

Asylum Rights of LGBTI Refugees from Ghana and the Power of the Asylum Status Adjudicator

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I. INTRODUCTION

Each year, individuals are forced to flee from their native homes to seek refuge in other countries out of fear that they will otherwise be persecuted for their sexual orientation or gender identity.¹ Among the many lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees who rely on the asylum process for protection from torture are those from Ghana, where citizens are prohibited, by law, to engage in same-sex conduct.² Although sex-based persecution is a long-established tragedy that is inherent to many countries, international tribunals have recently

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1. U.N. HIGH COMM’R FOR REFUGEES, THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM-SEEKERS AND REFUGEES DISCUSSION PAPER 3 (2010), available at <https://www.refworld.org/pdfid/4cff9a8f2.pdf> [hereinafter THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES].

2. See *Abass v. Sessions*, 731 F. App’x 646, 648 (9th Cir. 2018); see also *X, Re*, 2019 CarswellNat 8387, 2019 CanLII 124102 (CA IRB).

experienced an increase in the number of claims made by LGBTI asylum-seekers, which has provoked policymakers around the world to re-examine asylum policies as they relate to sexual orientation and gender identity.³ International human rights law, which prohibits discrimination on the basis of sexual orientation and gender identity,⁴ offers a comprehensive approach for determining whether an individual qualifies for asylum protection.⁵ Thus, while the legal guidelines of such groups as the United Nations High Commissioner for Refugees strongly favor protection for LGBTI asylum-seekers,⁶ refugee status adjudicators maintain broad discretion in making ultimate asylum determinations.⁷ Due to such discretion, asylum judgments made among and within several countries tend to be highly variable.⁸ For example, while several United States court decisions provide a systematic framework for evaluating sex-based asylum claims, including those filed by Ghanaian refugees,⁹ disparate asylum determinations made within the Department of Justice suggest that judicial standards are being applied inconsistently among adjudicators.¹⁰

II. GHANA LAW AND CUSTOMS INVOLVING LGBTI CITIZENS

Under Section 104 (1)(b) of Ghana's Criminal Offenses Act (Section 104), engaging in consensual "unnatural carnal knowledge" constitutes a criminal offense that carries a sentence of up to three years

3. U.N. HIGH COMM'R FOR REFUGEES ASYLUM LAWYERS PROJECT, UNHCR'S VIEWS ON ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION AND/OR GENDER IDENTITY 1 (2016), available at <https://www.unhcr.org/5829e36f4.pdf> [hereinafter REFUGEES ASYLUM LAWYERS PROJECT].

4. G.A. Res. 2198 (XXI), U.N. Convention and Protocol Relating to the Status of Refugees 3 (2010), available at <https://www.unhcr.org/en-us/3b66c2aa10>.

5. *See id.*; REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 4.

6. *See generally* THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1; REFUGEES ASYLUM LAWYERS PROJECT *supra* note 3; U.N. High Comm'r for Refugees, *Guidelines on Int'l Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and Gender Identity Within the Context of Art. 1 A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) [hereinafter "Guidelines on Int'l Protection No. 9"].

7. *See* REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 3-4.

8. *Asylum and the Rights of Refugees*, INT'L JUST. RSCH. CTR., <https://ijrcenter.org/refugee-law/> (last visited Mar. 13, 2020).

9. *See* *Abass v. Sessions*, 731 F. App'x 646, 648 (9th Cir. 2018), *reh'g denied* (July 5, 2018); *Owusu v. Feeley*, No. 19-CV-694, 2019 WL 3935296, at *1 (W.D.N.Y. Aug. 20, 2019).

10. *See Asylum Claims Based Upon Sexual Orientation and Transgender Status*, 47 A.L.R. Fed. 3d Art. 2 § 6, (2019) (discussing several federal court decisions where the Board of Immigration Appeals or the immigration judge was found to have erred in cases involving LGBTI asylum-seekers).

imprisonment.¹¹ “Unnatural carnal knowledge” is defined under Ghanaian law as “sexual intercourse with a person in an unnatural manner or with an animal”¹² and is construed by officials to include sexual intercourse between adult males.¹³ While enforcement of Section 104 by Ghanaian authorities is allegedly rare, the law’s existence demonstrates governmental and societal support for the discrimination and mistreatment of the country’s LGBTI citizens.¹⁴

Although criminalization is limited to intercourse between men, anti-LGBTI rhetoric is advanced broadly in Ghana and is found to incite violence and hostility against anyone found or perceived to be gay.¹⁵ In recent years, Ghanaian residents and refugees have reported a broad range of discrimination and torture that includes acts of extortion, arrest, blackmail, physical abuse, sexual assault, and attempted murder.¹⁶ Such activity is reportedly committed and promoted by a wide range of community actors including religious organizations, government officials, media outlets, and mobs.¹⁷ For example, in 2020, Dr. Hanna Bissiw, a renowned public figure of Ghana, made a public statement advancing her beliefs that homosexuality is an illness and that LGBTI individuals should be murdered.¹⁸ Similarly, a young Ghanaian man reported that, in 2015, he was violently attacked by a vigilante group based on their suspicion that he was gay.¹⁹ Further, while anti-LGBTI discrimination and mistreatment is often advanced by the public of Ghana, reports indicate that LGBTI individuals remain highly

11. Criminal Code Act 29 of 1960 § 104 (Ghana).

12. *Id.* at § 104(2) (Ghana).

13. Abass, 731 F. App’x at 648 (noting that “consensual intercourse between two men is illegal in Ghana”).

14. “No Choice but to Deny Who I Am”: Violence and Discrimination Against LGBT People in Ghana, HUM. RTS. WATCH, 1-2, (Jan. 8, 2018), <https://www.hrw.org/report/2018/01/08/no-choice-deny-who-i-am/violence-and-discrimination-against-lgbt-people-ghana>.

15. *Id.*

16. See *id.*; see also Ghana, Persecution and Discrimination, HUM. DIGNITY TR., <https://www.humandignitytrust.org/country-profile/ghana/> (last visited Mar. 20, 2020).

17. See “No Choice but to Deny Who I Am”: Violence and Discrimination Against LGBT People in Ghana, *supra* note 14.

18.

Ghana, Statements by Public Figures, HUM. DIGNITY TR., <https://www.humandignitytrust.org/country-profile/ghana/> (last visited Mar. 20, 2020).

19. See “No Choice but to Deny Who I Am”: Violence and Discrimination Against LGBT People in Ghana, *supra* note 14.

susceptible to discrimination among family members as well.²⁰ For example, in 2016, a Ghanaian mother was reported to have organized a mob attack against her daughter and another young female who were suspected to be engaged in a same-sex relationship.²¹ Similarly, reports demonstrate that a significant number of lesbian and transgender Ghanaians are victims of domestic violence and/or sexual assault within their own homes.²²

Due to Ghana's overwhelmingly homophobic atmosphere and the extreme lack of protection afforded to the LGBTI community,²³ individuals in Ghana are often unwilling and unable to express their sexual orientation or gender identities.²⁴ Further, because individuals are often condemned or abused for supporting gender equity, advocacy efforts are limited by self-censorship, thereby hindering the development and recognition of LGBTI rights.²⁵

III. INTERNATIONAL ASYLUM LAW AND LGBTI REFUGEES

Asylum is a legal process by which individuals who fear, or are fleeing from, persecution may obtain protection in other countries.²⁶ The right of asylum derives largely from international law that was enacted as a result of World War II and is governed by the 1951 Convention Relating to the Status of Refugees (1951 Convention) and its 1967 Optional Protocol Relating to the Status of Refugees (1967 Optional Protocol).²⁷ The large majority of countries, including the United States, United Kingdom, and Canada, are signatory States (States) to the Convention and its Protocol and are thereby legally bound to adhere to certain international humanitarian standards.²⁸ However, while the 1951

20. See *id.* at 1-3; see also Wendy Isaack, *UN Expert Spotlights LGBT Poverty in Ghana: LGBT People Routinely Discriminated Against in Job Market*, HUM. RTS. WATCH (June 26, 2018) <https://www.hrw.org/news/2018/06/26/un-expert-spotlights-lgbt-poverty-ghana>; *Abass v. Sessions*, 731 F. App'x 646, 649 (9th Cir. 2018), *reh'g denied* (July 5, 2018).

21. See "*No Choice but to Deny Who I Am*": *Violence and Discrimination Against LGBT People in Ghana*, *supra* note 14, at 2.

22. See *id.* at 2-3.

23. UK BORDER AGENCY, OPERATIONAL GUIDANCE NOTE, GHANA, 2011, § 3.10.9 (UK); *Abass v. Sessions*, 731 F. App'x 646, 649 (9th Cir. 2018), *reh'g denied* (July 5, 2018).

24. "*No Choice but to Deny Who I Am*": *Violence and Discrimination Against LGBT People in Ghana*, *supra* note 14, at 2.

25. UK BORDER AGENCY, OPERATIONAL GUIDANCE NOTE, GHANA, 2011, § 3.10.7 (UK).

26. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, (entered into force Apr. 22, 1954); *Asylum and the Rights of Refugees*, *supra* note 8.

27. Convention Relating to the Status of Refugees, *supra* note 26.

28. Convention Relating to the Status of Refugees, *supra* note 26; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; U.N. High Comm'r for Refugees, *State*

Convention does enforce certain standards of protection for refugees, the adjudication of asylum claims is subject to the discretion of the States, which has led to international inconsistencies and affords a great deal of power to the various government agencies that are tasked with making asylum judgments.²⁹

A. *The 1951 Convention and Its 1967 Optional Protocol*

Under the 1951 Convention, asylum protection hinges upon whether the asylum seeker qualifies as a “refugee,” which is defined in Article 1 as an individual who is

unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁰

While States and treaties may independently expand on this definition,³¹ most signatory States have adopted the Convention’s definition of refugee into their own domestic laws.³² Additionally, the 1951 Convention enforces the principles of non-discrimination, non-penalization, and, subject to a few exceptions, non-refoulement, which prohibits States from returning refugees to foreign territories in which their lives or freedom would be threatened as a consequence of their “race, religion, nationality, membership in a particular social group or political opinion.”³³ Other essential rights upheld by the 1951 Convention include refugees’ right to education, work, and access to courts.³⁴

Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, 1-4 (last updated Apr. 2015).

29. See *Asylum and the Rights of Refugees*, *supra* note 8.

30. Convention Relating to the Status of Refugees, *supra* note 26; *What Is a Refugee?*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> (last visited Mar. 31, 2020).

31. See Convention relating to the Status of Refugees, *supra* note 26; U.N. High Comm’r for Refugees, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, Introductory Note by the Office of the United Nations High Comm’r for Refugees, at 3 [hereinafter CONVENTION AND PROTOCOL].

32. *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, *supra* note 28.

33. CONVENTION AND PROTOCOL, *supra* note 31, at 1-4, 30.

34. *Id.* at 3; *Asylum and the Rights of Refugees*, *supra* note 8.

B. UNHCR and LGBTI Asylum Claims

The 1951 Convention is largely enforced by the Office of the United Nations High Commissioner for Refugees (UNHCR) which, among other tasks, is responsible for “promoting international instruments for the protection of refugees, and supervising their application.”³⁵ Several guidelines advanced by the UNHCR relate specifically to the treatment and adjudication of asylum claims made by LGBTI refugees.³⁶

Various reports released by the UNHCR demonstrate that, in addition to the disparities that are generally experienced by all asylum-seekers, LGBTI refugees often face distinct hardships when seeking asylum.³⁷ For example, reports have found that some LGBTI asylum seekers lack proper access to critical information regarding the asylum process, including the countries in which asylum may be sought.³⁸ Additionally, research suggests that, upon arriving to countries in which asylum is sought, LGBTI refugees are often hesitant to seek consultation from immigration agencies and authorities based on a common perception that such agencies are unwilling or incapable of protecting them.³⁹ Moreover, it has been reported that, throughout the registration and adjudication process, many LGBTI refugees experience bias and insensitive treatment by officers and other government agents.⁴⁰ LGBTI refugees who are detained may also be subject to abuse and discrimination by both officers and fellow asylum-seekers⁴¹ and may have more difficulty obtaining adequate legal counsel due to conflicting beliefs or a lack of understanding with regards to sexual orientation and gender identity.⁴² Findings such as these have propelled the UNHCR to endorse a comprehensive approach for adjudicating asylum claims that

35. CONVENTION AND PROTOCOL, *supra* note 31, at 4.

36. *See e.g.*, THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1; REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3; *Guidelines on Int'l Protection No. 9*, *supra* note 6.

37. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶ 16.

38. *Id.* at ¶ 17.

39. *Id.*

40. *Id.* at ¶ 18, ¶ 30, ¶ 55(G).

41. *Id.* at ¶ 16, ¶¶ 34- 37; *see also* *LGBTQ Asylum-Seekers, How Clinicians Can Help*, AM. PSYCH. ASS'N, 1-2, <https://www.apa.org/pi/lgbt/resources/lgbtq-asylum-seekers.pdf> (last visited Mar. 31, 2020) (noting that “Transgender women are 13 times more likely to be sexually assaulted than other detainees”).

42. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶¶ 21-22.

strongly considers the distinct hardships suffered by LGBTI refugees and how these experiences may impact their asylum pursuits.⁴³

Although many signatory States demonstrate an increased awareness towards LGBTI refugees' right to asylum protection,⁴⁴ the UNHCR has found that the definition of refugee continues to be applied inconsistently among this grouping.⁴⁵ According to the UNHCR, these discrepancies emanate largely from States' analyses of whether claimants present a well-founded fear of persecution and whether such persecution is based on one or more of the five grounds enumerated in the 1951 Convention: race, religion, nationality, membership of a particular social group, or political opinion (Convention Grounds).⁴⁶ Thus, in an effort to foster asylum determinations that are compatible with international human rights standards, the UNHCR raises several considerations that should be made by States when adjudicating LGBTI asylum claims.⁴⁷

The UNHCR holds that all individuals have a right to asylum for protection from persecution, including persecution that is predicated on an individual's sexual orientation or gender identity.⁴⁸ The UNHCR has also held that evidence of past persecution is not required for a claimant's fear to be considered well-founded, nor is the claimant required to prove that the government or persecutors were aware of his or her sexual orientation or gender identity.⁴⁹ Under UNHCR standards, actions that generally constitute persecution include threats of physical, psychological, and/or sexual violence.⁵⁰ In addition, the UNHCR has held that discriminatory treatment can rise to a persecutory level when it independently or collectively imposes substantially prejudicial consequences on the claimant.⁵¹ The UNHCR urges States to

43. REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 1, 3-4; *Guidelines on Int'l Protection No. 9*, *supra* note 6.

44. See REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 4 (noting that "refugee status adjudicators from several signatories to the 1951 Convention and/or 1967 Protocol, including the United States, have shown a pattern of granting asylum to LGBTI individuals for their membership in a particular social group").

45. *Guidelines on Int'l Protection No. 9*, *supra* note 6, at ¶ 1.

46. REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 2-3.

47. *Id.*

48. *Id.* at 3 (stating that "(w)here individuals can show that they have experienced, or have good reason to fear, serious violations of human rights on account of their sexual orientation or gender identity, such acts amount to persecution").

49. *Guidelines on Int'l Protection No. 9*, *supra* note 6, at ¶ 18.

50. REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 2-3.

51. *Id.*

acknowledge the many forms of discrimination and abuse to which LGBTI refugees may be subject, including honor crimes, arbitrary detainment, and community ostracism.⁵² Although family or community disapproval would not be considered “persecution” for purposes of obtaining asylum, the UNHCR has held that such disapproval may be relevant to the overall context of the claim and may be classified as persecutory conduct when expressed through acts or threats of violence.⁵³ Further, the UNHCR recognizes that authoritative measures intended to “change” or “alter” an individual’s sexual orientation or gender identity can constitute persecution.⁵⁴

When evaluating asylum claims based on sexual orientation, the UNHCR urges adjudicators to consider both the refugee’s gender and the particular LGBTI sub-group to which the refugee claims or is perceived to be a member.⁵⁵ The reason for making this consideration is because the persecutory practices administered in many countries against LGBTI claimants often emanate from cultural and societal gender roles, and the treatment or societal expectations from which protection is sought may vary based on sex.⁵⁶ In turn, information about native countries’ treatment of LGBTI individuals may differ depending on the particular gender or sexual orientation of the claimant.⁵⁷ Because information regarding native countries’ treatment of such groups is often relied upon in determining whether a fear of persecution is well-founded, it is critical for adjudicators to be vigilant about claimants’ actual or perceived gender identity and/or sexual orientation.⁵⁸

The UNHCR compels adjudicators to consider whether the claimant’s native country has statutes that criminalize same-sex relationships, as both the UNHCR and other legal sources have recognized that such statutes are in direct conflict with international

52. *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 23-25.

53. *Id.* at ¶ 23.

54. *Id.* at ¶ 21.

55. *Id.* at ¶¶ 12-14; United Nations High Comm’r for Refugees, U.N. High Comm’r for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶¶ 15-16 (Nov. 21, 2008) [hereinafter “UNHCR Guidance”].

56. *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 12-15; THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶ 9.

57. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶ 23; *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 12-15; *UNHCR Guidance*, *supra* note 55, at ¶ 10.

58. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶ 23.

human rights law.⁵⁹ More specifically, the UNHCR holds that “where persons are at risk of persecution or punishment such as by . . . prison terms, their persecutory character is particularly evident.”⁶⁰ Even where such laws are said not to be enforced, the UNHCR requires adjudicators to consider the climatic impact that is had on the country in question by the mere existence of anti-LGBTI statutes and whether a “lack of enforcement” offers any actual aid in alleviating instances of sex-based discrimination.⁶¹ Thus, when analyzing the “well-founded fear of persecution” in this context, the UNHCR requires that adjudicators take a particularly fact-based approach by considering all relevant circumstances.⁶² In the event that information fails to indicate whether such laws are actually enforced, adjudicators are advised to consider evidence of homophobic environments as indicating the existence of⁶³ Similarly, the UNHCR urges courts to recognize that many LGBTI applicants, including those from Ghana, may likely be accustomed to withholding their sexual orientation and/or gender identity from others out of fear that such disclosure would subject them to criminal punishment or abusive treatment.⁶⁴ This forced concealment, in turn, may severely limit the availability of evidence in support of refugees’ status as LGBTI individuals.⁶⁵ Similarly, former self-censorship can contribute to a reluctance or failure to disclose their LGBTI status during the registration process.⁶⁶ Under a similar line of reasoning, the UNHCR supports an objective analysis for the “well-founded fear of persecution” requirement and discourages adjudicators from rejecting asylum protection for refugees who could avoid persecution in their native countries if they exercise discretion in expressing or disclosing their sexual orientation or gender identity.⁶⁷

The UNHCR and other sources of international law have recognized LGBTI individuals as “members of a particular social group”

59. See *id.* at ¶ 10 (noting that “(i)nternational and national courts have found that laws criminalizing same-sex relations between consenting adults are at variance with international legal standards”).

60. *UNHCR Guidance*, *supra* note 55, at ¶ 19.

61. *Id.* at ¶¶ 17-22; *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 26-29.

62. *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 26-29.

63. *Id.*

64. *Id.* at ¶¶ 30-33.

65. See THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶ 27.

66. *Id.* at ¶ 19.

67. *UNHCR Guidance*, *supra* note 55, at ¶ 12, ¶¶ 25-26.

for purposes of determining refugee-related matters.⁶⁸ According to the UNHCR, “sexual orientation and/or gender identity are considered as innate and immutable characteristics or as characteristics so fundamental to human dignity that the person should not be compelled to forsake them.”⁶⁹ When evaluating a refugee’s claimed LGBTI membership, the UNHCR urges adjudicators to be mindful of the complexities involving gender identity and sexual orientation, and discourages asylum decisions that are premised on societal stereotypes or assumptions.⁷⁰ In addition, the UNHCR has established that refugees may be afforded asylum protection on account of their perceived LGBTI status based on one or more Convention Grounds, including political opinion or religion.⁷¹ According to UNHCR guidelines, actual LGBTI membership is not required to pursue an asylum claim based on sexual orientation or gender identity.⁷² These findings are particularly critical when adjudicating claims made by those who fear persecution based on their support or defense of LGBTI individuals, as well as claimants who are suspected or falsely accused of being gay.⁷³

IV. UNITED STATES ASYLUM LAW AND LGBTI ASYLUM RIGHTS

Like many other signatory States, the United States has incorporated the 1951 Convention definition of “refugee” into its domestic immigration law under the Immigration and Nationality Act (INA), which establishes individuals’ right to asylum.⁷⁴ Pursuant to the international and federal law definition of refugee, the United States recognizes the right of LGBTI individuals to qualify for asylum as “members of a particular social group.”⁷⁵ In addition, United States jurisprudence requires courts to interpret domestic statutes in a way that is “consistent with U.S. international obligations” as often as possible.⁷⁶ Compliance with UNHCR guidelines regarding LGBTI asylum claims has been demonstrated in several federal court decisions, some of which

68. REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 1, 4.

69. *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶ 47.

70. See THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1; UNHCR *Guidance*, *supra* note 55.

71. *Guidelines on Int’l Protection No. 9*, *supra* note 6, at ¶¶ 40-41.

72. *Id.*

73. *Id.*

74. Immigration and Nationality Act § 101(a), codified as 8 USC § 1101(a) (2014).

75. REFUGEES ASYLUM LAWYERS PROJECT, *supra* note 3, at 1, 4.

76. *Id.* at 2.

have established precedents that reflect a willingness to protect LGBTI refugees.⁷⁷

A. *Case Studies: Abass v. Sessions and Sumaila v. Attorney General of the United States*

Many of the standards developed by the judicial branch for reviewing sex-based asylum claims are manifested in *Abass v. Sessions*, where the United States Court of Appeals for the Ninth Circuit reversed the Board of Immigration Appeals' decision and granted asylum to an LGBTI refugee from Ghana.⁷⁸ There, the court held that the Ghanaian asylum-seeker was statutorily eligible for asylum based on his sexual orientation, was eligible for withholding removal based on sexual orientation, and was entitled to relief under the Convention Against Torture (CAT).⁷⁹ This case provides a demonstration of the current hardships faced by LGBTI asylum-seekers in the United States, particularly those from Ghana, and illustrates the judicial framework that is used to evaluate asylum claims based on sexual orientation or gender identity.⁸⁰

In *Abass v. Sessions*, the Ninth Circuit reversed the Board of Immigration Appeals' (BIA) decision to deny Mumin Abass's (Abass) application for asylum.⁸¹ Abass was a native citizen of Ghana who fled from the country out of fear that he would otherwise be killed by his father and community on account of his sexual orientation.⁸² Prior to fleeing Ghana, Abass was subject to persecution after it was discovered that he was gay⁸³ and was forced into hiding for the remainder of his time there.⁸⁴ In addition, it was reported that Abass's romantic partner, who was also recognized in the Ghanaian community for being gay, was killed as a result of his sexual orientation.⁸⁵ Despite evidence in support of his contentions, the BIA found that Abass failed to show that the Ghanaian government is "unable or unwilling to protect him from anti-

77. See, e.g., *Abass v. Sessions*, 731 F. App'x 646, 648-50 (9th Cir. 2018), *reh'g denied* (July 5, 2018); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 784 (9th Cir. 2004).

78. *Abass* 731 F. App'x at 648.

79. *Id.* at 646.

80. See *id.* at 648-52.

81. *Id.* at 648-49.

82. *Id.* at 649.

83. *Id.* at 648-49.

84. *Id.* at 651.

85. *Id.*

gay violence or harm” and thereby denied his application for asylum.⁸⁶ The Ninth Circuit reversed the BIA’s decision and granted Abass’s application for asylum based on its findings that he possessed a well-founded fear of persecution and that the Ghanaian government manifests an unwillingness to protect its LGBTI citizens.⁸⁷

First, in reversing its denial of Abass’s application for asylum, the Ninth Circuit found that the BIA “disregarded and mischaracterized substantial evidence” regarding the Ghanaian government’s unwillingness to protect LGBTI citizens.⁸⁸ In reaching this conclusion, the Ninth Circuit relied heavily on evidence of Ghanaian law that criminalizes sexual intercourse between two men.⁸⁹ In addition, the court pointed to evidence in the record that demonstrates Ghanaian officers’ frequent participation in extorting and detaining LGBTI individuals and their strong disinclination to inquire into allegations of anti-LGBTI violence.⁹⁰ The court found that Ghana’s laws and customs divest citizens such as Abass from seeking meaningful recourse, thus rendering any report of persecution ineffective.⁹¹ Moreover, the court found that the evidence presented by Abass, which was blatantly disregarded by the BIA, clearly indicates the Ghanaian government’s unwillingness to protect LGBTI individuals, which supports an issuance of asylum protection.⁹²

Second, the Ninth Circuit found that Abass’s fear of future persecution on account of his sexual orientation was well-founded.⁹³ In reaching this conclusion, the court relied heavily on its holding in *Mamouzian v. Ashcroft*, which established that a well-founded fear is presumed to exist among refugees who have been subject to past persecution in their native countries.⁹⁴ The court’s presumption regarding Abass’s fear might have been rebutted if Ghana’s treatment of LGBTI individuals was found to have changed or if it was found that Abass could avoid persecution by relocating to another part of the country.⁹⁵ Instead, however, the Ninth Circuit concluded that Abass’s fear of future

86. *Id.* at 648.

87. *Id.* at 648-50.

88. *Id.* at 648.

89. *Id.*

90. *Id.* at 648-49.

91. *Id.*

92. *Id.*

93. *Id.* at 649.

94. *Id.*; see also *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1135 (9th Cir. 2004).

95. *Abass*, 731 F. App’x at 649-51.

persecution was both subjectively and objectively reasonable and necessitated asylum protection.⁹⁶

The court found that Abass's fear of future persecution was subjectively reasonable based on the credibility of his testimony, in which he expressed his belief that he would be killed by his family and community as a result of his sexual identity if he remained in Ghana.⁹⁷ In concluding that Abass's testimony was sufficient to demonstrate a subjectively reasonable fear of future persecution, the court relied, in part, on its holding that "even a ten percent chance of persecution may establish a well-founded fear."⁹⁸ Similarly, the Ninth Circuit found that Abass's fear of persecution was objectively reasonable based on Ghana's severely homophobic environment, which, according to the court, is not expected to improve any time soon.⁹⁹ The court reasoned that Ghana's laws and practices demonstrate the country's longstanding custom for viewing same-sex relationships with extreme disapproval, which is often expressed through acts of violence committed by family members, government officials and other members of the community.¹⁰⁰ The court emphasized the evidentiary value of the declarations provided by Abass, which stated that "he will be killed now that people know he is gay" and found that the risk of future persecution would likely persist despite any efforts to relocate.¹⁰¹ In reaching this conclusion, the court relied on a report issued by the United Kingdom Border Agency, which stated that "there are . . . likely to be difficulties in finding safety through internal relocation given that homophobic attitudes are prevalent across the country."¹⁰² Thus, in view of the possibility that Abass would be subject to severe prejudices and a lack of protection if returned to Ghana, the Ninth Circuit ultimately reversed the BIA's judgment and granted his application for asylum.¹⁰³

Similarly, in *Sumaila v. United States*, the Third Circuit vacated the BIA's decision to affirm the Immigration Judge's (IJ) denial of asylum

96. *Id.* at 649-50.

97. *Id.* at 649.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*; see also UK BORDER AGENCY, OPERATIONAL GUIDANCE NOTE, GHANA, 2011, § 3.10.9 (UK).

103. *Abass*, 731 F. App'x at 652.

and order of removal of an LGBTI refugee from Ghana.¹⁰⁴ There, Ghanaian refugee Adamu Sumaila (Sumaila) fled from his native home and sought asylum in the U.S. after being persecuted by his neighbors and family on account of his sexual proclivities.¹⁰⁵ Sumaila, who had concealed his sexual orientation for years, feared that he would be killed by his family and neighbors after his father discovered him having sexual intercourse with his male partner.¹⁰⁶ Upon learning that his son was gay, Sumaila's father provoked a mob of neighbors to form who, together, decided that the couple should be beheaded or burned to death as punishment for their actions.¹⁰⁷ The mob attacked Sumaila and his partner with metal rods and other weapons, dragged them to a nearby yard and drenched them in kerosene.¹⁰⁸ Sumaila was able to escape the attack and subsequently fled the country out of fear that he would otherwise be murdered by his family and community.¹⁰⁹ Despite Sumaila's testimony regarding his horrific experiences in Ghana, the IJ found, and the BIA affirmed, that Sumaila failed to establish past-persecution or a well-founded fear of future persecution, and therefore denied his application for asylum.¹¹⁰ In denying his application, the IJ further reasoned that Sumaila should be able to avoid persecution if he concealed his sexual orientation from others in Ghana.¹¹¹

The Third Circuit vacated the BIA's decision on several grounds and found that both the IJ and the BIA "disregarded, mischaracterized and understated evidence favorable to Sumaila"¹¹² and reached conclusions that "are not supported by substantial evidence, because they are based on mischaracterizations, unreasonable inferences, and an incomplete assessment of the record."¹¹³ Unlike the incorrect judgments of the IJ and BIA, the court held that Sumaila's experiences in Ghana do amount to past-persecution,¹¹⁴ but further held that past-persecution is not a required element of asylum.¹¹⁵ In addition, the Third Circuit's

104. *Sumaila v. Att'y Gen. of U.S.*, No. 18-1342, 2020 WL 1527070, at *1 (3d Cir. Mar. 31, 2020).

105. *Id.* at *1-2.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at *2.

111. *Id.*

112. *Id.* at *10.

113. *Id.* at *12.

114. *See id.* at *4-11.

115. *Id.* at *11-12.

decision in *Sumaila* endorsed the UNHCR's position that an asylum claim should not be rejected based on a finding that the refugee might be able to avoid persecution if he exercises discretion in expressing his sexuality.¹¹⁶

V. CONCLUSION

The circuit courts in both *Abass* and *Sumaila* were able to correct the BIA's negligent and potentially life-threatening judgments by applying an analytical framework that is consistent with the nation's international law obligation to afford asylum protection to refugees who fear persecution on account of their sexual orientation or gender identity.¹¹⁷ However, because U.S. immigration law comprises complex procedural standards that severely limit federal courts' ability to review asylum adjudications, the refugees in these cases were each afforded a rare opportunity for judicial review that is unlikely to exist for others engaged in the asylum process.¹¹⁸ To the contrary, the fate of asylum-seekers hinges largely upon the perception and empathy of the adjudicator, which poses a significant threat to LGBTI refugees due the heightened stereotypes and biases associated with sexual orientation and gender identities.¹¹⁹

As international reports have made clear, LGBTI refugees generally face a significant risk of experiencing discrimination during the asylum-seeking process, regardless of the country from which they fled.¹²⁰ The adjudicative outcomes of Ghanaian refugees, however, are particularly demonstrative of U.S. asylum law's discriminatory underpinnings, as these claims derive out of a country where it is illegal for adults to

116. *Id.* at *14.

117. *Id.*; see also *Abass v. Sessions*, 731 F. App'x 646, 652 (9th Cir. 2018), *reh'g denied* (July 5, 2018).

118. See *Background on Judicial Review of Immigration Decisions*, AM. IMMIGR. COUNCIL (June 1, 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/background_on_judicial_review_of_immigration_decisions.pdf.

119. Swetha Sridharan, *The Difficulties of U.S. Asylum Claims Based on Sexual Orientation*, MIGRATION POL'Y INST. (Oct. 29, 2018), <https://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation> (noting that "Legal practitioners have observed that the success of their case hangs almost entirely upon the attitude—accepting or resilient—of the adjudicator").

120. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶¶ 16-18, ¶ 30, ¶ 55.

engage in consensual same-sex activity.¹²¹ While it is well-established that anti-LGBTI laws are not required for a refugee to succeed in asserting an asylum claim based on sexual orientation or gender identity, such laws are recognized as inciting a heightened likelihood of persecution among LGBTI individuals.¹²² The legal standards established by both the UNHCR and U.S. precedent suggest that Ghanaian refugees are entitled to a degree of assumed credibility in alleging a well-founded fear of persecution due to their native country's anti-LGBTI law.¹²³ Both UNHCR guidelines and judicial precedent demonstrate the generalization that countries where such laws are endorsed cultivate societies that engage in the persecution of LGBTI individuals.¹²⁴ In this regard, governing standards for adjudicating asylum claims suggest that the adjudicator should afford particular deference to LGBTI refugees who have fled from countries such as Ghana where same-sex conduct is criminalized by law.¹²⁵

Moreover, it is widely recognized that laws such as Ghana's may impose significant limitations on refugees' ability to procure evidence in support of sex-based asylum claims.¹²⁶ Compliance with UNHCR guidelines requires that adjudicators consider the fact that sex-based-discrimination in Ghana is prevalent among a wide range of community actors, including relatives, employers, and government actors, which may severely limit refugees' access to adequate evidence.¹²⁷ In addition, both UNHCR and U.S. judicial standards encourage adjudicators to be mindful of the consequential effects of self-censorship and how such forced discretion may discourage a refugee from initially disclosing his or her sexual orientation or gender identity to authorities in other countries.¹²⁸ Lastly, U.S. courts have joined with other national and international entities in recognizing Ghana as a country that endorses a climate of homophobia, based on

121. See e.g., *Sumaila v. Att'y Gen. of U.S.*, No. 18-1342, 2020 WL 1527070, at *9-11 (3d Cir. Mar. 31, 2020); see also *Abass v. Sessions*, 731 F. App'x 646, 652 (9th Cir. 2018), *reh'g denied* (July 5, 2018).

122. See *UNHCR Guidance, supra* note 55, at ¶¶ 17-22; *Guidelines on Int'l Protection No. 9, supra* note 6, at ¶¶ 27-29.

123. *UNHCR Guidance, supra* note 55, at ¶¶ 17-22; *Sumaila*, 2020 WL 1527070 at *6-7.

124. See *UNHCR Guidance, supra* note 55, at ¶¶ 17-22; *Guidelines on Int'l Protection No. 9, supra* note 6, at ¶¶ 27-29; *Sumaila*, 2020 WL 1527070 at *8-11; *Abass*, 731 F. App'x at 651.

125. *UNHCR Guidance, supra* note 55, at ¶¶ 17-22.

126. THE PROTECTION OF LGBTI ASYLUM-SEEKERS AND REFUGEES, *supra* note 1, at ¶¶ 27-32.

127. See *id.* at ¶ 27.

128. See *id.* at ¶ 19.

both its laws and customs, that affords little to no protection to its LGBTI citizens.¹²⁹ Despite international and national standards such as these, cases such as *Abass v. Sessions* and *Sumaila v. Attorney General of the United States* both demonstrate modern-day adjudicators' tendency to evaluate LGBTI asylum claims based on personal dispositions.¹³⁰ Thus, in order to prevent the continuance of such unprecedented asylum adjudications, U.S. immigration law should be modified to create more opportunity for judicial review in order to ensure that all tribunals within the Department of Justice are adhering to international law standards.¹³¹

129. *Sumaila v. Att'y Gen. of U.S.*, No. 18-1342, 2020 WL 1527070, at *13 (3d Cir. Mar. 31, 2020); *Abass v. Sessions*, 731 F. App'x 646, 648 (9th Cir. 2018), *reh'g denied* (July 5, 2018); *see also* UK BORDER AGENCY, OPERATIONAL GUIDANCE NOTE, GHANA, 2011, § 3.10.9 (UK).

130. *See Sumaila*, 2020 WL 1527070 at *14; *Abass*, 731 F. App'x at 648.

131. *See Background on Judicial Review of Immigration Decisions*, *supra* note 118 (noting that “(u)nder the current system, the federal courts often are prevented from playing their constitutionally-mandated role of providing a check on executive power”).