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## **Fleeing for love: asylum seekers and sexual orientation in Scandinavia**

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## Introduction

Since 2003, Iraq's largely marginalized and vulnerable lesbian, gay, bisexual and transgender (LGBT) community has frequently been targeted for attacks in an environment of impunity. In the Central and Southern Governorates, LGBT Iraqis continue to face threats, torture and extra-judicial killings at the hands of "state and non-state actors," including their own families, which consider them as violating the family's "honour".<sup>1</sup>

In its April 2009 *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*, UNHCR lists lesbian, gay, bisexual and transgender (LGBT) persons as a group at risk. A few months later Human Rights Watch released the report entitled "They Want Us Exterminated; Murder, Torture, Sexual Orientation and Gender in Iraq". The report received much publicity, and Scandinavian media started writing about homosexual Iraqis being rejected by the immigration authorities and the subsequent criticism from NGOs.<sup>2</sup>

The case of the rejected LGBT Iraqi asylum seekers is not the first episode in which immigration authorities have been publicly criticised for their handling for persons seeking asylum on grounds of sexual orientation. On the other hand, NGOs have never been so vocal on this issue before. In the aforementioned case of the Iraqi asylum seekers, they criticised immigration authorities for not properly taking into consideration the Human Rights Watch report with regards to the situation in Iraq for LGBT persons<sup>3</sup>.

UNHCR has also dedicated more attention to the case of LGBT asylum seekers. In November 2008, UNHCR published an official document on the issue: a guidance note on refugee claims relating to sexual orientation and gender identity. Previously, in the 2002 *Guidelines on International Protection: Gender-Related Persecution and Guidelines on International Protection, "Membership of a Particular Social Group"*, UNHCR had referred to the issue of homosexual refugees. At the same time, UNHCR has been less involved in the issue than several NGOs that have been working with and helping persons seeking asylum on grounds of sexual orientation for a long period.

Immigration authorities have also shown increased awareness concerning this particular group of asylum seekers<sup>4</sup>. However, despite the increasing prominence of the issue, nobody knows exactly how many persons seek asylum on grounds of sexual orientation

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<sup>1</sup> UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*, April 2009, <http://www.unhcr.org/refworld/docid/49f569cf2.html>

<sup>2</sup> Dagens Nyheter, "Ung homosexuell irakier ska utvisas", 17 August 2009, <http://www.dn.se/nyheter/sverige/ung-homosexuell-irakier-ska-utvisas-1.932721>; NRK, "Homofile irakere nektes asyl", 14 September 2009, <http://www.nrk.no/nyheter/1.6816709>.

<sup>3</sup> Gaysir, "Demonstrerer mot utsendelse av homofile asylsøkere", 4 September 2009, <http://www.gaysir.no/artikkel.cfm?CID=13743>

<sup>4</sup> See e.g. Migrationsverket, "Svår situation för homosexuella i Irak", 27 August 2009, <http://www.migrationsverket.se/news/getArticle.do?ldid=10&id=82261>

in the Scandinavian countries. Relatively little is known about their situation in the country of destination or about the conditions from which they have fled.

In this review we will look more closely at the three Scandinavian countries Denmark, Norway and Sweden. All three receive a substantial number of asylum claims each year<sup>5</sup> and all three are known for their relatively liberal policies towards sexual minorities. However, a liberal policy towards homosexuals does not equate a liberal policy towards homosexual asylum seekers. Asylum rights for those persecuted because of their sexual orientation do not exist in a vacuum, but are embedded in the country's larger asylum policy and practice.

Bearing that in mind, this review will focus on two main areas: Firstly, it will look at the legal basis for persons to seek asylum on grounds of sexual orientation in the Scandinavian countries. This will cover international jurisdiction as well as national legislation and actual legal practice. Secondly, the review will address the asylum procedure, including what information asylum seekers are given upon arrival, the interview situation, accommodation at reception centres and possibilities of getting adequate and appropriate legal advice. Both parts will take as a point of departure UNHCR guidelines and recommendations, and subsequently compare these with national laws, regulations and practice.

This review covers those persons seeking asylum on grounds of sexual orientation. "Sexual orientation" refers to a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender.<sup>6</sup> In most cases the asylum-seeker claims to be oriented towards the same, and sometimes both, genders, and to be persecuted because of this fact. Heterosexual persons may also seek asylum on grounds of sexual orientation if they are believed to have a different sexuality (e.g. homosexual) and are therefore persecuted because of their perceived orientation.

Not included in this review are those cases in which gender identity<sup>7</sup> is referred to as the grounds for seeking protection. Although the two groups of asylum seekers both included under the heading of "LGBT", their cases are not totally similar. In cases of transgenders, their rights to seek asylum might also be covered under the more general heading "gender-related persecution" rather than as persecution because of sexual orientation.

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<sup>5</sup> In 2008, 2,377 persons sought asylum in Denmark, 14,407 in Norway and 24,353 in Sweden. During the first half of 2009, Denmark received 1,673 asylum applications, Norway 8,168 and Sweden 10,129.

(<http://www.nyidanmark.dk/da-dk/Statistik/SearchStatistics.htm?searchtype=statistics>;

[http://www.migrationsverket.se/swedish/statistik/per\\_manad.html](http://www.migrationsverket.se/swedish/statistik/per_manad.html);

<http://www.udi.no/templates/Statistikk.aspx?id=9990>)

<sup>6</sup> Definition taken from the *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, p. 6.

<http://www.unhcr.org/refworld/docid/48244e602.html>

<sup>7</sup> "Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.", *Yogyakarta Principles*, p. 6.

Currently, there is little and inadequate information about transgendered asylum seekers<sup>8</sup>, which should be addressed more specifically in future studies.

### **How many cases?**

None of the Scandinavian countries register in their statistics the grounds on which asylum claims have been made. Therefore it is not possible to say how many persons apply for asylum divided on protection grounds. Even if they had compiled such statistics, it would be impossible to determine the number of asylum claims made on grounds of sexual orientation since, as we will see later on, they might be recognised as refugees on several convention grounds, such as political opinion, religion or membership to particular social group.

However, the Norwegian and Danish appeals boards both have an incomplete, online database of cases handled in which “sexual orientation” can be searched for as a keyword. Additionally, the Danish Refugee Council has a database of decisions made by the Refugee Appeals Board. Again, this database is not sorted according to grounds for seeking asylum. Furthermore, asylum seekers often seek asylum for *several* reasons. Therefore, it is also impossible to give an exact number of how many of the persons that have sought asylum on grounds of sexual orientation reach appeals level. On the other hand, larger trends can be registered, and some more imprecise numbers have been cited.

In Denmark, whereas there are no statistics detailing how many persons have been granted asylum because of their sexual orientation, the Refugee Appeals Board publishes a selection of its decisions in an online database (though not sorted according to grounds for seeking asylum). Furthermore, the Danish Refugee Council keeps a database of decisions from the Refugee Appeals Board. The Danish National Association of Gays & Lesbians (LBL) did a study of these cases in 2001 for the period 1990-2001, concluding that 94 applicants had had their cases assessed by the Appeals Board, whereof 10 had been granted asylum.<sup>9</sup>

An updated version of the overview was produced for the World Outgames 2009 which set the total number of cases to 147 for the period 1990-2007.<sup>10</sup> Of the known appeal cases from the period 2003-2007, there were 23 of which 5 were granted subsidiary protection.<sup>11</sup> According to Søren Laursen from LBL, figures have not changed much over the years, staying at a relatively low level<sup>12</sup>. However, there has been a shift towards more asylum seekers coming from the Middle-East, whereas previously the largest group

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<sup>8</sup> See e.g. European Union: European Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Part II: The Social Situation*, March 2009, pp 124-125,

[http://www.fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://www.fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)

<sup>9</sup> M. T. Drud-Jensen & S. P. Knudsen, *Migrationsvæsenets skab. Betingelser for ikke-heteroseksuelle i forbindelse med asyl og familiesammenføring i en nutidig dansk kontekst*, Copenhagen: University of Copenhagen, Department of Sociology, 2009, pp. 74-77.

<sup>10</sup> Søren Laursen & Mary Lisa Jayaseelan, *Disturbing knowledge. Decisions from asylum cases as documentation of persecution of LGBT-persons*, 2009,

[http://www.lbl.dk/uploads/media/DisturbingKnowledge.PA.01\\_02.pdf](http://www.lbl.dk/uploads/media/DisturbingKnowledge.PA.01_02.pdf)

<sup>11</sup> Ibid.

<sup>12</sup> E-mail from Søren Laursen, 27 June 2009.

came from the Ex-USSR.

In Norway, the electronic database<sup>13</sup> of the Immigration Appeals Board includes 11 cases involving persons claiming asylum on grounds of sexual orientation in the period of 03.2008-03.2009. The figures are, however, incomplete as the Appeals Board only publishes a minority of its cases. Furthermore, as in Denmark the cases are only from appeals level. In total, the database includes 41 cases of asylum seekers claiming protection needs because of their sexuality, dating back to 2002 up until present. This makes up about 0.9% of all cases in the database (4,559).

However, there is a trend towards a small but steady increase in the number of cases. One employee in the organization Self-help for immigrants and refugees (SEIF) who is in contact with many homosexual asylum seekers has reported that he is currently involved in more than a dozen asylum cases concerning asylum on grounds of sexual orientation, of which only a couple had been finally settled within the last two years.<sup>14</sup> 13 individual LGBT asylum seekers have contacted SEIF in 2008.<sup>15</sup>

In Sweden, the Swedish Migration Board was in 2002 ordered by the Government to make an estimation of how many asylum cases there were annually related to sexual orientation. Their conclusion was around 300 per year.<sup>16</sup> The Swedish Federation for LGBT Rights (RFSL) states that it is in contact with about 50-60 LGBT asylum seekers annually. Whereas a couple of years ago, the proportion of gay men to lesbians was about 90:10, it is now closer to 75:25. Few of the asylum seekers are transgendered.<sup>17</sup>

The European Union Agency for Fundamental Rights has made a review of homophobia and discrimination on grounds of sexual orientation and gender identity in the EU member states. This includes a small section on asylum rights for LGBT persons which states that available data shows that asylum seekers have been granted protection on grounds of sexual orientation in the following countries: Austria, Belgium, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, the Czech Republic and the United Kingdom, as well as the Scandinavian countries. However, information on asylum-related issues is scarce, and most of the information presented is from Scandinavia as well as Belgium.

Concluding, there are no precise figures of how many persons seek asylum on grounds of sexual orientation each year in the Scandinavian countries. Numbers are relatively small, ranging probably from some dozen in Denmark and Norway to around 300 per year in Sweden. This constitutes a significant number of asylum seekers. And as refugee rights for sexual minorities are increasingly articulated and claimed, there is a chance that more people will flee to seemingly liberal, gay-friendly countries in order to find protection.

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<sup>13</sup> Norway: Norwegian Immigration Appeals Board electronic practice database, <http://www.une.no/PS/default2.aspx>

<sup>14</sup> Telephone conversation with Jon Ole Halvorsen, 24 June 2009.

<sup>15</sup> Selvhjelp for innvandrere og flyktninger, *Likeverd report 2008*, <http://www.seif.no/likeverd/2008/>

<sup>16</sup> European Union: European Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Part II: The Social Situation: The social situation concerning homophobia and discrimination on grounds of sexual orientation in Sweden*, March 2009, [http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-part2-NR\\_SE.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-part2-NR_SE.pdf)

<sup>17</sup> Meeting with Stig-Åke Petersson, 6 July 2009.

## Sexual orientation as grounds for asylum

International refugee law needs to be considered when determining the minimum standards for the treatment of asylum claims relating to sexual orientation. Additionally, UNHCR has made recommendations and guidelines which set benchmarks to which national legislation, regulations and practice in the Scandinavian countries can be compared. Therefore this section will firstly look at what international refugee law states about asylum claims related to sexual orientation, before addressing the laws and regulations concerning such asylum cases in the individual Scandinavian countries.

In 2007, a group of 29 human rights experts launched The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.<sup>18</sup> The principles are an attempt to apply existing international human rights law in the area of sexual orientation and gender identity. Though holding no legal position as such, the principles have been supported by several countries, including all three Scandinavian.<sup>19</sup> Its 23<sup>rd</sup> principle details the right to seek asylum:

### Principle 23: The Right to seek Asylum

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall:

- a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;
- c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.”<sup>20</sup>

UNHCR provides an analysis of the right to claim asylum on the grounds of sexual orientation according to the 1951 Refugee Convention and its 1967 Protocol, following

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<sup>18</sup> See *Yogyakarta Principles*, <http://www.unhcr.org/refworld/docid/48244e602.html> and Michael O’Flaherty & John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles”, in *Human Rights Law Review*, 2008, 8 (2), pp. 207-248 <http://hrhr.oxfordjournals.org/cgi/content/abstract/8/2/207>

<sup>19</sup> See inter alia International Service for Human Rights, “Council Monitor, Council Update – Item 8 Human Rights Council, 10<sup>th</sup> Session, 24 March 2009”,

[http://www.ishr.ch/component/option,com\\_docman/task,doc\\_download/gid,313/Itemid,/](http://www.ishr.ch/component/option,com_docman/task,doc_download/gid,313/Itemid,/)

<sup>20</sup> *Yogyakarta principles*, p. 27.

prevailing international legal interpretation and custom in its *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*<sup>21</sup>. The Guidance Note also serves as guidelines for countries in forming and implementing legislation and regulations. Another practical overview of the current jurisdiction with regards to the rights of asylum on grounds of sexual orientation is the International Commission of Jurists *Practitioners Guide on Sexual Orientation, Gender Identity and International Human Rights Law chapter VIII*.<sup>22</sup>

Both the UNHCR Guidance Note and the ICJ Practitioners Guide focus on two important questions: Firstly, what grounds for persecution in the 1951 Refugee Convention are applicable to persons seeking asylum because of sexual orientation? Secondly, do they have a well-founded fear of persecution?

### **Social group, politics or religion?**

The 1951 Refugee Convention states that a refugee is someone who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. Most often, persons seeking asylum on grounds of sexual orientation have been associated with “particular social group”. UNHCR has developed guidelines on what constitutes membership of a particular social group which state that

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>23</sup>

In order to decide what constitutes a particular social group, UNHCR looks at both characteristics which are often “innate, unchangeable, or which is otherwise fundamental to identity”, as well as “perceived” nature as a group by society. UNHCR considers homosexuals to be an example of such a group.<sup>24</sup> Homosexuality is at once seen as an innate characteristic as well as a characteristic so fundamental to human dignity that the

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<sup>21</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, <http://www.unhcr.org/refworld/docid/48abd5660.html>

<sup>22</sup> International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and International Human Rights Law - A Practitioners Guide*, 2009, Practitioners Guide No. 4, pp. 127-137 <http://www.unhcr.org/refworld/docid/4a783aed2.html>

<sup>23</sup> UN High Commissioner for Refugees, *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*, para. 11, UNHCR Doc. HCR/GIP/02/02, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>

<sup>24</sup> UN High Commissioner for Refugees, *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*, para. 6.



person should not be compelled to forsake it.<sup>25</sup> Several national courts have reaffirmed UNHCR's view on the matter.<sup>26</sup>

One dilemma which occurs when categorizing sexual minorities as constituting a particular social group is that it may entail a static perspective on sexuality; that it is something that stays fundamentally unchanged in the individual throughout his or her life. This runs counter to much theory on sexuality, including strands of queer theory. It is also something that might pose serious problems in the refugee-status determination (RSD) process and in the period following decision. One example is a person who was granted asylum on grounds of sexual orientation, only to have this annulled later upon practicing a heterosexual lifestyle.<sup>27</sup>

However, as stated above, UNHCR guidelines include those “perceived” as belong to a social group by society. Somebody fleeing persecution because they are known as homosexuals in their country of origin may still be perceived to belong to such a group despite a later change of sexual practice. It therefore follows that a less essentialist perspective on sexual orientation does not prejudice against considering sexual minorities as belonging to a particular social group.

UNHCR also holds that persons seeking asylum on grounds of sexual orientation might also fulfil the criteria of the 1951 Refugee Convention because of political opinion and religion. In the former case, it is possible to argue that an individual's opinion on sexuality constitutes a political opinion that in some cases will differ from the official policy of the country. Likewise, religion might be relevant in the case where the attitudes of religious authorities are particularly hostile towards sexual minorities or sexual minorities in other ways do not conform to strongly-held religious beliefs in society.<sup>28</sup>

### **A well-founded fear of being persecuted?**

A second important issue in assessing the international right to seek asylum on grounds of sexual orientation is whether or not asylum seekers have a “well-founded fear of being persecuted” and are “unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>29</sup> Sexual minorities will often face discrimination and harassment from either private individuals or government representatives, and this will often be central in the asylum claim of individuals. In its 1992 Protection Handbook, UNHCR states that:

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<sup>25</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, para. 32.

<sup>26</sup> See International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and International Human Rights Law - A Practitioners Guide* and UNHCR UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* for a more detailed overview of relevant jurisprudence.

<sup>27</sup> See e.g. Dagbladet, “Et uønsket barn”, 25 March 2008, <http://www.dagbladet.no/magasinet/2008/03/25/530500.html>

<sup>28</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, para. 30-31.

<sup>29</sup> Convention Relating to the Status of Refugees, 1951, art. 1A, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

[w]here measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.<sup>30</sup>

A case-by-case approach needs to be adopted in order to assess whether the degree of discrimination suffered by an individual is enough to constitute persecution. However UNHCR has adopted a policy in which it recognizes that it might be considered persecution if an individual is being compelled to forsake or conceal his or her sexual orientation, in cases where this is instigated or condoned by the state.<sup>31</sup>

Furthermore, even social, cultural or other types of community pressure can amount to persecution, for example when pressuring an individual to marry a person of the opposite sex despite the former's wish.<sup>32</sup> Claims made by sexual minorities often reveal exposure to physical and sexual violence, including periods of detention, medical abuse, threat of execution and honour killings. Types of violence and pressure might vary depending on the gender, as lesbians have in many cases been subjected to so-called correctional rapes, often by relatives and acquaintances, and often on the request of their close family.

Around 80 countries criminalize homosexuality, with punishments varying from a fine to possible death sentence. UNHCR has stated that a law can be persecutory per se in, inter alia, cases where they reflect cultural and social norms which are not in conformity with international human rights standard. This includes the criminalization of homosexuality. However, a law need not amount to being persecutory in itself unless applied to particular groups only (like homosexuals) or if it is arbitrarily or unlawfully executed.<sup>33</sup>

In cases where severe punishments are actually imposed, the persecutory character of the law is especially evident.<sup>34</sup> In other cases though, the law might not be used in practice. In most of the countries criminalizing homosexuality, one seldom hears of cases in which persons are actually punished for participating in homosexual activity. Firstly, it might be difficult to prove. In Iran, where homosexual activity is punishable by death, the testimony of four men who have seen the act (i.e. the penetration) themselves is necessary in order to find the accused guilty.<sup>35</sup> Secondly, in some cases persons may publicly be found guilty of other subsidiary crimes instead of homosexuality in an attempt to deflect potential criticism from Western countries.<sup>36</sup>

Even when laws seem dormant, being de facto criminals many homosexuals lack the possibility to seek protection from the government in case of e.g. discrimination, blackmailing, assault or persecution because of their sexual orientation. Out of fear of persecution, they are unwilling to seek protection from their state. They would, by

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<sup>30</sup> UN High Commissioner 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*, 1 January 1992, para. 55, <http://www.unhcr.org/refworld/docid/3ae6b3314.html>

reporting to the police, draw suspicion to themselves, perhaps being regarded as an offender instead of the victim.<sup>37</sup>

Sometimes acts of discrimination, blackmailing, assault or persecution have been committed by private actors, other times they have been committed by the police, judges or other government representatives themselves. As long as the state either instigates the persecution or condones it, a refugee claim can be established.<sup>38</sup>

Finally, UNHCR guidelines state that it is not necessary for persons seeking asylum on grounds of sexual orientation to have been persecuted in their country of origin in the past. What has to be assessed is whether they have a well-founded fear of persecution if he or she were to be returned. Also, a person can become refugee sur place in case where he or she came out after having left his or her country of origin. UNHCR has stated that a person cannot be expected or required to change or conceal his or her sexual orientation in order to avoid prosecution.<sup>39</sup> Similarly, asylum seekers are not told to conceal their political opinions in order to avoid persecution. This has also been reaffirmed by jurisdictions of several countries.

### **Laws, regulations and practice in the Scandinavian countries**

The three Scandinavian countries are all signatories to the 1951 Refugee Convention, its 1967 Protocol and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Their legislation with regards to asylum on grounds of sexual orientation diverges at some important points.

Differences also follow from the fact that Denmark and Sweden are EU-members while Norway is not, and that Denmark has opted out from the *European Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*. The Directive states that “depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States”.<sup>40</sup>

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<sup>31</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, para. 12.

<sup>32</sup> *Ibid.*, para. 13.

<sup>33</sup> *Ibid.*, para. 18.

<sup>34</sup> *Ibid.*, para. 19.

<sup>35</sup> United Kingdom: Home Office, *Country of Origin Information Report - Iran*, 6 August 2009, para. 21.05, <http://www.unhcr.org/refworld/docid/4a8126cf2.html>

<sup>36</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, para. 21.

<sup>37</sup> *Ibid.*, para. 22.

<sup>38</sup> *Ibid.*, para. 27.

<sup>39</sup> *Ibid.*, para. 25.

<sup>40</sup> This definition of “sexual orientation” seems to be added to clearly exclude e.g. paedophilia, whereas homosexuality is included as it is legalised in all EU member states.

As already mentioned, there are no available statistics over how many persons have sought asylum on grounds of sexual orientation in the Scandinavian countries. No systematic study exists of the practice of case-workers in applying the laws and regulations in asylum cases where the individual seeks asylum on grounds of sexual orientation. More information exists from the appeals level, where judgements are made more public and where more people, including NGOs, tend to be involved.

However, the case-material from appeals level is also skewed. Cases in which asylum seekers are obviously in need of protection will not reach this level, and left are those in which the asylum-seeker either clearly does not merit protection of some kind, or cases that are ambiguous. Furthermore, many cases are not clear-cut, but refer to several protection grounds. This makes it more difficult to assess their bearing on sexual orientation as a ground for seeking asylum. It therefore follows that information about practice found at the appeals level has to be considered with some caution.

### *Denmark*

The Danish Aliens Act of 1 September 2006 does not mention sexual orientation as a protection ground explicitly. §7 states that residence permit shall be given to those encompassed by the 1951 Refugee Convention. Furthermore, §7 (1) gives protection status (so-called “B-status”, subsidiary protection) to those who do not fulfil the criteria of the 1951 Refugee Convention, but who risk death sentence, torture, inhuman or degrading treatment. According to the European Union Fundamental Rights Agency, those persecuted on grounds of sexual orientation are deemed to fall under the B-status category rather than as being convention refugees.<sup>41</sup>

While Denmark is a member of the EU, it has as mentioned above opted out from European Council Directive 2004/83/EC, which does include sexual orientation. There are no specific guidelines concerning persons seeking asylum on grounds of sexual orientation or because of membership of a particular social group. The Danish Immigration Service also states that they partly follow UNHCR’s guidelines on the issue, as well as the practice of the Refugee Appeals Board.<sup>42</sup>

The Refugee Appeals Board publishes resumés from a “representative selection of the Board’s decisions” [author’s translation]. Resumés are published in a separate practice database as well as in the Board’s annual report. In the former, 14 cases can be found from the period March 2004-February 2009. The total number of cases in the same period was 1083. In other words, if the selection truly is representative, asylum claims on grounds of sexual orientation make up about 1.3% of all cases. LBL’s overview of asylum cases in the period 1990-2007 includes all cases which reached appeals level and were thereby collected by the Danish Refugee Council.

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<sup>41</sup> European Union: European Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Part I: Legal Analysis*, June 2008, p. 93, <http://www.unhcr.org/refworld/docid/49997afe1e.html>; see also Kim U. Kjær, *Flygtning i Danmark. En kommenteret introduction til det danske asylsystem*, Copenhagen: Akademisk Forlag.

<sup>42</sup> E-mail from Eva Singer, Danish Immigration Service, 5 July 2009.

Of a total of 149 cases in this period, 126 were rejected (84.6%), 19 were given subsidiary protection (12.8%), three were withdrawn and one was given Convention status. The latter is an Iranian man who was granted protection in 1995. Another homosexual was also recognised as a convention refugee in February 2009, after a process which lasted several years. According to LBL, it is doubtful that the man was granted convention refugee status due to his sexuality, but rather because he was a stateless Palestinian.<sup>43</sup>

The numbers show that only a few appeal cases lead to an overturn of the original rejection. Those that are granted protection were done so on subsidiary grounds, rather than the 1951 Refugee Convention. This is also confirmed by other studies of asylum rights in Denmark for persons persecuted on grounds of sexual orientation.<sup>44</sup> In general, in both cases where the appeal has been rejected and where it has been supported, the Board states that country of origin information indicates that there is no general persecution of homosexuals.

Acts of violence, threats of violence and murder, et cetera have been considered as acts of crime, rather than amounting to persecution. In those cases where the asylum-seeker has been rejected, this has sometimes been done with reference to the fact that homosexuality is not criminalised in the person's country of origin, so he or she could claim their home authorities' protection. In those cases where the asylum-seeker has been granted protection, this has been done because the Appeals Board does not consider it possible for the person to seek protection from his or her native authorities, e.g. because homosexuality is criminalised and violence against homosexuals is indirectly condoned.

Finally, there are some cases in which asylum seekers, coming from countries that criminalise homosexuality, have expressed fear of persecution by their home authorities even though this has not happened yet. The Refugee Appeals Board has rejected such cases with stating that, following the person's story, it is unlikely that his or her homosexual activities are known to the authorities of that country. In none of the cases in the Board's database do they explicitly doubt the asylum seekers sexual orientation.

### Norway

The Norwegian asylum policy is regulated through its Aliens Act of 24 June 1988. A new, revised law was adopted 15 May 2008 and is foreseen to be promulgated 1 January 2010.<sup>45</sup> The goal of the new law is to better differentiate between persons granted asylum as refugees and those granted asylum on humanitarian grounds. The new refugee definition is an expansion of the previous, in which all those who have a right to international protection are included. Consequently, it will comprise not only those who

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<sup>43</sup> E-mail from Søren Laursen, 12 August 2009.

<sup>44</sup> M. T. Drud-Jensen & S. P. Knudsen, *Migrationsvæsenets skab. Betingelser for ikke-heteroseksuelle i forbindelse med asyl og familiesammenføring i en nutidig dansk kontekst*; European Union: European Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Part I: Legal Analysis*

<sup>45</sup> Norway: Ministry of Labour and Social Inclusion, "Ny utlendingslov og forskrift", <http://www.regjeringen.no/nb/dep/aid/tema/innvandringspolitikk/midtpalte/ny-utlendingslov.html?id=475301>

fall under the 1951 Refugee Convention and its 1967 Protocol, but also those who fall under the European Convention on Human Rights, the latter prohibiting the return of people to areas in which they risk being subjected to torture or to inhuman or degrading treatment or punishment.<sup>46</sup>

Neither the old nor the new Aliens Act include explicit references to sexual minorities or sexual orientation as a protection ground. However, the new law does define “particular social group” (“spesiell sosial gruppe”) in a close to identical fashion as UNHCR does in its Guidelines on “Membership of a Particular Social Group”. It can be expected that this article will normally be invoked when considering inter alia homosexual asylum seekers. Furthermore, the new law states that persecution may include actions especially directed towards gender and children.<sup>47</sup>

The Norwegian Directorate of Immigration (UDI) is responsible for handling asylum cases according to the Aliens Act and the Aliens Regulation of 21 December 1990. According to §38 of the 1988 Aliens Act, the Department of Labour and Social Inclusion (under which UDI is administered) can instruct UDI in how to interpret the Aliens Act and in general questions regarding discretionary practice. In 2008, the Department of Labour and Social Inclusion published guidelines on gender-based persecution. The guidelines state that they are of relevance for both women and men, and that they may also be applicable in cases involving lesbians, homosexuals, bisexuals and transpersons.<sup>48</sup>

The guidelines cover both questions regarding the case-handling process as well as the grounds on which asylum can be claimed. Procedural issues will be addressed later in this review. Despite focusing more on female asylum seekers rather than sexual minorities, they are applicable to both groups as they are sufficiently open to allow the individual case-worker some discretion in assessing cases. The Norwegian LGBT Association, LLH, has also suggested changes in the guidelines to bring the case of sexual and gender minorities to the fore.<sup>49</sup>

The guidelines follow UNHCR’s recommendations to a large extent. Inter alia, they state that discrimination may amount to persecution depending on its severity and the accumulated pressure it forms. Also, if a person is sentenced to an disproportionately severe punishment, this may also be characterized as persecution. Already in the 1998 guidelines from the Ministry of Justice, it was stated that a person could become a refugee sur place in revealed his or her sexual orientation after having applied for asylum

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<sup>46</sup> Norway, Ministry of Labour and Social Inclusion, “Faktaark om ny utlendingslov”, <http://www.regjeringen.no/nb/dep/aid/tema/innvandringspolitikk/midtspalte/ny-utlendingslov/flyktningrett.html?id=475625>

<sup>47</sup> LOV 2008-05-15 nr 35: Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven), § 29 (f), <http://lovdata.no/all/hl-20080515-035.html#29>

<sup>48</sup> Norway: Ministry of Labour and Social Inclusion, ”Til Utlendingsdirektoratet, Instruks - retningslinjer om kjønnsrelatert forfølgelse, AI 63/08”, p. 2, <http://www.udiregelverk.no/sitecore/content/Home/Rettskilder/AID-KRD%20rundskriv%20og%20instrukser/AI-2008-063%20Instruks%20%20retningslinjer%20om%20kjønnsrelatert%20forfølgelse.aspx>

<sup>49</sup> E-mail from Marna Eide, Norwegian LGBT Association, LLH.

in Norway.<sup>50</sup> This is in line with UNHCR's recommendation that an assessment of the protection need of the individual should not be prejudiced by whether or not the individual was openly homosexual or bisexual in the country of origin.

However, the Norwegian authorities have learnt to be more cautious with regards to asylum seekers claiming fear of persecution because of their sexual orientation. In 2006, it was revealed that a few years earlier around fifty Iranians, who were already residing in Norway at the time, were automatically granted asylum for stating that they were homosexual.<sup>51</sup> The very liberal internal guidelines in the Directorate with regards to homosexual Iranians were later even investigated in an official report published by the Government.<sup>52</sup>

The However, the guidelines also state that it "must be expected that persons to a certain degree will have to adjust their behaviour, clothing et cetera to the governing social and cultural codes"<sup>53</sup> [author's translation]. This was reiterated by UDI, which has stated that individuals face little chance of persecution if they keep their sexuality concealed to the private sphere.<sup>54</sup>

When criticized for demanding homosexuals to conceal their sexuality whereas no such demand is made when assessing those persecuted for their political opinion, the Head of the Asylum Unit at UDI wrote an op-ed stating that she believed "most people [would] see the difference [between the two groups of asylum seekers]"<sup>55</sup> [author's translation]. This runs counter to UNHCR's recommendation and may give case-workers too much discretion in rejecting cases on grounds that the asylum-seeker could conceal his or her sexuality by altering his or her behaviour and mannerism in the public sphere. The policy might also result in a more arbitrary, non-consistent practice as "a certain extent" is never defined.

The Immigration Appeals Board publishes a selection of decisions in their online database. Of the 45 cases published that involve sexual orientation, in five of these sexual orientation is not cited as a primary reason for seeking asylum. Of the remaining 40 cases, 34 were rejected (85%), seven were granted subsidiary protection and one was recognised as a refugee for fearing persecution because of membership of a particular social group. The latter case was a Yugoslav citizen who was granted protection in October 2002. Since then, there are no other cases in the Appeals Board's database where a person has been similarly recognised as a refugee on grounds of sexual orientation.

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<sup>50</sup> Norway: Ministry of Justice, "Justisdepartementets brev av 13.01.98 om retningslinjer for nye asylkriterier, IM 1999-032V", 28 May 1999, <https://www.udiregelverk.no/layouts/PrintPusher.aspx?docid=%7B903DC938-5376-48F4-AC3E-DA11701112A7%7D&l=orvpPrint>

<sup>51</sup> Verdens Gang, "50 homser fikk bli. UDI beklager 'iraner-praksis'", 1 April 2006, <http://www.vg.no/nyheter/innenriks/artikkel.php?artid=129248>

<sup>52</sup> Norway: Norwegian Official Report (NOU), Gransking av Utlendingsdirektoratet, NOU 2006: 14, para. 10, <http://www.regjeringen.no/nb/dep/aid/dok/nouer/2006/nou-2006-14.html?id=391981>

<sup>53</sup> Norway: Ministry of Labour and Social Inclusion, "Til Utlendingsdirektoratet, Instruks - retningslinjer om kjønnsrelatert forfølgelse, AI 63/08", p 4.

<sup>54</sup> Dagsavisen, "Norge tvinger homofile til å skjule sin legning", 22 November 2008, <http://www.dagsavisen.no/innenriks/article382234.ece>

<sup>55</sup> Dagsavisen, "Homofile asylsøkere", 27 November 2008, <http://www.dagsavisen.no/meningen/article383109.ece>

However, this does not mean that neither the Appeals Board nor the Directorate of Migration have recognised anyone as being in fear of persecution because of their sexual orientation. Furthermore, the Appeals Board have in several cases reiterated that it sees homosexuals as constituting a particular social group in certain circumstances.

Generally, in those cases that have been rejected, the Appeals Board has either referred to country of origin information or put the asylum-seeker's credibility into question. With regards to the former, the Board has in most cases stated that persecution of homosexuals is not known, even in those countries that criminalise homosexuality. For example, the Board cites sources saying that homosexual activity is extensively practiced and tolerated due to the gender segregation in a given society.

On the other hand, the Board shows a more inconsistent attitude towards Iran. In a case from September 2008, the Board states that recent reports, including one from the British Foreign Office, have reported an increase in the number of criminal cases against homosexuals in Iran. The Iranian asylum-seeker is therefore granted subsidiary protection. However, in a case from March 2009, the Board refers to the Norwegian Directorate of Immigration which has stated that there is little chance of being prosecuted for homosexual activity in Iran, and that the asylum-seeker must accept local custom in practicing his sexuality.

In the same case, the Immigration Appeals Board also doubts the veracity of the asylum-seeker's case, in particular the claim that he is homosexual. Similarly, in about a dozen of the 40 cases listed the Board has doubted the asylum seekers' story, and often his or her sexual orientation. In a majority of cases though (about 25 out of the total of 40), the rejection seems to pertain mainly to country of origin information.

Another interesting decision from the Immigration Appeals Board was made in August 2007 when a Rwandan man was granted subsidiary protection. In the case resumé, the Board states that it gave much consideration to the fact that the man was only fully aware of his sexuality after having arrived to Norway.

Since he had not had any experience of living in a Rwandan context as a self-identified homosexual, the Board found that it would be an extra burden for the man as compared to those who were self-identified as homosexual *before* leaving Rwanda. As the man was not recognised as a refugee, this cannot be taken as an example of a *sur place*-consideration, but shows an interesting parallel principle for the right to subsidiary protection.

### *Sweden*

The Swedish Aliens Act of 2005 defines refugees as being persons “outside of the country in which the foreigner is a citizen, because he or she feels a well-founded fear of persecution due to race, nationality, religious or political belief or because of gender, sexual orientation or other belonging to a particular social group”, and that he or she “cannot, or because of his or her fear will not, avail himself or herself of that country's protection”.



The definition follows the 1951 Refugee Convention closely, but goes further in explicitly including sexual orientation as a ground for seeking asylum. The previous Swedish Aliens Act of 1989 also included sexual orientation as a possible ground for seeking asylum. However, at that time the asylum-seeker would only be eligible for protection status and not for refugee status<sup>56</sup>. With the new law, they can now be defined as refugees. Furthermore, Sweden has also implemented EU Directive 2004/83/EC through its Legislative Decree 251/2007.

In 2002, the Swedish Migration Board issued guidelines for the investigation and evaluation of asylum cases in which persecution based on given sexual orientation is cited as ground. As the guidelines were written under the previous Aliens Act, they are at certain points out of date with current policy. However, already the 2002 guidelines stated that there was a move towards considering homosexuals as falling under the 1951 Refugee Convention as a “particular social group”. Furthermore, the guidelines opened up for considering sexual minorities as filling the criteria for refugee status on political grounds.

In addition to the guidelines, the Swedish Migration Board has an electronic handbook for aliens’ affairs (*Handbok for utlänningsärenden, Utlänningshandboken*) which is updated regularly. Its chapter 40.2 addresses persons seeking asylum on grounds of sexual orientation. Like UNHCR’s guidance note, the Handbook states that the discrimination or harm done towards a person has to be of a certain magnitude, or cumulative, in order for it to amount to persecution.

It also states that individuals should not have to conceal their sexuality to avoid harm or discrimination, and that the Government considers that sexuality is such a fundamental part of a person that he or she should not be asked to relinquish it. However, the Handbook also goes on to say that a person who has concealed his or her sexuality both in the country of origin and in Sweden, but has revealed it to the Migration Board case-worker, faces a minimal chance of persecution.

Generally, the Handbook –and Swedish asylum policy –follows the recommendations made by UNHCR in 2008. However, policy and practice are two different aspects that both influence the outcome of asylum applications. Therefore an examination has to be done of the process and practice surrounding asylum claims on grounds of sexual orientation.

According to RFSL, the two main reasons why persons seeking asylum on grounds of sexual orientation have been rejected, are firstly that the Migration Board and Migration Courts’ country of origin information states that homosexuals are generally not persecuted because of their sexuality, and secondly because the Migration Board and Courts doubt the veracity of the asylum-seeker’s story, including sometimes his or her claimed sexual orientation.<sup>57</sup>

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<sup>56</sup> Sweden: Riksdagen, ”Regeringens proposition 2005/06:6: Flyktingskap och förföljelse på grund av kön eller sexuell läggning”, 22 September 2005.

<sup>57</sup> Stig-Åke Petersson, statement at workshop, Stockholm Pride, 29 July 2009.

Furthermore, it has been pointed out that the three Migration Courts have in cases involving homosexuals from Iran ruled divergently, based on different assessments of the fear of persecution as stated in country of origin information.<sup>58</sup> The Migration Court of Appeal has not so far made any rulings on cases involving asylum claims on grounds of sexual orientation, which would have given the Migration Board and Courts better guideline in how to interpret the country of origin information.

The Migration Board has taken one Guiding Decision regarding homosexual asylum seekers from Iran. The decision, which was made 27 June 2008, recognised the Iranian man as a refugee. While the Migration Board states that being homosexual in Iran does not alone qualify and individual for refugee status, as country of origin information reports that there is no general persecution of homosexuals, this individual case fulfils the criteria due to the Iranian's openly homosexual lifestyle and partnership with another man, and due to the fact that he has previously been detained for committing acts of homosexuality but also for having participated in public demonstrations. The Migration Board states that it believes that there is no doubt about the veracity of the asylum-seeker's story or sexuality.

In a sample of seven decisions from the Migration Courts, dating from the period May 2007-September 2009, five were recognised as refugees whereas two were rejected. Of the two rejected cases, one decision was made on the grounds that the asylum-seeker, who was a homosexual man from Western Ukraine, had internal flight alternatives. His story as such was not disputed. The other case, however, was rejected partly due to country of origin information as well as due to his story being disputed.

Of the five appeals cases in which the asylum seekers were recognised as refugees, the Migration Board had disputed their stories in three of them, and in all of them it had based its rejection in part on country of origin information. In one case, the asylum-seeker only made the claim of being in fear of persecution because of his sexual orientation at the appeals level.

While the Migration Board disputed the veracity of the new claim due to its belatedness, the Migration Court ruled that it believed it to be credible that the applicant would withhold such information due to its sensitive nature. In the other cases, it seems that the Migration Courts made a different assessment of the risk of persecution for homosexuals in their country of origin than the Migration Board did, therefore overturning the latter's previous decision.

RFSL estimates that about two-thirds of those seeking asylum on grounds of sexual orientation are eventually given protection.<sup>59</sup>

### **The asylum procedure**

Throughout the entire process from arrival to a final decision, the asylum-seeker and the immigration authorities encounter several practical obstacles. This part addresses those

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<sup>58</sup> Ibid.

<sup>59</sup> Dagens Nyheter, "Ung homosexuell irakier ska utvisas", 17 August 2009

obstacles that are particular or particularly critical for persons seeking asylum on grounds of sexual orientation.

### **Information to asylum seekers**

Some of the persons who seek asylum on grounds of sexual orientation in the Scandinavian countries, travelled specifically to this region because they knew of the relatively liberal policy towards homosexuality that presides there. Some knew before coming that persecution on grounds of sexual orientation can make one eligible for protection in for example Sweden. However, others came to Scandinavia by coincidence, and are therefore not aware of their rights to seek asylum on grounds of sexual orientation.

Asylum seekers will first receive basic information when applying for asylum, and then more information about the RSD procedure, their rights and obligations later on in the reception centres. In Denmark, the Danish Refugee Council arrange information meetings for asylum seekers, while in Norway, the Norwegian Organization for Asylum seekers (NOAS) is responsible for disseminating information in reception centres. In Sweden the Migration Board is responsible for information programmes for asylum seekers.

It is important that asylum seekers know which grounds for persecution might merit protection, and in the case of sexual orientation, this might not be self-evidently a protection ground. Though a systematic study of the information programmes for asylum seekers is not currently available, a Danish study shows that the information material disseminated by the Immigration Service lacks information about rights to seek asylum on grounds of sexual orientation. Furthermore, many asylum seekers fail to attend information meetings held by the Danish Refugee Council.<sup>60</sup>

In addition to the general information disseminated at reception centres, one important source of advice for asylum seekers are their lawyers or other qualified legal aid. The amount of free legal aid offered to asylum seekers varies from country to country. Whereas Denmark and Norway only offer free legal aid to asylum seekers if they have been rejected at the first instance and are applying to have their cases re-examined by the countries' respective Appeals Boards, currently in Sweden the asylum-seeker will also be offered free legal aid in the first instance if the Migration Board decides that his or her case will be submitted to the normal procedure (i.e. not a Dublin II-case or a claim which is manifestly unfounded).

Another source of advice to asylum seekers is LGBT NGOs. In all of the three Scandinavian countries, there are LGBT NGOs that offer help to persons seeking asylum on grounds of sexual orientation, usually in the form of one dedicated activist (Denmark and Sweden) or a hired legal advisor (Norway). These organisations have been in contact with several LGBT asylum seekers and therefore are often able to give very concrete advice to the asylum seekers about their rights. Additionally, LGBT asylum seekers can contact NGOs that work in general with asylum-seeker rights, and some of them have

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<sup>60</sup> M. T. Drud-Jensen & S. P. Knudsen, *Migrationsvæsenets skab. Betingelser for ikke-heteroseksuelle i forbindelse med asyl og familiesammenføring i en nutidig dansk kontekst*, p. 126.

extensive experience from working with LGBT-related asylum cases (for example the Norwegian organisations SEIF). In sum, the Scandinavian countries have particularly strong and active NGOs working for LGBT asylum seekers' rights, unlike most other regions.

However, very often asylum seekers only contact these NGOs once they have been interviewed, perhaps even rejected, for the first time. This limits the possibility for NGOs to help persons fleeing persecution on grounds of sexual orientation. In cases where asylum seekers were unaware of their right to seek protection for such persecution, and because of social stigma or fear did not reveal his or her sexual orientation from the outset of the RSD process, information RSD staff of this later on might weaken the asylum-seeker's credibility and therefore chances for being recognised as a refugee. Therefore, although aid from NGOs and legal advisors is important, it cannot be a substitute for the information supplied by the immigration authorities themselves.

### **Reception standards**

1 July 2000, UNHCR released a review of and recommendations for Reception Standards for Asylum Seekers in the European Union.<sup>61</sup> Later on, in July 2003, it published the UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003.<sup>62</sup> The former states that:

UNHCR has, within its mandate of providing international protection to refugees and seeking durable solutions to their problems, a legitimate interest in the standards of treatment that asylum seekers enjoy from the moment of their arrival in the asylum country until a final decision is taken on their claims.<sup>63</sup>

International public law states general principles regarding housing conditions, living standards, the freedom of movement et cetera through inter alia the International Convention on Civil and Political Rights as well as the International Convention on Social, Economic and Cultural Rights.

However, legislation concerning the specific rights and needs of asylum seekers and refugees are not explicitly stated in any international legal document. However, UNHCR has in the above-mentioned documents made some general and some more specific recommendations concerning the reception standards for asylum seekers.

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<sup>61</sup> UN High Commissioner for Refugees, *Reception Standards for Asylum Seekers in the European Union*, 1 July 2000, <http://www.unhcr.org/refworld/docid/3ae6b3440.html>

<sup>62</sup> UN High Commissioner for Refugees, *UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, July 2003, <http://www.unhcr.org/refworld/docid/3f3770104.html>

<sup>63</sup> UN High Commissioner for Refugees, *Reception Standards for Asylum Seekers in the European Union*, p. 1.

Broadly speaking, the Scandinavian countries offer a high standard of living to asylum seekers compared to most other countries, but they do not necessarily offer a high standard of living to asylum seekers compared to what their own nationals enjoy.

A study of the life of LGBT asylum seekers in a Danish reception centre raises a number of problems faced by this group.<sup>64</sup> Inter alia, accommodating several men of the same cultural background in a small room or small flat has been challenging for LGBT asylum seekers. They may fear being revealed as homosexual, harassment from persons of the same ethnic background or other background, and some have been subject to threats.

The lack of privacy makes it impossible for some to openly express their sexual orientation, which in turn might have bearings on their credibility in the RSD procedure itself. Much of the experience from Denmark can also be found in Norway and Sweden. LLH reports having been contacted by several asylum seekers who do not dare to return to reception centres due to their fear of being subjected to physical attacks, rape and mental abuse,<sup>65</sup> and interviews with a homosexual asylum-seeker in Sweden reconfirms many of these problems in a Swedish setting.<sup>66</sup>

The *UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003* state that “[a]ccommodation in centres should respect privacy and provide for the basic necessities of life”. UNHCR also recommends that asylum seekers are housed in locations with consideration to “the presence of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum seekers’ national or ethnic group”.

LGBT communities and LGBT organizations are generally located in larger urban areas, whereas reception centres in the Scandinavian countries are often found in remote and sparsely populated regions of the country. Denmark is an exception in the sense that the country is geographically small, thus allowing for asylum seekers to travel to and from larger cities where LGBT organizations and communities can be found, but only at the expense of the asylum seekers relatively small financial means. In Sweden and Norway however, reception centres might be hours away from larger cities, which therefore might be inaccessible for those LGBT asylum seekers who are in search for organizations that can help them and give them more information about their rights.

A possible solution to remotely located reception centres is private accommodation. UNHCR has stated in the above-mentioned annotated comments that “[a]t a later stage, private accommodation is often more suitable, as prolonged periods of stay in collective centres could lead to marginalisation”: However, here the Scandinavian countries differ in their policy.

While none of the countries will pay for private accommodation for asylum seekers unless they have special medical needs, Norway and Denmark also refuse asylum seekers

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<sup>64</sup> M. T. Drud-Jensen & S. P. Knudsen, *Migrationsvæsenets skab. Betingelser for ikke-heteroseksuelle i forbindelse med asyl og familiesammenføring i en nutidig dansk kontekst.*

<sup>65</sup> Dagsavisen, ”Krever bedre sikkerhet for homofile asylsøkere”, 6 November 2008, <http://www.dagsavisen.no/innenriks/article379079.ece>

<sup>66</sup> Interview with asylum-seeker, Stockholm, 4 September 2009.

living in private accommodation financial support that they would normally receive if staying reception centres. These grants are usually meant to cover expenses such as food, hygiene articles, clothes et cetera. Sweden, on the other hand, extends this financial support even to asylum seekers in private accommodation, with the result that about 56 % of all asylum seekers live outside of reception centres.<sup>67</sup>

While there are many arguments voiced against supporting private accommodation as an alternative for asylum seekers, including the danger of ghettoization, these possible dilemmas need to be balanced with the need of asylum seekers, and in particular LGBT persons, to become more independent, to have more privacy and to be able to find a community in which they may seek support and information.

### *The interview*

UNHCR standards for RSD interviews can be found in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees<sup>68</sup> and its 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. The latter specifies that it is also applicable for the gender-related persecution experienced inter alia homosexuals.

The particular problems and challenges that may arise when interviewing persons claiming asylum on grounds of sexual orientation can be found in all three Scandinavian countries. Although the Swedish Migration Board handbook for aliens' affairs specify guidelines for the interviewing of asylum seekers, it ultimately depends on the RSD staff and their norms whether or not LGBT asylum seekers will be interviewed in a manner which is conducive for them to be open, confident and honest in the interview situation.

With regards to the interviewer, the person should be trained in order to be sensitive with regards to the particularities relating to claims of asylum on grounds of sexual orientation. UNHCR guidelines on gender-related persecution state that “[b]oth ‘open-ended’ and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews”.<sup>69</sup>

As an example, questions like “do you have a wife/husband” may make it difficult for LGBT asylum seekers to disclose all relevant information. Therefore, the Swedish Migration Board will by late 2009 initiate a programme to train hundreds of RSD staff in cooperation with the Swedish Youth Federation for Lesbian, Gay, Bisexual and

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<sup>67</sup> Sweden: Swedish Official Report (SOU), *Aktiv väntan – asylsökande i Sverige*, SOU 2009: 19, p. 128, <http://www.regeringen.se/sb/d/108/a/121133>

<sup>68</sup> UN High Commissioner 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*

<sup>69</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, p. 10 <http://www.unhcr.org/refworld/docid/3d36f1c64.html>

Transgender Rights (RFSLUngdom). The aim of the initiative is to sensitise RSD staff about their norms and presuppositions concerning the sexuality of other persons.

With regards to interpreters, UNHCR guidelines on gender-related persecution state that “[refugee status c]laimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.” Similarly, LGBT persons should be allowed to choose the gender of their interpreter if both are available, and that the interpreter is knowledgeable about the terminology that may be relevant in cases of LGBT asylum seekers.

Studies have shown that many LGBT persons feel reluctant to openly talk about their sexuality in front of an interpreter that might be from the same ethnic group, as they are afraid that their whole ethnic community in the country of asylum will then know about his or her sexual orientation<sup>70</sup>. Furthermore, the asylum-seeker might feel it uncomfortable to talk about his or her sexual orientation and activities in front of an older interpreter.

While adequate training of interpreter is necessary to ensure that they will not disclose any information about the applicant to anybody else, and to ensure that the person will be professional in interpreting potentially controversial issues, there have also been experiments with inter alia interpretation by phone which has yielded some positive experience.

#### *Determining protection needs through information*

In judging the extent to which a person’s fear of persecution in his or her country of origin is well-founded, RSD staff depend on information from those countries in form of embassy reports, their own fact finding-missions, reports from NGOs like Amnesty International and Human Rights Watch, and so on. However, the accuracy of the information or its bias has to be considered as well. When it comes to sexual orientation, there is relatively scarce information. According to a survey made by RFSL of Swedish embassy reports from the about 80 countries in which homosexuality is criminalized, they contain very little information about the local conditions for sexual minorities.<sup>71</sup>

In the UNHCR *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*, it is stated concerning country of origin information that

[i]t is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence

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<sup>70</sup> M. T. Drud-Jensen & S. P. Knudsen, *Migrationsvæsenets skab. Betingelser for ikke-heteroseksuelle i forbindelse med asyl og familiesammenføring i en nutidig dansk kontekst*, 145

<sup>71</sup> Meeting with Stig-Åke Petersson, 6 July 2009.

may not be available, due to under-reporting of cases, or lack of prosecution.<sup>72</sup>

Because information on gender-related persecution is not readily available and because those that collect such information also need a certain understanding of a phenomenon that is unknown to them, e.g. homosexual lifestyle, information on persecution on grounds of sexual orientation might be lacking or incorrectly interpreted respectively.

LGBT organizations have questioned several reports regarding the situation for LGBT persons which are currently being used by migration authorities<sup>73</sup>. Additionally, there are diverging views on the fear faced by homosexuals in different reports. As an example, UNHCR has stated in its April 2009 *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers* that “[homosexuals] may be at risk of “honour killings” at the hands of their families”<sup>74</sup> in the Kurdistan Region of the country.

On the other hand, the Swedish Migration Board wrote in its report from a fact-finding mission from July 2009 that “[h]omosexuality is not considered a question of honour; to be homosexual is not dishonourable for the family”<sup>75</sup>. With regards to whether anyone has been killed because of their homosexuality in the region, the Migration Board’s report first states that “[a]ccording to the informants, no one has been killed by it in Lebanon, Syria or the Kurd-ruled provinces due to his or her homosexuality”<sup>76</sup>, but later on that

[h]omosexuality is considered as a great sin and is contrary to Islam and Kurdish culture and it may therefore not be ruled out that a homosexual man that would reveal his homosexuality could be punished by death by his family, says the representative of the organization Harikar. However none of the interviewed has ever heard about anyone having been murdered because of his or her homosexual orientation or because he or she has committed acts of homosexuality.<sup>77</sup>

As stated in UNHCR’s guidelines, information may not be available due to under-reporting or the lack of prosecution, and not necessarily because there is no persecution taking place. It is therefore important that persons tasked to collect country of origin information have adequate training in order to be better able to find the correct facts.

The Swedish Migration Board will during autumn 2009 have an external consultant assess the country of origin information unit’s LGBT-related information from a queer

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<sup>72</sup> UN High Commissioner for Refugees, *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*, para. 37.

<sup>73</sup> Meeting Stig-Åke Petersson, 6 July 2009.

<sup>74</sup> UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum seekers*, para. 335.

<sup>75</sup> Sweden: Migrationsverket, Hedersrelaterat våld i Libanon, Syrien och de kurdstyrda provinserna i norra Irak, 24 July 2009, p. 10, <http://www.migrationsverket.se/include/lifos/dokument/www/09073060.pdf> Author’s translation.

<sup>76</sup> Ibid., p. 42. Author’s translation.

<sup>77</sup> Ibid., p. 42-43. Author’s translation.



perspective, which is a commendable initiative. Furthermore, RSD staff need to be trained in order to be able to assess what of the available information best reflects the actual situation for LGBT persons.

## **Conclusion**

Asylum claims on grounds of sexual orientation are a largely under-researched and thereby largely obscure issue. This review has to be seen in light of that fact. However, there is no reason to foresee any end in the flow of persons seeking protection from abuse, harassment and persecution for who they are and who they love. Many countries still staunchly keep their criminal codes that outlaw consenting, adult homosexual activity.

The lack of information about the particular needs of LGBT persons, both in their countries of origin and as asylum seekers in their countries of destination, makes it difficult to ensure these groups the right to seek and be considered for asylum. Therefore, more knowledge and sensitivity is needed, both in the immigration services of reception countries as well as in NGOs and UNHCR itself.

In conclusion, the following recommendations can be made.

First, UNHCR needs to build its competence and knowledge with regards to persecution on grounds of sexual orientation and the particular needs of LGBT persons. One study has showed that UNHCR field personnel often lacked knowledge and sensitivity about this particular group of asylum seekers and refugees<sup>78</sup>

Second, UNHCR should continue to include the right to seek asylum on grounds of sexual orientation and the needs of LGBT asylum seekers in their meetings with and trainings of national immigration authorities, judges and border guards. Best practice examples of training should be identified and fitted to the context of other regional offices.

Third, the RSD staff and interpreters of national immigration services should receive adequate training in how to handle LGBT asylum seekers. This includes being sensitive to the difficulties people experience in revealing and talking about issues that might be surrounded by taboo and strong cultural and religious norms.

Fourth, Scandinavian immigration authorities should, as is already being done in Sweden, have their country of origin information assessed by an external consultant in order to determine whether it is sensitive to the particular situation faced by LGBT persons. Information about the social situation for LGBT persons and acts of violence and harassment directed towards them, might not be easily collected and needs to be interpreted carefully in order to assess whether or not it amounts to persecution.

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<sup>78</sup> Helsinki Citizens' Assembly & Organization for Refuge, Asylum & Migration (ORAM), *Unsafe haven. The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey*, June 2009, [http://www.hyd.org.tr/staticfiles/files/unsafe\\_latest.pdf](http://www.hyd.org.tr/staticfiles/files/unsafe_latest.pdf)

Finally, and to the extent possible, immigration authorities should offer asylum seekers accommodation that takes into account their need for privacy as well as proximity to NGOs and social networks for LGBT persons. NGOs and lawyers who offer legal aid to asylum seekers, either as a part of their work or on a voluntary basis, should make sure that they have the competence and knowledge needed to give adequate and proper help to LGBT asylum seekers.

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