In many countries applications for asylum on grounds of sexual orientation are rejected because of the "discretion argument" – that LGBTI people can hide their orientation and thereby avoid persecution. Is this a legitimate interpretation of the criteria for refugee status contained in the 1951 Convention?

- **Introduction**

Discretion is defined as "the quality of behaving or speaking […] to avoid causing offence or revealing confidential information" (Oxford English Dictionary, 2018), not to avoid being targeted or persecuted, nor in order to live in a society where revealing your true nature could cost you your life. According to Kolinsky (2016), the discretion argument rests on the assumption that, if upon return to their home country, "an LGBT applicant chooses to live discretely, or even completely closeted, he or she would not be subject to future persecution, even if the applicant's home country has a pervasive homophobic culture or existing laws criminalizing homosexual behaviour." Even if possible, advising such concealment to vulnerable persons seeking asylum can be seen as ethically wrong, but can also be in contravention of the terms of the 1951 Convention relating to the Status of Refugees (hereinafter referred to as 'the Convention'). Alternatively, it can be seen as cooperation on the part of the refugee to contribute to their own protection, and a necessary and 'reasonably tolerable' alternative to seeking refuge outside of ones' own country and away from family. In order to come to a conclusion as to whether the discretion argument is legitimate in the eyes of the Convention, it will be necessary to examine the wording in order to delineate those parts with which the 'discretion argument' may be in conflict. The main tensions to be tackled will be to ascertain whether or not a well-founded fear of persecution can be abated by concealment of identity and whether or not such concealment would result in refugee status being altered. It will also be useful to seek comparisons with other groups that, given their nature, could also employ discretion as a technique. In order to make the argument tangible, several escalated asylum cases from the UK and Australia will be invoked as evidence to demonstrate the logical reasoning present on each side.

According to the Convention a refugee is defined 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" (Article 1(A)(1), UN General Assembly, 1951, emphasis added)

Throughout this essay, 'well-founded fear', 'persecution' and 'membership of a particular social group' will be discussed with reference to 'discretion'.

- **The discretion argument and a unique ability to hide**

The discretion argument is a concept that has been widely cited in order to inform asylum decisions across the world. According to Wessels (2012), the argument rests on the "reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection" by concealing their of sexual orientation and gender identity (SOGI). In doing so, they will be able to return to their country of origin and live in peace for the rest of their lives, free from persecution thanks to having hidden their true selves. The case of Anne Frank has been cited in both the UKSC and the Australian High Court in order

to speculate what would have happened should Anne Frank have escaped to the UK and had the discretion argument been applied:

> "it would have countenanced the return of Anne Frank to Nazi-occupied Holland [...] on the basis that she could have hidden in the attic and therefore successfully avoided the possibility of Nazi detection." (ICJ, 2016)

When put in this manner, it seems fairly ridiculous (and the comparison is somewhat flawed), but some reasoning for discretion for LGBTI+ claimants is explored by Choi (2010), where they note that SOGI is not generally "visible or obvious" unlike some other protected groups. In fact, LGBTI+ persons are unique since 'self-identification' is necessary; the person's difference in SOGI has to be revealed and members of the LGBTI+ community may experience their identities in private for a short period of their lives or even longer, potentially on a voluntary basis (Berg and Millbank, 2009). This unique ability therefore renders LGBTI+ individuals able to be "discreet" and hide part of themselves from the wider society. In doing so they are able purportedly ensure their safety in environments where being overt would lead to persecution. It is worth noting at this point, however, that there is no part within the Convention that suggests refugee status will not be recognised if the claimant is able to 'go incognito' in order to avoid persecution through concealment. Indeed none of the five protected statuses (race, religion, nationality, membership of a particular social group or political opinion) are held to the same; Briddock (2016) attests that if preaching were part of a religious faith and a person were not able to do so in their home country, they would not be asked to return and avoid such displays of affiliation. Nor is there mention of obligation of the claimant to contribute to their own protection by doing so; such arguments originate from illogical extrapolations. Rather, within the preamble of the Convention it affirms its aims that "human beings shall enjoy fundamental rights and freedoms without discrimination", which as will shall see extends to the protection of SOGI without requiring concealment in order to do so (Briddock, 2016; ICJ, 2016).

- **Discretion and 'a well-founded fear'**

Even if discretion is possible and enables an individual to avoid persecution – is that enough to exempt them from the Convention's definition of a refugee? We must remember that claims are based on having a 'well-founded fear of persecution', rather than whether it has actually occurred in the past or not, or whether discretion can assuage this. Gray and McDowall (2013) note that the mere act of concealing an identity due to a well-founded fear does not mean that that fear disappears even if the subterfuge is successful. In fact, the mere possibility that a returnee would choose discretion in itself could even form part of evidence in favour of establishing the existence of a well-founded fear of persecution, and therefore the right to recognition of refugee status. Decision-makers have been slow to realise that concealment of SOGI is not done lightly or flippantly – but is largely employed due to "oppressive social forces rather than by choice" (ibid.). It is a rather antiquated line of reasoning that because LGBTI+ persons can remain closeted, even in progressive nations where persecution is not rife, that they can reasonably be expected to do so out of fear. The ICJ, in their practitioner's guide for claims based on SOGI (2016) notes that "concealment results from a fear of persecution [..]. [It] is a typical response, consistent with the existence of a well-founded fear of being persecuted, and it is evidence of the well-foundedness of an applicant's fear".

Until 2010, UK law followed a misinterpretation of an Australian High Court ruling commonly referred to as S395 (Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, [2003] HCA 71). The ruling referred to persecution only constituting such if "the person […] cannot reasonably be expected to tolerate it" – however in many cases this was taken to mean that claimants could be returned to their home countries even with a well-founded fear if they could reasonably tolerate living in discretion. Within the famous 2010 UK Supreme Court ruling (*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, [2010] UKSC 31;[2011] 1 AC 596*, 2010), this was overturned, and it was ruled that the idea that asking a person to be 'discreet' to avoid persecution would mean that:

> "he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country." (HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, [2010] UKSC 31;[2011] 1 AC 596, 2010)

Even if the discretion argument were not invalid in such a way relating to the well-founded fear, it hangs on the ability of the claimant in question to be flawlessly deceptive on all levels of their public existence, replacing the fear with a facade. The argument focusses on such abilities, and in doing so ignores the fact that others, such as friends, family, the police or government may discover the truth despite the claimant's best efforts. Regrettably, the discretion argument still persists in UK law even following the landmark judgement cited above, since if asylum seekers state they would be discreet upon return to their country but cannot prove this would be due to reasons of well-founded fear of persecution, but rather familial or societal reasons, their claim will still be rejected (ibid). Kolinsky (2016) notes importantly that in a context proven to be persecutory towards LGBTI+ persons, even if the reasons for living discretely are proven only to be for personal reasons (though highly unlikely), persecution would still occur if the person were discovered and exposed.

- **Discretion and 'a particular social group'**

Proponents of the discretion argument will also contend that in order to attain protected status under the Convention, it is necessary to define how LGBTI+ individuals with differing SOGI fall into the definition of a 'particular social group' that is the reason for persecution, and whether abstinence from certain behaviours associated with SOGI could remove such belonging and therefore danger. Spijkerboer (2015) notes an example of an Hungarian case in which, although the court found that homosexuality and homosexual acts were illegal, an Algerian applicant could be expected to return to Algeria since he could continue to 'practice' in a "hidden, discrete way, in order to prevent possible attacks". This points to a strange 'within and without' mentality where individuals can be members of a particular social group which is acknowledged to be persecuted, but can exist within society that abhors such an identity by only indulging in sexual behaviour associated with that identity in private. Of course, the issue then evolves into using specific behaviour, rather than identity in all of its complex facets, to define membership to a particular social group – and implying that abstinence or covert practice can disqualify membership to said group thereby removing the need for protection under the Convention. The opposite can also be argued in order to deny claims whereby applicants only refer to homosexual behaviours or behaviours

that are consistent with their SOGI, but do not display emotional traits or conform to stereotypes that are expected by caseworkers (UKLGIG, 2013).

Crucially, the European Qualification Directive (European Union: Council of the European Union, 2011) defines that a group of people can be considered to constitute a particular social group where members "share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it". Within the Directive, SOGI is taken to be a characteristic as mentioned above that constitutes membership to a 'particular social group'. Additionally, within the UNHCR's Guidelines for claimed based on SOGI (2012), Articles 44 – 49 note that membership to a 'particular social group' within the Convention should be read in an "evolutionary manner", and should be extended to persons sharing such a protected, innate characteristic as is mentioned in the EU Directive. The guidance note states that either such characteristics or 'social perception' of such a social group are sufficient to denote membership, and also note importantly within Article 49 that although "an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group". It logically follows, therefore, that even if one were to act discreetly (i.e. make invisible attributes and characteristics), one could and should still be recognised as part of the LGBTI social group by law, and also by persecutors. The UK Supreme Court ruling HJ (Iran) and HT (Cameroon) adds to this argument by differentiating SOGI cases from others which do not rely on innate or immutable characteristics manifested in behaviour:

> "[U]nlike a person's religion or political opinion, [the behaviour] is incapable of being changed. To pretend that it does not exist, or that [it] can be suppressed, is to deny the members of this group their fundamental right to be what they are – of the right to do simple, everyday things with others of the same orientation such as living or spending time together or expressing their affection for each other in public."

Such a definition of characteristic (as innate or immutable) and as a marker for membership to a social group means that it would be difficult to argue that suppression of behaviour in any circumstance could ever really mean that a person stops being a member of that group, and therefore entitled to such protection that it affords.

- **Discretion and persecution vs. discrimination**

Whilst not explicitly linked to the conditions for refugee status as mentioned in Article 1(A) of the Convention, there is another aspect of it that could be helpful for future consideration contained to the 'non-refoulement' clause, which explicitly prohibits signatory states from returning a refugee "to the frontiers of territories where his *life or freedom* would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Article 33(1), Ibid., emphasis added). This section is interesting as it mentions the concept of freedom. According to the Yogyakarta principles, a set of rights with explicit mention of SOGI issues, the right to freedom of opinion and expression is fundamental and should not be restricted for persons of LGBTI+ identification. Everyone should have such freedoms, including:

> "Expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, [SOGI], through any medium and regardless of frontiers." (Yogyakarta Principles, 2007)

If persecution were to be defined in this manner, given this definition of restriction of freedom, then members of the LGBTI+ grouping would surely be afforded refugee status. Of course, a difficulty arises here since the definitions of persecution and discrimination are different, but contestable. If society is sufficiently discriminatory against LGBTI+ persons and incrementally reduces their freedoms of expression and equality, is this persecution or rather discrimination? Could enforced concealment itself be tantamount to persecution? Some argue that the confinement that goes along with concealing an immutable part of oneself could constitute such persecution through psychological harm, but that decision markers often cannot attribute persecution to the gradual damage involved in concealment. The UNHCR SOGI guidelines state that "significant psychological harm" could result and have serious impact on the mental and physical wellbeing of LGBTI+ persons. Additionally, in relation to this and discrimination generally, it is UNHCR's stance that "persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees" (UNHCR, 2002).

- **Concluding remarks**

Given the above argument, it seems logical to state that the discretion argument falls down and is not a legitimate argument against of the recognition of refugee status according to the wording of the 1951 Convention. SOGI has been proven and accepted as constituting membership of a 'particular social group', and that such membership cannot be removed in the event of concealment. Discretion on the part of LGBTI+ persons, therefore, does not relieve them of this aspect of their claim for asylum. Additionally, concealment within a context where persecution is deemed to exist cannot alleviate a well-founded fear of that persecution, even if that discretion were to prove infallible. Rather, the act of concealment could even form part of a case for evidence of a well-founded fear of persecution. Whilst the definition of persecution requires more in-depth exploration, it can be argued that the discretion argument itself is in violation of the core principles of the Convention since it alludes to a situation whereby asylum claimants would be forced to endure psychological harm. Wider acknowledgement of societal discrimination and acceptance of principles such as the Yogyakarta would bring this more to the fore. Steps are being made in the right direction with rulings such as HJ (Iran) and HT (Cameroon) and the creation of guidelines such as the UNHCR 2012 guidance note, however application of such guidance remains patchy. It will remain to be seen within the coming decades whether the discretion argument will fade into obscurity as it is further deminished, and whether this will have a positive impact on the number of LGBTI+ aslyum cases that are won.

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