted their obligations differently (such as the much condemned 'Pacific solution' in Australia involving the turning away of boats to non-convention countries for processing).[28]

Despite this, commentators argue that refugee law is rightly considered to be a part of international human rights law, and point to an increasing internationalisation of refugee jurisprudence in receiving nations, as appellate courts in key countries look to each other for guidance in developing the law.[29] The development of

[27] Anker, supra n. 2; Gorlick, supra n. 2.

[28] This was accompanied by a raft of legislative reforms so that hundreds of Australian islands are no longer part of the Australian 'migration zone' excluding the operation of Refugee Convention rights for those who land there. See Coombs, *Excisions from the Migration Zone - Policy and Practice* (2004) Research Note No. 42, Australian Parliamentary Library, Parliamentary Research Services, http://www.aph.gov.au/library/pubs/RN/2003-04/04rn42.pdf.

[29] Anker, supra n. 2; Haines, supra n. 2; and Musalo, 'Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence', (2003) 52 *DePaul Law Review* 777.

jurisprudence around the 'particular social group' category over the past decade is a notable example of this process with the UK, USA, Australia, Canada and New Zealand in a close dialogue over, among other aspects, the recognition of gender and sexual orientation as cognisable identities under the Convention.[30] Deborah Anker argues that:

> The human rights paradigm has been critical to [developments in gender and asylum]. Not only are states interpreting key criteria of the refugee definition in light of human rights principles, but international human rights law is providing the unifying theory binding different bodies of national jurisprudence.[31]

Anker and others have argued that a human rights paradigm is at the core of 'particular social group' jurisprudence developing from the landmark Supreme Court of Canada case of *Canada v Ward* which places human dignity at the core of the group analysis and frames persecution as a form of serious human rights abuse. The Supreme Court held that underlying the Refugee Convention 'is the international community's commitment to the assurance of basic human rights without discrimination'.[32] The Court identified three possible categories under particular social group:

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. [33]

The concept of human dignity ensures that a human rights paradigm is used to identify the group by reference not only to the innateness of the characteristic that defines it but to the inherent *value* of that which its members seek to express. The group need not be cohesive, nor necessarily possessed of immutable characteristics. Notably, while the Court expressly identified sexual orientation with the *first* category, later decisions elsewhere avoided entering into a debate about the immutability or innateness of sexual orientation[34] by finding that sexuality is '*either*

[30] See Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in Feller, Turk and Nicholson (eds), supra n. 2, 263.

[31] Anker, supra n. 2 at 136.

[32] *Attorney General of Canada v Ward* [1993] 2 SCR 689, at para. 63.

[33] Ibid. at para. 103.

[34] See early criticism of this aspect of *Ward* in LaViolette, 'The Immutable Refugee: Sexual Orientation in *Canada (AG) v Ward*', (1997) 55 *University of Toronto Faculty of Law Review* 1.

an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to change'.[35] This 'protected characteristics' or 'anti-discrimination' approach to defining the 'particular social group' has been adopted by many receiving nations.[36]

A human rights paradigm has also been integral to the analysis of persecution under the Refugee Convention.[37] It is now widely accepted in international refugee jurisprudence that persecution entails the 'sustained or systemic failure of state protection in relation to one or more of the core entitlements recognised by the international community'.[38] The Supreme Court of Canada in *Ward* approved James Hathaway's definition of persecution as involving the 'violation of basic human rights'.[39]

In his seminal 1991 book, James Hathaway proposed a four tiered human rights approach to persecution, based on the concept of core entitlements drawn from the Universal Declaration of Human Rights 1948 (UDHR), International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). In this schema, first and second tier rights are those enunciated in the UDHR and made binding by their inclusion in the ICCPR. The first tier comprises non-derogable rights such as freedom from arbitrary deprivation of life, protection from torture and cruel inhuman and degrading treatment, freedom from slavery, the right to recognition as a person in law and freedom of thought, conscience and religion. The second tier comprises rights which are derogable only in cases of national emergency, such as freedom from arbitrary arrest or detention, the right to equal protection before the law, the right to a fair trial and the presumption of innocence in criminal matters, the right to freedom from arbitrary interference in privacy and family life, freedom of movement, expression, assembly and association. Any breach of the first tier and discriminatory or non-emergency breaches of the second tier would ordinarily be defined as persecutory.[40] The third tier rights are those found in the UDHR and contained within the ICESCR, which, unlike the ICCPR does not impose binding standards upon States. Third tier values include the right to work, entitlement to food, clothing,

[35] See *Re GJ* Refugee Appeal 1312/93, 30 August 1995, Refugee Status Appeals Authority (NZ) (Unreported, available online at www.refugee.org.nz). Most Australian decisions appear to have accepted this less categorical approach, as has the US 9th Circuit Court of Appeals in *Hernandez-Montiel v INS* (2000) 225 F3d 1084 and (less conclusively) the United Kingdom House of Lords in *R v Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah; Islam v Immigration Appeal Tribunal ('Shah and Islam')* [1999] 2 AC 629.

[36] Notably, Australia has not followed this approach: see discussion in Hathaway and Foster, 'Membership of a Particular Social Group, Discussion Paper No 4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges', (2003) 15 *International Journal of Refugee Law* 477. Although, note that even within Canada it has not necessarily been applied consistently at lower court levels: see Daley and Kelley, supra n. 2.

[37] For example in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570 the High Court of Australia approved the view that measures in disregard of human dignity may, in appropriate cases, constitute persecution.

[38] Haines, supra n. 2 at 327.

[39] Hathaway, supra n. 2 at 105.

[40] Ibid. at 108-10.

housing, medical care and basic education, as well as protection of the family. Fourth tier entitlements are rights recognised in the UDHR but not elsewhere codified. They include the right to own property and the right to be protected from unemployment. While severe or discriminatory breaches of the third tier could in some circumstances be persecutory, breaches of the fourth tier would very rarely be so under any circumstance. While national courts have regularly reiterated that the assessment of persecution must be made on a case-by-case basis, Hathaway's scheme has nonetheless been deeply influential in developing refugee decisions within a human rights framework.[41]

In essence, the human rights argument is that refugee law protects those whose fundamental human rights are seriously abused or at risk of serious abuse. It also thereby protects those who campaign for human rights and freedoms in their home country, by providing the possibility of protection elsewhere if they face punishment for their actions at home. At the base of the contest in sexual orientation claims for refugee status is the extent to which lesbians and gay men are conceived of as rights bearing entities in the sense outlined above, such that abuse or repression of them is seen as illegitimate and potentially persecutory. How the question of risk of persecution is answered depends very much on decision-makers pre-existing understandings of what is proper or tolerable behaviour on the part of sexual outsiders (whether they should, for example, be 'discreet') and on the part of the State (such as criminal prohibitions on some or all forms of same-sex sexual activity). These understandings in turn hinge upon unexpressed and under-analysed conceptions of both human rights and sexual norms. Take the premise that lesbians are only behaving appropriately by hiding their sexuality from neighbours, families and employers, or that gay men can rightly be punished under the criminal law for having sex. Such a premise will led to the conclusion that a lesbian unable to express her sexuality without fear of violence, from which the police will not protect her, is simply acting 'naturally'. It will also lead to the conclusion that a gay man who is detained for having sex is experiencing the 'normal policy of enforcement of the criminal law' rather than State-sponsored persecution. If lesbian and gay claims are a matter of morals or manners and not of rights, then what happens to the people bringing those claims ceases to be persecution. It is the rights-claim that transforms violence and oppression on the basis of sexual orientation *into* a cognisable wrong under the Refugee Convention: i.e. persecution.

SEXUAL ORIENTATION IN INTERNATIONAL HUMAN RIGHTS LAW

International human rights jurisprudence on sexual orientation is in its relative infancy, although it has developed rapidly in the past decade.[42] Initially international

[41] See for instance Canadian decisions holding that rape is persecution by reference to Hathaway's scheme: *ZDW* [1993] CRDD 3; and *HFU* [1996] CRDD 40.

[42] Morgan, supra n. 6; Sanders, 'Human Rights and Sexual Orientation in International Law', (2002) 25 *International Journal of Public Administration* 13.

human rights claims were completely rejected on the basis that homosexuals simply had no rights. Later claims made during the 1980s and 1990s tended to focus upon privacy rights within limits, while several cases in recent years have been firmly grounded in equality principles and have extended across the entire range of human rights.

In the 1950s and 1960s a series of claims were made under the ECHR by gay men from Germany and Austria who had been imprisoned for gay sex. These claims were all rejected at the preliminary European Commission of Human Rights (European Commission) stage as 'manifestly unfounded' and so never reached the European Court of Human Rights (ECtHR) itself.[43] Such decisions reflect an era in which being gay was so indubitably wrong that there was not even seen to be a justiciable human rights claim involved. Rob Wintemute notes that all such claims were rejected with the same terse conclusion:

> [T]he Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals (Article 8(2) of the Convention).[44]

This view changed in a series of ECtHR decisions dating from 1981 which could be described as a 'rights within limits' approach, focusing upon privacy as the key right so long as it did not transgress public space or public morals. The ECtHR held in *Dudgeon v UK* that criminal sanctions prohibiting gay sex *in toto* were in breach of the right to privacy.[45] Later international determinations held that criminal statutes even when rarely enforced, or unenforced were nonetheless in breach of privacy rights because of their effect on the individual.[46] However throughout the 1980s and 1990s the ECtHR continued to hold in a series of cases that there was no violation of ECHR rights in discriminatory criminal statutes setting a higher age of consent for gay sex than heterosexual sex.[47]

This era was marked by the sense that lesbians and gay men had no entitlement to a broader range of human rights beyond a limited right to privacy, or to equal access to and enjoyment of the limited rights they were granted when compared to heterosexuals. For instance, ECtHR decisions from the 1980s refused to categorise lesbian and gay parenting and partner relationships as 'family' under the 'privacy and family life' provision, and did not find any impermissible discrimination in the lesser treatment of same-sex relationships when compared to heterosexual

[43] Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995) at 92.

[44] *X v Germany* (1960) 3 YB 184 as quoted in Wintemute, ibid. at 92.

[45] *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186.

[46] *Modinos v Cyprus* (1993) 16 EHRR 485. See also the decision of the UN Human Rights Committee in *Toonen v Australia* (488/92), CCPR/C/50/D/488/1992 (1994); 1-3 IHRR 97 (1994).

[47] Beginning with *X v UK* (1977) 11 DR 36, as discussed in Wintemute, supra n. 43 at 92-5 and 107-8.

relationships.[48] While more recent decisions have continued to reject claims to marry and found a family under Article 12 and its equivalent under the ICCPR,[49] there has nonetheless been a discernable trend towards an equality based approach in the early 21st century. In the late 1990s there was an express finding that sexual orientation is a protected 'other status' under the equality provision of the ECHR, opening the way for the application of all other Convention rights to lesbians and gay men.[50] Recent ECtHR and UN Human Rights Committee decisions have held that statutes granting rights and benefits (such as the automatic inheritance of a lease from a deceased partner and publicly funded war widow pensions) to heterosexual unmarried partners but not same-sex partners are in breach of the rights to privacy and family life *and* the right to equality.[51] Likewise in 2003 the ECtHR determined that higher ages of consent for gay sex were in breach of the privacy and equality provisions in conjunction.[52] These recent decisions signal a far broader understanding of human rights and sexual orientation than that which appeared in the earliest considerations.

Yet these developments in international human rights jurisprudence have not been reflected, and indeed are barely acknowledged, in refugee law on sexual orientation. References to human rights norms or international standards in refugee determinations in Australia and the UK have been far and few between. Where they do occur, such references appear firmly limited to a conception of human rights as 'privacy' that goes no further than – and in some cases does not even approach – the incipient analysis of sexuality rights first articulated by the ECtHR in *Dudgeon*.

[48] Wintemute, supra n. 43 at 110-8. Note that Wintemute concludes from his analysis of ECHR cases up to 1995 that the ECtHR followed rather than led its member states in the development of lesbian and gay rights, supra n. 43 at 138-40.

[49] Ibid. at 112-3 and see also the UN Human Rights Committee opinion in *Joslin v New Zealand* (902/99), CCPR/C/75/D/902/1999 (2002); 10 IHRR 40 (2003), arising from the New Zealand matter *Quilter v Attorney-General* [1998] 1 NZLR 523.

[50] In *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 1055. This extension through interpretation was in part the reason why the Council of Europe did not specifically include the ground of sexual orientation in the general equality guarantee enshrined in Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedom, on a General Prohbition of Discrimination 2000, ETS No. 177; 8 IHRR 300 (2001). See Council of Europe, 'Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report' at para. 20.

[51] *Karner v Austria* (2004) 38 EHRR 24 in direct contrast to *Simpson v UK* 47 DR 274 (1986). See also the UN Human Rights Committee opinion in *Young v Australia* (941/00), CCPR/C/78/D/941/2000 (2003); 11 IHRR 146 (2004). The ECHR held that denial of marriage to transgendered people is in breach of privacy and equality rights: see *Goodwin v United Kingdom* (2002) 35 EHRR 447 and *I v United Kingdom* (2003) 36 EHRR 53, but has not yet extended that analysis to same-sex couples.

[52] *SL v Austria* (2003) 37 EHRR 39. In July 1997 the European Commission of Human Rights expressed the opinion that laws stipulating higher ages of consent for male homosexual sex were a violation of Article 8 taken in conjunction with Article 14: *Sutherland v United Kingdom* (1996) 22 EHRR 182. However, the matter did not reach the ECtHR: it was struck out following the decision by the UK Parliament to pass the Sexual Offences (Amendment) Act 2000 equalising the age of consent.

HUMAN RIGHTS IN REFUGEE DETERMINATIONS ON SEXUAL ORIENTATION

The Office of the United Nations High Commissioner for Refugees has argued for a human rights-based interpretation to persecution in both a broad and specific sense. So for instance in its *Handbook* the UNHCR states that 'serious violations of human rights' constitute persecution[53] and also suggests elsewhere that determining specific issues such as whether criminal punishment is persecution can be addressed by reference to whether it is in conformity with basic human rights standards as set out in the principle human rights treaties.[54] More recently the UNHCR guidelines on 'particular social group' state that the category should be read in an 'evolutionary manner ... open to evolving international human rights norms'.[55] Further, the UNHCR guidelines on gender draw heavily upon international human rights instruments to explore how understandings of sexuality and gender have changed in refugee law.[56]

Deborah Anker argues that:

> While refugee law may be formally non-intrusive and non-judgmental, it does make a determination of a state's willingness and ability to protect a particular citizen or resident, and in so doing lays claim to an *international* human rights standard.[57]

The use of international human rights standards in the decision-making process, however, may be implicit or explicit - and very often it is the former rather than the latter. This section outlines how human rights considerations have appeared in refugee decisions on sexuality in Australia and Britain and contrasts them with the approach in Canada.

Australia

Just as the UK faced adverse judgment from the ECtHR in *Dudgeon* in 1981, Australia, too, was held to be in breach of the right to privacy in 1994 by the UN Human Rights Committee in the case of *Toonen*, another case concerning the criminalisation of gay sex. The coincidence that Australia was the respondent in another claim decided in the same year that the Australian Refugee Review Tribunal ('Tribunal') first began to consider sexual orientation claims gave *Toonen* a higher profile in

[53] UNHCR, *United Nations High Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* re-edited ed (Geneva: UNHCR, 1992) at para. 51.

[54] Ibid. at paras. 59-60.

[55] Guidelines on International Protection: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention, and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (2002) at para. 3.

[56] Guidelines on International Protection: 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 HRC/GIP/02/01 (2002) at paras. 5 and 9.

[57] Anker, supra n. 2 at 152.

refugee determinations than it would perhaps otherwise have achieved. So, while *Toonen* was multiply cited in Tribunal decisions for five years after it was handed down, the more recent ECtHR decision of *Modinos* has not once been referred to in the many Australian Tribunal decisions that consider the role of unenforced or rarely enforced criminal statutes.

Yet despite the early references to *Toonen*, the human rights analysis in *Toonen* appears to have had very little if any impact upon Tribunal determinations.[58] Indeed, many Australian decisions utlised international human rights decisions to *restrict* rather than expand their understanding of 'core rights' for lesbians and gay men. While a handful of early decisions referred to Hathaway's schema with approval,[59] and one of the first decided cases found that forced separation and harassment of a gay couple was in breach of the applicants' Article 17, ICCPR right to privacy and family life,[60] the general consensus in the Australian Tribunal's decisions was that international human rights were held to a very limited degree by homosexuals, and that derogations by States were justifiable no matter where on the scale they fell. In two cases, in 1994 and 1996 respectively, the Tribunal stated that:

> In a number of countries, including Western nations, homosexual conduct of various kinds is a criminal offence. Several major religions condemn homosexuality. The reluctance of international human rights regulatory bodies to hold that such laws are in violation of human rights indicates that such laws do not, of themselves, offend international human rights principles.[61]

In a 1994 case, the Tribunal considered that the criminalisation of homosexual sex was *not* a violation of human rights because Article 29 of the UDHR permits legal limitations on the exercise of rights and freedoms for the purpose of 'meeting the just requirements of morality, public order and the general welfare', implicitly positing homosexuality as immoral and a threat to the general welfare. Similarly the Tribunal distinguished between expression of political opinion and sexual orientation by focusing on the 'public health and morals' exceptions to freedom of expression under Article 19 of the ICCPR. Relying upon a 1982 opinion of the UN Human Rights Committee in *Hertzberg v Finland*,[62] the Tribunal held in 1994 (and again in 1995 and 1999) that:

[58] When the Australian Tribunal referred to *Toonen* it usually held that criminal prohibitions on gay sex were merely a 'theoretical' breach of the applicant's human rights: see e.g. RRT Reference *N93/00846*, Fordham, 8 March 1994 (Unreported); RRT Reference *N93/00015*, Mathlin, 28 July 1994 (Unreported). This issue is discussed in further detail below: see infra n. 65.

[59] See RRT Reference *V95/03188*, Hudson, 12 October 1995 (Unreported).

[60] RRT Reference *N93/00846*, Fordham, 8 March 1994 (Unreported). Notably this case suggested that the criminal prohibition of homosexual sex was not in itself persecutory based on the premise that 'many countries' still had such provisions and 'many religions' still condemned homosexuality as an unnatural perversion.

[61] RRT Reference *N93/00015*, Mathlin, 28 July 1994 (Unreported), quoted with approval in RRT Reference *N94/04638*, McIntosh, 31 January 1996 (Unreported).

[62] *Hertzberg v Finland* (R.14/61), UN Doc. Supp. No. 40 (A/37/40) at 161 (1982).

> Given the conservative nature of Chinese society ... it is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and that this restriction on his activities would not constitute persecution.[63]

In doing so the Tribunal ignored a key component of Hathaway's schema: that derogations from second tier rights must not be discriminatory. Instead, *Hertzberg* was used in the identical reasoning of all three Australian decisions, as authority that the State ought to be accorded a wide margin of appreciation in matters of 'public morals'.[64] This appears to be a wilful misuse of out-of-date authority. The *Hertzberg* approach was not supported by the UN Human Rights Committee in *Toonen*; indeed the Committee expressly rejected the public health and morals defence of criminal sanctions.[65] Nor has the public morals defence to discriminatory laws affecting lesbians and gay men been accepted in several ECtHR decisions handed down in the many intervening years. Such decisions have continually emphasised that restrictions on rights must be proportional and adapted to a legitimate government aim – and that the repression of homosexuality itself is *not* a legitimate aim.[66]

In a similar fashion the Tribunal utilised early European Commission decisions which held that stable lesbian and gay relationships did not fall within the scope of protection as 'family'[67] to find that:

> [I]nternational jurisprudence does not show that homosexuals have inalienable human rights relating to their sexuality which extend beyond

[63] RRT Reference *BV93/00242*, Glaros, 10 June 1994 (Unreported); RRT Reference V94/02607, Harper, 4 April 1995 (Unreported); RRT Reference *94/02607*, Kelleghan, 29 June 1999 (Unreported).

[64] A more tentative use of *Hertzberg* also appears in RRT Reference *V96/04324*, Glaros, 21 August 1996 (Unreported) where the Tribunal member again held that the applicant was not entitled to offend public morals but also held that following an 'open homosexual lifestyle' was something the applicant would do 'and which is his right'.

[65] *Toonen v Australia* (488/92), supra n. 46. In two other cases, where this inconsistency was no doubt pointed out by the applicant's advisers, the Tribunal held that *Toonen* involved mere 'interference' which did not meet the requisite standard of persecution: RRT Reference *BN93/00015*, Mathlin, 28 July 1994 (Unreported); RRT Reference *N94/04638*, McIntosh, 31 January 1996 (Unreported).

[66] In *Smith and Grady v The United Kingdom* (2000) 29 EHRR 493 the UK argued that it excluded lesbians and gay men from the defence forces in part because of the negative attitudes that other service personnel held toward homosexuality. The ECtHR responded:

> To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour. (para. 97)

SL v Austria, supra n. 52 the ECtHR quoted this view with approval when rejecting Austria's arguments for a higher age of consent for homosexual sex, at para. 44.

[67] *X and Y v United Kingdom* (1983) 32 DR 220 and *Kerkhoven v The Netherlands* [1993] Fam Law 102.

> the right to private consensual adult sex. I therefore think it is correct to say that it can be reasonable to expect a homosexual to avoid persecution by being discreet in his conduct where this discretion does not involve giving up this right.[68]

A decision to this effect was not disturbed by the Federal Court in its judicial review of *LSLS* in 2000, by which time it was plainly wrong. Firstly, it is certainly not the case that the ECtHR or European Commission declared that the *only* potential rights claimable by lesbians or gay men were to private consensual sex. Secondly, whilst in early decisions the ECtHR did not accord lesbians and gay men rights under the 'family' aspect of 'privacy and family life', it was clear by the early 2000s that the ECtHR had changed its view.[69] Yet early ECtHR decisions were used to support the proposition that the 'integral and defining feature of the group'[70] was same-sex sexual activity in private, and the ability to meet same-sex partners to do so - thus as long as this ability existed the Australian Tribunal held there was no persecution. In a later Federal Court decision the landmark ECtHR cases on criminal sanctions for gay sex, *Dudgeon* and *Norris*,[71] were cited by counsel for the appellant for support that the criminal laws of Iran were persecutory in nature. The Federal Court curtly held that these cases do not 'suggest that need to confine homosexual activities to situations of privacy would inevitably be a denial of a human right much less that it would involve persecution'.[72]

These few reflections on international human rights law regarding sexual orientation in the Australian decisions seem directed to forcing lesbians and gay men back into the invisible private realm (the closet) rather than in any way conceptualising lesbians and gay men as rights-bearing entities. Only a tiny handful of decisions considered lesbian or gay claims in terms of freedom of expression, freedom of association or a right to equal protection before the law,[73] and many rejected such claims when made. Claims to universal standards, when made, tended to be to a universal abhorrence of homosexuality rather than to universal human rights.

[68] RRT Reference *V95/03188*, Hudson, 12 October 1995 (Unreported), quoted with approval in RRT Reference *V97/05640*, Hudson, 3 June 1997 (Unreported); referred to with qualified approval in RRT Reference *N94/06450*, Fergus, 26 July 1996 (Unreported); and quoted with wholesale approval in RRT Reference *V98/08356*, Hudson, 28 October 1998 (Unreported). The latter decision was upheld on review: *LSLS v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 per Ryan J.

[69] See *Karner v Austria*, supra n. 51. See also *Young v Australia*, supra n. 51.

[70] *LSLS v Minister for Immigration*, supra n. 68 at paras. 27-8 and 33.

[71] *Dudgeon v United Kingdom*, supra n. 45 and *Norris v Ireland*, supra n. 45.

[72] *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947 per Burchett J at para. 6. Contrast a 1996 Tribunal decision which used *Dudgeon* and *Norris* to support the view that: 'If a law does purport to prohibit such a basic human activity *in toto*, then the effect or harm of such a law can only be described as persecutory because there can be no greater violation of a human right than its prohibition': RRT Reference *N95/09584*, Blair, 31 October 1996 (Unreported).

[73] See e.g. RRT Reference *V95/03527*, Brewer, 9 February 1996 (Unreported).

In 2003, in the case of *s395/2002 v Minister for Immigration and Multicultural Affairs*, when the High Court of Australia first considered a sexual orientation based refugee claim, a majority of the Court rejected the analysis of some of the abovementioned cases and expressly disapproved the 2000 Federal Court decision in *LSLS*.[74] However, it is notable that despite accepting *amicus curiae* submissions from Amnesty International Australia, the Court did *not* examine the erroneous and outdated readings of international human rights law that had informed these earlier decisions. Moreover, both majority judgments assiduously avoided *any* reference to human rights instruments,[75] determinations or jurisprudence, citing only refugee decisions from the UK House of Lords.

However, despite this pointed silence on the role of human rights, the majority judgments in *s395/2002* did affirm, albeit obliquely, human rights concepts such as freedom of expression and freedom of association. For instance, Justices Gummow and Hayne note that the Tribunal's errors stem in part from limiting their understanding of sexual identity to sexual acts:

> Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.[76]

Later they return to the idea of a 'range of behaviour and activities of life which may be informed or affected by sexual identity'.[77] Unlike the Tribunal's understanding of sexuality, as always and only about sex, the judgment conceives of sexuality as a fully rounded identity and in doing so implicitly posits self expression as a protected aspect of that identity.[78]

The other majority judgment by Justices McHugh and Kirby likewise affirms the right to freedom of expression and association through a circuitous route; using a traditional reading of rule of law ideology rather than human rights instruments or norms:

[74] *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 per McHugh and Kirby JJ at para. 55 and Gummow and Hayne JJ at para. 83.

[75] Although note that Kirby and McHugh JJ did state that when determining whether criminal proscriptions were persecutory 'international human rights standards as well as the laws and culture of the country are relevant matters', ibid. at para. 45. In doing so they mirrored the UNHCR's own position: see supra n. 53.

[76] Ibid. at para. 81.

[77] Ibid. at para. 82.

[78] But note also that they say it is a mistake to focus on what one is *entitled* to do: ibid. at para. 83.

> Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law .... homosexuals as well as heterosexuals are free to associate with such persons as they wish and to live as they please.[79]

While it seems extraordinary that the decision was made with no express analysis of human rights, the High Court of Australia in *s395/2000* in 2003 *did* disapprove and depart from the decisions of the earlier lower courts that restricted refugee status on the basis of sexuality. As the above quotations make clear, that disapproval rested upon the premise that lesbians and gay men are rights bearing entities with clear claims to equal treatment with heterosexual people. This is a very far cry from decisions emanating from the UK to date.

UK

In the first UK case to consider (and reject) the claim of sexual orientation and particular social group membership, the High Court considered the claims of a gay man from Cyprus, *Binbasi*. In rejecting the claim that criminal sanctions were persecutory, the Court held that:

> In 1951 those who drafted the Convention were not seeking to guarantee all human rights. They had a more modest aim, namely to protect those who are genuinely fearful that if they returned to their homeland they will be persecuted simply because of who they are or what they have done. As was pointed out in ... [another] case, persecution is a strong word.[80]

The High Court also quoted with apparent approval the submission of counsel for the State:

> ... that a man cannot demand asylum under the Convention just because if he is returned to his country of origin he will not be able to enjoy the full range of freedoms he would enjoy in the United Kingdom. In reality, a judgment has to be made as to whether the interference with freedom is sufficiently serious to merit asylum.[81]

[79] Ibid. at para. 44.

[80] *R v Secretary of State for the Home Department ex parte Binbasi* [1989] Imm AR 595 at 596. Note also that Justices Heydon and Callinan dissenting in the High Court of Australia decision of *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs*, quoted this with approval, supra n. 74 at para. 107.

[81] *R v Secretary of State for the Home Department ex parte Binbasi*, ibid. See also *Boyd v Secretary of State for the Home Department*, 1 June 2000, IAT Appeal No 00TH01419 CC-50717-99 (Unreported) where the Immigration Appeal Tribunal rejected the applicant's proposition that 'The Convention was there to enable people to exercise freedom'.

The Court held in *Binbasi* that complete abstinence would protect the applicant from prosecution as it was gay sex, rather than being gay, which was the subject of criminal sanctions. In doing so, the Court implicitly accepted that this was *not* a serious interference with the applicant's rights and freedoms.

The introduction of Human Rights Act 1998 in the UK has meant that since 2000 decision-makers have referred to whether there is a possibility of breach of Article 3, ECHR (prohibition of torture and inhuman or degrading treatment) as a separate (and lesser) part of the inquiry. From 2000 to 2002 UK Immigration Tribunals and Courts also considered Article 8 rights to privacy and family life,[82] but ceased to do so after the Court of Appeal held that potential breach of Article 8, ECHR, rights, alone, did *not* prevent *refoulment*.[83] However, in 2004, the House of Lords disagreed with the Court of Appeal in holding that a breach of other ECHR rights *could* engage protection obligations; yet this would only be so if there were a 'flagrant denial or gross violation' of the right such as to completely nullify it in the destination country.[84]

The formal presence of human rights considerations did not translate into any real consideration of international human rights generally or the rights of lesbians and gay men more specifically in the vast majority of cases. Instead, in many instances reference to EHCR rights is merely formulaic and sometimes completely superficial.[85] It is also noteworthy that as recently as 2002 the Court of Appeal doubted, in passing, whether a same-sex relationship even qualified as 'family life' under the ECHR, despite recent ECtHR authority to the contrary.[86]

As in Australia, it is rare for the Immigration Appeal Tribunal or the UK courts to consider the development of international human rights law on sexual orientation or how the repression of fundamental human rights such as freedom of expression and association relate to persecution. In one of very few UK decisions on sexuality to refer to international human rights jurisprudence, the Immigration Appeal Tribunal relied upon the ECtHR decision in *Modinos* to find that unenforced laws criminalising homosexual acts would lead to a breach of the applicant's Article 8

[82] The Court of Appeal in *Z v Secretary of State for the Home Department ('Z, A and M')* [2002] Imm AR 560 held that this extended to same-sex claims. However note that by treating a breach of Article 8 as a claim under the ECHR but not the Refugee Convention, the UK decision-makers are implicitly departing from Hathaway's schema of human rights and persecution, which place privacy and family life on tier two such that discriminatory breach could be persecutory.

[83] *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal ('Ullah and Do')* [2003] All ER 1174; [2003] HRLR 12. See e.g. *HM v Secretary of State for the Home Department*, Court of Appeal, 8 April 2003 (Unreported).

[84] *Regina v Special Adjudicator ex parte Ullah; Do v Secretary of State for the Home Department ('Ullah and Do')* [2004] UKHL 26.

[85] See e.g. 'In the circumstances, it is not necessary for me to consider whether the effect of asking a homosexual to conceal his true identity would amount to denying him his full rights under the European Convention': *R v Special Immigration Adjudicator, ex parte T* [2001] Imm AR 187.

[86] *Z v Secretary of State for the Home Department ('Z, A and M')*, supra n. 82. See also the caselaw mentioned supra n. 69 and *Salgueiro da Silva Mouta v Portugal*, supra n. 50.

rights if he were *refouled*.[87] The Court of Appeal overturned the decision and read down the applicability of *Modinos* to the 'factual matrix' of Cyprus; appearing to regret that the Cypriot government had not argued the case for criminalisation before the ECtHR more forcefully.[88] The Court suggested that had the Cypriot government argued the Article 8(2) justification on 'public health and morals' grounds the decision may not have been made as it was and alluded to a domestic decision of the Supreme Court of Cyprus some years earlier to suggest that the criminal statute itself was indeed a legitimate protection of youth and public morals. That earlier domestic decision, *Costa*,[89] had upheld the constitutional legality of the Cypriot sodomy laws in a case involving a 19 year old man who had been charged after being caught engaged in gay sex in a tent whilst serving in the military (the penalty was a maximum five years in prison). While the ECtHR in *Modinos* had construed *Costa* as evidence that the Cypriot legal system was committed to on-going rights violations, the English Court of Appeal revisiting it many years later in a refugee determination appeared rather supportive than otherwise of the sodomy statute:

> The Strasbourg Court did not decide whether the very same law might have been justified if, for example, it was used to prosecute non-private homosexuality (such as was the case in *Costa*) or homosexual activity with a young person requiring special protection (arguably the 19 year old in that case).[90]

As the Court of Appeal did not explain its view further, analysis of this remark must rest on a considerable amount of inference. But it is striking that in 2002 the Court was prepared to automatically equate public morals with the protection of young men ('arguably' a 19 year old man, over the age of consent in Britain by that time but still assumed to be in need of 'special protection') from the threat of consensual gay sex.

The UK courts have also been content to accept that formal instruments in the sending countries that contain any form of equality provision are themselves guarantees of enforcement of human rights and State protection. So, for example, in *Lepoev* it was accepted that the applicant had gone to the police in Bulgaria when his car was vandalised with anti-gay slogans, but that the police had been more concerned with whether he was actually gay. Later the applicant claimed that he had been assaulted in front of police who did not intervene to assist him. Country evidence showed that police had raided gay clubs and organisations in recent times. Yet the adjudicator held that:

[87] *Appellant Z v Secretary of State for the Home Department*, IAT Appeal No 01TH02634 CC-10392-01, 8 November 2001 (Unreported).

[88] *Z v Secretary of State for the Home Department ('Z, A and M')*, supra n. 82.

[89] *Costa v The Republic* [1982] 2 Cyprus Law Reports 120.

[90] *Z v Secretary of State for the Home Department ('Z, A and M')*, supra n. 82 at para. 28.

> The evidence overall does not demonstrate that discrimination against homosexuals is state-sanctioned. In the first place, the Bulgarian Penal Code does not proscribe homosexual acts as such as illegal .... Secondly, the Bulgarian Constitution protects all manner of citizens against violence and discrimination .... Thirdly, Bulgaria is a signatory to a number of international human rights treaties, including the European Convention on Human Rights.[91]

Bearing in mind that other UK decisions had demonstrated a great reluctance to interpret ECHR rights, or any other general human rights guarantees, as extending to homosexuals, such a finding appears rather disingenuous.[92]

By way of contrast, the Canadian Immigration Review Board took account of a wide range of international human rights instruments early in its existence and explicitly applied these rights to lesbians and gay men. In recent years Canadian decision-makers have continued to make general reference to human rights norms in determining what harms constitute persecution.

Canada

As early as 1992 members of the Canadian Immigration Review Board characterised laws prohibiting gay sex as persecutory because they were directed towards the exercise of a 'fundamental human right'.[93] In another 1992 decision the Immigration Review Board considered the regular practice of police raids of gay bars in Argentina. It cited the right to freedom of association under the UDHR to hold that exposure to illegal detention and torture for the simple act of being present in a bar was persecutory.[94]

The Canadian Gender Guidelines, in place since 1993, state that persecution must be a serious form of harm which detracts from the claimant's fundamental

[91] *R v Secretary of State for the Home Department ex parte Lepeov*, High Court, 15 February 2000 (Unreported) at paras. 14-6, quoting the Adjudicator.

[92] See also *R v Immigration Appeal Tribunal ex parte Svilpa*, Court of Appeal, 20 December 1999 (Unreported) in which the Court of Appeal noted the 'full and fair' findings at first instance:

> The Secretary of State set out that he was aware that Article 29 of the Constitution of the Republic of Lithuania provides that all persons are equal under the law, the courts and other institutions and offices. It would be unconstitutional to restrict human rights and the effect of art 29 is that discrimination against someone because of, among other things, their sex, is not allowed. (para. 7)

Given that the UK had just been to the European Court of Justice successfully arguing in *Grant v South-West Trains* [1998] ECR I-621 that 'sex' does not cover sexual orientation this last finding suggests either hypocrisy or a complete ignorance of international legal developments.

[93] *KBT* [1992] CRDD No. 430. Note however that there was a dissent in this case.

[94] *LXN* [1992] CRDD No. 47.

human rights, and specifically refer decision-makers to human rights instruments as objective standards of what kinds of treatment are considered persecution.[95] This appears to have had a significant impact upon determinations in sexuality cases.

In a 1996 case concerning a gay man from Singapore, the Immigration Review Board noted that:

> Although the International Covenant on Civil and Political Rights and other international human rights instruments make no specific provision for the protection of the rights of homosexuals, their anti-discrimination provisions are sufficiently broad to apply to sexual orientation.[96]

In that case the Immigration Review Board referred to the rights to both privacy and equality under the UDHR and ICCPR to conclude that criminal laws prohibiting gay sex were violations of the fundamental right to equality (and further held that compulsory blood testing of known gay men in the army for HIV was cruel, inhuman or degrading treatment) in holding that a fear of persecution was well founded.

In another 1996 case concerning a lesbian from Venezuela who had been detained, threatened with rape and sexually assaulted, the Canadian Immigration Review Board first referred to the rights of security of the person and freedom from torture and cruel, inhuman or degrading treatment and then quoted with approval a document from Human Rights Watch arguing for the protection of individuals persecuted on the basis of sexual orientation by reference to the human rights of: freedom of expression and association, right against arbitrary detention, the right to privacy and the prohibition of discrimination on the basis of status under the UDHR and ICCPR.[97]

[95] See Immigration and Refugee Board Canada, Guideline 4: Women Refugee Claimants Fearing Gender Related Persecution, Update, 13 November 1996:

> FRAMEWORK OF ANALYSIS: Assess the harm feared by the claimant. Does the harm feared constitute persecution?
> (a) For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from the claimant's fundamental human rights.
> (b) To assist decision-makers in determining what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments. The following instruments, among others, may be considered:
> Universal Declaration of Human Rights;
> International Covenant on Civil and Political Rights;
> International Covenant on Economic, Social and Cultural Rights;
> Convention on the Elimination of All Forms of Discrimination Against Women;
> Convention on the Political Rights of Women;
> Convention on the Nationality of Married Women;
> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
> Declaration on the Elimination of Violence Against Women.

[96] *OPK* [1996] CRDD No. 88, at para. 36.

[97] *CLQ* [1996] CRDD No. 145. The Immigration Review Board held that the claimant's right to liberty and personal security had been violated and that the assaults and threats were forms of cruel and degrading treatment, and that such treatment was serious enough to give rise to a well founded fear of persecution.

Interestingly, several of the Canadian cases which do refer specifically to international human rights instruments do so in conjunction with the Hathaway four tier scheme of human rights in determining persecution.[98] Although references to Hathaway's scheme were more common in the earlier cases and diminish somewhat through the late 1990s, Canadian case law continues to draw upon this analysis. Moreover, later decisions often refer to human rights in general terms, as norms or expectations that are well known to the reader and need no further explanation. Thus, although there are less frequent references to international human rights conventions or human rights determinations, there are common passing references to human rights in a generic sense.[99]

These cases form a sharp contrast with those in the UK and Australia where the lack of a grounded human rights framework or any thoughtful application of international human rights standards to sexual orientation claims have led to very restrictive refugee decisions. The following sections explore in some detail how a lack of human rights analysis has affected decisions in the UK and Australia on persecution, in the areas of self-expression and criminal sanctions, respectively.

QUIETLY AND PRIVATELY

> *Member: So what do you think will happen to you if you go back to Vladivostok? ...*
>
> *Applicant: Well I don't know what to expect in the event of my return ... I tried to approach the police ...*
>
> *Member: Well you don't need to approach the police now... you know that that's useless, your aim now is to stay away from gay bashers ... and ahm prying family neighbours ... there must be more anonymous accommodation.*[100]

A contentious issue in refugee determinations on the basis of sexuality is the extent to which applicants are under an obligation to prevent or minimise the likelihood of persecution by hiding their sexuality. On one hand, such suppression entails the applicant forgoing the exercise of fundamental human rights such as freedom of expression, association and family life. On the other, the applicant is merely behaving 'reasonably' or 'discreetly' to avoid harm.

[98] *XMU* [1995] CRDD No. 146; *EYW* [2000] CRDD No. 116.

[99] So, for example, in a 1997 decision: 'In its latest version, Article 200 [of the Romanian Criminal Code proscribing "public scandal"] preserves the repressive and discriminatory principles of the former Penal Code, adding provisions which violate freedom of expression and association': *Re SEX* [1997] CRDD No. 277, at 3.

[100] Transcript of an Australian hearing a quoted in *NADO v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 215 at para. 24.

In Australia, prior to December 2003,[101] and in the UK to date, if a lesbian or gay applicant demonstrates the ability to outwardly conform (or to be 'discreet' as the cases frame it) or the decision-maker regards them as able to do so in the future, their claim is highly likely to be rejected.[102] Expecting or requiring discretion reflects an underlying norm, that open expression of non-heterosexuality is dangerous and offensive. Derek McGhee argues that: 'This production of "invisible" homosexuality perpetuates the continual social eradication of the expression, public visibility, and even the practice of homosexuality in the countries concerned'.[103] In this sense the 'discretion' decisions come perilously close to the same ideology as discriminatory criminal laws, and indeed Patricia Tuitt has argued that they are performing the same function. Tuitt notes that the discretion standard 'may result in the host State indirectly colluding with the persecutory State in limiting the extent to which the refugee is free to assert the rights and freedoms about which his claim to asylum may well have been prompted'.[104]

In *Binbasi*, discussed earlier, the first instance decision-maker held that the risk of prosecution of a gay man in Turkish Cyprus could be avoided by 'self restraint' presumably complete and life-long sexual abstinence. Although approved in one decision in 2000,[105] most UK decision-makers do not follow *Binbasi* and instead require or assume different degrees of hiding one's sexuality rather than absolute suppression. So, for example: 'In Yemen the Appellant could live quietly and privately in a homosexual relationship without fear of persecution by the authorities';[106] or 'He has not said that he wishes to act in any particular way or in a way which might put him at risk ... It is likely that he appreciates what is and is not acceptable in Iran.'[107]

Decision-makers have appeared oblivious to the connection between repression and discretion: in a 2002 Australian case the Federal Court was able to refer to the applicant's '*preferred* lifestyle of discreet homosexuality' in Iran with no apparent irony.[108] The expectation of silence and conformity is so strong that decision-makers

[101] *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs*, supra n. 74 and see further discussion infra n. 113 and 114.

[102] McGhee, supra n. 5; Dauvergne and Millbank, 'Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh', (2003) 25 *Sydney Law Review* 97.

[103] McGhee, supra n. 5 at 25.

[104] Tuitt, *False Images: The Law's Construction of the Refugee* (London: Pluto, 1996) at 93.

[105] *Boyd v Secretary of State for the Home Department*, IAT Appeal No 00TH01419 CC-50717-99, 1 June 2000 (Unreported).

[106] Adjudicator (quoted on appeal to the Immigration Appeal Tribunal) in *Saeed v Secretary of State for the Home Department* [2002] UKIAT 01465 at para. 48.

[107] *Musavi v Secretary of State for the Home Department* [2002] UKIAT 04050 at para. 12.

[108] *SAAM v Minister for Immigration and Multicultural Affairs* [2002] FCA 444 at para. 21 (emphasis added).

may privilege an imagined (discreet) lesbian or gay life over the applicant's past experience in addition to valuing it over their testimony about their current and future conduct.[109]

In Australian cases until December 2003, decision-makers also imported a requirement of 'reasonableness' to the applicant's future conduct.[110] The Full court of the Federal Court of Australia held in 2002 that:

> the Tribunal is within its rights in expecting that potential offenders would act with discretion and that they would refrain from publicising their sexuality .... It was open to the Tribunal to conclude that it was reasonable to expect that the appellant would accept the constraints that were a consequence of the exercise of that discretion.[111]

Reversing the Refugee Convention aim that the receiving State is a surrogate for protection from the home State, the discretion decisions place the onus of protection upon the applicant: it is he or she who must avoid the harm.[112] In December 2003 a slim majority of the High Court of Australia rejected the discretion approach in very strong terms holding that, 'It would undermine the object of the [Refugee] Convention if the signatory countries required them to modify their beliefs or to hide'[113] and adding that 'in so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed'.[114] It remains to be seen whether Britain will follow the Australian rejection of the deeply entrenched 'discretion' approach.

Statutes in place in Eastern European States such as Romania and Bulgaria until the early 2000s[115] criminalising the expression of a gay or lesbian identity by proscribing 'public scandal' rather than gay sex *per se* were often treated as neutral

[109] In a 1999 claim brought by a gay man from India the English Court of Appeal accepted that the findings of the Immigration Appeal Tribunal were consistent with the Appellant being handed over to the police if he lives openly as a homosexual and being at risk of brutality in their hands but did not disturb the Tribunal's decision to deny protection as it had held that there was little chance of this happening. Despite the claimant's own evidence that he wanted to live openly (he was 'unable to live what is to him a "normal lifestyle", by which he means he will be unable to live openly in a homosexual relationship') the Tribunal had determined that he would be 'discreet': *Jain v Secretary of State for the Home Department* [2000] Imm AR 76 at para. 9.

[110] See e.g. *Khalili Vahed v Minister for Immigration and Multicultural Affairs* [2001] FCA 1404.

[111] *WABR v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 124 at paras. 25-7.

[112] Dauvergne and Millbank, supra n. 102; Germov and Motta, *Refugee Law in Australia* (Melbourne: Oxford University Press, 2003) at 327.

[113] *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs*, supra n. 74, per Kirby and McHugh JJ at para. 41.

[114] Ibid. per Kirby and McHugh JJ at para. 50.

[115] For instance: 'Whoever engages in homosexual acts in public or in a scandalous manner or in way so as to entice others to perversity will be punished with a prison sentence of up to two years': Article 157(3), Bulgarian Penal Code, as cited in *Apostolov v Secretary of State for the Home Department*, IAT Appeal No 18547 HX/73944/96, 24 September 1998 (Unreported).

and reasonable by British decision-makers, regardless of their broad scope and discriminatory use.[116] Such preparedness to accept that gay and lesbian conduct can be subject to criminal laws that 'set limits' entails blindness to the discriminatory nature of the law and the State hostility behind it, as well as the real the possibility of its persecutory application. Abuses of such laws in Romania were well documented.[117] The Romanian provisions prohibited 'inciting or encouraging a person to the practise of sexual relations between persons of the same-sex, as well as propaganda or associations, or any other act of proselytism committed in the same scope'.[118] Such 'public scandal' provisions were repeatedly condemned by human rights organisations as an instrument of repression used freely to arrest, detain and harass lesbians and gay men.[119] They were eventually repealed in 2002. The ambit of such provisions were taken by police to include gay men and lesbians at home who disturbed neighbours by their presence or made 'too much noise'.[120] Yet UK decision-makers hesitated to construe these provisions as an improper interference with the applicants' human rights.[121]

In the UK and Australia there has been a marked reluctance to accept that lesbian and gay asylum seekers are entitled to voluntarily disclose their sexuality, and do so in the manner of their choosing, in their country of origin. In *Binbasi* (discussed above), being open about one's sexuality was obliquely characterised (through a quote from another case on religious grounds) as 'inviting' persecution.[122]

It is significant that in some cases the claim to self-expression is not even conceptualised *as* a right-claim, such as where the fear of a gay man being returned to Pakistan are trivialised and privatised into a 'right to go clubbing' by the UK decision makers.[123] The adjudicator found that:

[116] So for example, in a claim from a Bulgarian gay man in 2000 the Adjudicator stressed that gay sex was legal and construed the Code in the following manner: '... whilst this clause has been criticised for evidencing an anti-homosexual bias, it draws short of proscribing homosexual acts as such and sets out instead limits to types of homosexual conduct that are within the law': *Lepoev v Secretary of State for the Home Department*, supra n. 91 at paras. 15-6, quoting the Adjudicator.

[117] Human Rights Watch and International Gay and Lesbian Human Rights Commission, *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch, 1998).

[118] Article 200(5), Penal Code, as enacted by Law 140 of 5 November 1996.

[119] Human Rights Watch and International Gay and Lesbian Human Rights Commission, supra n. 117.

[120] Ibid. at 38-47.

[121] 'Given a sensible interpretation of 'public scandal' there might be nothing wrong with that': adjudicator quoted in *Beteringhe v Secretary of State for the Home Department*, IAT Appeal No 18120 HX/70791/97, 11 October 1999 (Unreported).

[122] *R v Secretary of State for the Home Department ex parte Binbasi*, supra n. 80. See also the dissent of Callinan and Heydon JJ in *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs*, supra n. 74, which repeatedly uses the term 'provoke'.

[123] See also a recent Australian decision where the claimant gave considerable evidence of his own feelings of shame and repression in Russia and the Tribunal held that: 'underpinning the claim was the applicant's belief that Vladivostock did not offer its male homosexual community the same kind of variety, diversion, lifestyle and affirmation that might be enjoyed by many of its members in places outside of Russia, such as in some Australian cities': *NADO v Minister for Immigration and Multicultural and Indigenous Affairs*, supra n. 100, per Conti J paraphrasing the Tribunal findings, at para. 15.

> The Appellant's demeanour in court supported his claim to be a homosexual desirous of living openly as a homosexual but only in the gay community. ... His fear is of persecution should he return to Pakistan and behave there as an open and outed homosexual and in a promiscuous manner. In those circumstances he states that he would fall foul of the Pakistan legislation. ... My task is to consider the likelihood of the Appellant facing persecution should he return to Pakistan and behave there as he behaved before he left Pakistan or behave there as he has currently been organising his social activities in the United Kingdom. I have to accept that there is probably not an open gay community in Pakistan as there is in this country. There will not be in Pakistan gay clubs or gay pubs. The second alternative scenario can probably therefore be discounted because the circumstances in which the Appellant moves socially in the United Kingdom do not apply in Pakistan. It is of course not a Convention reason that an asylum seeker returning to his own country is unable to enjoy there the peripheral benefits of westernised and so called liberalised behaviour. As I stated earlier, the Appellant has failed [to] demonstrate that he would face problems if he were to return to Pakistan and resume his former lifestyle there. To attract problems he would have to flaunt his homosexuality.[124]

The decision, undisturbed by the Court (and later by the Court of Appeal) clearly rests upon the assumptions discussed above regarding the ability of the applicant, no matter his own evidence to the contrary, to 'be discreet'. However it also demonstrates a dogged determination not to conceptualise the life experience (designated 'social activities') of a gay man in terms of human rights concepts such as self-expression or freedom of association.

In numerous Australian cases throughout the 1990s and early 2000s, decision-makers refused to accept that 'proclaiming' or 'parading' one's identity is protected by refugee law.[125] The approach of decision-makers in Australia was similar to the UK in that claims to self expression were frequently (although not universally)[126] received with open condemnation. In a claim from Iran the Full Federal Court of Australia approved an earlier statement of the Tribunal that: 'Public manifestation of homosexuality is not an essential part of being homosexual' and held that: 'It is not appropriate to submit that the ability to proclaim one's sexual preference is an essential right, the denial of which would or could lead to persecution.'[127]

[124] Quoted on review by the High Court: *T v Special Immigration Adjudicator*, supra n. 85 at paras. 10-1.

[125] Dauvergne and Millbank, supra n. 102.

[126] See *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1704 in which the Tribunal had considered the applicant's 'core rights' as, in the Court's words, 'including being able to cohabit with the same sex partner and being able to acknowledge honestly his sexuality, in the same way that others in the community may acknowledge their political or religious or sexual beliefs and allegiances without fear of persecution' (at para. 15). However, note that, typically, the Tribunal found that these rights were not impaired.

[127] *WABR v Minister for Immigration and Multicultural Affairs*, supra n. 111, per Spender, O'Loughlin and Gyles JJ at paras. 23 and 19.

The question of which rights are 'essential' or 'core rights' is at the heart of many decisions on sexuality: yet as has been demonstrated, decision-makers rarely consult any external standard in determining this question. In marked contrast to Canada, refugee decision-makers in Australia and the UK appear reluctant to accept the claims of lesbians and gay men within a human rights framework. In the above case, and others,[128] Australian decision-makers have conceptualised lesbian and gay arguments about repression as a claim to a 'universal right to publicly display one's sexuality'[129] with no apparent understanding that freedom of expression, association or privacy and family life are part of the experience of being human, rather than a 'display'. While the decisions of *LSLS* and *WABR*, cited above, were expressly disapproved by a majority of the High Court of Australia in 2003, the High Court was prepared to assume, rather than articulate, the rights to self expression of lesbians and gay men.

The profound impact of the absence of any articulated human rights framework is also demonstrated in the hesitatant attitude of decision-makers in the UK and Australia to construe criminal penalties for homosexual acts as persecutory.

CRIMINALISING 'SEXUAL MISCONDUCT'

> Homosexuality, *as with many other forms of sexual misconduct*, is a criminal offence in Pakistan punishable by, in this case, up to life imprisonment, and is also a religious offence which could attract a death sentence by stoning.[130]

Criminal prohibitions of same-sex sexual activity have been described as 'the crudest form of sexual orientation discrimination'.[131] Such laws are the most openly and repeatedly contested form of sexuality discrimination in both domestic and international legal arenas.[132] As noted earlier in this paper, human rights claims based on criminal sanctions formed the backbone of early international human rights determinations on sexual orientation. It is thus surprising that criminal proscriptions on gay sex have not been readily categorised as serious human rights breaches in the refugee context.

The UK courts accepted in the late 1990s that criminal laws, *if enforced*, could be persecution in principle, yet, in recent years they appear to have resiled from this position. A number of recent cases explicitly reject the proposition that even lengthy terms of imprisonment for same-sex sexual activity could be persecutory. The process by which these decisions were reached are worth exploring, as they expose decision-makers' reluctance to view gay claimants as rights-bearing subjects.

[128] See e.g. *LSLS v Minister for Immigration*, supra n. 68.

[129] Edwards, 'Age and Gender Dimensions in International Refugee Law', in Feller, Turk and Nicholson (eds), supra n. 2, 46 at 67.

[130] *R v Special Immigration Adjudicator, ex parte T*, High Court, 11 May 2000 (Unreported) per Tuckey LJ at para. 2 (emphasis added).

[131] Wintemute, supra n. 43 at 93.

[132] See Wintemute, ibid. at 92-7 and 138-40.

In 1989 the High Court was able to blithely remark that 'apart from risking prosecution, [the applicant] would not be victimised in any other way'.[133] In the quotation above from *T*,[134] the High Court refers to homosexuality as a form of 'misconduct'. Similarly, in *WABR* the Full Federal Court of Australia refers to gay men as 'potential offenders'.[135] These are not mere slips of the tongue: in a 2002 decision a UK Immigration Adjudicator held that:

> the Appellant would not face persecution if he were returned to the Yemen by the Yemeni authorities only prosecution and any punishment [100 lashes or 1 year in prison], *within the context of the Yemeni culture would* not be harsh and unconscionable'.[136]

In a number of other UK cases explored below criminal penalties for homosexual sex were characterised as relatively lenient by reference to the prevailing norms of the country in question.[137]

The 'context' in question may be one in which heterosexual adulterers also face criminal sanctions. In Australia this has been central to findings in the Federal Court that criminal laws are not discriminatory[138] and more recent suggestions to the same effect in the dissenting judgments in *s395/2002* in the High Court.[139] This

[133] *R v Secretary of State for the Home Department ex parte Binbasi*, supra n. 80.

[134] *R v Special Immigration Adjudicator, ex parte T*, supra n. 130.

[135] *WABR v Minister for Immigration and Multicultural Affairs*, supra n. 111.

[136] *Saeed*, Adjudicator's decision; overturned on appeal to the Immigration Appeal Tribunal in *Saeed v Secretary of State for the Home Department*, supra n. 106 (emphasis added).

[137] See also the disturbing suggestion that murder is culturally relative in a 2001 case regarding a man from Brazil. The Immigration Appeal Tribunal responded to country evidence that more than 1600 gay men, transvestites and lesbians were murdered in the period 1980-1999, stating:

> But that must be seen in the context of a country which has an almost unbelievable record of violence. In 1999 there were over 6000 murders in Rio de Janiro alone. Given that the [Gay group of Bahia] claims that there are 15 million homosexuals in Brazil, it is difficult to see, on the figures that we have been given, that the homosexual community in Brazil is a particular target of violence'

Barbalaga v Secretary of State for the Home Department, IAT Appeal No 01TH00068 HX-73150-96, 28 February 2001 (Unreported) at para. 5.

[138] *F v Minister for Immigration and Multicultural Affairs*, supra n. 72.

[139] Gleeson CJ did not make a finding on the question of whether the criminal law of Bangladesh was persecutory, but stated: 'The Penal Code also makes adultery, and enticement, illegal (ss 497, 498). Presumably this affects the openness of some heterosexual behaviour', *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, supra n. 74 at para. 12. Callinan and Heydon JJ stated:

> So too, in all societies, there are greatly varying views, and indeed laws, about what is or is not acceptable, conventional, or proper sexual conduct or practice, both heterosexual and homosexual. And the same may readily be said about other expressions of identity, not merely sexual. These may well be matters of cultural and national interest in respect of which there may be great divergence of opinion and, in consequence, laws, from nation to nation. For example, in Ireland the Offences Against the Person Act 1861, s 58, makes abortion a felony punishable by imprisonment for life and other legislation has restricted access to contraceptive devices and also access to information about abortion. It is not necessarily beyond argument that sexual inclination or practice necessarily defines a social class, a matter which was not raised here but seems to have been assumed.

apparent 'taking into account' of context involving equal (or equally bad) treatment in fact ignores the *whole* context while focusing superficially on parity between heterosexuals and non-heterosexuals: numerous commentators have pointed out that lesbians and gay men are unable to marry or enter into any form of culturally acceptable union.[140] Further, Germov and Motta note that this use of comparisons distracts from application of the Refugee Convention: the fact that other people may be persecuted for non-Convention reasons related to sexuality is *not* proof that the persecution of lesbians and gay men on the basis of their sexuality *fails* to be Refugee Convention persecution.[141]

Taking the cultural climate of the sending country as a barometer of what abuse is 'proportionate' is also very troubling. Haines has said in relation to gender related claims: 'Whether the harm threatened is sufficiently serious to be described as "persecution" must be measured against the core human rights entitlements recognized by the international community. Breaches of human rights cannot be ignored, discounted, or explained away on the basis of culture, tradition, or religion.'[142]

While reference to external standards when considering whether criminal proscriptions on gay sex are persecutory has been a regular feature of the Canadian cases,[143] it has been notably haphazard in the UK decisions. The 2004 UK Home Office refugee claim standard letter of reasons for refusal includes a section on 'prosecution versus persecution' which specifically refers to the 'need to be able to show that the law in your country does not conform with accepted human rights standards'.[144] Yet this consideration appears in only a tiny handful of the UK decisions which consider the question of criminalisation of gay sex.

In a 1995 decision the UK High Court considered Romanian penalties of imprisonment of one to five years for gay sex.[145] Although the decision-maker noted that the UNHCR Handbook indicated the need to address whether a law itself

[139] (contd) Nor, as we have said, did the appellants contend that the presence on the statute books of Bangladesh of s 377 of the Penal Code mean that they were, in consequence, members of a persecuted social group. Until 1997, the year in which the last relevant criminal provision was repealed, homosexual intercourse was illegal in at least parts of Australia. Did that repeal mean that homosexuals in other countries in which a similar law may still have applied immediately became potential refugees under the Convention? Many countries (for example Australia and Canada) without qualification make bigamy a criminal offence. Others do not. Does that mean that would-be polygamists in Australia, Muslim or otherwise, might seek refuge in other countries which are subscribers to the Convention where polygamy is not necessarily criminal? The distinction between criminal sanctions and persecution is not yet a settled one.' (paras. 108-9, footnotes omitted.)

[140] Dauvergne and Millbank, supra n. 102; Walker, 'New Uses of the Refugee Convention: Sexuality and Refugee Status', in Kneebone (ed), *The Refugee Convention 50 Years On* (Aldershot: Ashgate, 2002).

[141] Germov and Motta, supra n. 112 at 322.

[142] Haines, supra n. 2 at 333.

[143] See *KBT*, supra n. 93 and *OPK*, supra n. 96.

[144] UK Home Office, Immigration and Nationality Directorate, 'Reasons for Refusal Letter', available at www.ind.homeoffice.gov.uk.

[145] *R v Immigration Appeal Tribunal, ex parte Vraciu*, High Court, 1 November 1995 (Unreported).

is in conformity with human rights standards and whether the application of that law is discriminatory in determining whether criminal sanctions are persecutory, these considerations appear to have had no impact on the decision. The adjudicator did not actually answer the question of whether the law was in conformity with human rights standards (some 14 years after the ECHR had first held that such laws *were* in breach of the right to privacy and family life) and astonishingly concluded that as the applicant would 'be properly represented and would receive a fair trial'[146] and there was 'no evidence that the applicant would be singled out' this was a 'normal policy of enforcement of the criminal law' and not persecution. This decision was not disturbed on judicial review.[147]

The 1999 decision in *Jain* is unusual in that the Immigration Appeal Tribunal openly acknowledged that there were a series of competing norms at work when assessing the role of the criminal prohibitions on 'carnal intercourse against the order of nature' in India. The Tribunal stated:

> ... there is an international standard there is our own domestic standard and there is the standard in the country of origin.
>
> To judge all issues in all cases arising under the Refugee Convention by the criteria of the country from which the asylum seeker comes could be to deny that very protection which the Convention provides for. Yet to deny a country its right to adhere to mores, to cultural attitudes and to laws different from one's own and which make up its inherent being cannot be acceptable if the Convention is to have any truly international acceptability. The problem is to hit the right note.[148]

On review, the Court of Appeal stated:

> As it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect ... the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a State which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee.[149]

[146] Ibid. at para. 10.

[147] Ibid. at para. 11; see McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status? The Case of Ioan Vraciu', (2000) 6 *Body and Society* 29 at 29-30.

[148] *Jain v Secretary of State for the Home Department*, supra n. 109, Immigration Appeal Tribunal quoted at para. 11 on review by the Court of Appeal.

[149] Ibid. at para. 22. Confusingly, although the Court of Appeal held that the international standard was the correct one it did *not* overturn the Tribunal which had determined that the applicant could be returned to India and protect himself through 'discretion'.

Although *Jain* held that mere criminalisation did not entail persecution,[150] it was careful to say that either actual enforcement or the risk of prosecution could well constitute persecution. Yet later lower level decisions have not followed this approach. In the 2001 case of *Ashley*[151] and 2002 case of *Saeed*[152] decision-makers used *Jain* as support for the conclusion that prosecution was *not* persecution. While the subsequent decision in *Saeed* pointed out that this was a completely incorrect application of *Jain*, the vast majority of cases have simply ignored *Jain*, holding that prison terms of 40 days,[153] one year[154] and up to ten years[155] would not amount to either persecution or to inhuman and degrading treatment under Article 3 of the ECHR if imposed on the applicant in the future.[156]

In some cases criminal penalties were not simply threatened but actually had been imposed on the applicant. In a 2002 case an Iranian man had been caught in a relationship with another young man while at school and was handed over to the authorities, where he was beaten and seriously ill-treated, and then imprisoned for six months. The Adjudicator accepted this evidence but found that: 'There was nothing to suggest that the ill-treatment he suffered was State sanctioned. His sentence of six months for homosexuality and sodomy was *not disproportionate and relatively lenient*'.[157] Not disproportionate and relatively lenient compared to *what*? To the maximum penalty prescribed or imposed on those who have gay sex in Iran? Again, the Home Office policy on this point appears to have been overlooked; in the standard reasons for refusal letter *proportionality* is explicitly linked to whether the application of the law is *discriminatory* based on the applicant's Refugee Convention status.[158] Given that the law in question specifically targets the particular

[150] More recently this has been expressed as a floodgates argument. 'It simply cannot be the law, in my judgment, that merely because the law of Jamaica has a criminal statute which criminalises homosexual behaviour, that mere fact cannot, of itself, be sufficient to require this country to grant immigration status to all practising homosexuals in Jamaica. On that basis, anybody who was a homosexual could come to this country and claim asylum': *R (on the application of Dawkins v Immigration Appeal Tribunal)* [2003] EWHC 373 at para. 49. See also *R v Immigration Appeal Tribunal ex parte Lupsa*, High Court, 2 July 1999 (Unreported); *R v Special Immigration Adjudicator, ex parte Ragman*, High Court, 1 November 2000 (Unreported).

[151] *Ashley v Secretary of State for the Home Department*, IAT Appeal No 01TH01837 CC-11907-01, 21 September 2001 (Unreported) at para. 7.

[152] Adjudicator decision as cited in *Saeed v Secretary of State for the Home Department*, supra n. 106.

[153] *Ashley v Secretary of State for the Home Department*, supra n. 151.

[154] *R (on the application of S) v Secretary of State for the Home Department* [2003] EWHC 352.

[155] *R (on the application of Mbasvi) v Immigration Appeal Tribunal* [2001] EWHC Admin 891.

[156] See also the anomalous Canadian case where a potential prison sentence of anywhere from 'ten days to three years, with the possibility of increase to five years or more, depending on the abusive elements incorporated into the offence' was held by the Tribunal to be 'so light' that 'in its minimal form a sentence is not, clearly, in my view, persecution': *Re NTS* [1999] CRDD No 319. The applicant's subsequent appeal to the Federal Court was also unsuccessful: *Talke v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 1146.

[157] *Musavi v Secretary of State for the Home Department*, supra n. 107 at para. 5 (emphasis added). This decision was undisturbed on appeal.

[158] '[Y]ou would need to be able to show that ... the application of the law is discriminatory and therefore you would not receive a fair trial or any punishment you might receive as a result of conviction would be disproportionate, for reasons of race, religion, nationality, membership of a particular social group or political opinion': Home Office, supra n. 144.

social group, the discriminatory nature of the law should ensure that it is *never* classified as proportional.

Decision-makers in the UK fail to consider criminal sanctions as direct human rights breaches, but, importantly, they also commonly fail to examine the role of criminal sanctions in establishing a climate where further human rights breaches are allowed to flourish unchecked. A disturbing example of this trend is the 2001 case of *Ashley*. In that case a gay man from Zimbabwe was involved in a dispute with his male partner resulting in domestic violence, as a result of which the police were called. When questioned the couple 'volunteered the carnal nature of their relationship'[159] and the police responded by charging them under the criminal law with sodomy. After pleading guilty a 40 day suspended sentence and a fine was imposed. The applicant claimed as a result of the court case being reported in the newspaper he was beaten up in a local bar by men who recognised him from the report. The Tribunal held that neither the criminal law nor the police conduct was persecutory and there was 'nothing to show that the appellant would have anything to fear as consensual sodomy in private (and the appellant has not claimed to have indulged in any other kind) is likely to remain undetected, as his and W's did till they chose to reveal it to the police.'[160]

A's claim on police assistance in a situation of violence led to police initiated prosecution, which then led the applicant to fear the police and not approach them after he suffered later violent assaults. Yet there was no consideration at any level of the key asylum question of failure of State protection.[161] In the Immigration Appeal Tribunal's view this harm was self inflicted; it twice stressed that A 'chose' to 'volunteer' his relationship and did not consider that in the future, even without further prosecution, A's ability to seek police protection for homophobic violence (or indeed for any other matter that could lead to a revelation of his sexuality) was severely limited. Rights such as equality before the law, security of the person and freedom of expression are not contemplated in the judgment. If they, or the right to privacy and family life, had been taken as a starting point of analysis in considering how A's fundamental human rights were violated, it is difficult to see how the decision could ever have been made in the way it was.

It is notable that all of the above cases holding that prosecution was not persecution, bar one, were subject to judicial review, where these findings were either not dealt with or were approved in obiter.[162] So for example in *S* the Court

[159] In the words of the Immigration Appeal Tribunal, *Ashley v Secretary of State for the Home Department*, supra n. 151 at para. 2.

[160] Ibid. at para. 5.

[161] Although this claim was remitted for reconsideration on the issue of A's Article 8 rights (this would not occur now since the limitation of such considerations following from *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal ('Ullah and Do')*, supra n. 83).

[162] See *Z v Secretary of State for the Home Department ('Z, A and M')*, supra n. 82; *R (on the application of S) v Secretary of State for the Home Department*, supra n. 154; *R (on the application of Mbasvi) v Immigration Appeal Tribunal*, supra n. 155. The exception is *Musavi v Secretary of State for the Home Department*, supra n. 107.

held of a one year prison term that 'without being taken to approve of any form of penal sanction for such behaviour or conduct, it falls short of that which engages Article 3'.[163] The UK approach is particularly surprising when it is noted that in 2002 the Office of the UN High Commissioner for Refugees drew attention to the relevance of criminal laws when assessing refugee claims, stating that: 'Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution.'[164]

In Australia, by contrast, there was fairly early acceptance that criminal sanctions *could* be persecutory. Although decisions at the Tribunal level in Australia were initially divided over whether criminal prohibitions on homosexual sex were persecutory,[165] by 1998 one of the earliest Federal Court decisions on sexual orientation and refugee status, *MMM*, held that criminal laws which target 'homosexual acts' either specifically or by selective application, may be so regarded.[166] However the same case stressed that this would *only* be so if there was a likelihood of the statute being enforced, and this appears to have had a strong impact upon Tribunal decisions to the present day, which continue to reject claimants from countries such as Iran and Bangladesh on that basis.

The Federal Court in *MMM* rejected the persecutory effect of unenforced criminal sanctions as follows:

> The framers of the Convention were concerned with persecution of a kind which morally obliged civilised States to receive refugees, regardless of other restrictions those States might place on immigration. ... Merely to be legally stigmatised because the expression of one's (legitimate) sexual desires is subjected to the theoretical possibility of a heavy penalty, without proof of a real chance of more substantial harm, is hardly likely to have been of great concern to States dealing with the consequences of the murderous excesses of Nazi Germany or Stalinist Russia, and with being obliged to exclude from access to refugee status persons suffering from natural disasters and other sources of profound misery.[167]

The above quotation comprehensively trivializes the applicant's claims as one of stigmatisation through a 'theoretical' penalty. While much criticised,[168] it was a heavily influential judgment and heralded a series of Federal Court cases in Australia in which criminal laws in Bangladesh (maximum penalty of 10 years in prison),

[163] *R (on the application of S) v Secretary of State for the Home Department*, ibid. at para. 20.

[164] Guidelines on International Protection: Gender-Related Persecution within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, supra n. 56 at para. 17.

[165] RRT Reference *N94/06450*, Fergus, 26 July 1996 (Unreported) held that 'the absolute prohibition of consensual adult sex is persecutory'.

[166] *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 at 331.

[167] Ibid. at 329.

[168] Germov and Motta, supra n. 112; and Walker, supra n. 5.

India (life imprisonment, and 10 years for 'abetting' sodomy for example by discussing it), Sri Lanka (up to 12 years in prison) and Iran (ranging from 100 lashes to death) were held to 'merely stigmatise' individuals. Australian decision-makers refuse Refugee Convention protection on the basis that in the absence of evidence of enforcement there is no 'real chance of suffering some significant, actual detriment or disadvantage'.[169] This has also been been expressed as the rejection of 'persecution as a theoretical prospect' or the 'contention that the Penal Code is persecutory *per se*'.[170]

By 2001 the Australian courts routinely referred to severe penalties 'in theory'[171] and the bad 'impression' given by the Criminal Code in Iran,[172] which was contrasted to a 'lack of repression in practice'.[173] Although the Refugee Convention is fundamentally concerned with future risks and the real chance of harm,[174] the chance of future harm to lesbians and gay men was discursively excised by being reduced to mere theory. As new cases referred to past cases on this point the lack of evidence of legal prosecutions in Iran in recent years became proof for a far broader reverse proposition: that there was no repression, and by 2001 a case keyword index produced by the Federal Court actually stated 'no repression of homosexuals in practice in Iran'.[175] This 'theory and practice' distinction was reproduced in full or relied upon in *all* Australian Tribunal decisions on Iran over the period 2001-02.[176]

Two former Tribunal members, Germov and Motta, are deeply critical of the Australian Courts' approach arguing that:

[169] *MMM v Minister for Immigration and Multicultural Affairs*, supra n. 166 at 329. See also *LSLS v Minister for Immigration*, supra n. 68; *Singh v Minister for Immigration and Multicultural Affairs*, supra n. 126; and *Nezhadian v Minister for Immigration and Multicultural Affairs* [2001] FCA 1415.

[170] *Nezhadian v Minister for Immigration and Multicultural Affairs*, ibid. at paras. 7-8.

[171] See for example, *W405 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1843.

[172] *Nezhadian v Minister for Immigration and Multicultural Affairs*, supra n. 169 at para. 11.

[173] *W410 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1859 at para. 20. This approach seems to be gaining currency in the UK and, disturbingly, was recently accepted as factual by the ECtHR: see *F v UK*, Application no. 17341/03, 22 June 2004.

[174] Germov and Motta, supra n. 112 at 320, state:

> The finding that the law may not have been enforced in the recent past is simply a finding that the applicant has, up until the present time, not experienced persecution as a result of that law. It is *not* a finding as to whether the applicant has a well-founded fear of persecution stemming from application of the law should it be applied to them in the future, nor is it a consideration of the chance that it may be. As such, the Courts only embarked on part of the question that must be determined in refugee cases. The proper consideration is, therefore, whether the existence of the law, the potential of its application, and the penalty that would ensue, substantiate the applicant's claimed fear of persecution for reasons of homosexuality.

[175] *W410 v Minister for Immigration and Multicultural Affairs*, supra n. 173.

[176] RRT Reference *N01/37352*, Witton, 24 April 2001 (Unreported); RRT Reference *V01/12689*, Kissane, 24 May 2001 (Unreported); RRT Reference *N01/37891*, Hardy, 16 October 2001 (Unreported); RRT Reference *N01/40131*, Keher, 5 November 2001 (Unreported). Moreover this was based upon country evidence that had been misquoted and misapplied as it related to Islam in general not Iran in particular: see Dauvergne and Millbank, 'Burdened by Proof: How the Australian Tribunal System Has Failed Lesbian and Gay Asylum Seekers', (2003) 31 *Federal Law Review* 299.

> Indeed where a law is directed at a group for a [Refugee] Convention ground, it is *prima facie* evidence that state protection would be lacking if an individual who belongs to that group, or is inferred to belong to that group, seeks protection from the authorities against harm directed against them for this reason ... [177]

This is a very different starting point for an inquiry: rather than taking silence on prosecutions as evidence of tolerance, the existence of the statute is taken as an indication of a non-protective environment. Germov and Motta note that the law itself, even if unenforced, may also increase the chance of homophobic violence as 'its mere existence may be a signal to wider elements of the community that the state will not protect such an individual'.[178] Finally they note that if serious harm befalls an individual and they are unwilling to avail themselves of protection because of the risk of prosecution, 'the mere existence of the law concerned results in a denial of protection to the individual'.[179] In countries such as Bangladesh and Zimbabwe, criminal proscriptions are closely tied to widespread extortion of gay men and lesbians, often at the hands of the police themselves.[180] While the majority judgment of Kirby and McHugh JJ in *s395/2002* acknowledged the inter-relation between criminal sanctions and other forms of extra-judicial harms,[181] all other judges in the case, both majority and dissentients treated Bangladesh criminal law sanctions as irrelevant on the basis of evidence of their lack of recent enforcement.

These decisions in the UK and Australia demonstrate a manifest failure to examine in the refugee context the human rights that are violated when States criminalise

[177] Germov and Motta, supra n. 112 at 226.

[178] Ibid.

[179] Ibid. at 227. Conclusions that sodomy laws are 'unenforced in practice' should also be treated with extreme caution. A lack of information about prosecutions does not necessarily mean that they do not occur, as, for example, in Zimbabwe cases are heard in Magistrate's Courts and records are not published: Human Rights Watch and International Gay and Lesbian Human Rights Commission, 'More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa' (New York: Human Rights Watch, 2003). A senior police official interviewed in 2000 for that report said that to his knowledge there were 'two or three' arrests for consensual sodomy every year in Harare (at 86). Moreover, as the UK Lesbian and Gay Immigration Group has noted, in *Appellant Z v Secretary of State for the Home Department*, supra n. 87, the Immigration Appeal Tribunal held that the law 'was not actively enforced' despite the Tribunal – including the same presiding member – having sat on a case (*Ashley*) only weeks earlier where it *had* been enforced. See UK Lesbian and Gay Immigration Group, *Legal Bulletin: January 2002*, available at http://www.uklgig.org.uk/Previous%20Legal%20Bulletins.htm.

[180] On Zimbabwe see Human Rights Watch and International Gay and Lesbian Human Rights Commission, ibid. at 92-102; on Bangladesh see NAZ Foundation, 'Social Justice, Human Rights and MSM', Briefing Paper No 7, 2002, available at http://www.nazfoundint.com/home.html. See also the range of information collated in International Gay and Lesbian Human Rights Commission, 'Current Update Packet: Bangladesh, 2001'.

[181] 'Even where a law such as s 377 is not enforced, however, there may be a real chance that a homosexual person will suffer serious harm - bashings or blackmail, for example - that the government of the country will not or cannot adequately suppress. That appears to be the position in Bangladesh': *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs*, supra n. 74 at para. 47.

gay sex. They also expose a deeper lack of analysis about how criminal statutes establish a cultural context in which broader human rights violations can occur unchecked by the State.

CONCLUSION

This article has argued that the integration of a human rights framework has had a major impact upon refugee determinations on the basis of sexuality in Canada, Australia and the UK. In Canada the routine use of such a framework has paved the way for early recognition of sexual orientation as a 'particular social group' and was instrumental in the development of the law of persecution as it applies to lesbians and gay men. Canada quickly held that criminalisation of gay sex is persecutory, and also examined the persecutory impact of unenforced or rarely enforced criminal laws. A premise of equality and non-discrimination in the enjoyment of a wide range of human rights and freedoms meant that Canadian decision-makers assumed lesbian and gay asylum seekers to have rights to freedom of expression, family life and association. These baseline rights cannot be derogated from by the receiving country imposing a requirement of 'discretion' or 'reasonable' efforts to avoid persecution.

By contrast decision-makers in both the UK and Australia have imposed or assumed a standard of 'discretion' over the years and have also failed to grapple with the persecutory role of criminal sanctions in sexual orientation cases. In the UK human rights considerations have been referred to only in the most superficial manner, while in Australia they have been more commonly used to restrict, rather than expand, an understanding of the rights of lesbians and gay men. By and large refugee decision-makers in both countries have failed to grapple with the complex inter-relation of refugee rights and other human rights.

This is not to suggest that refugee decision-making can be instantly improved by the use of international human rights standards. Mere reference to or consideration of international instruments does not necessarily translate into a thoughtful analysis or application of those rights to the asylum case at hand. Indeed the contrast between Australian and UK decisions highlights this point acutely. While the UK has been compelled to note ECHR rights, there has been a real reluctance to see lesbians and gay men as rights bearing entities under that Convention. Moreover in UK decisions there has been no consideration of recent ECtHR jurisprudence on sexual orientation, and no real consideration of what those rights would mean in the context of the applicant's claim. In Australia, while the High Court appeared extraordinarily reluctant to acknowledge any international human rights instrument or standards in the decision of *s395/2002*, it nevertheless implicitly accommodated fundamental human rights norms in its decision to reject the 'discretion' standard in sexuality cases. In this sense the explicit but superficial referencing of human rights instruments in UK decisions lags behind the implicit premise of human rights norms in the High Court of Australia. However neither approach augers well for a detailed, contextual or evolving consideration of the inter-relation of refugee law in a human rights framework.

A Member of Romanian Parliament described the purpose of Romania's infamous pre-2002 anti-gay 'public scandal' laws in the following terms: 'If a lesbian were to go out in the streets dressed to protest, it is not certain she would get away alive. This law exists to protect her from doing so'.[182] This logic is impeccable unless you assume that a lesbian is actually entitled to dress, protest, and appear on the streets as expressions of her fundamental human dignity. What happens when such a lesbian defies the law, is punished, and flees to a refugee receiving nation? It is only by starting with the expectation that lesbians and gay men have the right of equal access to the full range of fundamental rights and freedoms that a refugee claim by such a lesbian can be properly assessed as a failure of State protection, rather than, say, an irrational act of that individual lesbian or as a thoughtless violation of prevailing cultural norms.

Greater use of international jurisprudence on sexual orientation, and detailed analysis of the role of fundamental human rights, offer the potential to greatly improve refugee decisions on sexuality emanating from both the UK and Australia. Such a step ought not to be regarded as anything other than a logical extension of refugee law as it already exists, in which human rights norms have been the basis for international understandings of the meaning of both persecution and 'particular social group' under the Refugee Convention.

[182] Human Rights Watch and International Gay and Lesbian Human Rights Commission, supra n. 117 at 60.