

**Nexus with a Convention Ground:
The Particular Social Group and Sexual Minority Refugees in
Ireland and the United Kingdom**

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It is well established in law and practice in Ireland, the United Kingdom, and across the Western world that sexual minority applicants for international protection fall within the scope of the particular social group ground of the Geneva Convention. The particular social group Convention ground developed the strongest nexus in practice with sexual minority applicants because of its relative flexibility, openness, and inclusiveness as compared to the other four Convention grounds. Using field research, this article analyses the strengths and weaknesses of this nexus and determines whether the particular social group is the most effective Convention ground to invoke for sexual orientation and gender identity applicants.

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I. INTRODUCTION

Over the past decade the United Nations, the Council of Europe, domestic governments, and courts worldwide have addressed issues surrounding the intersection of the asylum process with sexual orientation¹ and gender identity² applicants. In determining whether these applicants could be considered within the narrow definition of ‘refugee’, one of the initial questions was whether membership of these groups satisfied the nexus with the Convention ground requirement under Article 1A(2) of the Geneva Convention.³

Under Article 1A(2) of the Convention, applicants must have a ‘well-founded fear of persecution’ based on the grounds of ‘race, religion, nationality, membership of a particular social group or political opinion’. While sexual orientation and gender identity were not considered grounds for protection in the drafting of the Convention,⁴ a fear of persecution for reasons of sexual orientation or gender identity may fall within the scope of one or more of the aforementioned Convention grounds. Subsequent litigation has shown that the ‘particular social group’ is the most commonly invoked Convention ground in these cases, as sexual orientation and gender identity are key elements of an individual’s identity and are typically indicative of their belonging to a wider social group with these qualities. A recent study estimates that sexual orientation and gender identity applicants seeking asylum in the European Union numbers 8,450 annually.⁵

This article discusses the applicability of the particular social group Convention ground in considering claims related to sexual orientation and gender identity, and the evidence of its application through adjudication.

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1. Sexual orientation can be defined as 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’. International Commission of Jurists, ‘Yogyakarta Principles: Principles on the application of internal human rights law in relation to sexual orientation and gender identity’ [2007] <http://www.yogyakartaprinciples.org/principles_en.pdf> accessed 15 March 2010, 6, fn 1.

2. Gender identity can be defined as ‘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 ... and other expressions of gender, including dress, speech and mannerisms’. *ibid* 6 fn 2.

3. Convention Relating to the Status of Refugees 189 UNTS 137.

4. Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 74-75.

5. Sabine Jansen and Thomas Spijkerboer, ‘Fleeing Homophobia: Seeking Safety in Europe’ (COC Netherlands & VU University Amsterdam 2011) <http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN_tcm22-232205.pdf> accessed 22 September 2011, 15.

The article also outlines the criteria for recognition as a particular social group under the Convention as it has developed internationally, but with a specific focus on how courts in Ireland and the United Kingdom have developed and applied the Convention ground. Ireland and the United Kingdom are particularly noteworthy as both countries have been historically reluctant to consider sexual minority applicants as constituting a particular social group eligible for protection, unless the applicant exhibits some degree of 'social visibility'.⁶ In practice, decision-makers in both Ireland and the United Kingdom have been less likely to grant asylum where individual applicants have, in the courts' opinions, failed to use their 'discretion' to publicly conceal their membership of the group, thus *attracting* persecution.⁷ Referred to in the United Kingdom as the 'discretion test',⁸ this article discusses the practice of both countries in light of *HJ (Iran) and HT (Cameroon) v SSHD*,⁹ where the UK Supreme Court found the discretion test to be contrary to the Geneva Convention.

The following sections discuss: firstly, the historical development of the particular social group ground and its eventual utilisation in sexual orientation and gender identity cases; secondly, the difference in interpretation internationally and that of Ireland and the United Kingdom as well as the 'social visibility principle'; and thirdly, the possible or potential limitations of the use of the particular social group ground. Throughout this article, the main question asked is whether it is problematic that the majority of claims relating to sexual orientation and gender identity have been considered within the membership of a particular social group Convention ground.

II. THE EVOLUTION OF THE PARTICULAR SOCIAL GROUP CONVENTION GROUND AND ITS UTILISATION IN RESPECT OF SEXUAL ORIENTATION AND GENDER IDENTITY APPLICANTS

The exact origins of the particular social group Convention ground are unclear as the *travaux préparatoires* of the Geneva Convention provide no substantive explanation for the ground's inclusion. At the Geneva Convention's drafting in 1951, however, the Swedish delegate argued for the explicit inclusion of a social group ground in the Convention on the basis that 'experience had shown that certain refugees had been persecuted because

6. cf Jenni Millbank, 'A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (2005) 14 *Social & Legal Studies* 115, 120-21 (highlighting the requirement of social visibility in the United Kingdom by noting the ruling in *Kizza v Secretary of State for the Home Department* [2002] UKIAT 06100, where it was held that lesbians in Uganda cannot be persecuted because 'no one knows they exist' as a group).

7. See further, *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238.

8. See example, *ibid* [16].

9. *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

they belonged to particular social groups'.¹⁰ Furthermore, Goodwin-Gill and McAdam describe the nexus as a category that 'possesses an element of open-endedness capable of expansion',¹¹ leaving space for interpretation in its application by governments and courts. Thus, the particular social group ground was likely designed as a catch-all provision to accommodate those who were targets of persecution in their country of origin or place of habitual residence for reasons that did not directly invoke the race, religion, nationality, or political opinion ground.

A. International Case Law in the Evolution of the Particular Social Group Convention Ground

Decision-makers worldwide contended early on that sexual minorities should be excluded from invoking international protection under the Geneva Convention by arguing that sexual minorities were not mentioned in the Universal Declaration of Human Rights and that homosexuality contradicted the moral and religious mores of their societies.¹² However, in the late 1980s and the early 1990s, courts in the United States, New Zealand, Australia, Canada, and some European countries began to consider the meaning of a 'social group' under the Convention ground, which ultimately led to the recognition of the particular situation of sexual minorities and their potential need for international protection.¹³

One of the first cases to determine when a group constituted a particular social group according to the Convention was *Matter of Acosta*¹⁴ in 1985. In this case, the United States Board of Immigration Appeals examined whether Salvadoran taxi drivers, who feared persecution from anti-government guerrillas because they refused to engage in work stoppages, qualified as a particular social group. The Board of Immigration Appeals found:

the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,' to be most helpful in construing the phrase 'membership in a particular social group' ... The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it

10. Goodwin-Gill (n 4) 74 fn 119 (citing UN Doc. A/CONF.2/SR.3, 14).

11. *ibid* 76.

12. See examples: *Re R (UW)* [1991] CRDD No 501 (QL); *Re X (JK)* [1992] CRDD No 348 (QL).

13. See further, Kirsten L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12 *International Journal of Refugee Law* 175.

14. *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (BIA).

is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution ...¹⁵

This decision represents an early interpretation of what could constitute a particular social group and outlined the following list of criteria to determine whether a group qualifies as a particular social group under the Geneva Convention:

1. whether the group is defined by an innate and immutable characteristic;
2. whether the group is defined by their past temporary or voluntary status, since their history or experience is not within their power to change; and
3. whether the common characteristic is so fundamental to each group member's human dignity that applicants should not be required to change or abandon it to avoid persecution.¹⁶

In determining whether an applicant was a member of a particular social group, the *Acosta* test focused on the internal characteristics of the group and not on how visible the group was within society. Indeed, the only test for visibility was whether a potential persecutor was aware or 'could easily become aware' that the applicant possessed a belief or characteristic that the persecutor sought to overcome by some form of punishment.¹⁷

The following year, a similar issue was brought before a US federal appellate court. In the case of *Sanchez-Trujillo v INS*,¹⁸ the Court of Appeals for the Ninth Circuit examined the right to asylum based on a fear of persecution as members of a particular social group. In a time of civil unrest, this potential group consisted of 'young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador'.¹⁹ Although *Sanchez-Trujillo* built on the criteria set out in *Acosta*, the findings were distinctly different. The Ninth Circuit held that for the group to satisfy the nexus with the particular social group Convention ground the group must be cognisable within society, the applicant must be able to prove their membership of the group, and the group must be able to prove fear of persecution on the basis of the group's shared characteristic.²⁰

15. *ibid* 233.

16. James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 161.

17. *Acosta* (n 14) 226.

18. *Sanchez-Trujillo v Immigration and Naturalization Service* 801 F 2d 1571 (1986).

19. *ibid* [4].

Sanchez-Trujillo departed from the internal focus advanced by *Acosta* and instead put forward an external test that required the group to be cognisable within society. The Ninth Circuit also expanded on *Acosta*'s requirement that the group share immutable characteristics and determined that applicants could be members by 'voluntary association', admitting applicants that had sought membership based on a commonality fundamental to their identity rather than perhaps their social circumstances at birth.²¹ This interpretation ultimately paved the way for the particular social group's application in cases of sexual orientation and gender identity, as courts began to view membership to a sexual minority group as an instance of voluntary association.

Some years later, in *Attorney General of Canada v Ward*,²² the Supreme Court of Canada outlined criteria for determining whether or not a person was at risk of persecution based on their membership of a group.²³ Ward invoked the particular social group Convention ground in a claim for protection from the Irish National Liberation Army ('INLA'). This was a paramilitary group from which he had defected and, as such, he feared persecutory repercussions. Ward asserted that because neither the British nor Irish police were capable of protecting him, he should be granted refugee status based on his former membership of the INLA. In considering whether Ward's membership of the INLA constituted membership of a particular social group in line with the Convention, La Forest J closely followed the decision in *Acosta* and advanced a very similar test. According to La Forest J, protection from persecution should be based on the following three categories:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.²⁴

The Court ultimately ruled that Ward could not invoke the protection of the Geneva Convention based on the particular social group Convention

20. Stuart Grider, 'Sexual Orientation as Grounds for Asylum in the United States—*In re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993)' (1994) 35 *Harvard International Law Journal* 213, 216.

21. *Sanchez-Trujillo* (n 18) [25].

22. *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

23. The judgment also deals with the definition of persecution, the scope of the particular social group, and the concepts of dual nationality and state complicity. See further, Audrey Macklin, 'Canada (Attorney-General) v. Ward: A Review Essay' (1994) 6 *International Journal of Refugee Law* 362.

24. *Ward* (n 22) 692.

ground. Instead, the Court classified the INLA as a political movement and granted Ward's application for asylum based on the political opinion ground.²⁵

The three criteria from *Ward* closely mirrored the *Acosta* test which focused on the internal nature of the group. The Court in *Ward*, however, further complicated the internal/external debate by considering the discrimination which the group endured from society — an inherently external aspect. La Forest J's judgment stated that earlier decisions failed to address how members of a particular social group endured discrimination in their community by way of 'disenfranchisement', 'breakdown of basic membership rights', 'shared marginalization', and 'lack of a meaningful stake in the governance of their own society'.²⁶ Despite advancing three internally-focused criteria, the Court's consideration of the discrimination suffered by the group represented an implicit focus on the external nature of the group. The judgment, therefore, failed to clearly endorse an internal or external test.

The above cases show how the particular social group may be viewed in terms of persons of similar experiences, behaviour, background, or social status. The broadness of this interpretation allows for flexibility, which may account for the prevalence of connecting characteristics associated with sexual orientation and/or gender identity to this Convention ground, rather than the other four grounds. When this ground was eventually utilised in cases of sexual minority and gender identity applicants, the internal/external tests became ever more contentious, given the intensely personal nature of sexual orientation and gender identity.

Some months after *Ward*, the United States Board of Immigration Appeals assessed whether the particular social group Convention ground could extend to sexual orientation applicants. In *In re Tenorio*,²⁷ the Board heard an appeal from a gay man who fled his country of origin, Brazil, following an incident of serious violence resulting from his identification as a sexual minority. Tenorio was granted asylum in the United States on the basis that he would be subject to persecution because of his sexual orientation if returned to Brazil as, in 1989, he was the victim of a serious homophobic attack in Rio de Janeiro. The Board of Immigration Appeals ruled that, as a gay man, Tenorio was a member of a particular social group as outlined in the Geneva Convention, and had a well-founded fear of future persecution.²⁸

In coming to this conclusion, Leadbetter J applied one of the internal concepts from *Acosta*: that the characteristics that members of a particular social group share must be immutable.²⁹ Continuing on from this reasoning,

25. *ibid* 749-50.

26. *ibid* 734-35.

27. *In re Tenorio* No A72 093 558 (EOIR Immigration Court, July 26, 1993).

28. *ibid* 16-17.

29. *ibid* 14.

sexual orientation, in accordance with Leadbetter J's decision, is 'arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change'.³⁰ However, Leadbetter J also adopted some of *Sanchez-Trujillo*'s external concepts and granted Tenorio asylum on the basis that gay men, as a group, had a reasonable fear of persecution as they were visible targets within their society based on their shared characteristics.

As *Tenorio* was one of the first cases to expressly consider both the internal and external perspectives — developed in *Acosta* and *Sanchez-Trujillo* respectively — it subsequently became increasingly unclear whether an applicant had to satisfy the internal *ejusdem generis* approach, or the external social visibility approach, or both. This will be discussed in more detail below.

B. The Internal and External Approaches to Qualification for the Particular Social Group Convention Ground

The checklists and standards developed in *Acosta*, *Sanchez-Trujillo*, *Ward*, and *Tenorio* have all influenced contemporary asylum law in relation to claims based on sexual orientation and gender identity. Two main judicial approaches can be traced through the majority of the aforementioned court rulings. The first approach is that of the *ejusdem generis* — or immutability — approach, which examines whether the group is united by a characteristic which is so fundamental to human dignity that a person should not be required to forsake it.³¹ As noted above, *Acosta* was the first decision to adopt this internal consideration. Sex, ethnicity, historical fact or association, and occupation or status are all examples of immutable characteristics. Using this approach, the courts must test the group to ascertain whether or not the group is united by the following: an innate or unchangeable characteristic,³² a past temporary or voluntary status that cannot be changed due to its historical significance,³³ or a characteristic so fundamental to human dignity that a person should not be required to 'forsake that association'.³⁴

The second judicial approach determines whether the particular social group is perceived as a group within society. The Ninth Circuit in *Sanchez-Trujillo* was the first to consider this external approach, an approach that has two limbs. The first limb focuses on the group itself and examines whether the group is united by sharing a common characteristic that makes its

30. *ibid.*

31. 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' (HCR/GIP/02/02, May 2002) <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>> accessed 25 September 2011, para 6.

32. *Acosta* (n 14) 233.

33. *Ward* (n 22) 692.

34. *ibid.*

members cognisable, or sets them apart from society.³⁵ If this limb is satisfied, a person's status in society as a member of a group must be connected, in a concrete way, to that person's fear of persecution in their country of origin. The UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* confirms the importance of the second limb by stating that 'mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status'.³⁶ Only in special circumstances will mere membership be a sufficient ground for fearing persecution.³⁷ A relatively recent example of the operation of this external approach was in 2009, in a decision of the National Asylum Court in France. Here, the Court ruled that homosexuals in Tunisia were considered to be identifiable as a group, a group whose members would automatically fear and be subjected to persecutory acts for reasons of a shared characteristic.³⁸

The debate between the internal and the external approaches is of fundamental importance when considering their applicability to sexual orientation or gender identity applicants. While human rights organisations argue that mere identification as a sexual minority should be enough to establish credibility, many courts and decision-making bodies have required applicants to show that they are viewed by society as a member of this group. Indeed, this additional requirement may reflect the general culture of disbelief that surrounds the area of asylum.³⁹ The social visibility test creates another obstacle in satisfying membership to a particular social group. This can be problematic for members of a sexual minority who have concealed their sexual orientation or gender identity in their country of origin, or for applicants who do not reflect typical Western stereotypes of the particular group.⁴⁰ The following section examines these difficulties in the context of supra-state and domestic legislation in Ireland and the United Kingdom and analyses the impact of the legislation on the approaches taken by each country's decision-making bodies.

35. See further, James C Hathaway and Michelle Foster, 'Membership of a Particular Social Group Discussion Paper No. 4 (Advanced Refugee Law Workshop International Association of Refugee Law Judges, Auckland, New Zealand, October 2002)' (2003) 15 *International Journal of Refugee Law*, 477, 482-84.

36. 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' (Geneva, December 2011) 17.

37. *ibid.*

38. *Mr. C*, CNDA, 7 July 2009, No 634565, MC.

39. cf Carol Coulter, 'Asylum appeal reform would cut costs, says ex-judge' *Irish Times* (Dublin, 14 September 2011) 4 (referring to former Irish Supreme Court judge Catherine McGuinness who advocated for an independent and transparent appeals system to change the 'culture of disbelief' which exists).

40. See further, UK Lesbian and Gay Immigration Group, 'Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum' [2010] <<http://www.scribd.com/doc/29855294/Failing-the-Grade>> accessed 30 September 2011.

III. SUPRA-STATE AND DOMESTIC LEGISLATION AND ITS IMPACT ON THE UNITED KINGDOM AND IRELAND

As a result of the two conflicting approaches for the qualification of a group as a particular social group, neither approach was ever uniformly implemented by subsequent courts or lawmakers. Some interpreted the above line of cases, and their resulting approaches, as affording applicants with discretion as to which approach to invoke. For example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, referred to above, allows for either approach to be applied: the group either ‘shares a common characteristic’ or the group is ‘perceived as a group by society’.⁴¹ Others declined to afford applicants with the same level of discretion and prescribed either a particular approach or, in some cases, required applicants to satisfy both approaches. The following sections will examine the effect of the European Council Directive 2004/83/EC, known as the Qualification Directive,⁴² and will assess how decision-makers in both Ireland and the United Kingdom have implemented the Directive.

A. The Qualification Directive and its Transposition into Irish and UK Law

The Council of Europe provided guidance on the qualification of refugees and beneficiaries of subsidiary protection through supra-state legislation as part of the establishment of the Common European Asylum System.⁴³ This supra-state legislation outlined the European Union’s interpretation of the particular social group Convention ground and specifically 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’.⁴⁴ The Qualification Directive entered into force in October 2004 to be transposed into member states’ laws by October 2006.⁴⁵ However, this directive was never intended to supersede the Geneva Convention; in fact, recital three of the Directive ensures that the Convention remains the governing law. Instead, the Directive merely sought to codify the existing interpretations of the Convention.⁴⁶

41. UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (n 36) 85.

42. Council Directive 2004/83/EC of 29 April 2004 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 [2004] OJ L 304/12.

43. See generally, Olga Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (TMC Asser Press 2007) (analysing and evaluating the Common European Asylum System).

44. Qualification Directive 2004/83/EC (n 42) Article 10.1(d).

45. *ibid* Article 38.

46. *ibid* recital (3) (‘The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees’).

It is important to note, however, that the European Parliament approved the European Commission's proposal to amend the Qualification Directive in July 2011, and the new text was published in December 2011.⁴⁷ Although many areas of the 2004 Directive remain unchanged, the new Directive does amend the previous definition of a particular social group and states that 'gender identity ... shall be given due consideration for the purposes of determining membership of a particular social group'.⁴⁸ Both Ireland and the United Kingdom, however, have opted out of the amended Directive.⁴⁹ While both countries continue to be bound by the Qualification Directive in its original form, the Council may decide, on a proposal from the Commission, to terminate Ireland's and the United Kingdom's participation in the prior measure if their nonparticipation in the 2011 amendment makes the rules 'inoperable' for the European Union or for other member states.⁵⁰

In contrast to the UNHCR's position (allowing either approach), the Qualification Directive appears to adopt a more rigid interpretation. Under Article 10.1(d) of the Qualification Directive, a group shall be considered to form a particular social group where, in particular:

members of that group 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, *and* that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society ...⁵¹

EU member states were required to transpose the general objectives of the Qualification Directive into their law and, as with all EU directives, they were granted a limited discretion to transpose the 'either/or' or 'both' requirement for identification and social visibility as outlined above. A strict

47. Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

48. *ibid* Article 10.1(d).

49. 'Qualification Directive: Latest Developments' (*European Council on Refugees and Exiles*) <<http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html>> accessed 28 May 2012. Ireland and the United Kingdom have departed from European Union norms in the past in areas such as border control. See example, Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland [1997] OJ C 340/97.

50. Steve Peers, 'The revised directive on Refugee and Subsidiary Protection' [2011] Statewatch News Online <<http://www.statewatch.org/analyses/no-141-qualifications-directive.pdf>> accessed 30 July 2011; See also, 'Qualification Directive approved by European Parliament' (*European Migration Network Ireland*, 27 October 2011) <<http://www.emn.ie/index.jsp?p=100&n=105&a=163>> accessed 28 May 2012.

51. Qualification Directive 2004/83/EC (n 42) Article 10.1(d) (emphasis added).

reading of the Directive would necessitate *both* tests to be satisfied under domestic law in order to justify protection under the Directive. However, some countries, including Ireland, adopted a more liberal interpretation and gave applicants the opportunity to satisfy *either* test under domestic law. This is reflected in Statutory Instrument No. 518 of 2006 which only requires applicants to satisfy *either* that they ‘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’ *or* that the ‘group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’.⁵² As discussed below, however, in practice Irish courts have required applicants to satisfy both tests.

In the United Kingdom, the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006 requires that applicants satisfy *both* aspects of the Qualification Directive. Regulation 6.1(d) requires that the members of a particular social group ‘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’ *and* that the ‘group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’.⁵³

The importance of the approach approved by the Refugee or Persons in Need of International Protection (Qualification) Regulations (2006) was reaffirmed recently, courtesy of the UK Supreme Court’s decision in *HJ (Iran) and HT (Cameroon) v SSHD*. This decision resulted in the UK Border Agency publishing *Sexual Orientation Issues in the Asylum Claim*, which states that where the particular social group Convention ground is invoked in cases considering persecution on grounds of sexual orientation or gender identity, the decision-maker must rely on the definition of what constitutes a particular social group in regulation 6.1(d).⁵⁴ Thus, the need for applicants in the United Kingdom to satisfy both approaches appears firmly rooted in UK asylum law.

In practice, decision-makers in both Ireland and the United Kingdom have sought to restrict the definition of a particular social group by requiring applicants to show a degree of social visibility in addition to establishing membership to a particular social group. For example, in Ireland, the Refugee

52. European Communities (Eligibility for Protection) Regulations 2006, SI 2006/518, section 10(1)(d).

53. Persons in Need of International Protection (Qualification) Regulations 2006, regulation 6.1(d).

54. UK Border Agency, ‘Sexual Orientation Issues in the Asylum Claim’ <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary>> accessed 25 June 2012, 8.

Appeals Tribunal has often expected gay applicants to show their involvement in the gay community in Ireland by bringing documentary evidence to that effect, such as photographs of themselves actively participating in Lesbian, Gay, Bisexual, and Transgender ('LGBT') groups.⁵⁵ Similarly, one practitioner in the United Kingdom noted that when presenting to a judge, they encourage their client to bring friends from the gay community and referred to it as a 'pink parade'.⁵⁶ While this is understandable in the United Kingdom, as their laws require applicants to satisfy both the internal and external conditions, Ireland's laws seemingly afford applicants with the option to satisfy the internal characteristics of the group exclusively.

Therefore, in requiring that applicants demonstrate their group's social visibility, the Qualification Directive, UK legislation, and legal practice in both Ireland and the United Kingdom all fail to take account of *Acosta's ejusdem generis* approach, whereby those who are subjected to persecution due to a characteristic they cannot or should not be required to change are members of a particular social group and eligible for protection. This approach does not restrict eligibility based on an inherently subjective analysis of the member's or the group's visibility within society. This may be viewed as an additional barrier for sexual minority refugees, which reflects the frequent negative cultural climate in respect of asylum seekers in the United Kingdom and Ireland and, indeed, in most of Western society.⁵⁷

Furthermore, gender identity applicants in Ireland and the United Kingdom are at a particular disadvantage compared to sexual orientation applicants. This is as the 2004 Qualification Directive only mentions sexual orientation as a potential particular social group under the Convention. No such express provision is made for gender identity applicants; instead, the Directive merely states that '[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'. As noted above, the position of gender identity applicants was altered by the 2011 Directive as gender identity is now expressly included in the definition of a particular social group. Given Ireland's and the United Kingdom's rejection of the amended Directive, gender identity applicants applying for protection in these countries may be adversely affected. Indeed, the historic omission of gender identity applicants has been a point of contention among human rights groups, notably the International Lesbian, Gay, Bisexual, Trans and Intersex Association Europe and the European Council on Refugees and Exiles.⁵⁸

55. Tribunal 1, appendix.

56. UKP1, appendix.

57. See example, Annika Howard, 'Negative press gives asylum seekers a bad name' (*Innovations Report*, 10 November 2006) <http://www.innovations-report.com/html/reports/social_sciences/report-73783.html> accessed 10 May 2012.

In Ireland, sexual orientation is explicitly mentioned as an example of a particular social group under section 1 of the Refugee Act 1996⁵⁹ and, as mentioned above, sexual orientation is included in the Qualification Directive. But, unlike sexual orientation, Irish law does not include gender identity as an example of a particular social group and so those with fears specific to gender identity do not fit as clearly within the Qualification Directive, or within Irish law. Compounded with this, the Office of the Refugee Applications Commissioner's guidance on sexual minority claims is not available to the public. Therefore, it is unknown to what extent applicants that fear persecution on the basis of their gender identity are included in the particular social group Convention ground or any other Convention ground. The United Kingdom Border Agency's asylum policy instructions do, however, refer to gender identity. In debunking the notion that applicants should use their discretion in order to avoid persecution,⁶⁰ the Border Agency approved the UNHCR's *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. According to this document, '[a] person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution' and applications based on sexual orientation and gender identity should not be rejected merely on such grounds.⁶¹

B. Case Law in Ireland and in the United Kingdom

The implementation of the particular social group Convention ground in both Irish and British courts has been slow when compared to other countries. The United Kingdom, for instance, took no note of the internationally accepted interpretations of the Geneva Convention until 1999. Therefore, an analysis of the law in practice involves many relatively recent cases.

In Ireland, moreover, asylum hearings and their judgments are not available to the public; only legal practitioners acting on behalf of a client may access past decisions, and still only those related to their particular claim.⁶²

58. See examples: European Council on Refugees and Exiles, 'The Impact of the EU Qualification Directive on International Protection' (European Legal Network on Asylum 2008) <<http://www.unhcr.org/refworld/docid/4908758d2.html>> 25 September 2011; Mark Bell, 'Protecting LGBT People Seeking Asylum: Guidelines on the Refugee Status Directive' [2005] International Lesbian, Gay, Bisexual, Trans and Intersex Association Europe <<http://www.equalrightstrust.org/view-subdocument/index.htm?id=492>> accessed 20 June 2012.

59. Refugee Act 1996, section 1 ("membership of a particular social group" includes ... membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation').

60. UK Border Agency, 'Sexual Orientation Issues in the Asylum Claim' (n 54) 12.

61. *ibid.*

62. Refugee Appeals Tribunal, 'Archive Information' (*Refugee Appeals Tribunal Decisions Archive*) <<http://www.refappeal.ie/website/rat/ratweb.nsf/SplashPageForROMDA.html>> accessed 3 June 2011 ('Access to the [Refugee Appeals] Tribunal's Decisions Archive is available to Registered Users of the Archive and access is confined to appeal applicants' legal representatives').

Therefore, an analysis of the practices in Ireland could only be achieved by interviewing those involved with the various cases.⁶³ This research method was supplemented by observation of a selected proceeding before the Refugee Appeals Tribunal. The interview questions requested information regarding the practitioners' use of the Convention grounds when representing sexual minority applicants and key problems they encountered. The questions also gauged the experiences with establishing credibility in relation to asylum applicants in general and sexual minority asylum seekers specifically, experiences with what constitutes persecution under the Convention, and experiences with the concepts of discretion and internal relocation.

i. The United Kingdom

In the 1990s, courts in the United Kingdom held that homosexuals fell outside the scope for the particular social group Convention ground on the basis that they were not a minority group that possessed characteristics that were historical or cultural by nature.⁶⁴ Decisions in the United Kingdom before 1999 were not based on the existing international framework mentioned in the discussion above. Instead, decisions were merely based on the risk posed to an applicant if returned to their home country, or in line with the principle of non-refoulement⁶⁵ and its potential implications with the prohibition of inhumane or degrading treatment under Article 3 of the European Convention on Human Rights. As a result, applicants were more commonly given the lesser status of 'exceptional leave to remain' rather than refugee status or a form of subsidiary protection.⁶⁶ The courts in the United Kingdom did not begin to view sexual orientation and gender applicants as persons in need of protection until the joint appeal of *Shah and Islam*⁶⁷ in 1999, despite the fact that courts in America, Australia, Canada, and New Zealand were implementing this framework since the late 1980s.

63. In total, eleven practitioners were interviewed: three barristers practicing in Ireland (one of whom recently practiced in the United Kingdom); four solicitors practicing in Ireland; one case worker (who recently practiced in the United Kingdom); and three barristers in the United Kingdom. See further, appendix.

64. See further, Derek McGhee, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s' (2001) 14 *Journal of Refugee Studies* 20.

65. The principle of non-refoulement refers to Article 33.1 of the Convention (n 3):

[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever 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.

66. *Millbank* (n 6) 118.

67. *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* [1999] 2 AC 629.

The House of Lords in *Shah and Islam* finally addressed, in part, what constituted a particular social group. The principal question was whether or not the two female Pakistani appellants — who were forced to leave their husbands and homes for fear of being falsely accused of adultery — were members of a particular social group within the meaning of Article 1A(2) of the Geneva Convention. The Court determined that women were unprotected by the Pakistani State and that discrimination against women was found to be ‘partly tolerated by the State and partly sanctioned by the State’.⁶⁸ The Court held that both women could be classified as members of a particular social group under the Geneva Convention. The majority, however, disagreed among themselves as to which particular group was applicable; one faction determined that the applicants belonged to the wider social group of women in Pakistan, while another faction decided that the women belonged to a narrower social group of Pakistani women against whom there were imputations of sexual misconduct. While noting the applicability of *Sanchez-Trujillo*, Lord Steyn opted to follow the ‘less restrictive interpretation’⁶⁹ offered by *Acosta* and *Ward*, and quoted La Forest J’s conclusion that a social group ‘could include individuals fearing of persecution on “such bases as gender, linguistic background and sexual orientation”’.⁷⁰ Lord Hoffman also reiterated the *Acosta* reasoning by interpreting persecution on account of membership of a particular social group to mean persecution ‘that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic’.⁷¹

The House of Lords broadened the scope of the particular social group Convention ground in the context of gender discrimination when it considered the 2006 joint appeal of *K and Fornah*.⁷² The second applicant, Fornah, contended that the persecution she would have suffered — female genital mutilation — had she not fled her country was based on her membership of a particular social group, namely women in Sierra Leone. The Court had no difficulty in classifying female genital mutilation as persecution and accepted that women in Sierra Leone were a particular social group as they were perceived within society as a ‘distinct group’.⁷³

Both *Shah and Islam* and *K and Fornah* support the nexus between gender-based persecution and the particular social group Convention ground. In the same year as *K and Fornah*, the Court of Appeal addressed the relationship between sexual orientation and the particular social group Convention

68. *ibid* 635.

69. *ibid* 640.

70. *ibid* 652.

71. *ibid* 641.

72. *K and Fornah v Secretary of State for the Home Department* [2006] UKHL 46.

73. *ibid* [31].

ground. In acknowledging the possibility that sexual orientation could constitute a particular social group, the Court in *J v SSHD*⁷⁴ disagreed with the Asylum and Immigration Tribunal which had previously ruled that J — a homosexual — faced relatively little harm in his home country of Iran. The Court based its rejection on the legislative penalties imposed upon sexual minorities under Iranian law⁷⁵ and ruled that because the Tribunal failed to fully appreciate the discretion exercised by J while living in Iran, the case should be remitted for reconsideration. The possible nexus between sexual orientation applicants and the particular social group Convention ground was confirmed by the Asylum and Immigration Tribunal in *AJ*⁷⁶ where it ruled that ‘practising homosexuals in Afghanistan’ could constitute a particular social group in light of the potentially serious penalties under Afghan law for homosexuality.⁷⁷

The most important judgment to date on the United Kingdom’s interpretation of the particular social group’s applicability to sexual minority applicants was issued by the UK Supreme Court in 2010. In *HJ (Iran) and HT (Cameroon) v SSHD*, two gay men from Iran⁷⁸ and Cameroon (respectively) appealed a lower-court decision that had refused them asylum. Lord Hope stated that the particular social group was defined by the immutable characteristics of its members.⁷⁹ He also noted that there was no universally accepted criteria regarding the nexus between sexual orientation applicants and the particular social group Convention ground.⁸⁰ Both Lord Hope and Lord Roger attempted to remedy the lack of an accepted approach by proposing two separate but very similar tests to be applied by fact-finding tribunals in the United Kingdom.⁸¹ Although the tests specifically relate to gay applicants, they can be extended to encompass all sexual minority applicants who are claiming a nexus with the particular social group Convention ground. The combination of the two tests’ requirements can be summarised as follows:

1. A tribunal must first ascertain if the applicant is indeed a member of the particular social group or if they are suspected of being a member by potential persecutors in their country of nationality.

74. *J v SSHD* (n 7).

75. *ibid* [3], [4].

76. *AJ (Risk to Homosexuals) Afghanistan CG* [2009] UKAIT 00001.

77. *ibid* [40].

78. The Iranian man in this case was the same applicant in *J v SSHD* (n 7). As mentioned above, the Court of Appeal remitted the case for reconsideration by the Asylum Immigration Tribunal. The Tribunal reached the same result and refused J’s application. Much of the UK Supreme Court’s judgment in this case was spent clarifying and refining the tests used by the Court of Appeal in 2006 and again in 2009.

79. *HJ and HT* (n 9) [11].

80. *ibid* [30].

81. *ibid* [35], [82].

2. A tribunal must then determine what would happen to the applicant should they return to their country of origin. The applicant will not be expected to conceal any aspect of their sexual orientation.
3. The standard for protection is to have a well-founded fear of persecution. The Convention was not designed to reform the level of rights in an applicant's country of origin. A tribunal should not focus on the restrictions which exist in the applicant's country of origin compared to the country they are applying to.
4. If the applicant conceals aspects of their sexual orientation, a tribunal should consider why this is so. If the reason behind the concealment is in response to social pressures — e.g. not wanting to distress their parents — and not because of a fear of persecution, the claim for asylum should be rejected.
5. Finally, a tribunal must believe that the applicant has a well-founded fear of persecution.

In applying their tests to the facts of the two cases, the UK Supreme Court ruled in favour of the two applicants and granted both appeals.

This case has had a profound effect on case law and decision-making in the United Kingdom and abroad. Both the British and the Irish practitioners interviewed all cited this case as the most recent decision (at the time of interview) to be relied upon in cases dealing with sexual orientation. The case's confirmation of immutable characteristics as a defining feature of a particular social group and its clear rejection of the 'discretion test' constituted a significant shift away from social visibility as a necessary feature of a particular social group. Courtesy of this judgment, decision-makers cannot expect applicants to conceal their sexual orientation. Therefore, decision-makers should no longer focus on whether the group is a visible group within society and should instead focus on the persecution which members of the group endure while living an open life.

ii. Ireland

As Ireland's asylum process developed comparatively later than the United Kingdom's, it had the potential to develop a stronger dialogue with international human rights norms and to engage with expanding refugee law practice. Unfortunately, as noted above, decisions of the Refugee Appeals Tribunal are not available to the public, with the exception of a handful of reported judgments each year. Therefore, the exact status of contemporary Irish asylum law remains undefined.

Three barristers and two solicitors interviewed stated that they have represented clients who invoked the particular social group Convention

ground. One solicitor noted, however, that he typically invoked more than one ground in support of the particular social group where there was an overlap with political or religious beliefs.⁸² Another solicitor stated that in fifty per cent of his cases, sexual orientation was secondary to another reason for persecution, usually political beliefs.⁸³ The particular social group ground was, however, identified by the participating legal practitioners as the most developed or applicable ground in cases relating to sexual orientation or gender identity. This is supported by a 2011 decision in which the Office of the Refugee Applications Commissioner granted asylum at first instance to a sexual minority stating that, '[t]he applicant contends that he has a well-founded fear of persecution in his country of origin due to his sexual orientation, which would fall under the remit of membership of a particular social group'.⁸⁴

The overall response of the legal representatives interviewed echoes a determination made by the Refugee Applications Commissioner — reiterated by Herbert J in *E v MJELR and RAC*⁸⁵ — that it is settled 'that a woman of homosexual orientation could properly claim to be a "member of a particular social group", within the definition of a "refugee", contained in Section 2 of the Refugee Act 1996, (as amended)'.⁸⁶ All published decisions where an application was submitted on grounds of sexual orientation or gender identity have invoked, at least, the particular social group ground.

The above case law fails to resolve the lack of clarity surrounding the internal and external debate. In practice, it would seem that social visibility or the external requirement will gradually become redundant since the ruling in *HJ and HT v SSHD*. However, the existing legislation and previous rulings would suggest otherwise. In Ireland, the position is even less clear, despite the apparent flexibility given in the Qualification Directive's transposition into Irish law. While there is very little evidence in Ireland from which to draw conclusions on this point, the issue of social visibility was discussed in the interviews in terms of the applicant's ability to act discreetly. Most practitioners working in Ireland and the United Kingdom stated that decision-makers assume that 'credible' applicants will exhibit stereotypical Western characteristics. This can also be seen from Herbert J's ruling in *E* where he

82. IP3, appendix.

83. IP5, appendix.

84. P1, appendix.

85. *E v Minister for Justice, Equality and Law Reform* [2008] IEHC 137.

86. *ibid.* However, in this particular case the lesbian applicant, a Nigerian woman, was denied protection under the Convention. This was despite suffering an arson attack in which her house was burned down and her partner killed, and also suffering numerous assaults from people and police in her district. The denial was upheld by the High Court who agreed with the Refugee Applications Commissioner's finding that the applicant was not identifiable as a lesbian within society and that she failed to demonstrate that state authorities and agencies in Nigeria were unwilling to assist her.

upheld the denial of Convention protection because, *inter alia*, the applicant supposedly wasn't identifiable in her society as a lesbian.⁸⁷ This reaffirms the potential risk that those who are more overtly 'Western' in their sexual or gendered expressions would be able to successfully engage the social visibility principle and gain protection under the Geneva Convention while other just as credible applicants would not.

IV. THE PARTICULAR SOCIAL GROUP CONVENTION GROUND: LIMITING OR BEST DEVELOPED OPTION FOR CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY IN IRELAND AND THE UNITED KINGDOM?

The particular social group is not the only Convention ground which can apply to sexual orientation and gender identity applicants. Many organisations refer to the applicability of the other four Convention grounds listed in Article 1(A)2. For example, the UNHCR's *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* acknowledges that Convention grounds are not 'mutually exclusive and may overlap'.⁸⁸ For sexual orientation and sexual minority applicants, the potential to overlap is made all the more likely given the lack of an official, exclusive category pertaining to their claims. Indeed, it is worth noting that the applicant in *Ward* was refused protection under the particular social group Convention ground and was instead granted protection under the political opinion ground.⁸⁹

A. The Lack of a Nexus Between the Particular Social Group Convention Ground and Sexual Minority and Gender Identity Applicants

Despite the development of different approaches and the relatively substantial amount of case law supporting the inclusion of sexual minorities within the particular social group ground, no official category exists for claimants fearing persecution on the basis of sexual orientation or gender identity. Discussing gender-based claims, Silenzi Cianciarulo and David note that this 'void leaves it up to advocates and adjudicators to tie gender-based asylum claims to one of the five protected grounds'.⁹⁰ This particular review of practices in Ireland and the United Kingdom suggests that practitioners

87. *E v MJELR* (n 85).

88. UN High Commissioner for Refugees, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (Protection Policy and Legal Advice Section Division of International Protection Services, Geneva, 21 November 2008) <<http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>> accessed 29 May 2012, para 29.

89. *Ward* (n 22) 750.

90. Marisa Silenzi Cianciarulo and Claudia David, 'Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women' (2009) 59 *American University Law Review* 337, 354.

generally do not look beyond the particular social group ground in sexual minority cases, despite potential benefits discussed below. One barrister, who recently began practicing in Ireland after five years practicing in the United Kingdom, noted that the application of the particular social group was a ‘non-issue’, meaning that she always invoked this ground and could not identify any benefits to using any of the other four grounds in sexual minority or gender identity cases.⁹¹ Only one of four British practitioners stated that they might consider other grounds in a sexual minority case.⁹²

Despite these existing practices, the need to specify the limits of the particular social group ground was noted by Gummow J of the High Court of Australia in *A v Minister for Immigration & Ethnic Affairs*.⁹³ Here, Gummow J maintained that:

[s]uch propositions [that the terms of Article 1 of the Convention shirk specificity] appear to abandon the quest for standards by which administrative decisions may determine the fate of individuals ...⁹⁴

However, the opposite view was advanced by Kirby J in the same case. Kirby J favoured eschewing defining or framing the social group and advocated for a case-by-case approach:

courts and agencies should turn away from attempts to formulate abstract definitions. Instead, they should recognise ‘particular social groups’ on a case by case basis. This approach ... accepts that an element of intuition on the part of decision-makers is inescapable, based on the assumption that they will recognise persecuted groups of particularity when they see them ... The development and expression of such categories ... is the province of administrators and review tribunals with experience of refugee claims.⁹⁵

In the absence of a comprehensive framework, decision-makers applying the particular social group ground should continue to follow the UNHCR’s *Guidelines on International Protection*⁹⁶ and bear the following conclusions in mind:

91. UKP1, appendix.

92. UKP4, appendix.

93. *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4.

94. *ibid* [160].

95. *ibid* [298]-[301].

96. 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’ (n 31).

1. a social group cannot be defined *exclusively* by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group);⁹⁷
2. the term ‘membership of a particular social group’ should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms;⁹⁸ and
3. the Convention grounds are not mutually exclusive. For example, a claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on religious conviction opposed by the State), or membership in a particular social group.⁹⁹

Given the notable absence of an official nexus between sexual orientation and gender identity applicants and the particular social group Convention ground, the fact that it remains the most utilised Convention ground in practice suggests a definite reluctance to engage with other grounds in sexual orientation or gender identity cases — a reluctance which can be detrimental in certain cases.¹⁰⁰

B. Considering the Nexus Between Sexual Orientation and Gender Identity and the Other Four Convention Grounds

Without a clear definition or framework, it is perhaps questionable in some cases whether the particular social group Convention ground should be invoked ahead of the other four Convention grounds, particularly the religion ground or political opinion ground. Indeed, the utilisation of the particular social group ahead of the better developed Convention grounds may be indicative of practitioners’ unfamiliarity with the commonalities between sexual orientation and gender identity and the other Convention grounds.

97. *ibid* para 2.

98. *ibid* para 3.

99. *ibid* para 4.

100. cf Silenzi Cianciarulo (n 90) 355 (noting that the lack of specific protection has been detrimental in cases involving battered women applying for asylum).

This unfamiliarity is even more likely in Ireland because, in addition to the privacy of asylum court proceedings, Ireland does not provide any publicly accessible guidelines related to sexual orientation or gender identity asylum claims.

The United Kingdom Border Agency, however, publishes asylum policy instructions which discuss each Convention ground in relation to sexual orientation and gender identity.¹⁰¹ These instructions remind decision-makers that the applicant does not have to identify a specific Convention ground and that they may in fact invoke more than one ground as long as they establish a well-founded fear of persecution.¹⁰² While the United Kingdom Border Agency discusses the particular social group as the most relevant and the most frequently relied upon Convention ground in cases related to sexual orientation and gender identity, the instructions also highlight the potential applicability of race, religion, nationality, and political opinion grounds.¹⁰³

i. Race

While clearly not specific to the sexual minority demographic, the Border Agency purports that race may nonetheless be a component in the applicant's fear of persecution. Instances where race may be relevant are in cases where a member of a particular racial group becomes the target of persecution by their own racial group on the basis of their sexual orientation or gender identity.¹⁰⁴

ii. Religion

The Border Agency discusses religion as an applicable Convention ground for sexual orientation or gender identity asylum claims where transgression from a religious norm by way of sexual behaviour or expressions of gender identity may be 'seen as an affront to religious beliefs in a given society'.¹⁰⁵ As noted by the European Legal Network on Asylum, those responsible for enforcing compliance with religious doctrine may be state or private actors,¹⁰⁶ and anyone who transgresses these norms may be at risk of persecution. The UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* notes that Kurdish homosexuals may be sub-

101. UK Border Agency, 'Sexual Orientation Issues in the Asylum Claim' (n 54).

102. *ibid* 8.

103. *ibid*.

104. *ibid*.

105. *ibid* 9.

106. European Council on Refugees and Exiles, 'ELENA Research paper on Sexual Orientation as a Ground for Recognition of Refugee Status' [1997] <<http://www.unhcr.org/refworld/docid/3decd1fa4.html>> accessed 29 September 2011, 2.

jected to 'honour killings', since homosexuality and gender transgression are considered to be in conflict with religious and social norms in the Kurdistan region.¹⁰⁷

iii. Nationality

When outlining the reasons for refugees to apply for asylum under the nationality Convention ground, the Border Agency refers back to regulation 6.1(c) of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006. Regulation 6.1(c) states that:

the concept of nationality shall not be confined to citizenship or lack thereof but shall include, for example, membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.

Therefore, nationality, in accordance with the Regulations, may overlap with race and, although neither ground is specific to sexual orientation or gender identity applicants, they may be relevant in explaining why an individual fears persecution. Nationality may be an applicable Convention ground where applicants fear persecution from within their particular ethnic group even in countries where minority sexual orientation in majority groups does not attract persecutory actions.¹⁰⁸ Nationality could therefore apply to the Kurdish community in Iraq as well.

iv. Political Opinion

The final remaining Convention ground, political opinion, may be invoked where, for example, the political opinions held or perceived to be held by applicants are in contradiction with those held by the state or by the governmental majority. For example, President of Zimbabwe, Robert Mugabe, has traditionally said that homosexuality goes against human nature and transgressions from heteronormativity would not be tolerated in Zimbabwe.¹⁰⁹ An applicant from Zimbabwe who holds the opinion that they are a member of a sexual minority and who wishes to exercise their right to identify as such

107. See further, UN High Commissioner for Refugees, 'Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers' [2007] <<http://www.unhcr.org/4a2640852.pdf>> accessed 29 May 2012.

108. UK Border Agency, 'Sexual Orientation Issues in the Asylum Claim' (n 54) 9.

109. Oliver Philips, 'Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa' <<http://www.ids.ac.uk/files/dmfile/Globalgay.pdf>> accessed 1 June 2012, 2-3.

would, therefore, hold an opinion contrary to the ruling government. In *LZ (homosexuals) Zimbabwe*,¹¹⁰ the Upper Tribunal noted that ‘President Mugabe’s posturing on the issue and his identification of any other view as alien, colonial and western made it practically impossible for anyone publicly to take a more liberal and tolerant position’.¹¹¹

While exclusive reliance on the particular social group ground is not always detrimental, the failure to consider additional grounds — which may create a stronger case by drawing attention to the other reasons why sexual minorities are at risk of persecution — could adversely affect many applications for asylum.

V. CONCLUSION

As noted at the beginning of this article, the particular social group ground was likely designed as a ‘catch-all’ provision with no particular type of applicant in mind. Therefore, the reluctance to develop a specific framework identifying the protected groups is understandable. However, the existence of a concrete and official framework would greatly assist applicants in applying for protection.

The existence of a structured framework may rectify the current problems that applicants face when applying for protection as a particular social group. The first of these problems is the slower acknowledgment of gender identity applicants as credible refugees compared to the growing acceptance of sexual minority applicants. Although the term ‘gender identity’ is included in the amended Qualification Directive, there is no universal agreement whether applicants seeking protection on the basis of gender identity fall within the scope of the particular social group. If an official, universal framework existed and gender identity was included as a protected group, applicants seeking protection under this nexus would, *prima facie*, be more likely to succeed.

The second of these problems, the internal/external debate, would also benefit from the establishment of a framework — one which would clearly outline to decision-makers which approach to follow. The UK Supreme Court’s ruling in *HJ and HT v SSHD*, particularly Lord Hope’s and Lord Roger’s tests, would serve as useful models that could be implemented on a wider scale.

Finally, the creation of an official framework for the particular social group may empower sexual minority and gender identity applicants to also

110. *LZ (homosexuals) Zimbabwe* CG [2011] UKUT 00487 (IAC).

111. *ibid* [84].

apply for protection under the other Convention grounds and would prevent possible unfair situations where applicants conforming to Western stereotypes of sexual minorities may succeed ahead of other applicants.

VI. APPENDIX

A. Practitioners

The Republic of Ireland IP = Irish Practitioner		The United Kingdom UKP = United Kingdom Practitioner	
IP1	Solicitor	UKP1*	Barrister
IP2	Barrister	UKP2*	Solicitor
IP3	Solicitor	UKP3	Barrister
IP4	Barrister	UKP4	Barrister
IP5	Solicitor		
IP6	Barrister		
IP7	Solicitor		

*Practiced in the United Kingdom until 2011 and then began to practice in Ireland.

B. Unreported Irish Cases

Code(s)	Source	Description
DS1.1, DS1.2	Solicitors' Firm	Access to two unreported and redacted cases
—	—	—
Judicial Review 1	Irish Practitioner	Judicial Review application to High Court
—	—	—
Tribunal 1	Refugee Appeals Tribunal	Observer at Tribunal
—	—	—
P1	Access directly through participant	Unreported first instance decision