

Exam for JUR1530 and JUR5530 - Refugee and Asylum Law

Autumn 2008

Question: The United Nations High Commissioner for Refugees has just issued a Guidance Note on Claims for Refugee Status Under the 1951 Convention Relating on Sexual Orientation and Gender Identity. It contains a section on "Avoiding Persecution" reprinted below. Please draft a memo in which you outline reasons why some national immigration authorities consider it reasonable to expect this type of asylum seeker to conceal his/her belief/identity in order to avoid persecution. What impact do you think the UNHCR guidance note will have on refugee status determination in these types of cases? Please refer to cases and readings in your analysis.

iii. Avoiding Persecution

25. A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds. As noted by the Immigration and Refugee Board of Canada:

"Into the equation must be added the claimant's new found freedom of expression in Canada and his desire to live openly in Sri Lanka as he does here in Canada[...]. We do not tell claimants that they have a right to practice their religion so long as they hide it. A hidden right is not a right".

26. The question to be considered is whether the applicant has a well-founded fear of being persecuted, rather than whether he or she could live in the country of origin without attracting adverse consequences. This requires an objective examination of how the applicant may be treated if he or she were returned to that country. Hence, it is not relevant whether the applicant's conduct with regard to his or her sexual orientation is viewed as "reasonable" or "necessary". There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships. A requirement for discretion would furthermore imply that a person's sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviours and everyday activities otherwise affected by that person's sexual orientation and gender identity. It would, in fact, amount to requiring the "same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution seeks to achieve by persecutory conduct." As stated by the New Zealand Refugee Status Appeal Authority:

"Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm".