

FLEEING

HOMIO

PHOBIA



ASYLUM CLAIMS RELATED  
TO SEXUAL ORIENTATION AND  
GENDER IDENTITY IN EUROPE

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## EXECUTIVE SUMMARY

Thousands of lesbian, gay, bisexual, trans and intersex (LGBTI) asylum seekers apply for international protection in Europe each year. The European Union and European States have already taken some concrete and positive steps, such as recognising sexual orientation as a persecution ground in Article 10 of the Qualification Directive. Some Member States have also explicitly added gender identity as a persecution ground in their national legislation (Portugal, Spain) or policy documents (Austria, the United Kingdom); the Qualification Directive may well be amended so as to include gender identity. There are cases in which persecuted LGBTI asylum seekers are recognised as refugees, receive subsidiary protection, or are granted another form of protection in Member States of the European Union.

## GENERAL FINDINGS

This report, however, shows that there are considerable **differences** in the way in which European States examine LGBTI asylum applications. As Europe aims at creating a Common European Asylum System with a uniform status, this is highly problematic. The Dublin system, according to which only one EU Member State examines an asylum application, presumes an illusory common standard in the application of refugee law which is sadly lacking. To counter these differences in asylum application treatment, the European Asylum Support Office should give priority to promoting and coordinating the identification and pooling of good practices regarding the examination of lesbian, gay, bisexual, trans and intersex asylum applications. A second general conclusion which follows from the present comparative study is that on a number of points, European State practice is **below the standards** required by international and European human rights and refugee law.

European practice clearly shows that national authorities in many instances rely on **stereotypes** when examining LGBTI asylum applications. For example, legal decisions still frequently rely on the idea that the sexual orientation of an asylum seeker is only to be taken seriously when the applicant has an 'overwhelming and irreversible' inner urge to have sex with a person of the same gender. These stereotypes exclude persecuted bisexuals from international protection, in addition to other LGBTI people who do not behave in accordance with the stereotypes used by decision makers. Stereotypes may exclude lesbians who do not behave in a masculine way, non-effeminate gays, and LGBTI applicants who have been married or who have children.

Furthermore, the fundamental character of the relevant **human rights** for LGBTI individuals is frequently **denied** in the asylum

practice of European States. On a regular basis, LGBTI asylum seekers are returned to their country of origin because they purportedly can prevent persecution by concealing their identity. This denies, for LGBTI applicants, the fundamental notion which is at the heart of refugee law: if people have a well-founded fear of being persecuted on account of the legitimate exercise of a human right, they are entitled to international protection. To require them to renounce their human rights in order to be 'protected' negates the function of such rights. Similarly, LGB asylum applicants are regularly returned to countries where they have a well-founded fear of being imprisoned or sentenced to death for engaging in sexual activities with a person of the same gender. A further example is that serious human rights violations against trans people, occurring on a large scale in many parts of the world, often do not lead to asylum.

## SPECIFIC ISSUES

In our study, we focused on eight concrete issues.

### 1. Criminalisation

Many LGBTI asylum applicants come from countries where their sexual orientation or gender identity is criminalised. This may take different forms. Same-sex sexual activity between consenting adults may be a criminal act; 'unnatural' acts may be criminalised, and this may be used against trans people or people having sex with a person of the same gender.

In five European countries, LGBTI applicants from such countries are denied asylum even when these criminal law provisions are enforced. In most other countries, enforced criminalisation (prosecution) is sufficient for recognition as a refugee in theory. In practice, however, protection is often denied since lack of information about enforcement of criminal law provisions targeting LGBTIs is often mistakenly equated with non enforcement. In Italy, the mere fact of criminalisation is sufficient for granting refugee status.

The situation in the other European countries, however, remains problematic. On the basis of Article 4(3)(a) of the Qualification Directive, the fact that a certain sexual orientation or gender identity is criminalised in a country should mean that LGBTI applicants fleeing from those countries have a well-founded fear of being persecuted on account of their sexual orientation or gender identity.

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### 2. State Protection against non-State Persecution

When LGBTI people have been subjected to persecution by non-State actors (like relatives, or gangs) it may well be reasonable to apply the notion which holds that, before turning to external protection which the Refugee Convention provides, they can be expected to turn to the authorities of their own country in order to get internal protection. From an LGBTI rights perspective, the principle at the basis of this notion is to be applauded, because it expresses the obligation of national authorities to protect LGBTI citizens against violence by fellow-citizens. However, European practice should acknowledge in a more realistic way that such national **protection may not be forthcoming**. In ten European States, LGBTI applicants are required to turn to the authorities for protection even if sexual orientation or gender identity is criminalised in their country of origin; in four European countries, this is not required if the applicant is from a 'criminalising' country of origin. In most European countries, LGBTI applicants are required to turn to the authorities for protection even if these are known to be homophobic or transphobic; only in two European countries, is this different.

It is quite unlikely that protection will be provided by the national authorities (and in many cases it is possible that further persecution, this time by the authorities, will occur) if:

(a) LGBTIs are **criminalised** in that country; even if these laws are not applied, their mere existence makes it unlikely that the authorities will provide protection to people who face persecution by non-State actors for engaging in criminalised behaviour; or

(b) the police are **homo- or transphobic**.

### 3. Concealment of sexual orientation or gender identity

Concealment, also known as the discretion requirement, is not a formal requirement but is used without a clear legal basis in cases where, in principle, a risk of persecution is acknowledged. However, the applicant herself or himself is expected to ward off persecution by being 'discreet' about her or his sexual orientation or gender identity. In other words: the applicant should remain in, or return to 'the closet' – the closet becomes another internal protection alternative. In a few European States, the discretion requirement has been abolished. In the large majority of European States, it is still frequently applied. The asylum authorities of these States often rule that concealment of the applicant's sexual orientation or gender identity can be reasonably expected in order to prevent persecution. This notion is problematic on two counts. First, it cannot reasonably

be expected that people refrain from giving expression to sexual orientation or gender identity – or that they express them only in deep secret since that results in people being denied the legitimate exercise of **fundamental human rights**. By using this argument, European asylum authorities effectively collude with homo- and transphobic actors in the country of origin in violating the expression of LGBTI rights. Apart from this fundamental normative problem, the discretion requirement is also problematic for a second, empirical reason: which is that the closet is a very **unsafe** place. The sexual orientation or gender identity of LGBTIs may be made public against their will, and there is a permanent risk that this will happen. This may happen by sexual partners, or by suspicious neighbours or relatives. This permanent risk implies a permanent risk of persecution. It may also be argued that, even if an LGBTI successfully conceals her or his sexual orientation or gender identity, the permanent situation of anguish and fear, which concealing a fundamental aspect of one's life brings with it, is inhuman and degrading in itself.

Therefore, the discretion requirement should be abolished in the States where it is still being used.

### 4. Internal protection

Though not part of the 1951 Refugee Convention, many States rely upon what is known as the **internal flight alternative or internal protection alternative** in refusing international protection. Again, there is no problem in applying to LGBTI cases, as to any other case, the notion that, if the well-founded fear of persecution is specific for only one region of the country of origin, an asylum applicant may be expected to go to another region of the country of origin, where she or he will be safe from persecution. However, one should be aware that internal protection is only applied in cases where the applicant is presumed to have a well-founded fear of being persecuted by non-State actors in one part of the country. In other words: the applicant is in need of protection. The protection which the applicant needs, and to which she or he is entitled, must for that reason be effective. This excludes the application of the internal protection alternative in countries where sexual orientation or gender identity is **criminalised**, because no protection will be available in such countries. It also excludes application of the internal protection alternatives in situations where '**discretion**' of the applicant is expected in order to prevent further problems. Notwithstanding, we found that 16 European countries applied internal protection in LGBTI cases, while in 9 of these countries this was accompanied by discretion reasoning.



### 5. Credibility assessment

Credibility issues, where there is an assessment of the genuineness of the narrative of an asylum seeker's claim, have come to be at the core of many, if not most, asylum cases. Credibility assessment is notoriously difficult, because, owing to the absence of adequate awareness and sensitivity on the side of the adjudicator, her/his subjective sense of lived reality is used as a benchmark in order to assess the statements of a person from another country, often another culture, with other communication codes and value systems. In many LGBTI cases reported in this study, credibility assessment focuses on whether or not the applicant is LGBTI. Two things add to the complexity of credibility assessment in LGBTI cases. One: in many European States, remnants of the notion that LGBTI identities are deviant in a medical, psychiatric or psychological sense are very much alive in an asylum context, although the notion has been formally abolished for sexual orientation, and by now is seriously contested for trans and intersex people. Since LGBTI identities are not legitimate medical, psychiatric or psychological categories, the use of **medical, psychiatric or psychological expert opinions** in order to establish an applicant's sexual orientation or gender identity is not legitimate or appropriate. Producing such opinions entails an invasion of the applicant's privacy which may cause intense suffering, especially for applicants who have faced similar interrogative practices in their country of origin. Because such opinions serve no legitimate purpose, the invasion of the applicant's privacy constitutes an unjustified infringement of the right to respect for their private life. We emphasise that this concerns not only the notorious 'phallometry' method, but other medical, psychiatric or psychological investigation methods as well. Conversely, medical, psychiatric or psychological expert opinions about the *consequences* which homo- or transphobia may have had for LGBTI applicants can be useful in order to examine an asylum application. However, medical, psychiatric or psychological investigations should not be used as a means to 'prove' an LGBTI identity. Sexual orientation and gender identity are a matter of self identification, not a matter of medicine, psychiatry or psychology.

The second issue adding to the complexity of credibility assessment in LGBTI asylum cases is the use of **stereotypes**. People use stereotypes in order to structure the sensory impulses they receive. Such stereotypes may be incorrect but often that is of no consequence e.g. if we think that all Swedes prefer vanilla ice cream, the possibility that this is incorrect will only bother us if we are planning to market ice cream in Sweden. However, it is a problem if asylum authorities think that all gay men from Iraq are effeminate; or that a lesbian from Sierra Leone must know whether lesbian sexual activities are criminal acts in Sierra Leone; or that a man from Egypt

who is not familiar with the best gay bar in Dublin is not gay; or that a woman who is married with a man and has a child cannot be lesbian or bisexual. Although there is no ready-made 'solution' for the use of stereotypes, it is of great importance that asylum authorities are made aware of the fact that they are inherently predisposed to rely on stereotypes in practice; that they should be aware of the particular stereotype(s) they rely on in examining cases; and that they should be open to questioning the particular stereotype(s) they use. To this aim, there should be a training module specifically about LGBTI asylum issues at the beginning of the training of asylum adjudicators and LGBTI issues should be a standard part of their general permanent education. The European Asylum Support Office has an important role to play on this point.

### 6. Late disclosure

It regularly happens that applicants disclose their sexual orientation or gender identity to the asylum authorities only later during the initial asylum procedure, or through a subsequent application. This can be caused by feelings of fear and shame or even internalised homo- or transphobia; the applicant may be unable to name his/her own sexual orientation or gender identity, whatever his/her life experience actually is, or may fear that the news will reach people from the community who will then pass this information back to family in the country of origin or people from the same community in the country of refuge; the applicant may only have become aware of her or his sexual orientation or gender identity in the environment of the country of refuge; or the applicant may initially have been unaware that sexual orientation or gender identity can be relevant in the context of asylum. This may lead to caution or disbelief by asylum authorities, in particular where applications are made in countries in relation to which the asylum authorities have acknowledged that LGBTI applicants may be refugees. However, this does not justify reliance on practices which are bound to disqualify LGBTI applicants who do not fabricate their sexual orientation or gender identity, but who disclose their actual sexual orientation or gender identity later and need protection. These overly disqualifying practices can take two forms. In two European countries, a *res judicata* principle is used which allows asylum authorities to disregard information or evidence which could – in theory – have been submitted at an earlier stage. This principle may be applied flexibly, as happens in Austria, in ways allowing asylum authorities to examine the reasons for the late submission of, in our context, being L, G, B, T or I. Such varieties of the *res judicata* principle are not *per se* problematic. However, Dutch case law completely excludes late submissions from judicial examination, regardless of explanation. Such a rigid application of the *res judicata* principle is unacceptable, because they are bound to lead to denial of asylum to LGBTI applicants desperately in need of



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protection. The second way in which 'coming out late' is dealt with is in the context of **credibility**. As indicated below, this is not *per se* unacceptable so long as it does not imply that late disclosure *per se* leads to a negative finding of lack of credibility. The moment at which facts are disclosed is merely one of many elements to be taken into account in credibility assessment. The reasons for late disclosure of information should always be taken into account.

### 7. Country of Origin Information

Country of origin information (COI) is crucial for the determination of asylum claims. It should be objective, complete and reliable. Therefore, it is necessary that all country reports contain information about the position of LGBTIs. This information should not only concern, or primarily focus on, gay men, but should also deal with **lesbians, bisexuals, trans and intersex** individuals. Furthermore, this information should **not only** provide facts about **criminal law** provisions. It should also provide data about the legal position of LGBTIs in family law, labour and social security law, affirmative action, in addition to possible protection, in policy as well as in practice, of LGBTIs against discrimination and violence. The European Asylum Support Office can play an important role in this matter. Moreover, it is crucial that available COI is **used appropriately**. Clearly, it may be difficult to access information about LGBTIs in some countries of origin precisely because of their poor human rights position. In particular, the absence of information – for example about the enforcement of criminalisation, or about the position of lesbians, trans or intersex people – should not be taken to mean that there is no risk. In such cases, more information must be gathered, for example from grass roots LGBTI organisations in the country of origin, or – if that is impossible – decisions should take into account the lack of accurate information, in particular by relying on the principle of 'the benefit of the doubt'.

### 8. Reception

In reception and detention centres in Europe, LGBTI asylum applicants are frequently confronted with homophobic and transphobic behaviour, ranging from discrimination to abuse and violence. This stems from other asylum applicants and, in some cases, from reception or asylum authorities. The specific needs and issues of LGBTI asylum applicants should be addressed by developing appropriate procedures and guidelines. Among these, a proper and effective complaint system is crucial. Other appropriate measures include giving LGBTI applicants a form of control over their housing situation, and training the staff of reception, accommodation and detention centres.

## MAIN RECOMMENDATIONS

The report contains recommendations on all the following points, some of which are very specific. These can be found in the text of each chapter, and the complete text of all recommendations can be found on page 79. The main recommendations are the following.

1. **Refugee status should be granted to lesbian, gay, bisexual, trans and intersex applicants originating from countries where sexual orientation or gender identity are criminalised or where general provisions of criminal law are used in order to prosecute or persecute sexual orientation or gender identity.**
2. **Lesbian, gay, bisexual, trans and intersex applicants should not be required to invoke State protection against non-State actors of persecution when in the country of origin sexual orientation or gender identity are criminalised, or when authorities are homo- or transphobic.**
3. **Lesbian, gay, bisexual, trans and intersex applicants should not be required or presumed to conceal their sexual orientation or gender identity in order to avoid persecution.**
4. **An internal protection alternative should not be raised in cases of lesbian, gay, bisexual, trans or intersex applicants from those countries which criminalise sexual orientation or gender identity.**
5. **Establishing sexual orientation or gender identity should, in principle, be based on self-identification; these are not medical or psychiatric categories. Interviewers, decision makers, the judiciary and legal aid providers should be trained to have better understanding of sexual orientation and gender identity, thereby preventing unhelpful reliance on stereotypes.**
6. **Late disclosure of sexual orientation or gender identity should not lead to denial of asylum. This should happen neither by inflexible application of a res judicata principle, nor by considering a 'late coming out' per se as an indication of non-credibility of an applicant's sexual orientation or gender identity.**
7. **Country of origin information should always include information on the situation of lesbian, gay, bisexual, trans and intersex persons and not merely on criminal law. As long as little or no reliable country of origin information is available on the human rights situation of lesbians, gays, bisexuals, trans and intersex individuals in a particular country, this should not be considered as a sign that human rights violations against these groups do not occur. The principle of the benefit of the doubt is of particular importance in such situations.**
8. **In reception, accommodation and detention centres, measures must be taken in order to protect lesbian, gay, bisexual, trans and intersex asylum applicants against homophobic and transphobic violence.**
9. **The European Asylum Support Office should give priority to promoting and coordinating the identification and pooling of good practices regarding the examination of lesbian, gay, bisexual, trans and intersex asylum applications.**



## 1 INTRODUCTION

HT, a gay man from Cameroon, had a relationship with another man for three years. After he and his partner were seen kissing by a neighbour in his back garden, he was subjected to serious violence by way of mob 'justice'. Instead of helping him, the police joined the assault. The British asylum authorities denied asylum, arguing that he could move to another part of Cameroon where he was not known. It would be reasonably tolerable for him to conceal his sexual identity there. However, the Supreme Court quashed the decision, holding that lesbian, gay and bisexual people have a right to live freely and openly.<sup>1</sup>

### 1.1 WHY LGBTI ASYLUM APPLICANTS?

The present study presents the first comparative research ever undertaken on the way in which LGBTI asylum claims are examined across Europe. Each year, thousands of lesbian, gay, bisexual, trans and intersex (LGBTI) people apply for asylum in EU Member States. As the above example illustrates, asylum decisions may be based on problematic notions, and correcting these misguided notions requires paying explicit attention to the LGBTI aspects of the asylum applications concerned. Yet, little is known about the different ways in which the asylum applications of LGBTI people are dealt with in the different EU Member States. The European Union Agency for Fundamental Rights (FRA) has issued several reports on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States.<sup>2</sup> One of the conclusions of the FRA's social report is: "There is a significant lack of both academic research and unofficial NGO data regarding homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in many Member States and at the EU level. (...) The data gap analysis shows that there is a profound lack of quantitative and qualitative research and statistics on all the thematic areas covered in this report." According to this report, asylum is one of the issues which "appear to be profoundly under-researched in all EU Member States."<sup>3</sup>

1 UK Supreme Court 7 July 2010, HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department, [2010] UKSC 31; [2011] 1 A.C. 596.569.

2 European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, 2008; European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part II – The Social Situation*, 2009; European Union Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Comparative Legal Analysis* (updated version), 2010; European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States, Summary of findings, trends, challenges and promising practices*, 2010.

3 European Union Agency for Fundamental Rights, *Homophobia and*

The present study seeks to help in closing this gap by providing a more extensive and qualitative research with data from lawyers, governments, academics and NGO's, by describing policy and practice concerning LGBTI asylum seekers. On the basis of this information, we have sought to identify:

- issues on which policy and practice concerning LGBTI asylum applicants are similar or divergent in different EU Member States;
- problems and dilemmas which Member States face when they seek to examine LGBTI asylum applications in a fair and efficient manner;
- solutions which Member States may have found for these problems and dilemmas: 'good practices';
- recommendations, which are based on the good practices of EU Member States, as well as on international and European human rights and refugee law.

In this way, we aim to contribute to a European practice in examining LGBTI asylum applications which is (a) in full accordance with international and European law, and (b) harmonised.

The attention to LGBTI human rights has developed significantly in recent years. This is illustrated by the fact that the first comprehensive report on homophobia in the EU Member States was published as recently as 2008.<sup>4</sup> On a global level, the Yogyakarta Principles, on the application of existing international human rights standards to issues of sexual orientation and gender identity, were drafted in 2007.<sup>5</sup> In 2006, 54 Member states presented a joint statement to the Human Rights Council (HRC), addressing violence based on sexual orientation and gender identity.<sup>6</sup> This was preceded by an earlier attempt led by Brazil to pass a resolution at the Commission on Human Rights in 2003. In 2008, France and the Netherlands took the initiative for a joint statement at the UN General Assembly, which was supported by 66 States.<sup>7</sup> In March 2011, support for a resolution

*Discrimination on Grounds of Sexual Orientation in the EU Member States Part II – The Social Situation* (updated version), 2009, p. 129.

4 *Supra*, note 2.

5 International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

6 Norway et al., *Joint statement on Human Rights violations based on sexual orientation and gender identity*, 1 December 2006, Human Rights Council 3rd Session.

7 Argentina et al., *Joint statement on sexual orientation and gender identity*, 18 December 2008, United Nations General Assembly, 70th Plenary Meeting.

## INTRODUCTION

condemning violence had built up to 85, while still falling short of the support of a majority of HRC Member States.<sup>8</sup> Only three months later, a break-through came when South Africa successfully proposed a resolution in the HRC requesting a study on discrimination and sexual orientation.<sup>9</sup>

In light of the recent nature of these developments, it can scarcely be surprising that LGBTI asylum issues have only recently begun to receive attention. The UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity was published in 2008. The Commissioner for Human Rights of the Council of Europe published a report on LGBT discrimination in June 2011. In the paragraph on asylum, the report identifies as challenges and obstacles the following issues: the way in which criminalisation of LGBTs in the country of origin is addressed, including the requirement that LGBTs conceal their sexual orientation or gender identity; credibility findings; and the position of LGBT asylum seekers in reception centres for asylum seekers.<sup>10</sup> The first three topics are dealt with extensively in this study.

As yet, there are only two admissibility decisions by the European Court of Human Rights, both finding no systematic ill-treatment of gay men in Iran.<sup>11</sup> The only outstanding application that has been communicated is a case of a gay asylum seeker from Iran.<sup>12</sup>

Another aspect to which the Commissioner for Human Rights report calls attention to is that gender identity has not been addressed explicitly in either European law or legislation of EU Member States.<sup>13</sup> However, the present research shows that 'gender identity' is explicitly mentioned in the context of membership of a particular social group in the asylum laws of Portugal and Spain, as well as in the policy guidelines of Austria and the UK.<sup>14</sup> Although gender identity may be subsumed under the 'gender-related aspects' mentioned in Article 10(1)(d) of the Qualification Directive, this is

an obvious lacuna because Member States may assume now that gender identity is not a relevant persecution ground. In the most recent proposals for a recast of the Qualification Directive, gender identity is explicitly included.<sup>15</sup>

Because LGBTI asylum cases have only recently become the subject of debate, it is not surprising that, on this point, divergent practices exist in Europe, as is noted by the Commissioner for Human Rights,<sup>16</sup> and as will become clear from this study. This divergence can be close to non-implementation of European law.<sup>17</sup> This is a problem from the perspective of European policy. A harmonised interpretation and application of the concepts of refugee status and international protection is at the core of European asylum policy. However, it is a human rights issue as well. If the interpretation and application of asylum law in one or more European States is below the level required by European law, this is not only a violation of European law itself but may also make the transfer of asylum seekers to such States a violation of European law. This has already become evident in the context of human rights law: if the standards in one State are below the minimum level set by the European Convention on Human Rights, this can make the transfer of an asylum seeker to that State a violation of the Convention.<sup>18</sup> The present study indicates that also in LGBTI cases, divergence between Member States may interfere with transfer of an asylum seeker to the Member State which is responsible for the examination of the claim.<sup>19</sup> Therefore, it is urgent to find a solution for the divergences, not only from the

8 Colombia et al., *Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity*, 22 March 2011, Human Rights Council 16th Session.

9 Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/17/L.9/Rev.1 (17 June 2011).

10 Commissioner for Human Rights: *Discrimination on grounds of sexual orientation and gender identity in Europe*, Council of Europe Publishing, Strasbourg, June 2011, p. 62-69.

11 ECtHR (Dec) 22 June 2004, *F. v. the United Kingdom*, Appl. No. 17431/03; ECtHR (Dec) 20 December 2004, *I.I.N. v. the Netherlands*, Appl. No. 2035/04.

12 ECtHR *K.N. v. France*, Appl. No. 47129/09 (gay Iranian); ECtHR *D.B.N. v. the UK*, Appl. No. 26550/10 (lesbian from Zimbabwe) was withdrawn following exit from the United Kingdom.

13 Commissioner for Human Rights: *Discrimination on grounds of sexual orientation and gender identity in Europe*, Council of Europe Publishing, Strasbourg, June 2011, p. 65.

14 See UK Home Office, *Asylum Instruction: Sexual Orientation and Gender Identity in the Asylum Claim*, 6 October 2010, revised on 13 June 2011; Austria explicitly mentioned gender identity as part of a social group in the "Regierungsvorlage", a binding document.

15 Council of the European Union, Presidency's Note to the Permanent Representatives Committee, Brussels, 6 July 2011, 2009/0164 (COD), ASILE 56, CODEC 1133.

16 *Supra*, p. 62-69.

17 Our national expert reported that **Bulgaria** has not implemented the Article 10(1)(d) Qualification Directive definition of sexual orientation as a persecution ground into the national Law on Asylum and Refugees.

18 ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09.

19 We do not elaborate on this further because we did not succeed in gathering sufficient empirical information on LGBTI Dublin cases. However, see the Belgian questionnaire (Chechenyan asylum seeker not removed to Poland because of great influx of homophobic Chechenyans); the German questionnaire (Verwaltungsgericht (Administrative Court) Schleswig-Holstein 7 September 2009, 6 B 32/09: interim measure staying the transfer of an Iranian gay applicant because of the risk he would have to undergo phallogometric testing "the conformity of which with human rights standards seems at least very much in doubt"; the Dutch questionnaire (litigation about the physical safety of two gay applicants in Slovenia), Rechtbank (Regional Court) Zwolle, 15 December 2008, 08/27847; 08/27850; Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State) 7 September 2009, 200809455/1/V3; an Iranian gay applicant was rejected in the UK; the Netherlands did not assume responsibility, decision upheld by courts, Rechtbank (Regional Court) Zwolle, 14 December 2007, nr. 07/38475, Afdeling bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 11 March 2008, 200800250/1. Applicant was granted asylum in UK after subsequent re-examination, after pressure of the European Parliament <http://www.unhcr.org/refworld/docid/47da75002.html>. In a Finnish intersex case, the applicant was not transferred for health reasons; the applicant was in need of hormonal and psychological treatment, which had been started in Finland already; this seems unrelated to the (non)availability of treatment in Italy.

perspective of LGBTI applicants, but also from the perspective of EU Member States and of the European Union as a whole.

## 1.2 NUMBER OF LGBTI APPLICANTS; COUNTRIES OF ORIGIN

The great majority of EU Member States does not collect statistical data about the number of LGBTI asylum applicants. Therefore it is not possible to give precise information about the number of LGBTI applicants in the EU. However, both Belgium and Norway do have statistics.<sup>20</sup>

**Table 1: LGBTI decisions in Belgium**

Year	Total asylum decisions	LGBTI asylum decisions	Percentage of LGBTI asylum decisions
2008	8.964	226	2,52%
2009	8.883	362	4,08%
2010	13.170	522	3,96%
Total 2008-2010	31.017	1.110	3,58%

Source: Commissariat Général aux Réfugiés et aux Apatrides, Annual Reports, [www.cgara.be/fr/Publications/2\\_Rapport\\_annuel/](http://www.cgara.be/fr/Publications/2_Rapport_annuel/), last accessed 28 July 2011

**Table 2: LGBT decisions in Norway**

Year	Total asylum decisions	LGBT asylum decisions			LGBT %
2008	9.700	2 ♂	1 ♀	3	0,03%
2009	15.686	17 ♂	0 ♀	17	0,11%
2010	16.455	19 ♂	7 ♀	26	0,15%
Total 2008-2010	41.841	38 ♂	8 ♀	46	0,11%

Source: Norwegian Directorate of Immigration, [www.udi.no/Norwegian-Directorate-of-Immigration/Oversiktsider/Statistikk-/Asylum/Asylum-decisions-in-first-instance-by-outcome-and-nationality-/](http://www.udi.no/Norwegian-Directorate-of-Immigration/Oversiktsider/Statistikk-/Asylum/Asylum-decisions-in-first-instance-by-outcome-and-nationality-/), last accessed 28 July 2011

There are more approximate data. The Swedish Migration Board in 2002 estimated the number of applicants seeking asylum in Sweden on grounds of sexual orientation or gender identity to be approximately 300 per year. In the Netherlands, the applications of homosexual and transgender asylum seekers amount to approximately 200 per year. In Italy, according to the Ministry of Internal Affairs, in the period from 2005 to the beginning of 2008, at least 54 cases were filed, of which at least 29 were granted refugee status or humanitarian protection.<sup>21</sup>

There are reasons to believe the number of LGBTI claimants is higher.

Throughout this report (see specifically Chapter 7) we see examples of LGBTI claimants 'coming out' to the asylum authorities only after their first application for asylum has been denied. Understandably, asylum authorities are cautious that these claimants fake being LGBTI in order to be granted asylum. But undeniably, there will also be people who fled their country of origin on account of LGBTI based persecution, but tried to be granted asylum on other grounds. They may have remained silent about their LGBTI related problems initially out of shame or fear or they may not have known that their LGBTI related experiences could be a ground for protection. Again, others may have been granted asylum on non-LGBTI related grounds, with the consequence of the LGBTI basis of their flight remaining invisible. Although this probably also happens in cases of gay applicants, it is particularly likely

in cases of lesbian, bisexual, trans and intersex applicants, in light of their under representation (see further par. 1.6 below). There will also undeniably be a number who will live in the country with no legal status and never apply for status determination due to shame, stigma and fear. Therefore, we assume there is a dark number.

The difference between the number of LGBTI asylum seekers in Norway and Belgium is striking, and hard to explain. If we extrapolate the Belgian average percentage of 3,58% of the decisions to the total number of asylum applicants in the European Union in 2010 (which amounted to 235.900<sup>22</sup>), we would estimate there were about 8.450 LGBTI asylum seekers in the EU annually. However, on the basis of

<sup>20</sup> From 1 July 2011, also the UK will compile statistics on their Casework Information Database (source: Bill Brandon, Deputy Director Asylum, 9 June 2011).

<sup>21</sup> Commissioner for Human Rights: *Discrimination on grounds of sexual orientation and gender identity in Europe*, Council of Europe Publishing, Strasbourg, June 2011, p. 66.

<sup>22</sup> UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010*, Statistical overview of asylum applications in Europe and selected non-European countries, 2011, available at <http://www.unhcr.org/4d8c5b109.html>.

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the Norwegian average percentage of 0,11% we would conclude that there were some 260 LGBTI applicants in Europe. However, this is an improbably low number, as the Swedish and Dutch asylum authorities estimated the number of LGBT asylum applicants at 300 and 200 annually respectively. Therefore, more research on the issue is necessary. In the mean time, the Belgian percentage should be taken as a more reliable indicator of the number of LGBTI claimants. In addition to the latter, the 'hidden' number has to be reckoned with. Based on these assumptions a crude estimate is that there are up to 10.000 LGBTI related asylum applications in the European Union annually.

Because there are no reliable statistics, it is impossible to say how many LGBTI asylum applicants originate from which countries. However, on the basis of the examples mentioned by the national experts involved in this study, it is clear that LGBTI applicants originated from at least 104 countries in the world.<sup>23</sup> It is not possible to quantify their numbers, because in this study the data on countries of origin were not collected with a quantitative aim, and therefore cannot be used for that purpose.

### 1.3 METHODOLOGY

In order to map existing practices in the EU Member States, in October 2010 a questionnaire<sup>24</sup> was sent to national experts in all Member States except Estonia, Latvia and Luxemburg, where the experts we contacted reported they were unable to report about LGBTI applicants. We included Norway (not an EU Member State, but participating in the EU asylum *acquis* in some ways) and Denmark (an EU Member State presently not participating in the asylum *acquis*).<sup>25</sup> The national experts were identified by relying on

the networks of COC Netherlands; of the Migration Law Research Programme of VU University Amsterdam; and of the partners in this project: the European Council on Refugees and Exiles and (ECRE, and the European Legal Network on Asylum, ELENA) the Hungarian Helsinki Committee, and the Italian LGBT Lawyers Association (Avvocatura per i diritti LGBT/ Rete Lenford). We were assisted in this by The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), as well as the Geneva office of the United Nations High Commissioner for Refugees.<sup>26</sup> Each national questionnaire indicates on which sources it is based. Most of the national questionnaires will be published on the project website.<sup>27</sup> For some Member States, the national experts felt they were unable to publish the national questionnaire – even when anonymised – without disclosing confidential information, and for this reason, withheld consent for publication of the national questionnaire concerning their country. The questionnaires concerning Finland, Ireland, Romania and Spain are not published for that reason. Readers interested in seeing the material we relied on may contact the national experts of these countries for more information. In the report, whenever information about the situation in a particular country is not footnoted, it is based on the national questionnaire of the country in question, to which readers can turn for the sources we relied on.

A major advantage of research based on questionnaires is that it can have a wide geographical scope. That is the case in this research. The project includes many countries we could not possibly have covered without relying on questionnaires. Notably, however, research based on questionnaires is characterised by two problems. First, the way in which the national experts have understood the text of the questionnaire is hard to control. Due to differences in context, they may have given a different interpretation to the questions than we intended; or we may have given a different interpretation to the information presented in the national questionnaires than the national experts intended. We have tried to deal with this risk of misinterpretation by (a) using EU asylum law as the frame of reference of the questionnaire; (b) encouraging national experts to discuss the questions they had about the questionnaire in joint email discussions so as to develop a joint conceptual framework; (c) asking further questions about the national questionnaires we received, and requesting national experts to adapt their national questionnaire where appropriate; (d) by having a two day meeting about a first draft of the research report with all national experts, so as to ensure consistency; and (e) circulating the final draft of the report among all national experts, so as to enable them to avoid

23 These countries include Afghanistan, Albania, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Barbados, Belarus, Bolivia, Bosnia-Herzegovina, Brazil, Burundi, Cameroon, Central African Republic, Chile, China, Colombia, Congo (DRC), Costa Rica, Croatia, Cuba, Dominica, Ecuador, Egypt, Eritrea, Estonia\*, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Guinea-Conakry, Guyana, Honduras, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kosovo, Lebanon, Liberia, Libya, Lithuania\*, Macedonia, Malawi, Malaysia, Mali, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Palestine, Panama, Paraguay, Peru, Philippines, Qatar, Romania\*, Russia, Rwanda, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia\*, Somalia, South Africa, Sri Lanka, St. Vincent & the Grenadines, Sudan, Syria, Tajikistan, Tanzania, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia (FRY), Zambia, Zimbabwe. Countries that are now EU Member States have been marked with an asterisk.

24 Published on [www.rechten.vu.nl/fleeinghomophobiareport](http://www.rechten.vu.nl/fleeinghomophobiareport).

25 Switzerland answered our questionnaire partially. Israel, an associated state, was also included because we happened to know active LGBTI asylum advocates there, and decided to include it in order to show the situation in a State with a refugee determination system which is not influenced in any way by EU Directives and Regulations.

26 The list of the national experts we relied on is included as Annex I. The members of the Advisory Panel are included as Annex II.

27 [www.rechten.vu.nl/fleeinghomophobiareport](http://www.rechten.vu.nl/fleeinghomophobiareport)



errors and inaccuracies concerning their countries. The second problematic aspect of research based on questionnaires is that the national questionnaires are inevitably different. This is caused by different factors, most notably the different research environment (in some Member States, most relevant information was available in online databases containing policy guidelines and case law; in others, the national experts had to start data collection from scratch), and the kind of expertise and background of the national expert (academic, lawyer, NGO). Nevertheless, this methodology enabled us to write the first comprehensive, Europe-wide study on LGBTI asylum cases. The limitations inherent in our approach indicate that further research, using other methodologies, is needed in order to further address the scarcity of data on LGBTI asylum issues in Europe.

As will be clear from the above, we have involved many experts in the drafting of this report. It should be clear, however, that the analysis presented here is that of the two authors alone. We have discussed our analyses with the national experts and with our advisory panel, and we have sought to include as many viewpoints as possible. Nevertheless, this text does not necessarily reflect the views of the people we consulted, or those of the organisations they work for.

## 1.4 TERMINOLOGY

In this report, three sets of terms are used. One set of terms is used in order to classify what happens in Member States. A second set of terms concerns LGBTI issues. The third set of terms concerns asylum.

### 1.4.1 LEGISLATION, POLICY, PRACTICE

In the questionnaire, we enquired about Member State legislation, policy and practice. By *legislation* we primarily mean written and binding legal rules which have been adopted in a procedure involving national parliaments. However, in most European countries legislative instruments adopted by parliament empower the executive to adopt binding written legal rules, which we classify as legislation as well. Examples are the Dutch Aliens Act (adopted by Parliament), on which the Aliens Decree and the Aliens Regulation (both adopted by the executive) are based. *Policy* is the term we use for the way in which the executive uses the decision making power it has been granted by legislation. Often, these are laid down in written form, which however have not been adopted by Parliament in the way formal legislation is; for this we use the term *policy guidelines*. In some jurisdictions, the term policy can also be used for an actual practice of civil servants which is so consistent that, because of the principle of equal treatment, it is required that this standing practice is followed in other cases as well. As far as we have seen, this is not relevant for our

context. It does bring us, however, to the third term we use: *practice*. In this study, this term is used loosely. It refers to individual cases and covers both individual instances as well as consistent patterns of behaviour. In the latter case, this will be indicated in the text. *Good practice* is the term we use for legislation, policy or practices which are conducive to the realisation of LGBTI rights.

### 1.4.2 LGBTI

Central concepts in this study are sexual orientation and gender identity.<sup>28</sup> *Sexual orientation* refers to a person's capacity for emotional, affectional or sexual attraction to, and intimate relations with, individuals of a different gender (in which case a person has a heterosexual orientation), of the same gender (in which case someone is lesbian or gay) or more than one gender (in which case someone is bisexual). We try to stay away from the political and theoretical debates surrounding these terms, but sometimes we cannot. In some asylum cases, it is crucial whether (for example) a self-identified lesbian or gay person who marries and has children actually is lesbian or gay; or whether that person is bisexual or heterosexual.

*Gender identity* refers to a person's experience of gender, which may or may not correspond with the sex assigned at birth. It includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. In this study we refer to gender identity as an umbrella term for trans and intersex people.

*Intersex* refers to having a body that is not considered standard for a male or female. Intersex can be used as an umbrella term covering differences of sexual development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical.

*Coming out* refers to the process of self-acceptance of LGBTI people. People forge a lesbian, gay, bisexual, trans or intersex identity first to themselves; and then may or may not reveal it to others. We emphasise that self-identification is crucial. A person in a monogamous heterosexual marriage may, nevertheless, experience her- or himself as lesbian, gay or bisexual. Publicly identifying oneself as LGBTI may or may not be part of coming out.

*Criminalisation* is a term that will be used frequently in this study. By criminalisation we mean laws that define sexual acts between persons of the same gender (among consenting persons above

<sup>28</sup> We have relied on the Yogyakarta Principles for the terms sexual orientation and gender identity. For other terms, we have sought to follow the usage of those terms by ILGA-Europe.

## INTRODUCTION

the age of consent) as crimes. The precise sexual acts covered by criminalisation are rarely spelled out in law, but are typically understood by courts to include any sexual contact deemed immoral. Consensual homosexual acts between persons above the age of consent are illegal in 76 countries in the world; in 40 of them only male-male sex is explicitly outlawed.

### 1.4.3 ASYLUM

In this subparagraph, we aim at introducing some central notions from international and European refugee law. The aim is not to map the debates about these core notions, but to provide minimal information about the terms we use in this study. There is ample literature providing more in depth information.<sup>29</sup>

Asylum law provides that persons who, upon return to their country of origin, would face particular kinds of risk to life or freedom, are protected against return to such a country. The core concept of asylum law is that of the *refugee*. As defined in the 1951 Refugee Convention,<sup>30</sup> a refugee is a person, who is outside his or her country of nationality or habitual residence, with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>31</sup> The application of this definition in EU Member States is harmonised at a minimum level by the Qualification Directive.<sup>32</sup>

A person who is a refugee cannot be removed to her or his country of origin; this would constitute *refoulement*, which is forbidden by Article 33 (1) of the 1951 Refugee Convention. Over the past few decades, leave to remain has also been granted on other grounds.<sup>33</sup> Most notably, removal to the country of origin is prohibited if the person concerned would face a real risk of being subjected to the

death penalty, or to torture or inhuman or degrading treatment or punishment. This has been stipulated explicitly in one Convention (UN Convention Against Torture, Article 3) while in other cases international supervisory bodies have formulated a rule to this effect on the basis of norms prohibiting the death penalty and torture or inhuman or degrading treatment.<sup>34</sup> In order to harmonise and modify this practice, the Qualification Directive has introduced the concept of subsidiary protection. This is the protection to be granted on the basis of Article 15 Qualification Directive to persons who, when returned to their country of origin, would face a real risk of being subjected to

- the death penalty or execution;
- torture or inhuman or degrading treatment or punishment;
- or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>35</sup>

The term *persecution* in the refugee definition refers to threats to life or freedom (comp. Article 33(1) of the 1951 Geneva Convention). The notion of 'threat to freedom' is vague. Over the years, the concept of persecution has increasingly been interpreted and applied by reference to human rights norms. This is reflected in the Qualification Directive, which in Article 9 (1)(a) defines acts of persecution as acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of a basic human right. Provision (b) of the same paragraph refers to the possibility that an accumulation of various measures constitutes persecution because it is sufficiently severe so as to affect an individual in a similar manner.

In the classical case, persecution consists of acts performed by government officials (such as police or secret service agents torturing suspects) as *agents of persecution*. If, however, human rights violations do not emanate from formal or *de facto* authorities, but from non-State actors (such as relatives or gangs) these can also be relevant for refugee and subsidiary protection status. In such cases, these human rights violations are to be considered as acts of persecution if the authorities are either unwilling, or unable to provide protection against such acts (Article 6(c) and 7 Qualification Directive).

29 General books about refugee law are James C. Hathaway, *The Law of Refugee Status*, Toronto/Vancouver: Butterworths 1991; James C. Hathaway: *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press 2005; Guy S. Goodwin-Gill and Jane McAdam: *The Refugee in International Law*, Oxford: Oxford University Press 2007 (3rd Edition). The leading general book on European asylum law is Hemme Battjes, *European Asylum and International Law*, Leiden: Brill 2006.

30 United Nations Treaties Series 189, p. 137.

31 The refugee definition has other elements, which however, are not relevant in our context.

32 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, Official Journal L 304, 30 September 2004, p. 12-23. The most recent version of the recast Qualification Directive is the Council's text, Council of the European Union, Presidency's Note to the Permanent Representatives Committee, Brussels, 6 July 2011, 2009/0164 (COD), ASILE 56, CODEC 1133.

33 Some people believe that this protection has been granted *instead of* protection as a refugee (i.e. to people who would formerly have been recognised as Convention refugees) while others believe that it has been granted *in addition to* the protection of refugees (i.e. to people who formerly could not have been recognised as refugees and would have been returned to their country of origin). In the present context, this debate can be left aside.

34 For example, ECtHR 20 March 1991, *Cruz Varas v. Sweden*, Ser. A vol. 201 on Article 3 of the Council of Europe's European Convention on Human Rights; Human Rights Committee 13 November 2002, *C. v Australia*, no. 900/1999 on Article 7 of the UN International Covenant on Civil and Political Rights.

35 The formulation of this last provision is problematic; see for a first judgement of the Court of Justice of the EU CoJ 17 February 2009, *Elgafaji v. Staatssecretaris van Justitie*, C-465/07.

If an asylum seeker has established a well-founded fear of being persecuted, that does not necessarily mean he or she qualifies for refugee status. The well-founded fear of being persecuted should be “for reasons of” (Article 1A-2 1951 Refugee Convention) race, religion, nationality, membership of a particular social group, or political opinion. In the concept of refugee, discrimination is a central element. In our context, two aspects of this requirement of a *persecution ground* are relevant. First: Article 10(1)(d) Qualification Directive provides that, depending on the circumstances in the country of origin, the concept of particular social group in the refugee definition may apply to a group based on a common characteristic of sexual orientation. Although this was recognised in at least one EU Member State as of 1981,<sup>36</sup> this provision means that the refugee status of LGB asylum claimants cannot be denied on the ground that the requirement of a persecution ground is not fulfilled.<sup>37</sup> Gender identity has not been incorporated explicitly in the Qualification Directive, although it should be considered to be covered by the ‘gender-related aspects’ of Article 10(1)(d), and will probably be explicitly mentioned in the revised Qualification Directive. Second: in Article 10(2) the Qualification Directive codifies another widely recognised aspect of persecution grounds, being *attributed* persecution grounds. In our context, this may be relevant where someone is the victim of homophobic or transphobic violence, because people mistakenly perceive the person to be L, G, B, T or I. Another example would be that being an LGBTI person is considered to infringe on religious norms or to indicate disloyalty to official ideology. In both cases, the person fears acts of persecution on account of an attributed persecution ground, and can be considered as a refugee.

There are no explicit international law norms for the asylum procedure. In the Procedures Directive,<sup>38</sup> the European Union has laid down minimum standards for the asylum procedure. The practice in Member States should be in conformity with these minimum norms.

36 The first country to recognize sexual orientation as a persecution ground was the Netherlands, in *Afdeling rechtspraak van de Raad van State (Judicial Division of the Council of State) 13 August 1981, Rechtspraak Vreemdelingenrecht 1981, 5, Gids Vreemdelingenrecht (oud) D12-51*.

37 The influence of European law can be gleaned from the example of Israel, which is not a Member of the EU and not bound by the Qualification Directive; according to the Israeli expert in this research, Israel refuses to recognize LGBTIs as a potential social group. Denmark (a member of the EU, but not bound by the Qualification Directive) does, however, recognize LGBTIs as a potential social group; this predates the Qualification Directive, and reflects domestic legal developments rather than European law.

38 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326, 13 December 2005, p. 13-34. The most recent text of the recast Procedures Directive is the Commission’s Amended Proposal, COM (2011) 319 final, Brussels, 1 June 2011.

## 1.5 AIMS OF THE PROJECT; TARGET GROUPS

This project starts from the observation that there is a lack of data concerning the way in which the asylum applications of LGBTI applicants are dealt with in the European Union. We wish to address this data gap by collecting and disseminating the information which we have gathered during this project.

The information we have collected warrants two major conclusions:

1. There is considerable incongruity between European Union Member States on the adjudication of LGBTI asylum applications
2. Some practices of European Union Member States are problematic from the point of view of international human rights law, including international refugee law.

In order to address these two issues, we have sought to identify good practices which are already being applied in some Member States, and which should be emulated by other Member States. Adoption of such good practices by other Member States would serve the aim of harmonising Member State practice in the field of LGBTI related asylum claims. In order to identify good practices, we have relied on international human rights and refugee law.

This implies that one important target group of this report is policy makers in the European Union – both at the level of the European Union itself and at the Member State level. The term policy maker is used here in a very broad sense, including the European Asylum Support Office, civil society which is often involved in developing policies, and organisations such as UNHCR. However, policy is not only to be formulated, but also applied in everyday practice. For that reason, we also aim at both informing and sensitising decision makers, lawyers, the judiciary and civil society at the national level. Specifically, for civil society, we aim at sensitising the LGBTI community to asylum issues, and the asylum community to LGBTI issues. In addition, we hope that the information presented in this report, as well as in the national questionnaires published on the accompanying website, can be used as a resource for training purposes. It can also be used as a starting point for further analysis and research.

## 1.6 THE INVISIBILITY OF LBTTI’S

Publications about LGBTI asylum issues tend to focus on cases of gay men. For that reason, in our questionnaire we formulated most questions neutrally, so as to include all cases. At the same time, we



## INTRODUCTION

asked explicit further questions about asylum cases concerning lesbian, bisexual, trans and intersex applicants. By means of the explicit questions about LGBTI cases, we hoped to prevent a focus on gay asylum cases. Notwithstanding this explicit effort, information about LGBTI cases is scarce, and not many cases have been reported.<sup>39</sup> Although the scarcity in information might be taken to reflect a lower frequency of LGBTI persecution in countries of origin, this is hardly a plausible explanation. The assumption that in countries of origin anti-gay violence is so much more common than violence against lesbian, bisexual, trans and intersex people is simply not convincing.

There are more plausible explanations for why there is a scarcity of data on LGBTI claims. The first is: LGBTIs may be less prone to apply for asylum on the basis of their sexual orientation or gender identity. There may be reasons why they are less outspoken about it, or less likely to come forward with LGBTI issues towards asylum authorities.<sup>40</sup> The second explanation is: the patterns of persecution of LGBTIs are less highlighted than those of gay men. When the LGBTI activist David Kato was murdered in Uganda on 26 January 2011, media, civil society organisations and officials immediately were aware of, and condemned, the murder. However, not many take notice of the number of trans persons murdered around the world: from January 2008 to December 2010 there were 539 reported deaths of murdered trans persons.<sup>41</sup>

Another approach would be not to look for general explanations of the invisibility of LGBTI applicants, but to look at the different groups. The lower frequency of asylum claims by lesbians may be related to the fact that, as a general matter, only one third of all asylum seekers in Western countries tend to be women, and a much lower percentage are single women. This last data might partly explain the low number of lesbian claimants. The information we received from our country experts indicates that the proportion of gay to lesbian asylum applicants is not two to one, but the percentage of lesbian claimants is much lower. The low frequency of bisexual asylum claimants may reflect the general invisibility of bisexuals, who are incorrectly labelled as either lesbian/gay or heterosexual, depending

on the circumstances. The visibility of, and reliable information about trans issues, and even more so of intersex issues, is low generally; the invisibility of trans and intersex asylum seekers may reflect this.

The invisibility of LGBTI applicants in this report may have different explanations from those given above. However, contrary to our intention, it may well be that this report reflects the general invisibility of LGBTI asylum cases. We have sought to counter this by focussing specifically on LGBTI cases where that was possible, and by using more LGBTI examples than is representative of the information we have. In other words: we consciously over-represent the LGBTI information we have. We think the invisibility of LGBTI asylum cases should be the subject of further research.

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39 In this research twelve intersex cases were reported. Unfortunately, there was hardly any additional information about these cases, apart from their mere existence. The number of reported trans asylum cases was 67.

40 In Western countries, a large fraction of TI persons are not 'out'. A study of a representative sample of 27.000 Danes revealed that 2 out of 3 transgendered persons never spoke to anyone about their gender identity, see Leyla Gransell and Henning Hansen, *Equal and unequal? The living conditions and well being of gay and lesbian people, bisexuals and transgenders in Denmark*, Copenhagen: Casa 2009, available at [www.casa-analyse.dk/default.asp?Action=Details&Item=387](http://www.casa-analyse.dk/default.asp?Action=Details&Item=387). It is unlikely that among asylum applicants in European countries more trans people are out than among Danes.

41 Transgender Europe, *Trans Murder Monitoring Project: March 2011 Update*, available at [http://www.transrespect-transphobia.org/en\\_US/tvt-project/tmm-results/tmm-march-2011.htm](http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tmm-march-2011.htm), last accessed 28 June 2011.

## 2 CRIMINALISATION

### 2.1 INTRODUCTION

In 76 countries of the world, engaging in consensual same-sex sexual activities between adults is a criminal act,<sup>42</sup> sometimes criminalising same-sex sexual contacts for both sexes<sup>43</sup> and sometimes – not considering lesbians - criminalising only male-male sexual contacts.<sup>44</sup> In seven of these countries homosexual acts are punishable by the death penalty (Iran, northern States in Nigeria, Mauritania, Saudi Arabia, southern parts of Somalia, Sudan, and Yemen). In some of the 76 countries, same-sex sexual activities in themselves are not criminalised explicitly, but provisions that criminalise “unnatural” or “indecent” behaviour (or similar terms) are applied as to prosecute same-sex sexual activities.<sup>45</sup> We will refer to such legislation by using the term ‘criminalisation’. Since explicit criminalisation is mostly targeted at sexual orientation, and not at gender identity, this chapter predominantly deals with LGB applications.<sup>46</sup> However, the fact that sexual orientation is criminalised should be taken as an indicator that the position of trans and intersex people may be problematic as well. Similarly, in countries where lesbian sex is not explicitly criminalised, while gay sex is, this is an indication that lesbians are also at risk but tenuously ‘flying under the radar’. It should also be noted that in some countries trans identities may be targeted through criminalisation of cross-dressing or other transgressions of gender specific rules.

While many examples were reported of state persecution by

officials from states which abolished criminalisation, the issue of criminalisation of sexual orientation or gender identity is of particular importance regarding LGBTI applicants from those countries. Firstly, in criminalising countries LGBs risk prosecution. Secondly, criminalisation reinforces a general climate of homophobia (presumably accompanied by transphobia) which enables State agents as well as non-State agents to persecute or harm LGB(TI)s with impunity. In short, criminalisation makes LGBs into outlaws, at risk of persecution or serious harm at any time.

Should criminalisation as such be a ground for granting asylum to applicants from those countries, provided the asylum authorities believe the applicant to be an LGB person? In the following case this question was answered negatively, based on a reported low enforcement of criminalisation:

The **Irish** Tribunal refused the appeal of a Pakistani lesbian woman stating: “I accept that homosexuality in Pakistan is a criminal offence. However, it appears as if cases involving homosexuality are rarely prosecuted. In that regard I would like to refer to the US Department of State Human Rights Report on Pakistan, February 2009, in which it was stated that ‘homosexual intercourse is a criminal offence; in practice, however, the government rarely prosecuted cases.’<sup>47</sup>”

- 42 Eddie Bruce-Jones and Lucas Paoli Itaborahy: *State-sponsored Homophobia, A world survey of laws prohibiting same-sex activity between consenting adults*, The International Lesbian, Gay, Bisexual, Trans and Intersex Association, May 2011, [www.ilga.org](http://www.ilga.org), last accessed 5 July 2011.
- 43 For example the Gambian Criminal Code 1965, as amended in 2005, Article 144: “Unnatural offences. (1) Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits any person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for a term of 14 years. (2) In this section- “carnal knowledge of any person against the order of nature” includes- (a) carnal knowledge of the person through the anus or the mouth of the person; (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and (c) committing any other homosexual act with the person.”
- 44 For example the Uzbekistan 1994 Criminal Code, Article 120: “Besoqolbozlik, that is, voluntary sexual intercourse of two male individuals – shall be punished with imprisonment up to three years.” Available at <http://www.legislationline.org/documents/id/8931>
- 45 For example the Lebanese Penal Code of 1943, Article 534: “Any sexual intercourse against nature is punished with up to one year of imprisonment.”
- 46 Apart from ILGA’s list of 76 criminalising countries there are countries where trans persons are prosecuted. For instance in Turkey, a country which abolished criminalisation of same-sex sexual acts as early as 1858, the Law on Misdemeanours is used to impose fines against trans persons, while courts have on occasions applied the principle of “unjust provocation” in favour of perpetrators of crimes against trans persons. See *European Commission, Commission Staff Working Document: Turkey 2009 Progress Report, Brussels, 14 October 2009, SEC (2009)1334, p. 26 and p. 72.*

### 2.2 INTERNATIONAL AND EUROPEAN STANDARDS

Asylum applications have to be examined on an individual basis but all relevant facts have to be taken into account in this examination, including laws and regulations in the country of origin and the manner in which they are applied (Article 4(3)(a) Qualification Directive). It is relevant whether the applicant has already been subject to persecution or to direct threats of persecution (Article 4(4) Qualification Directive) but this is not a necessary condition for granting refugee status.

It is clear that a prison term or corporal punishment on account of engaging in same-sex sexual activities constitutes an act of persecution, because these acts are sufficiently serious by their nature as to constitute severe violations of basic human rights (Article 9(1)(a) Qualification Directive), namely the right to liberty (Article 5 ECHR) and the right not to be subjected to inhuman treatment

47 Refugee Appeals Tribunal 2009.

## CRIMINALISATION

(Article 3 ECHR).<sup>48</sup> A person facing such punishment has a well-founded fear of being persecuted on account of membership of a particular social group, which is based on the common characteristic of sexual orientation (Article 10(1)(d) Qualification Directive).

Article 9(2)(c) of the Qualification Directive qualifies prosecution or punishment which is disproportionate or discriminatory as an act of persecution. Because criminalisation is inherently discriminatory,<sup>49</sup> prosecution or punishment on the basis of laws directly or indirectly criminalising LGBTIs *per se* will constitute persecution in the sense of the refugee definition.

In the cases of *Dudgeon*, *Norris* and *Modinos*<sup>50</sup> the European Court of Human Rights held that the penal provisions criminalising homosexuality in respectively Northern Ireland, Ireland and Cyprus were contrary to the right to privacy in Article 8 of the European Convention on Human Rights. In *Norris v. Ireland* the Court addressed “the detrimental effects which the very existence of legislative provisions in question can have on the life of a person of homosexual orientation.” This led to the acknowledgement that “the mere criminalisation is sufficient for the conclusion that the right to private life in Article 8 of the European Convention on Human Rights of a person to whom these laws might be applicable is violated.”<sup>51</sup>

However, in its first gay asylum case, *F. v. United Kingdom*, the European Court of Human Rights has taken the position that the *removal* of an LGB person to a country that criminalises same-sex sexual acts (i.c. Iran) does not violate Article 8 ECHR. The Court held that “On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.”<sup>52</sup>

In its second gay asylum case, *I.I.N. v. the Netherlands*, the European Court of Human Rights rejected the claim of a gay Iranian, based on Article 3 ECHR. While the applicant stated he had been arrested

after having been caught kissing a male friend in an alley, the Court found no indication that this had in fact resulted in any criminal proceedings being brought against him. The Court observed that the materials (information) “do not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships.”<sup>53</sup>

UNHCR acknowledges that laws criminalising LGBTs, even when they are no longer systematically enforced, could also be enforced in an unofficial manner, which does not lead to recorded prosecutions, such as through police inflicted violence or extra-legal detention. In addition, UNHCR points out that persecution may be found even where there is no conclusive country of origin information to evidence that laws criminalising homosexual conduct are actually enforced.<sup>54</sup>

### 2.3 STATE PRACTICE

We found that in most Member States, for granting refugee status to applicants from countries which criminalise same-sex sexual activities, it is required that the criminalisation is enforced. However, in **Italy** enforcement is not required. In some other States even the existence of enforced criminalisation seems insufficient for granting protection to LGB asylum seekers from those states. Finally for some States, our information does not allow for clear conclusions, most notably because the situation is inconsistent.

#### 2.3.1 EXISTENCE OF ENFORCED CRIMINALISATION SUFFICIENT

In **France**, actual enforcement of criminalisation is required for recognition as a refugee, but will then be sufficient. If criminalisation is not always enforced, but is applied with some regularity, this would be sufficient for recognition. If criminalisation is never enforced, claims are rejected. The same applies in **Belgium** and **Sweden**.

Also in the **United Kingdom** criminal laws need to be enforced to constitute persecution. The Court of Appeal ruled that unenforced criminalization did not amount to persecution as defined by Article 9(2)(c) as a discriminatory legal measure.<sup>55</sup>

In **Ireland**, in one case a Kenyan gay applicant was recognised by the Tribunal as a refugee because the criminalisation of homosexuality

48 See on corporal punishment and Article 3 ECHR, ECtHR 25 April 1978, *Tyrer v. the United Kingdom*, Appl. No. 5856/72; and in the asylum context e.g. ECtHR 22 June 2006, *D. v. Turkey*, Appl. No. 24245/03.

49 In a formal sense, the concept of indecency may be used against heterosexuals as well. However, the concept tends to be used against LGBTI people in particular. Cf. Human Rights Watch, *This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism*, Human Rights Watch: New York 2008, www.hrw.org, last accessed 5 July 2011.

50 ECtHR 22 October 1981, *Dudgeon v. United Kingdom*, Appl. No. 7525/76; ECtHR 26 October 1988, *Norris v. Ireland*, Appl. No. 10581/83; ECtHR 22 April 1993, *Modinos v. Cyprus*, Appl. No. 15070/89.

51 ECtHR 26 October 1988, *Norris v. Ireland*, Appl. No. 10581/83.

52 ECtHR 22 June 2004, *F. v. United Kingdom*, Appl. No. 17341/03; comp. Committee Against Torture 20 May 2003, *CAT, K.S.Y. v. the Netherlands*, 190/2001 (deportation of gay Iranian - no violation of Article 3 Convention against Torture); comp. on the application of Article 9 ECHR (Christians from Pakistan) ECtHR 28 February 2006, *Z and T v. United Kingdom*, Appl. No. 27034/05.

53 ECtHR 20 December 2004, *I.I.N. v. the Netherlands*, Appl. No. 2035/04.

54 UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, par. 20-21, available at: <http://www.unhcr.org/refworld/docid/48abd5660.html> [accessed 5 July 2011].

55 UK: Court of Appeal (England and Wales) 18 November 2009, *JM (Uganda) and OO (Sudan) v Secretary of State for the Home Department* [2009] EWCA Civ 1432; [2010] All ER (D) 17 (Jun).

constituted *prima facie* evidence of State persecution on grounds of sexual orientation in that country. However, in other decisions, among which at least one other Kenyan case, refugee status was denied because criminalisation was not enforced. This suggests that the existence of enforced criminalisation may lead to recognition of LGB claimants from the countries of origin concerned.<sup>56</sup>

The country expert for **Lithuania** reports that there have been no cases addressing this issue yet, though the government stated that criminalisation in the country of origin would be considered as persecution. In **Poland**, the asylum authorities stated that it does not make a difference whether criminalisation is enforced or not. However, in a Pakistani case refugee status was denied because criminalisation in Pakistan was – according to the decision maker – almost never enforced.

In **Germany**, the 1988 Bundesverwaltungsgericht judgement<sup>57</sup> held that criminalisation was insufficient for refugee status, which would require excessive punishment (such as the death penalty or corporal punishment). However, some recent case law presumes that the existence of enforced criminalisation should lead to refugee status, also in cases where there are no individualised indications that prosecution will occur. This has been ruled in cases concerning Iran<sup>58</sup> and Cameroon,<sup>59</sup> while in a Moroccan case the application was denied because the position of the Moroccan authorities in prosecuting same-sex relationships was said to be “rather pragmatic.”<sup>60</sup>

In the **Netherlands**, the existence of enforced criminalisation in Iran was sufficient for a policy rule to the effect that LGBT applicants from Iran will in any case be granted asylum on domestic law based, humanitarian grounds. Decisions and case law rejecting LGB claims because in those countries there is no evidence of enforced criminalisation against LGB people<sup>61</sup> suggest that LGB claimants

from countries where criminalisation is enforced would qualify for asylum.<sup>62</sup>

In Austria a court granted refugee status to an Iranian gay man ruling that the situation for homosexuals in Iran is so serious that every homosexual has to fear persecution.<sup>63</sup>

#### GOOD PRACTICE: ITALY

In **Italy**, criminalisation in itself is considered as persecutory. Criminalisation is *per se* considered a limitation to the realisation of a human right. This has led to recognition as a refugee of a lesbian applicant from Senegal,<sup>64</sup> a gay applicant from Egypt,<sup>65</sup> and a gay applicant from Iran,<sup>66</sup> and to the grant of subsidiary protection to a gay applicant from Ghana.<sup>67</sup>

The enforcement of criminal law is not an issue in Italian practice: authorities and courts do not carry out an enquiry about the enforcement of criminal law.<sup>68</sup>

In brief: in eleven Member States,<sup>69</sup> the existence of enforced criminalisation may be sufficient for recognition as a refugee of LGB claimants, although in some cases this is not deemed sufficient for refugee status depending on the individual circumstances of the

56 Refugee Appeals Tribunal 2008. Applications were denied on this ground in cases originating from Kenya, Uganda and Pakistan.

57 Bundesverwaltungsgericht (Federal Administrative Court) of 15 March 1988, BVerwG 9 C 278.86.

58 Verwaltungsgericht (Administrative Court) Potsdam, 11 September 2006 - 9 K 189/03.A.

59 Verwaltungsgericht (Administrative Court) Frankfurt/Oder, 11 November 2010, VG 4 K 772/10.A: arrests and convictions of homosexuals are rare but do take place.

60 Oberverwaltungsgericht (High Administrative Court) Berlin-Brandenburg 4 February 2010 - 3 S 120.09.

61 See a Tunisian case, Rechtbank (Regional Court) Groningen 30 November 2009, 09/41408; Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division Council of State) 4 February 2010, 200909560/1/V2; a Cameroonian case Rechtbank (Regional Court) 's-Hertogenbosch 1 October 2009, 08/36980, upheld by Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division Council of State) 25 January 2010, 200908271/1/V1; an Algerian case Rechtbank (Regional Court) 's-Gravenhage 9 December 2009, 09/23841, upheld by Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division Council of State) 27 January 2010, 201000184/1A/2.

62 See for example Rechtbank (Regional Court) Den Haag 11 November 2009, 09/13455: the US State Department Report proves that section 377 of the Indian Penal Code is not a dead letter. On a regular basis this provision is used for police raids against homosexuals and for threatening gay people with arrest when they come to report acts of violence. Comp. Rechtbank (Regional Court) Haarlem 2 March 2010, 10/5782: applicant submitted country of origin information that stated several homosexuals have been arrested recently in Tanzania, the general climate towards homosexuals has deteriorated, and not only with respect to gay activists.

63 Asylgerichtshof (Asylum Court), 17 February 2009, E2 255.708-2/2008.

64 Tribunale (Tribunal) Torino, 5 November 2010, 426/10.

65 Commissione territoriale per il riconoscimento della protezione internazionale di Gorizia (Regional committee for the recognition of international protection of Gorizia), January 2011.

66 Commissione territoriale per il riconoscimento della protezione internazionale di Milano (Regional committee for the recognition of international protection of Milan), 2011.

67 Tribunale (Tribunal) Caltanissetta 10 February 2010.

68 Tribunale (Tribunal) Catania 4 March 2010, 1081/2010 (gay, Ghana); Tribunale (Tribunal) Trieste, 17 August 2009, 304/2009 (gay, Benin); Tribunale (Tribunal) Caltanissetta, 7 June 2010, (gay, Tunisia); Commissione territoriale per il riconoscimento della protezione internazionale di Gorizia (Regional committee for the recognition of international protection of Gorizia), January 2011 (gay, Egypt); Commissione territoriale per il riconoscimento della protezione internazionale di Milano (Regional committee for the recognition of international protection of Milan), 2011 (gay, Iran). In all the above cases the applicant was granted refugee status or subsidiary protection and in none of the above decisions/cases the enforcement of criminalization was assessed. Only Tribunale (Tribunal) Trieste 11 November 2009, 508/09 (gay; Senegal), reasoned that although in Senegal a sodomy law exists, there was no evidence of any fear of persecution among the citizens: however, the main reason to reject the claim seemingly was the lack of credibility of the applicant's sexual orientation.

69 Austria, Belgium, France, Germany, Italy, Ireland, Lithuania, the Netherlands, Poland, Sweden, the United Kingdom.

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case. In Italy, the enforcement is not an issue, criminalisation *per se* could lead to refugee status for LGB claimants. In the Member States which require enforcement, the country of origin information on practical enforcement is crucial, as well as the way in which this information is interpreted; this is illustrated by the following judgement.

In 1998, the **Austrian** Federal Asylum Review Board showed a sensitive approach to the use of country of origin information in a gay Iranian case: "Although UNHCR reportedly does not know of any examples in which a person has been prosecuted based on his homosexuality, this does not provide for a conclusion considering the reasons why no prosecutions have occurred. There might not have been any trials based on homosexuality, homosexual people might have fled Iran and have been granted asylum in another country, or the appropriate evidence might not have been submitted. Therefore, from this information it cannot be concluded that the provisions criminalising homosexual acts, which do exist in Iran, are not being enforced in practice."<sup>70</sup>

### 2.3.2 EXISTENCE OF ENFORCED CRIMINALISATION NOT SUFFICIENT

In four Member States, including **Denmark**, as well as in **Norway**, even the existence of enforced criminalisation in the country of origin seems to be insufficient for recognition as a refugee.<sup>71</sup> For recognition, it is required that applicants show that there are indications that prosecution will take place in their specific case. For example: the asylum applicant has previously been detained, or has been reported to the police, or has been caught by relatives or neighbours, or there are other indications that the authorities are aware of their criminalised behaviour and may react by prosecuting them. In such cases, the applicant not only has a well-founded fear of being persecuted, but actual persecution has already begun.

From **Bulgaria** it was reported that, according to the State Agency for Refugees' officials, proof of past persecution would be inevitably required for a positive decision.

In **Spain** in the case of a gay man from Algeria, the Court stated that "a gay in Algeria cannot have problems, the reality is not so serious as to consider that someone can be persecuted because of his sexual orientation."<sup>72</sup> From Spain it was also reported that refugee status concerning LGBTI applicants were (with one or two exceptions) only granted to LGBTI activists.

For **Finland**, the fact that five Gambian LGB asylum claims were denied, while one was granted refugee status, suggests that the existence of (enforced) criminalisation is not decisive for recognition as a refugee. In fact, most LGB asylum claims in Finland originated from criminalising countries of origin, and many of those claims are being denied. Such decisions were also reported from **Denmark**, although they are not recent (Iran, 2000;<sup>73</sup> Algeria, 1992 and 1998<sup>74</sup>).

In a leading case, the **Norwegian** Appeals Court denied asylum to an Iranian gay man on the following grounds: "The Appeals Court notes that the limitations homosexuals in Iran must endure, with regards to practising their sexual orientation because of social and religious condemnation in society, obviously cannot be regarded as persecution as defined by the UN-convention of 1951 or be considered as grounds for triggering a demand for protection. The Court moreover finds that denying a homosexual foreigner stay in Norway and returning the person to their home country where homosexual practices *are punishable by law* and leads to social condemnation, cannot be regarded as violating Article 8 of the European Convention on Human Rights"(emphasis added).<sup>75</sup>

### 'SAFE COUNTRIES'

A separate finding, closely connected to the issue of criminalising countries of origin, is the practice in some Member States to use lists of so-called 'safe countries of origin'. These are countries of origin considered to be safe, resulting in asylum seekers from these countries having less chance of being granted protection. They might, for instance, have their claims fast-tracked and their rights of defence restricted.

While in some of these countries the lists are not publicly available, we have found the following countries on such lists: Albania, Armenia, Benin, Bosnia-Herzegovina, Botswana, Burkina Faso, Chile, Costa Rica, Gabon, Ghana, India, Jamaica, Kenya, Kosovo, Macedonia, Madagascar, Mali, Mauritius, Moldova, Mongolia, Montenegro, Nigeria, Russia, Senegal, Serbia, Seychelles, Tanzania, Ukraine.

In some of these countries same-sex sexual acts are criminalised (Botswana, Ghana, India (partly), Jamaica, Kenya, Mauritius, Nigeria, Senegal, Seychelles, Tanzania) while in others the general climate seems to be homophobic and/or transphobic. Lists of safe countries containing homophobic countries were reported from the **Czech Republic, France, Germany, Malta, Slovakia, Spain, Switzerland** and the **United Kingdom**.

70 Unabhängiger Bundesasylsenat (Independent Federal Asylum Review Board) 28 September 1998, 203.430/0-IX/26/98.

71 Bulgaria, Denmark, Finland, Norway, Spain.

72 Audiencia Nacional (National Court) 7 November 2008, rec. n° 1563/2007.

73 Flygtningenævnet (Refugee Appeals Board) 17 July 2000.

74 Flygtningenævnet (Refugee Appeals Board) 2 April 1992; Flygtningenævnet (Refugee Appeals Board) 1 September 1998. See also "Disturbing Knowledge – Decisions from asylum cases as documentation of persecution of LGBT-persons", LGBT Denmark and Danish Refugee Council (2008), <http://www.lgbt.dk/uploads/media/DisturbingKnowledge.PA.01.pdf>

75 LB-2002-1351 - RG-2002-1259 (196-2002).



### 2.3.3 COUNTRIES IN WHICH PRACTICE IS NOT CLEAR

In the **Czech Republic**, in a case dating from before the entry into force of the Qualification Directive, the court held that the fact that homosexuality is a criminal act in the country of origin (Morocco) did not automatically satisfy the threshold of persecution, because of the low enforcement of this penal sanction.<sup>76</sup> In a later ruling, the court referred to this judgement but stressed that the wording of the term persecution in Czech domestic law had changed so as to incorporate the Qualification Directive.<sup>77</sup> However, the court did not address the purportedly low enforcement rate of Moroccan criminalisation in its judgement, which leaves it unclear whether enforced criminalisation would suffice for recognition as a refugee of LGB claimants.

In a **Romanian** case of an asylum seeker from Cameroon, the judge from the First Court used the following reasons for rejecting the case: “the applicant alleges that he is a victim of persecution because he is homosexual. But the only persecution he was victim to, was represented by his arrest for the recognised reason that he hugged and kissed another man in his car. Because in Cameroon homosexuality is considered a crime and the applicant committed this crime in a car, on a public road, the reaction of the authorities against him is perfectly normal. Besides, until 2001, the applicant’s act would have been considered a crime in Romania, also, and punished even more drastic than in Cameroon.” However, the judge from the Second Court acknowledged the enforced Penal Code from Cameroon and granted refugee status.

In **Portugal**, one decision recognizing a Senegalese man as a refugee was based on criminalisation *per se*,<sup>78</sup> but a negative decision concerning another Senegalese man and a Senegalese woman did not even mention criminalization in Senegal.<sup>79</sup>

The national expert from **Slovakia** reports that there is no established practice regarding LGBTI asylum cases on this point, although, in 2005, refugee status was granted to a bisexual applicant from a criminalising country, while the decision touched upon the criminal provisions in that country. The same applies for **Cyprus**, **Greece** and **Malta**. According to our national expert, practice in **Hungary** is inconsistent.

From **Slovenia** a remarkable case was reported, though it should be noted that this judgement dates from 2005, before the implementation of the Qualification Directive. In this case a gay

man from Iran claimed he was caught in the act (of having sex with a male person) by the police. The Court ruled that it should be examined whether this would lead to a real risk of the death penalty. Furthermore, according to the Court, it should be examined, whether the Iranian law criminalising same-sex sexual acts is applied to anyone, or only to homosexuals. The Court considered this to be relevant in order to see whether an exclusion clause, based on committing a serious non-political crime, should be applied.

### 2.4 CONCLUSION

On an empirical level, in eleven Member States the existence of enforced criminalisation in the country of origin may be sufficient for recognition as a refugee for LGB asylum applicants from those countries. In four Member States (and Norway), the existence of enforced criminalisation is not sufficient for recognition as a refugee. Indications are further required that criminalisation will be enforced in the individual case with respect to this specific applicant.

However, most countries where the existence of enforced criminalisation is insufficient for recognition of LGB applicants do not deny that an applicant who has a well-founded fear of being prosecuted for same-sex sexual activities between consenting adults also has a well-founded fear of being persecuted on account of membership of a particular social group.<sup>80</sup> Consequently, it would appear that the difference in practices of European States is essentially about the ‘well-founded fear’ requirement.

If one could be sure that the criminal law provision at stake is *never* enforced (for example: there is official policy to that effect, which is upheld in practice; but for political, cultural or religious reasons, revocation of the criminal law provision is not deemed prudent by the authorities) then the applicant does not have a well-founded fear of being persecuted on the grounds of this law. If one could be sure that the criminal law provision is *always* enforced, then clearly the applicant does have a well-founded fear of prosecution.

Reality tends to be more complicated than these two extremes and the enforcement of criminal provisions will vary in time and place. In criminalising countries, however, there is always the possibility of enforcement. It should also be taken into account that the existence of criminal sanctions reinforces the stigmatisation of LGBTIs in the countries concerned. Even in the absence of enforcement,

76 Supreme Administrative Court (Czech Republic) 23 November 2007, No. 5 Azs 50/2007.

77 Supreme Administrative Court (Czech Republic) 28 May 2009, No. 6 Azs 26/2009.

78 Asylum Procedure No. 148B/08.

79 Asylum Procedure No. 97C/08; Asylum Procedure No. 30C/10.

80 Although Norway and Bulgaria seem to deny this – Norway because a prison sentence for same-sex sexual contacts is not deemed to be persecution, and Bulgaria because it has not transposed the Article 10(1)(d) Qualification Directive definition of sexual orientation as a persecution ground into the national Law on Asylum and Refugees.



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criminalisation amounts to State sponsored homophobia. In addition, because there is always the possibility of prosecution, LGBT people are, as a general matter, defenceless against homophobic violence or extortion. Moreover, in countries where same-sex sexual activities are criminalised, State protection against anti-LGBTI violence must be deemed not to be forthcoming (see Chapter 3).

It should also be noted that, although we found many examples in which applicants were rejected because of non-enforcement or low enforcement of the criminal laws, this finding does not necessarily mean that, *a contrario*, they would have been recognised if they originated from countries where criminalisation was enforced. Taking into account the current scarcity of country of origin information on LGBTIs (see Chapter 8), including information on enforcement of criminalisation, it cannot be ruled out that the issue of (non-) enforcement of criminal provisions against LGBTs is merely used as a means applied by asylum authorities to reject LGBT applications.

How could it be assessed whether, and to what extent, the provisions against sexual orientation are enforced? Data on the prosecution rate in criminalising countries of origin will be seldom provided by the prosecuting governments. Also, prosecution might take place in Sharia courts or local tribunals or other places for which information is difficult to find. Therefore, it is essential that country of origin information is used appropriately. In the present context, it is important that scarcity of information about enforcement is not taken as an indication that enforcement does not take place. Lack of information should be taken for what it is: that the organisation collecting information does not know.

If one accepts that LGBT people should not be required to hide their sexual orientation (see Chapter 4), then the fact that sexual activities between consenting adults of the same sex are criminalised in the country of origin should lead to the conclusion that LGBT applicants from that country are refugees. They are likely to engage in criminalised conduct (or perceived to do so), hence they are likely to fall within the scope of criminal law. There is a reasonable likelihood that an LGBT person from the criminalising country of origin in question will face persecution upon return, be it in the form of prosecution or in the form of extortion or other forms of violence against LGBT people with no State protection to be found.

## RECOMMENDATIONS

- Article 4(3)(a) Qualification Directive should be applied in such a way that it leads to refugee status for lesbian, gay, bisexual, trans and intersex applicants originating from countries where sexual

orientation or gender identity are criminalised, or where general provisions of criminal law are used in order to prosecute people on account of their sexual orientation or gender identity.

- Countries of origin which criminalise sexual orientation or gender identity cannot be considered as 'safe countries of origin' for lesbian, gay, bisexual, trans and intersex applicants.

### 3 STATE PROTECTION AGAINST NON-STATE PERSECUTION

Many LGBTI asylum seekers do not flee persecution emanating only from the State, but they flee persecution or ill-treatment by non-State actors (family, neighbours, fellow-citizens or 'mobs'), or situations involving both State and non-State actors. In such situations, international protection will only be granted if applicants are unable to get protection from their national authorities.

Therefore, in these cases the reaction of the national authorities to persecution by non-State actors is crucial. Do they offer effective protection?

This problem is illustrated by an **Austrian** case:

A Ukrainian gay asylum seeker said that he was beaten up by a group called "Ukrainian Patriots" (who often harass homosexuals) when he met other homosexuals and lost three teeth. He was also openly threatened by graffiti concerning him personally. When he left his home town and lived in a hotel he asked the waiter for the gay scene in this town. Two days later four persons came to his hotel room. He was raped by one of them, they threatened him and warned him not to call the police. This case is still pending, but the Constitutional Court cancelled the Asylum Court's negative decision, even though he did not go to the Ukrainian police to complain about the violation of his rights.<sup>81</sup>

#### 3.1 INTERNATIONAL AND EUROPEAN STANDARDS

Persecution by non-State actors has been recognised as relevant for asylum in Article 6 of the Qualification Directive. Actors of persecution or serious harm include non-State actors, if it can be demonstrated that the State or *de facto* authorities, including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

The primacy of national protection over international is reflected in the Qualification Directive:

Article 7(2): Protection is generally provided when the actors mentioned in paragraph 1 take 'reasonable steps' to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection. In the most recent version of the recast proposal of the Qualification Directive it is proposed to add

<sup>81</sup> Asylgerichtshof (Asylum Court) 30 October 2009, D12 230.429-2/2009/8E.

to Article 7(2) that this protection must be *effective and of a non-temporary nature*.<sup>82</sup>

UNHCR has noted that criminal sanctions for homosexual activity impede the access of LGBT persons to State protection.

*"For example, a LGBT person who has been exposed to violence may hesitate to approach the police for protection because he or she may be regarded as an offender instead of a victim. An applicant could therefore also establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect him or her effectively against such harm."*<sup>83</sup>

*"A refugee claim can, thus, be established where the State is unwilling or unable to protect against violations committed by State or non-State actors. Instances where a State's inaction may be persecutory include failure of the police to respond to requests for assistance, and refusal by the authorities to investigate, prosecute or punish individuals inflicting harm on LGBT persons."*<sup>84</sup>

#### 3.2 SEEKING PROTECTION FROM STATES THAT CRIMINALISE LGBTI'S

In some Member States, LGBTI applications are rejected on the ground that the applicant should have sought protection from national authorities against homophobic and transphobic violence by non-State actors, while these national authorities criminalise LGBTIs.

##### 3.2.1 STATE PRACTICE

For instance in **Austria**, seeking national protection was required from a gay man from Zimbabwe:

He has known that he was homosexual since his time at school. People in Zimbabwe are against homosexuality, he was beaten by strangers several times and he has been discriminated against. Sometimes persons paid him or gave him presents when he had sex with them. After the community found out, they battered him even more. The negative decision of the Federal Asylum Office was cancelled once and there is still no final decision.<sup>85</sup>

<sup>82</sup> Council of the European Union, Presidency's Note to the Permanent Representatives Committee, Brussels, 6 July 2011, 2009/0164 (COD), ASILE 56, CODEC 1133.

<sup>83</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, p. 22.

<sup>84</sup> *Ibid.*, p. 27.

<sup>85</sup> Asylgerichtshof (Asylum Court) 12 August 2010, A2 414.747-1/2010. In another

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In **Finland**, applicants from Iran and Nigeria were required to seek protection from the state.<sup>86</sup> In **Norway** protection was withheld to an Ethiopian man on this ground.<sup>87</sup> In **Portugal** this happened in respect to applicants from Senegal and Angola,<sup>88</sup> in **Sweden** for Iraq, and in **Romania** for Afghanistan. Also in **Spain**, seeking state protection was expected in countries that criminalise homosexuality. Although the **Maltese** authorities stated they do not to require this, an example to the contrary was found.

The next case illustrates the impossibility of seeking State protection in criminalising countries:

In **Denmark**, there was an Algerian bisexual man who had been threatened with a gun because of his sexual orientation by Islamic fundamentalists. He paid them off with some jewellery. He did not dare to report the incident to the police out of fear for being sentenced to prison. In the following weeks he received death threats by telephone. His friend was killed by having his throat slit. The application was rejected by the Danish Refugee Board, for there was no indication that his sexual orientation was known to the authorities. Furthermore the maximum penalty in Algeria was not considered "disproportionate compared to Danish law."<sup>89</sup>

No examples either way were reported from **Bulgaria, Greece, Slovakia, Slovenia, Hungary, Poland, Lithuania** and the **Czech Republic**.

### 3.2.2 GOOD PRACTICE

A good practice is provided by the **Netherlands**, where since July 2009 the policy guidelines explicitly state: "Whenever homosexual acts are criminalised in the country of origin, the applicant is not required to have invoked the protection of the authorities there" (Aliens Circular C2/2.10.2).

In addition, this policy is incorporated in some policy guidelines concerning specific countries. "Homosexuals in [country name] are not expected to turn to the police for protection". On this basis, homosexuals from the following countries are not required to seek national protection in case of problems related to their sexual orientation: *Afghanistan, Democratic Republic Congo, Guinea, Iraq, Ivory Coast, Nepal* (referring to homosexuals, transvestites and transgenders), *Nigeria*,<sup>90</sup> *Sierra Leone, Sri Lanka, and Syria*. It should be noted that in some of these countries, homosexual acts are not criminalised, for instance in Nepal and Ivory Coast. In case of criminalising countries that do not appear in these country specific guidelines, LGBs can invoke the exemption from the requirement to seek national protection on the basis of the general policy rule, the application of which is not restricted to particular countries. It applies to all countries where same-sex sexual acts are criminalised.

In one **Irish** decision to grant the refugee appeal of a Kenyan gay man, the Tribunal referred to country of origin information that homosexuality is illegal in Kenya and that "in addition to repressive legislation gay people face stigmatisation and discrimination" and stated "in the opinion of the Tribunal this objective fact would absolve the applicant of the obligation to resort to state protection where available". Accordingly, it was accepted that the applicant would be at risk of persecution if returned to Kenya and that he could not be expected to seek protection from the police or other state authorities.<sup>91</sup> However, Irish practice is reported to be inconsistent, because in other cases it was expected to seek police protection in criminalising countries.

From **France, Germany** and **Italy** is reported that seeking state protection against non-state actors is not required from LGBTIs originating from countries which criminalise homosexuality.

In the **United Kingdom**, the same approach seems to be taken, insofar as LGB applicants from Jamaica are not expected to turn to their authorities for protection because of the prevailing homophobic climate.<sup>92</sup>

### 3.2.3 CONCLUSION

Our conclusion is that there is divergent state practice in the European Union on this point. On the basis of the information we

gay case seeking protection from the Nigerian authorities was required.

86 Maahanmuuttovirasto (Finnish Migration Service) 25 November 2009 and Helsingin hallinto-oikeus (Administrative Court of Helsinki) 26 October 2010, 10/1422/1.

87 Asylgerichtshof (Asylum Court) 1 March 2011, DUF: 2007 059077 09.

88 Asylum Procedure No. 97C/08, Asylum Procedure No. 30C/10, Asylum Procedure No. 124T/09.

89 Decision of the Refugee Appeals Board, 1998; Art. 338 of the Algerian Penal Code: Any person guilty of a homosexual act shall be punished with a term of imprisonment of between two months and two years and a fine of 500 to 2000 Algerian dinars. See also "Disturbing Knowledge – Decisions from asylum cases as documentation of persecution of LGBT-persons", LGBT Denmark and Danish Refugee Council (2008).

90 For Nigeria, the policy guidelines mention that sexual activities between persons of the same sex are criminal acts, and refer to the general policy rule providing, *inter alia*, that applicants are not required to seek national protection if homosexuality is criminalised.

91 Refugee Appeals Tribunal 2008.

92 Asylum and Immigration Tribunal, *DW (Jamaica) v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168 and UK Upper Tribunal, 24 June 2011, *SW (Jamaica) v. Secretary of State for the Home Department*, CG [2011] UKUT 00251. See also UK Home Office, *Operational Guidance Note: Jamaica*, 3 May 2011, v 9.0, paragraph 3.7.7.

have, seeking State protection even if LGBTIs are criminalised in the country of origin is required in **Austria, Denmark, Finland, Ireland, Norway, Portugal, Sweden, Romania, Malta and Spain**. In other Member States, seeking State protection is not required if LGBTIs are criminalised in the country of origin; this is the case in the **Netherlands, France, Germany and Italy**.

It is clear that in countries where homosexual acts (or other 'deviant' sexualities) are criminalised, acts of non-State persecution (including discrimination) cannot be remedied by turning to the authorities for protection, because this may lead to criminal sanctions on account of sexual orientation. Even in countries where criminal sanctions are not actively enforced in order to prosecute LGBTIs, the authorities cannot reasonably be expected to provide effective protection.

## RECOMMENDATIONS

- Article 7 of the Qualification Directive should be applied in such a way that lesbian, gay, bisexual, trans and intersex applicants are only required to turn to the authorities for protection, if it has been established that effective protection of a non-temporary nature would generally be available for lesbian, gay, bisexual, trans and intersex people in that country.
- Article 7 of the Qualification Directive should be applied in such a way that, when sexual orientation or gender identity is criminalised in the country of origin, lesbian, gay, bisexual, trans or intersex applicants are not required to invoke the protection of the authorities.

### 3.3 STATE PROTECTION AND HOMOPHOBIC/TRANSPHOBIC AUTHORITIES

It may be that in the country of origin of the applicant, criminal law has never been used against LGBTIs, or that Penal law has been amended so as to decriminalise homosexuality. Even then, it may be unreasonable to expect LGBTI asylum seekers to turn to the national authorities for protection, since such an attempt may be either useless because the authorities would not do anything to protect them, or it might be positively risky for their future safety from the authorities and/or non-state actors.

#### 3.3.1 STATE PRACTICE

Because of the diversity of Member State practices, we purposely provide many examples of the notion of State protection in countries of origin where the police or other authorities are homo- or transphobic.

Many Finnish cases concern Russian LGBTs. Decision makers claim that the applicant should seek protection from the police; however, when the police do not help them, they should bring their case to a court. In all of these cases applicants have suffered from incorrect or even hostile reactions from the police.<sup>93</sup>

From Finland we also received a positive asylum decision, concerning Iraq, where same-sex relationships are not clearly criminalised in the law (according to ILGA): "In general the authorities cannot guarantee the protection needed, because homosexuality is regarded illegal according to the religion and traditional *mores*. In most of the cases where homosexual persons have suffered from violence, honour killings, forced prostitution and kidnappings, nobody has been punished for those acts. There are many cases, where policemen have mistreated, sexually abused and blackmailed homosexuals."<sup>94</sup>

For **Denmark**, examples where police protection was requested concerned Russia (1994, 2003), Albania (2002), Lithuania (1997), and Turkey (2000).<sup>95</sup> When former Soviet Union countries decriminalised homosexuality, claims were rejected immediately, before any evidence concerning the availability of protection by the authorities could be obtained (e.g. Russia 1994). In a case of a gay man from Romania (1995) the decision was based on the expected decriminalisation in near future.<sup>96</sup>

In **Lithuania** there were two cases of gay Kazakh asylum seekers, who claimed they had sought protection from the militia, although the militia usually did not take any action and even expressed views like: "homosexuals have to be exterminated." Country of origin information showed that protection generally would not be available to gay people in Kazakhstan. However, the Lithuanian Migration Department required evidence that they had actively applied to the Kazakh state authorities and that those were unable or unwilling to protect.

Several **Czech** judgments dating from before the entry into force of the Qualification Directive held that applicants failed to seek protection from the state authorities in the country of origin, even though the police had a reputation of being homophobic.<sup>97</sup>

<sup>93</sup> Helsingin hallinto-oikeus (Administrative Court of Helsinki) 26 October 2007, 07/1355/1; Helsingin hallinto-oikeus (Administrative Court of Helsinki) 30 September 2008, 08/1444/3; Maahanmuuttovirasto (Finnish Migration Service) 7 September 2009.

<sup>94</sup> Maahanmuuttovirasto (Finnish Migration Service) 12 February 2010.

<sup>95</sup> Russia: Flygtningenævnet (Refugee Appeals Board) 12 January 1994; Flygtningenævnet (Refugee Appeals Board) 25 February 2003; Albania: Flygtningenævnet (Refugee Appeals Board) 16 May 2002; Lithuania: Flygtningenævnet (Refugee Appeals Board) 28 July 1997; Turkey: Flygtningenævnet (Refugee Appeals Board) 16 February 2000.

<sup>96</sup> Flygtningenævnet (Refugee Appeals Board), 11 May 1995.

<sup>97</sup> Claims were rejected because the applicants did not seek State protection against persecution by non-State agents, even though the effectiveness

## STATE PROTECTION AGAINST NON-STATE PERSECUTION

Since the transposition of the Qualification Directive, the Supreme Administrative Court interprets this requirement in light of Art. 7(2) of the Qualification Directive. Since the Department of Asylum and Migration Policies of the Ministry of the Interior (DAMP) can no longer reject an asylum claim merely on the ground that persecution emanates from 'non-state agents', the failure to seek protection from state authorities has become the most common reason for rejecting refugee claims. However, there have not been LGBTI cases yet discussing these issues in a comprehensive manner.

The case law of the **Dutch** Judicial Division of the Council of State holds that it has to be established firstly whether the authorities in the country concerned provide protection in general. Only after this is established, is the question addressed whether the applicant has established that seeking protection would have been clearly dangerous or pointless. If not, the applicant is required to have sought State protection. The authorities are only deemed to have been unable or unwilling to grant protection if the applicant has invoked protection in vain.<sup>98</sup> Only after this has proven to be dangerous or pointless, will the claim be examined on its merits.

The Dutch country report on Armenia<sup>99</sup> states that "in general homosexuals do not turn to the police for help, because there is no guarantee that they will get protection from the police. Upon contacting the police, homosexuals run the risk of being blackmailed by the police." However, according to the Court in the case of a gay Armenian, this does not mean that asking protection from the higher authorities would be dangerous or pointless.<sup>100</sup> For Turkey, the Dutch

policy guidelines explicitly state that "homosexuals, transvestites and transgenders can obtain national protection, unless it has been established in the individual case that this is not so," although this information is contrary to the information in the Dutch country report on Turkey.<sup>101</sup>

The decisions identified in **Portugal** indicate that seeking protection from police is always a requirement. Information on whether that protection would be available to LGBTI individuals does not seem to be sought by the Portuguese authorities nor does this play any role in decision-making.

In **Sweden**, it is common to require LGBTI applicants from ex-Soviet Union countries (like Kazakhstan and Kyrgyzstan) and Mongolia to seek State protection.

In **Germany**, it is usually not required that LGBTI applicants seek protection from authorities which are known to be homophobic, with one exception in a rejected case of a trans woman from Venezuela: The Federal Office considered that she should have reported the threats from a criminal gang to the police. In spite of her claim that she had been frequently subjected to degrading treatment by state authorities and that she could not get protection from the police, as they were corrupt and cooperating with the criminal gang, the court agreed with the Federal Office. It must be noted though, that the main reasons for the rejection of the claim were significant doubts concerning her credibility.<sup>102</sup>

In **Spain**, a Georgian gay who suffered physical attacks because of his sexual orientation, was rejected by the National Court because "the attitude of the police was not totally passive towards the problems the asylum seeker submitted as a basis for his asylum claim". The Court reached this conclusion "because on the day the asylum seeker was hit, there was police intervention. Although they did not take measures as effectively as would have been necessary."<sup>103</sup>

The case law of the **Polish** Office for Aliens as well as the court's case law is consistent in requiring that the applicants show the impossibility or ineffectiveness of state protection. However, the applicants may be asked to put forward evidence why such

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of protection and/or availability of protection was questionable or not addressed at all by the Department of Asylum and Migration Policies of the Ministry of the Interior (DAMP). See e.g. Supreme Administrative Court (Czech Republic), 5 October 2006, No. 2 Azs 66/2006; and Supreme Administrative Court (Czech Republic), 27 February 2008, No. 6 Azs 4/2008. See also cases in which applicants were required to seek State protection (at higher echelons of the police hierarchy) even though the applicant was subject to ridicule, intimidation or sexual harassment by the police when he or she turned to the local police officers: e.g. Supreme Administrative Court (Czech Republic), 20 April 2005, No. 3 Azs 245/2004; Supreme Administrative Court (Czech Republic), 30 October 2006, No. 4 Azs 13/2006; and Supreme Administrative Court (Czech Republic), 30 June 2006, No. 8 Azs 101/2005.

98 e.g. Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 12 December 2010, LJN: BL4567.

99 Netherlands Ministry of Foreign Affairs, *Country Report Armenia*, 19 December 2006.

100 Rechtbank (Regional Court) Zutphen, 10 October 2007, nr. 07/17458 (appeal dismissed). Confirmed by the Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 18 February 2008, 200707743/1. Comp. Rechtbank (Regional Court) Groningen, 3 November 2008, nr. 08/12467, appeal by applicant dismissed without reasons by Judicial Division of the Council of State, 7 April 2009, 200808661/1/V1 (China); Rechtbank (Regional Court) 's-Hertogenbosch, 16 February 2010, nr. 09/16343, applicant's appeal dismissed without reasons by Judicial Division of the Council of State, 11 June 2010, 201002793/1A/2. See also Rechtbank (Regional Court) Almelo, 28 May 2010, nr. 10/16955, Judicial Division of the Council of State, 31 August 2010, 201005517/1/V2 (appeal dismissed); Rechtbank (Regional Court) Arnhem, 21 December 2006, nr. 06/21595, Judicial Division of the Council

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of State, 8 June 2007, 200700569/1 (appeal dismissed), Rechtbank (Regional Court) Zutphen, 17 March 2006, nr. 06/9846 (appeal dismissed).

101 See Netherlands Ministry of Foreign Affairs, *Country Report Turkey*, 1 September 2010, par. 3.4.6, available at <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2010/09/14/turkije-2010-09-14.html>.

102 Verwaltungsgericht (Administrative Court) Dresden, 15 May 2009, A1 K 30157/07.

103 Audiencia Nacional (National Court) 23 May 2007, rec. nº 412/2004.

protection would be ineffective or impossible to obtain, and thus rebut the assumption. In the case of a trans person from Ingushetia, the Office took notice of the fact that the local authorities were unwilling to offer protection.

### 3.3.2 GOOD PRACTICE

In **France**, homophobia in official circles is taken into account when it comes to the requirement of invoking State protection:

The French National Asylum Law Court held that a Kosovar applicant had not asked police protection: 'Although homosexuality is not criminalised in Kosovo, homosexuals can be the victim of grave discrimination and violence; complaints lodged with the authorities are not always followed upon, when they concern persons belonging to the gay community, and may even give rise to reprisals; individuals who have been the victim of such facts most often refrain from filing a complaint; the attitude of the Kosovo authorities can be perceived as encouraging homophobic acts.'<sup>104</sup>

In **Germany**, generally it is not expected that LGBTI applicants seek State protection in countries where the authorities are homophobic (but, for an exception, see above).

### 3.3.3 CONCLUSION

There is divergent State practice on this point. It is clear that in countries where national or local authorities are homo- or transphobic, acts of non-State persecution (including discrimination) cannot be remedied by turning to the authorities for protection because this may lead to the person being subjected to further homo- or transphobia, this time from the police. Even when the authorities are not likely to engage in anti-LGBTI violence themselves, homo- and transphobic authorities are not likely to provide effective and non-temporary protection against anti-LGBTI violence or other forms of discrimination.

## RECOMMENDATION

- Article 7 of the Qualification Directive should be applied in such a way that when potential actors of protection are likely to be homophobic/transphobic, lesbian, gay, bisexual, trans or intersex applicants are not required to have invoked the protection of the authorities.

<sup>104</sup> Cour Nationale du Droit d'Asile (National Court for Asylum Law), 23 December 2009, ref 09012138; for comparable rulings on Morocco see Cour Nationale du Droit d'Asile (National Court for Asylum Law), 29 January 2008, ref 602367; and on Albania Cour Nationale du Droit d'Asile (National Court for Asylum Law), 10 December 2009, ref 08018574.





## 4 THE DISCRETION REQUIREMENT

In large parts of the world people still hide their sexual orientation or gender identity. They stay 'in the closet' (i.e. conceal their sexual orientation or gender identity) because they fear harm from others: their family-members, friends, neighbours, society in general or state authorities. The reactions to disclosure ('coming out') can take the form of abuse, discrimination, forced marriage, torture, rape, murder, etc.

LGBTI people who leave their country in order to seek refuge and apply for international protection elsewhere, are often rejected with the reasoning that they have nothing to fear in their country of origin as long as they remain 'discreet'. The explicit or implicit requirement that a person acts discreetly in order to prevent being persecuted on grounds of his or her sexual orientation or gender identity occurs in many countries and legal systems. Often discretion is required in the context of an internal protection alternative (see also Chapter 5).

In the case of an Algerian applicant the **Hungarian** Office of Immigration and Nationality stated that "even if criminal sanctions against homosexuals or homosexual behaviour are in force, the sexual orientation can be practised in a hidden, discreet way, in order to prevent possible attacks."

In the last decade this type of reasoning has met severe criticism from lawyers and activists, which has led to substantive changes in asylum practice in some countries outside Europe.<sup>105</sup>

### 4.1 INTERNATIONAL AND EUROPEAN STANDARDS

Article 1A-2 of the Refugee Convention (and, consequently, Article 2(c) of the Qualification Directive) defines a refugee as someone who has a well-founded fear of being persecuted for reasons of one

of the five persecution grounds. One of the persecution grounds is membership of a particular social group. Article 10(1)(d) of the Qualification Directive holds that a group shall be considered to form a particular social group where, in particular, the members of that group share a characteristic that is so fundamental to identity that a person should not be forced to renounce it. What the discretion requirement in fact does is to require LGBTI applicants to renounce the expression of their sexual orientation or gender identity; they are expected not to act on it, or at least to hide this crucial element of their personality, so as to escape being persecuted. This requirement goes against the Qualification Directive provision.

Also UNHCR's Guidance Note on Sexual Orientation and Gender Identity makes it clear that the discretion requirement should be abandoned, by stating:

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

*The question to be considered is whether the applicant has a well-founded fear of being persecuted, rather than whether he or she could live in the country of origin without attracting adverse consequences. This requires an objective examination of how the applicant may be treated if he or she were returned to that country. (...) There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships. A requirement for discretion would furthermore imply that a person's sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviours and everyday activities otherwise affected by that person's sexual orientation and gender identity. It would, in fact, amount to requiring the 'same submissive and compliant behaviour, the same denial of a fundamental right, which the agent of persecution seeks to achieve by persecutory conduct.'*<sup>106</sup>

<sup>105</sup> In 2003, the High Court of Australia held: "It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention", High Court of Australia 9 December 2003, *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, S395/2002 and S396/2002. In 2004, the New Zealand Refugee Status Appeals Authority ruled: "By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct. The potential complicity of the refugee decision-maker in the refugee claimant's predicament of 'being persecuted' in the country of origin must be confronted", Refugee Appeal no. 74665/03, 7 July 2004; cf. for similar rulings: United States Court of Appeals for the Ninth Circuit 7 March 2005, *Karouni v. Gonzales*, Attorney General, No. 02-72651, 399 F.3d 1163 (2005), and: Federal Court of Canada 8 October 2008, *Atta Fosu v. the Minister of Citizenship and Immigration*, 2008 FC 1135.

<sup>106</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, par. 25-26.

## THE DISCRETION REQUIREMENT

The discretion requirement was one of the subjects of a preliminary reference to the Court of Justice of the EU which, however, was later withdrawn because the asylum applicant had been granted refugee status.<sup>107</sup>

### 4.2 STATE PRACTICE

In the majority of EU Member States discretion reasoning still occurs. Examples were found in: **Austria** (mostly for bisexuals), **Belgium**, **Bulgaria**, **Cyprus**, **Denmark**, **Finland**, **France**, **Germany**, **Hungary**, **Ireland**, **Malta**, the **Netherlands** (despite the policy guidelines, see below), **Poland**, **Romania**, and **Spain**. **Norway** and **Switzerland** also use the discretion argument.

The experts from the **Czech Republic**, **Greece**, **Lithuania**, **Portugal**, **Slovakia**, and **Slovenia** did not find evidence from the cases analysed that such reasoning was used, although some of these countries had a very a small number of LGBTI asylum cases.

The **Netherlands** formally abolished the discretion requirement in its policy guidelines in 2007 but it is still applied in individual cases, with the approval of the judiciary (see below). The **United Kingdom** following the Supreme Court case of *HJ (Iran) and HT (Cameroon)* only apply discretion where it is voluntary and *only* because of reasons of family or societal pressure.<sup>108</sup> **Sweden** adopted the British approach in January 2011.

#### 4.2.1 DISCRETION REQUIRED

In a considerable number of cases, the asylum applications of gay Iranians were rejected on the ground that they could live in Iran as gay men, as long as they remained discreet.

A **Belgian** judgment states: "In Iranian society there is a great difference between public space and private sphere. In practice, homosexuality among men is widespread and accepted in many Islamic societies, as long as the relationship is kept private and not talked about. The general "de facto-tolerance" means that, as long as homosexuals live their sexuality in private, it is not very likely that the Iranian authorities will show interest in the person involved. Society knows sex segregation and, as long as they play it by the rules, homosexual men can interact socially, live together, travel, and share a hotel room, without attracting attention. In general there are no problems to find fellow-homosexuals in parks and sports

centres, known as homosexual meeting places."<sup>109</sup> The appeal was dismissed.<sup>110</sup>

The **Norwegian** Directory of Immigration held: "Regarding an evaluation of the risks that the complainant will meet if he returns to Iran, we must consider the socio-cultural framework which exists in Iranian society. The Appeals Board supposes that the applicant will not act in a way which is in conflict with what is socially acceptable."<sup>111</sup>

Recently, in **Switzerland** the asylum application of a gay man from Iran was rejected by the Federal Administrative Court, stating that in practice homosexuality is tolerated by the Iranian authorities, "when it is not publicly exposed in a way which could be offensive."<sup>112</sup>

Comparable examples were reported from **Finland**<sup>113</sup> and **Germany**.<sup>114</sup>

From **Austria** it was reported that the discretion argument is mostly used in cases of bisexuals. Bisexuals can be expected to practice discretion in a particular way. For instance, in a case of a bisexual Iranian the court believed he had homosexual experiences, but decided that "these were not so deeply engraved in his sexual orientation, that it would be impossible for him to live in a heterosexual relationship."<sup>115</sup>

Other discretion examples were found in **Hungary**: In a West-African lesbian's case the Hungarian authority stated: "Even if the applicant was a lesbian, if she would not make her lesbianism public, she would not have to fear the consequences of her behaviour." The **Bulgarian** expert reported an apparent common opinion shared by the State Agency for Refugees' officials, that it is better if a gay man returns to his country of origin and tries to live a more discreet life or even to make an attempt to 'change' his sexual orientation.

109 This was based on a Norwegian source of 27 April 2009.

110 Raad voor de Vreemdelingenbetwistingen (Council for Aliens Cases) 31 March 2010, 41 185, v Lex 200952695.

111 Decision dating from autumn 2010.

112 Bundesverwaltungsgericht (Federal Administrative Court) 18 January 2011, *T. v. Bundesamt für Migration*, C-2107/2010; see also: Seraina Nufer and Maximilian Lipp, *Zulässigkeit der Wegweisung eines homosexuellen Iraners*, Jusletter, 30 May 2011. www.jusletter.ch.

113 Maahanmuuttovirasto (Finnish Migration Service) 6 October 2010, Dnro 3498/0512/2010. Comp. in an Afghan case: "Homosexuality is common in Afghanistan, but it cannot be expressed publicly. If you keep quiet about it, you will not get into unreasonable difficulties, according to the country of origin information" Maahanmuuttovirasto (Finnish Migration Service) 1 November 2010, Dnro 3744/0512/2010.

114 In Iran there was deemed to be no serious risk of persecution for gay men "as long as they practice same-sex sexual life covertly and as long as they have not been drawn to the attention of the Iranian authorities". Verwaltungsgericht Düsseldorf (Administrative Court) 11 March 2009 - 5 K 1875/08.A, Informationsverbund Asyl & Migration M18011.

115 Asylgerichtshof (Asylum Court) 14 July 2009, E2 405.216-1/2009.

107 Official Journal of the European Union, 5 February 2011, C38/7, 2011/C 38/09, Case C-563/10: Reference for a preliminary ruling from the Oberverwaltungsgericht (High Administrative Court) Nordrhein-Westfalen, 1 December 2010, *Khavand v Federal Republic of Germany*, C-563/10.

108 UK Supreme Court 7 July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31; [2011] 1 A.C. 596.569, para. 82.

#### 4.2.2 DIVERGENT PRACTICE

Since 1 May 2007, the **Netherlands** incorporated the abandonment of the 'discretion requirement' in its Aliens Circular, for 'homosexuals' (presumably lesbians and gays): "People with a homosexual preference are not required to hide this preference upon return in the country of origin."<sup>116</sup> However, despite this good practice in terms of formal policy guidelines, in some cases the discretion requirement is still used.

A woman from Sierra Leone had a hidden lesbian relationship in her country of origin. She came out in the Netherlands and did not want to conceal her sexual orientation again. The Council of State accepted the argument that "the fact that in the Netherlands the applicant used the possibilities and rights of Dutch society does not imply that she will be unable to accommodate upon return, even if that would require a certain restraint towards society", adding: "although sexual orientation is a crucial element of one's personality, this does not imply that it cannot be expected that she lives her private life in Sierra Leone in the same way as before she left for the Netherlands, just because she cannot live her sexual orientation in Sierra Leone publicly. It is also not contrary to Article 8 ECHR to expect this from her, for the mere reason that she has not adduced facts or circumstances indicating that in Sierra Leone she has not been able or will not be able to give a meaningful interpretation to her homosexual orientation."<sup>117</sup>

In **Ireland**, practice also seems inconsistent. In a refugee appeal by a Pakistani gay man, a Tribunal decision referred to country of origin information, which was regarded as indicating that gay men in Pakistan rarely revealed their sexual orientation. The Tribunal Member considered that the applicant had previously concealed his sexual orientation in Pakistan and he could do so again on his return, and found that internal relocation was an option.<sup>118</sup>

In granting the appeal of an Iranian gay man, the Tribunal stated to the contrary: "One of the issues which has been raised is that while it was accepted that it is illegal to be homosexual in Iran, if people were very private or discreet, there was no problem. There can be difficulties with this when this argument is taken to its logical conclusion. I have some doubts whether there could be any obligation on a person to be so deceptive in hiding one's sexuality or act in a clandestine manner in order to protect themselves that it amounts to a suppression of their sexual orientation. As this State,

and its agencies and bodies including this Tribunal, is bound by the European Convention on Human Rights, I would require persuasive authority before imposing such an obligation on any applicant for refugee status, where that application is based on their sexuality."<sup>119</sup>

In **Germany**, as early as 1983, an Administrative Court compared the discretion argument to the requirement that someone changes his or her skin colour in order to evade persecution.<sup>120</sup> Yet, to date German case law is divided on the subject, while the discretion argument seems to be common, particularly with regard to North African countries like Egypt, Algeria<sup>121</sup> and Morocco.<sup>122</sup>

Other German courts disagree on the grounds that, as a matter of principle, it is unacceptable to ask a claimant to keep his/her sexual orientation secret. A fierce rejection of the discretion argument has been brought forward in a case of a Nigerian homosexual man:

*" (...) the claimant (...) can invoke the human right to free development of his personality which according to European and German legal opinion is universal and definitely must not be restricted in view of the legal systems of other countries. If one tolerates a situation in which the protection of human rights in Germany is dependent on the practice of other countries, one is inevitably bound to end up in Guantanamo as an especially blatant example of the violation of basic human rights by a country which considers itself a democratic and civilised nation."*<sup>123</sup>

In response to a parliamentary query from 18 May 2010,<sup>124</sup> the German government stated that a prognosis on the future conduct of the applicant is decisive, i.e. whether the applicant is to be expected to engage in homosexual activities after his/her return: "The outcome of the asylum procedure depends on whether the asylum-seeker will behave in a manner which will lead to persecution after his/her return (...). It is irrelevant whether he/she may reasonably

116 Vreemdelingencirculaire (Aliens Circular) 2000 C2/2.10.2.

117 Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State) 11 May 2011, 201011782/1/V1, MigratieWeb ve11001135, *Jurisprudentie Vreemdelingenrecht* 2011/307, annulling Rechtbank (Regional Court) Dordrecht, 9 November 2010, 09/4135.

118 Refugee Appeals Tribunal, 2009.

119 Refugee Appeals Tribunal, 2008.

120 Verwaltungsgericht Wiesbaden (Administrative Court) 26 April 1983, IV/I E 06244/81.

121 Verwaltungsgericht Trier (Administrative Court) 9 September 2010, 1 L 928/10, TR, Informationsverbund Asyl & Migration M17537.

122 Verwaltungsgericht Düsseldorf (Administrative Court) 14 January 2010, 11 K 6778/09.A, Informationsverbund Asyl & Migration M16859.

123 Verwaltungsgericht München (Administrative Court) 30 January 2007, M 21 K 04.51404; The arguments of the Verwaltungsgericht München (Administrative Court) have been rejected in turn by the Verwaltungsgericht Düsseldorf (Administrative Court) 21 February 2008, 11 K 2432/07.A, Informationsverbund Asyl & Migration M13330. A comment on this dispute: K. Dienelt, "Vermeidungsverhalten zur Abwendung von Verfolgung – Vereinbarkeit mit der Qualifikationsrichtlinie" <http://www.migrationsrecht.net/nachrichten-asylrecht/1178-eu-qualifikationsrichtlinie-rl-200483eg-religion-verfolgung.html>

124 Bundestags-Drucksache 17/1505, <http://dip21.bundestag.de/dip21/btd/17/015/1701505.pdf>.

## THE DISCRETION REQUIREMENT

be expected to behave in an alternative manner.” Also, it has to be assessed whether there is “a relevant degree of probability” that the homosexual activities will become known to the authorities in the country of origin.

### 4.2.3 THE DISCRETION REQUIREMENT IN REVERSE

The French National Asylum Court often requires LGB applicants to have fully disclosed their sexual orientation in the country of origin. They should have ‘exposed their sexual orientation publicly or manifested it by exterior behaviour.’<sup>125</sup> This is another way of saying: “If you are discreet, then there are no grounds to grant you asylum. You will only be granted asylum if you come out of the closet.”

This ‘indecision requirement’ is not about well-founded fear, as the discretion requirement is, but rather concerns the question whether or not an LGBTI person who has not yet ‘come out’ as such, can be a member of a particular social group defined by sexual orientation. It is derived from the interpretation of the concept of a ‘particular social group’ by the Council of State jurisprudence in France. Article 10(1)(d), second provision of the Qualification Directive requires that a *particular social group* has a distinct identity in the country of origin, because *that group* is perceived as being different by the surrounding society. This is exactly how the French Council of State formulated the test in its 1997 judgement: the social group is defined by “common characteristics which define them as a group in the eyes of authorities and society.”<sup>126</sup>

The National Asylum Court (CNDA, first level jurisdiction) often mistakenly applies this social group requirement as a ‘discretion requirement in reverse’: as long as a person hides her or his sexual orientation or gender identity from others no one can perceive it. Then this person cannot be a member of the social group of LGBs, since she or he is not perceived as such.

This CNDA jurisprudence is based on a misapplication of the social perception requirement of Article 10(1)(d) of the Directive. This requirement is about whether the social group is perceived to be different by the surroundings, instead of whether the (‘closeted’ or ‘out’) individual is perceived to be different.<sup>127</sup>

125 In French: ‘revendiquer son homosexualité ou manifester son homosexualité dans son comportement extérieur’.

126 Conseil d’Etat (Council of State) 23 June 1997, 171858; see also Conseil d’Etat (Council of State) 23 August 2006, 272680.

127 Comp. T. Alexander Aleinikoff’s article, which was the first to formulate the social perception approach as an alternative to the protected characteristics approach: T. Alexander Aleinikoff: Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’, in E. Feller, V. Türk and F. Nicholson: *Refugee Protection in International Law*, Cambridge University Press, Cambridge 2003, p. 263-311, at 296-301. See on the Qualification Directive on this point H. Battjes: *European Asylum Law and International Law*, Martinus Nijhoff, Leiden 2006, par. 327-329.

The French ‘indecision requirement’ reasoning may deny asylum to applicants who have been unable to give expression to their sexual orientation or gender identity due to the persecution they had good grounds to fear if they had expressed their sexual orientation or gender identity. As a consequence, LGB people who have not been out and were still in the closet in their country of origin out of fear of persecution, are not protected by the French authorities.

### 4.2.4 GOOD PRACTICE

Since July 2006, the **United Kingdom** has applied a test as to whether discretion was ‘reasonably tolerable.’<sup>128</sup> This is comparable to the test in many other European countries which enquired whether the applicant could be reasonably expected to hide his/her sexual orientation or gender identity. But in July 2010 the Supreme Court of the United Kingdom, in what has become a famous judgment of *HJ (Iran) and HT (Cameroon)*, abandoned this restrictive view.<sup>129</sup> The judgement is phrased as applying to lesbians, gays and bisexuals, but as trans and intersex asylum applicants rely on the same protected grounds, the reasoning could be applied in T and I cases as well.

The effect of discretion and why this undermined the rationale of the Refugee Convention were explained in paragraphs 55, 77 and 78 of the judgment by Lord Rodger:

55. *“At the risk of repetition, the importance of this analysis for present purposes is that it proceeds on the basis that, so far from permitting or encouraging its agents to persecute the applicant for one of the protected grounds, the home state should have protected him from any persecution on that ground. The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them.*”

128 Court of Appeal (England and Wales) 26 July 2006, *J v. Secretary of State for the Home Department*, [2006] EWCA Civ 1238, [2007] Imm AR 73. The Court has to enquire whether the individual will by ‘choice’ adopt discretion. English jurisprudence followed from considering the Australian High Court decision in *Appellant S395 in Z v. Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm A R 75, 2 December 2004, which then led to successive Court of Appeal judgments up to and including *J*, which then led to the appeal to the Supreme Court in *HJ (Iran) and HT (Cameroon)* in July 2010.

129 Supreme Court 7 July 2010, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31; [2011] 1 AC 596.

77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81: ‘Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense ‘discreetly’) may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.’

We also cite paragraph 82, in which Lord Rodger explains how LGB asylum claims should be dealt with:

*“When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the*

*applicant’s country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living ‘discreetly’. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”<sup>130</sup>*

In *SW* the United Kingdom Upper Tribunal has developed the reasoning of the UK Supreme Court’s approach in *HJ-HT*, to show that it is not mere silence which may be necessary for evading persecution, but not being able to present a ‘heterosexual narrative’ (i.e. by having children or being married), which will lead to identification, and then risk. The Upper Tribunal provided the following Country Guidance with respect to risk to (actual or perceived) lesbians from Jamaica, stating *inter alia*:

*“Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual*

<sup>130</sup> This new approach has also been incorporated in a new Asylum instruction: UK Border Agency, Asylum Instruction, Sexual Orientation and Gender Identity in the Asylum Claim, 6 October 2010, <http://www.ukba.homeoffice.gov.uk/sitecontent>.

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*narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear. (...) Single women with no male partner or children risk being perceived as lesbian, whether or not that is the case, unless they present a heterosexual narrative and behave with discretion.”<sup>131</sup>*

The approach developed in *HJ-HT* has been adopted by the United Kingdom's lower Courts and Tribunals in not only determining claims based on sexual identity, but also asylum claims based on political opinion<sup>132</sup> and religious grounds.<sup>133</sup> This illustrates a good practice in the cross-application of developing precedent in LGB claims to other Refugee Convention reason claims.

In Sweden, asylum applications were rejected based on discretion arguments. However, as of 13 January 2011, **Sweden** followed the reasoning of the UK Supreme Court and adopted a policy document not to require an applicant to live discreetly:

*“In case the applicant states s/he will choose a discreet way of life upon return, it is crucial to question the reason for this choice. If the reason is that s/he wishes to live that way, or if it is due to social pressure, the claim should be rejected. If on the other hand the reason of the discretion is a fear of persecution, the claim should be accepted.”<sup>134</sup>*

In **Italy**, one case was reported in which an asylum seeker declared that he had always lived his sexual orientation very discreetly, but he did not experience this as a privation. Therefore the first instance adjudicator decided he had no fear of persecution.<sup>135</sup> Except for this case, our Italian experts did not find any evidence that the discretion requirement has been used in decisions or case law.

### 4.3 CONCLUSION

Requiring discretion concerning sexual orientation, or making a finding of “voluntary” discretion, is widespread in EU Member States

and it is even applied in countries such as the Netherlands, where the discretion argument has been formally abolished.

Although the UK Supreme Court judgment is a very important step in the right direction, especially compared to practices we found in the other Member States, the distinction concerning the reasons why someone plans to live discreetly is problematic. Firstly, it ignores that by the mere fact of submitting an LGBTI based asylum application, applicants express their desire to live openly as LGBTIs without fear of persecution. If the applicant wants to live openly as an LGBTI person, this is the legitimate exercise of a basic human right which an applicant cannot be required to give up. Secondly, this reasoning does not take into account the fact that, although the applicant might ‘simply’ want to live in a discreet way, persecution may still be imminent as soon as the applicant is discovered being LGBTI or is outed against her or his will by others, due to their ‘difference’.<sup>136</sup> The test of well-founded fear should be the risk ‘open’ LGBTI claimants run upon return to their country of origin, instead of focussing on her/his reasons for living a double-life.<sup>137</sup>

The French requirement that a person must have disclosed her/his sexual orientation or gender identity in the country of origin is based on a misapplication of the social perception test. This test, which concerns the existence of a particular social group (Article 10(1)(d) Qualification Directive) requires that the social group to which the applicant purportedly belongs must be perceived as being different by the surrounding society. This can be the case, whether or not the applicant is in fact a member of that group.

We also found cultural relativistic arguments being used to reason that discretion could be expected, for instance by considerations on the socio-cultural framework in the country of origin. This kind of arguments is unacceptable; the discretion argument goes against the core of international and European refugee and human rights law. Human rights are universal. Requiring people not to express their political opinions, not to live according to their religious beliefs, or not to be open about their sexual orientation or gender identity in order not to be exposed to a risk of persecution, is unacceptable. A person with a well-founded fear of being persecuted for reasons

131 Upper Tribunal (Immigration and Asylum Chamber) 24th June 2011, *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251, par. 107.

132 Court of Appeal (England & Wales) 18 November 2010, *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2010] EWHC 1285 (non-Zanu-PF claimants from Zimbabwe).

133 Upper Tribunal (Immigration and Asylum Chamber) 13 July 2011, *MT (Ahmadi – HJ (Iran) Pakistan CG* [2011] UKUT 00277 (Ahmadis from Pakistan).

134 Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning (RCI 03/2011) available at: [www.migrationsverket.se/lifos](http://www.migrationsverket.se/lifos).

135 Case reported by Commissione territoriale per il riconoscimento della protezione internazionale di Bari (Regional committee for the recognition of international protection of Bari). Date unreported.

136 J. Millbank and C. Dauvergne have noted that “even an individual who wishes to hide, who desperately wishes – and takes all possible steps – to remain closeted does, in fact become increasingly ‘visible’ with the passage of time”, see C. Dauvergne and J. Millbank, ‘Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) *Sydney Law Review* 97, Vol 25, 122. See also S. Chelvan, ‘Put Your Hands Up (If You Feel Love)’, *Immigration, Asylum and Nationality Law*, Vol 25, No 1, 2011, S. 65, where the author remarked “that even where (voluntary) discretion is not due to a fear of well-founded persecution, the fact that an individual is not living a straight life, will identify them as ‘different’ leading to LGB identification”.

137 Cf. para 83 Handbook UNHCR on concealing a political opinion.

related to a persecution ground cannot reasonably be expected to renounce the characteristic constituting the basis of this persecution ground, even if, for the sake of the argument, it is accepted that that would theoretically be possible.

## RECOMMENDATIONS

- The well-founded fear element of the refugee definition should be applied in such a way that lesbian, gay, bisexual, trans and intersex applicants are not required or presumed to hide their sexual orientation or gender identity upon return to the country of origin in order to avoid persecution.
- The persecution ground element of the refugee definition should be applied in such a way that, for a sexual orientation or gender identity based particular social group to exist, the lesbian, gay, bisexual, trans or intersex applicant is not required to have already disclosed her/his sexual orientation or gender identity in the country of origin.





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If the asylum authorities have established, or presume, that an asylum seeker has a well-founded fear of being persecuted in her or his country, they might still deny asylum, because the applicant could live safely in another part of the country of origin and is therefore in no need of international protection. This is called the internal protection alternative (often also referred to as 'internal relocation alternative' or 'internal flight alternative'). To determine whether a location proposed by the authorities is a meaningful internal protection alternative, certain criteria should be met. There should be no risk of persecution or serious harm in the proposed location and state protection should be available there.<sup>138</sup>

In the case of a gay Afghan, the **Romanian** Immigration Office stated: "From the investigation of Country of Origin Information and from the applicant's statements, it follows that there is a possible relocation alternative for people like the applicant (i.e. homosexuals). Therefore a relocation alternative in Afghanistan is a reasonable and relevant choice for him, especially because he has no problems with the Afghan authorities."<sup>139</sup>

### 5.1 INTERNATIONAL AND EUROPEAN STANDARDS

Article 8(1) of the Qualification Directive provides that an applicant may not be in need of international protection if, in another part of the country, the applicant has no well-founded fear of being persecuted nor a real risk of serious harm; and if the applicant can reasonably be expected to stay in that part of the country. The most recent version of the Recast proposal amends Article 8(1) in such a way that internal protection can consist either of a part of the country where the applicant has no well-founded fear of being persecuted, or is not at real risk of suffering serious harm, "or has access to protection against persecution or serious harm."<sup>140</sup>

The current Article 8(2) states that the assessment of whether an internal protection alternative exists, should be done having regard

to the general circumstances in that part of the country and to the personal circumstances of the applicant.<sup>141</sup> The most recent version of the Recast proposal added to Article 8 that "to this end, Member states shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees (UNHCR) and the European Asylum Support Office."<sup>142</sup>

The UNHCR Guidance Note states:

33. *As homophobia, whether expressed through laws or people's attitudes and behaviour, often tends to exist nationwide rather than merely being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation and gender identity. Any suggested place of relocation would have to be carefully assessed and must be both "relevant" and "reasonable". Internal flight is normally not considered relevant where the State is the agent of persecution, unless the State's authority is limited to certain parts of the country. A law of general application, such as a penal code criminalizing homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in a proposed place of relocation.*

34. *Where a non-State actor is the persecutor, it can often be assumed that if the State is not willing or able to protect in one part of the country, it will not be willing or able to do so in any other part. Applicants cannot be expected to suppress their sexual orientation or gender identity in the internal flight area, or required to depend on anonymity to avoid the reach of the agent of persecution. While a major or capital city in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a "safe haven". The applicant must also be able to access a minimum level of political, civil and socio-economic rights. Thus, he or she must be able to access State protection in a genuine and meaningful way. The existence of LGBT*

138 See generally on the internal protection alternative James C. Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press 2003; see also First Colloquium on Challenges in International Refugee Law, *Michigan Guidelines on the Internal Protection Alternative*, April 9-11, 1999.

139 The COI used in this decision (by the Oficiul Roman pentru Imigrari) was: Department of State, 2009 Country reports on Human Rights Practices - Afghanistan, 11 March 2010; Report of the Secretary-General pursuant to paragraph 40 of resolution 1917 (16 June 2010) *UN Doc S/2010/318*.

140 Council of the European Union, Presidency's Note to the Permanent Representatives Committee, Brussels, 6 July 2011, 2009/0164 (COD), ASILE 56, CODEC 1133.

141 Article 8(3) Qualification Directive provides that the internal protection alternative may be held against the applicant notwithstanding technical obstacles to return to the country of origin. This provision is at odds with the position of the European Court of Human Rights, which requires that "the person to be expelled must be able to travel to the area concerned", ECtHR 11 January 2007, *Salah Sheekh v. the Netherlands*, Appl. No. 1948/04, par.138; ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl. Nos. 8319/07 and 11449/07, par. 266. We therefore agree with the most recent recast proposal to delete Article 8(3) QD.

142 Council of the European Union, Presidency's Note to the Permanent Representatives Committee, Brussels, 6 July 2011, 2009/0164 (COD), ASILE 56, CODEC 1133.

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*related NGOs does not in itself provide protection from persecution.*<sup>143</sup>

UNHCR's Guidelines on Internal Flight or Relocation Alternative state:

14. *Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State. The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government's failure to counteract the localised harm. The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise.*
15. (...) *It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.*
28. *Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.*
34. (...) *the decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned.*
38. (...) *It (an alternative flight or relocation alternative) is relevant only in certain cases, particularly when the source*

*of persecution emanates from a non-State actor. Even when relevant, its applicability will depend on a full consideration of all the circumstances of the case and the reasonableness of relocation to another area in the country of origin.*<sup>144</sup>

This means that in cases where the feared persecution emanates from or is condoned or tolerated by State actors, internal protection is not available, because under such circumstances the person is threatened with persecution countrywide. Also, when the feared persecution comes from local or regional State actors, internal protection will in most cases not be relevant. It should also be taken into account whether the basic human rights of the individual are respected and protected in the proposed location.

As we have concluded in the Chapter on State protection (Chapter 3), in countries that criminalise LGBTIs, State protection is not available. Therefore, an internal protection will also not be an option for LGBTIs in those countries. In other (i.e. non-criminalising) countries, an internal protection alternative can only be taken into consideration, after it has been established that the State authorities in that part of the country are not homophobic or transphobic, but are instead willing and able to offer protection to LGBTIs, when needed.

### 5.2 STATE PRACTICE: PROTECTION

We found examples in which LGBTI applicants were rejected, based on an internal protection alternative in sixteen European countries.<sup>145</sup>

A lesbian from Mongolia applied for asylum in Austria in 2002, after she was harassed and physically maltreated by her former husband and her colleagues because of her sexual orientation. The Asylum Court stated that: "Since 2002, homosexual acts are no longer criminalised in Mongolia, homosexuals are not more in danger than other minorities." In 2009, her asylum application was rejected, based on an internal protection alternative.<sup>146</sup>

In a judgment in 2003, in the case of a Russian trans woman the Danish Refugee Board relied on country of origin information in its finding that there was no reason to expect systematic persecution of trans persons in Russia, neither by private persons nor by the

<sup>143</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008.

<sup>144</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003.

<sup>145</sup> Austria, Denmark, Finland, Germany, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, United Kingdom (before *HJ/HT*).

<sup>146</sup> Asylgerichtshof (Asylum Court), 19 August 2009, C9 248.748-0/2008.

authorities. The Board therefore proposed that she should move to a larger city, where she could be expected to find a community of persons with her sexual orientation (sic), and where it would be less likely for her to become victim of abuse by the police.

In many cases it was assumed that LGBTIs could find internal protection in other parts of a criminalising country.

In an **Irish** decision refusing the refugee appeal of a Nigerian gay man, the Tribunal stated: "While it is accepted that state protection may not be available to homosexuals in Nigeria, internal relocation to avoid any possible threat would be an option."<sup>147</sup> The decision did not address the implications of this lack of state protection.

In the case of a gay Iranian, the Finnish Migration Service reasoned: "internal relocation would be a feasible and effective way for him to avoid possible problems with his relatives and the authorities. It is not regarded as probable that the authorities would try to catch him, at least not outside his home area."<sup>148</sup>

In the case of a gay Senegalese, an Italian court held that the claimant could have avoided the (eventual) threat of his father by moving to another town in Senegal.<sup>149</sup>

We also found that many decisions and judgements were relying on the presumption that the mere existence of gay bars, gay meeting places or LGBT NGOs in larger cities in the country would be sufficient to provide a safe place for LGBTIs, instead of carefully assessing whether in these cities the State offered protection against anti-gay or trans violence, when needed.

A Dutch Court held that the tourist coastal area of Gambia was a good protection alternative. "Because of the loose sexual morals found in that area, a gay man could live there in some anonymity."<sup>150</sup>

The Finnish Directorate of Immigration stated: "The applicants could move to an area, where the attitude towards homosexuals is more tolerant. In bigger cities it is less probable that homosexuals would stand out among the people, and e.g. in Moscow and in St. Petersburg there are a few NGOs for sexual minorities and publicly known clubs."<sup>151</sup>

147 Refugee Appeals Tribunal, 2009.

148 Maahanmuuttovirasto (Finnish Migration Service) 6 October 2010, Dnro 3498/0512/2010. Cf. also "If the applicant has problems because of his bisexuality in his hometown, he can move to another part of Ethiopia." Maahanmuuttovirasto (Finnish Migration Service) 27 October 2008, Dnro 403/0611/2008.

149 Tribunale (Tribunal) Trieste 11 November 2009, nr. 508/09.

150 Rechtbank (Regional Court) Amsterdam 6 October 2005, nr. 05/42699.

151 Ulkomaalaisvirasto (Directorate of Immigration) 3 November 2004, Dnro 1719-1720/0611/2004.

The **Lithuanian** Migration Department rejected the application of an asylum seeker from Kazakhstan. "Country of origin information stated that freedom of movement is respected in Kazakhstan and gays feel comparatively safe in Astana, Almata, Karaganda, Aktau, Atyrau, Ust-Kamenogorsk, Pavlodar. Bars, clubs and other entertainment are available for gays in those cities. Furthermore, psychological and material support is available for gays who live in the street or who are sexually abused." Therefore these places were considered a suitable protection alternative.

In an Ethiopian case the Norwegian Appeal Board stated: "She is a mature and resourceful woman who could be expected to live in a place other than her hometown, for example in Addis Ababa. Lesbians generally have no reason to fear persecution."<sup>152</sup>

In **Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Slovakia, Slovenia** and **Spain** no cases of rejection based on an internal protection alternative were found.

### 5.3 STATE PRACTICE: DISCRETION IN THE PROTECTION ALTERNATIVE

In nine European countries examples were found in which the applicant was explicitly or implicitly expected to move to another part of the country, and hide his or her sexual orientation or gender identity there.<sup>153</sup> (See on discretion also Chapter 4) Again, many cases were reported concerning criminalising countries, as is illustrated by the following examples.

For instance in the case of a Cameroonian gay man, the **Romanian** First Court (*Judecatorie*) stated: "Nothing prevents the applicant to settle in his country of origin in a place where he is not known and to practice his sexuality, but he should be more discreet, in order not to call for the reaction of the authorities and the general public opinion."

In the **Netherlands** we found divergence between policy and practice: In 2006, the Dutch Minister Verdonk stated that: "an internal flight alternative can only be raised if this does not imply that the asylum seeker should hide his or her sexual preference in the other part of the country."<sup>154</sup> However, in 2007 a Dutch Court considered

152 Decision no. N101901611.

153 These countries were: Finland, Germany, Ireland, the Netherlands, Romania, Denmark, Malta, Norway and Poland. Cf. a report of the UKLIG in which 68% of the 50 researched decisions cited an internal protection alternative as a reason for denial; in 38% of the cases discretion was expected in the internal relocation alternative. UK Lesbian & Gay Immigration Group, *Failing the Grade. Home Office initial decisions on lesbian and gay claims for asylum*, April 2010, p. 5.

154 Answers to parliamentary questions, 28 November 2006, Aanhangsel Handelingen II 2006/07, nr. 394.

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larger cities in Nigeria a good protection alternative, based on a British Home Office Report (October 2005) stating that “homosexuals do not have fear of persecution there, as long as they do not openly express their sexual orientation.”<sup>155</sup>

In several **Austrian** cases an internal relocation to a Christian part of Nigeria was proposed. For instance in the case of a Nigerian lesbian whose father threatened to kill her, because she refused to marry one of his friends, the Austrian Asylum Court stated that she had an internal protection alternative, for – according to COI – lesbians are not as discriminated as gay men.<sup>156</sup>

Similarly, in the refugee appeal of a Nigerian lesbian the **Irish** Tribunal concluded that country of origin information “indicates that there are parts of Nigeria, including Lagos, where lesbians can live freely as long as they do not impinge on the rights of others.”<sup>157</sup>

In another **Irish** decision refusing the refugee appeal of a Ugandan lesbian, the Tribunal noted that although the applicant had a lesbian partner, “she has not been discriminated in her country of origin in any way, save, that she kept her sexuality secret. There are gay people throughout the world who keep their sexuality secret, and do not choose to declare their sexuality and/or to have their sexuality identify them.” The Tribunal concluded: “it is considered reasonable, practical, safe and not of undue hardship, to relocate in Uganda if she so wishes. This is a matter of choice for the applicant.”<sup>158</sup>

### 5.4 GOOD PRACTICE

Concerning the implicit or explicit requirement of hiding one’s sexual orientation or gender identity, The **Netherlands’** official policy on criminalisation and the internal protection holds that “an internal flight alternative can only be raised if this does not imply that the asylum seeker should hide his or her sexual preference in the other part of the country.”<sup>159</sup> This is a good practice, but we found cases in which this policy is not applied in practice.

155 Rechtbank (Regional Court) Den Bosch, 31 May 2007, nr. 06/51632. Similarly in 2009, based on the Dutch Country Report on Algeria of 2005, another Dutch Court considered larger cities in Algeria, where homosexuality is being tolerated, as long as it is not explicitly propagated, a good protection alternative. Rechtbank (Regional Court) Assen, 17 April 2009, nr. 09/11179, confirmed without reasons by Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 25 May 2009, nr. 200902993/1/V2. In both Algeria and Nigeria, sexual orientation is criminalised.

156 Asylerichtshof (Asylum Court) 1 July 2009, A13 407.007-1/2009.

157 Refugee Appeals Tribunal, 2009.

158 Refugee Appeals Tribunal, 2009.

159 Answers to parliamentary questions, 28 November 2006, Aanhangel Handelingen II 2006/07, nr. 394.

A good practice is found in the **British** Supreme Court Judgment HJ (Iran) and HT (Cameroon) which makes it clear that internal relocation is not acceptable for LGB applicants originating from criminalising countries, if it depends on concealing their sexual orientation in the proposed new location:

“The objection to it is that it assumes that the applicant will be prepared to lie about and conceal his sexual orientation when he moves to the place of relocation. (...) There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.”<sup>160</sup>

In a Country Guidance case on lesbians in Jamaica the United Kingdom’s Upper Tribunal accepted that this objection against proposing internal protection for criminalising countries could also apply to perceived lesbians, i.e. to people who cannot present a “heterosexual narrative”:

“Because the risks arise from perceived as well as actual lesbian sexual orientation, internal relocation does not enhance safety. Newcomers in rural communities will be the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians. Perceived lesbians also risk social exclusion (loss of employment or being driven from their homes).”<sup>161</sup>

### 5.5 CONCLUSION

In many European countries internal protection alternatives were applied to applicants who fled from countries that criminalise sexual orientation. It should be borne in mind that the internal protection alternative should only enter into play when it has been established, or when at least it is presumed, that an applicant has a well-founded fear of being persecuted in one part of the country. If that has not been established or is not presumed, the whole notion of internal protection is not applicable because in that case the applicant has no need of protection.

As we concluded before (in Chapter 4 on the discretion requirement), requiring people not to be open about their sexual orientation or gender identity in order not to be exposed to a risk of persecution, is unacceptable. Similarly, requiring people to hide their

160 UK Supreme Court, 7 July 2010, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31; [2011] 1 A.C. 596.569.

161 UK Upper Tribunal, 24 June 2011, *SW (Jamaica) v. Secretary of State for the Home Department*, CG [2011] UKUT 00251, para. 107(5).

sexual orientation or gender identity in another part of the country is equally unacceptable.<sup>162</sup>

Where the risk of persecution emanates from State actors (including local and regional bodies) internal protection will rarely be a possibility. Consequently, in cases of LGBTI applicants fleeing countries which criminalise sexual orientation or gender identity, while having a well-founded fear of being persecuted by State actors, "internal protection" is really not an option. When LGBTI applicants fear non-State actors from countries criminalising sexual orientation or gender identity, then the internal protection is also not an option, for the criminalising State will not be able or willing to provide them effective protection. (see also Chapter 3, State protection) In conclusion: in a country that criminalises LGBTI persons, internal protection is unavailable. LGBTI asylum applications of applicants from criminalising countries of origin should never be rejected on the ground of internal protection.

In all other cases, the decision making authorities should make a careful assessment of the situation of LGBTI people in the part of the country proposed as the internal protection alternative, including whether it is possible to live openly as LGBTI persons there and whether effective state protection is available for them. It must be prevented that the applicant ends up in a part of the country where he or she may be subjected to persecution, ill-treatment or other situations that breach Article 3 ECHR.

## RECOMMENDATIONS

- Article 8 of the Qualification Directive should be applied in such a way that internal protection is deemed unavailable in cases of lesbian, gay, bisexual, trans and intersex applicants from countries which criminalise sexual orientation or gender identity.

<sup>162</sup> Millbank has noted: "Discretion reasoning clouded the consideration of internal relocation by implicitly or explicitly assuming that the purpose of relocation was to achieve (re)concealment rather than to move to a place of actual safety and sufficiency of state protection." Jenni Millbank, 'From discretion to disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom', *International Journal of Human Rights*, Vol. 13, No. 2/3, 2009, p.3. See also: UN High Commissioner for Refugees, *Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity. Summary Conclusions of the Expert roundtable organized by the UN High Commissioner for Refugees (Geneva, 30 September - 1 October 2010)*: "Just as the so-called 'discretion' argument has been held not to be a valid reason to deny refugee protection in other types of refugee claims, it likewise has no validity in sexual orientation or gender identity cases. Similarly, the concept of Internal Flight Alternative should not be relied upon where it involves concealment or 'recloseting' to be safe."



## 6 CREDIBILITY ASSESSMENT

### 6.1 INTRODUCTION

Credibility has become a major issue in many refugee status determinations. In most asylum cases, statements of the applicant (laid down in a written report of the interview, or in a written statement) are the main source of evidence. Based on this, decision-makers have to decide whether the claim is truthful, i.e. credible. Did the stated events really happen? What will happen in the future if the person is returned to the country of origin? The importance of a thorough way of investigating the facts in the initial interview is growing, as fast track procedures become more common, while at the same time there is a trend for judicial review on the facts to become less substantive.

Apart from the general credibility of the account, when the asylum application is based on the sexual orientation or gender identity of the applicant, a specific credibility aspect is at stake: is it credible that the person is, or is perceived to be,<sup>163</sup> a member of a social group constituted in terms of sexual orientation or gender identity?

Only one case was found in the present research in which the gender identity of an applicant was doubted (see in more detail below, par. 6.4.4). However, the question regarding gender identity is similar to that of sexual orientation: Does the surrounding society know about the applicant's gender identity? Was the applicant persecuted because of actual or perceived gender identity?

The focus on the question whether or not the applicant is an L, G, B, T or I person is problematic, because it is based on assumptions about how a "true" LGBTI person behaves. There is no uniform way in which LGBTIs recognise and act on their sexual orientation or gender identity.<sup>164</sup> For example, there is diversity among born and bred LGBTI people of Amsterdam – never mind when one takes into account the sexual identities of people from other parts of the world. This makes it very hard to decide whether asylum seekers really are credible when they testify regarding their sexual orientation - in particular where the interviewer take the stereotype of relatively

emancipated European LGBTIs as a standard representation of what LGBTI people look like.

On the other hand, dismissing credibility as a legitimate issue altogether will not do either. When an asylum seeker claims to have a well-founded fear of being persecuted on account of being a communist, there is a good reason to turn the application down if it has been established that the applicant does not in fact hold such political views, nor is she or he perceived to be a communist. Similarly, an LGBTI asylum claim may be legitimately turned down if the applicant is not an L, G, B, T or I and thus not a member of a particular social group constituted of LGBTI people, and not perceived to be by anyone.

In some countries, when asylum policy is made LGBTI sensitive in one way (abolition of the discretion requirement, see Chapter 4; or a policy of granting protection to a particular group of LGBTI applicants) this is offset by a counter tendency: a growing number of LGB claims being rejected because the sexual orientation of the applicants is disbelieved. In countries where obstacles to the recognition of LGBTI applicants as refugees were abandoned, a shift towards credibility-problems occurs (the **Czech Republic**,<sup>165</sup> the **Netherlands** and the **United Kingdom** after the abandonment of the discretion requirement).<sup>166</sup> The same has happened recently in the **Netherlands**, after favourable policies were adopted for specific groups of homosexuals.<sup>167</sup> Thus, an expansion of the scope of protection for LGBTI claimants may be accompanied by an even greater emphasis on credibility issues.

For some countries the national experts reported that there are no problems on the point of credibility: some of them only found a few LGB cases that were rejected because the fear was not believed to be well founded or the risk of ill-treatment was not considered real. For some of those countries, it seems that credibility is not a topic in LGB cases (**Greece, Portugal**) while others mention examples but also state that LGB applications are usually rejected on other grounds (ill-treatment does not meet the threshold of persecution; failure to seek State protection: **Spain**).

163 Middelkoop has argued that, except in *sur place* cases, the focus should be exclusively on whether an applicant has a well-founded fear on grounds of perceived homosexuality. In this way, he aims at sidestepping debates triggered by cases where an applicant denies being gay, despite having a same-sex relationship; and, for example, a case in which a male applicant has a relationship with a male-to-female transgender, and was considered to have a heterosexual relationship, L.P. Middelkoop, 'Geloofwaardigheidskwesties rond homoseksuelen in de Nederlandse asielprocedure', *Asiel- en Migrantenrecht* 2010-1, p. 508-515.

164 N. LaViolette, 'Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act', *McGill Law Journal* 2004, p. 996.

165 Until the transposition of the Qualification Directive, LGB applications were usually rejected on substantive grounds. However, after the transposition of the Qualification Directive the restrictive positions towards persecution by non-State actors, the threshold of persecution and the failure to seek State protection had to be abandoned and thus the credibility assessment has become a key issue in the LGB claims. In other words, an expansion of the scope of protection for LGBTI claimants was accompanied by an even greater emphasis on credibility issues.

166 Comp. on Australia Jenni Millbank, From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom, *International Journal of Human Rights* 2009-13 (2/3). On the Netherlands, see the Dutch national questionnaire.

167 Cf. Middelkoop 2010, supra.

## CREDIBILITY ASSESSMENT

There is wide divergence in the way in which credibility issues are dealt with in the various EU countries. Apparently, there is no consistent practice in the Member States on this point. The following issues will be identified in this chapter:

- Medical examinations;
- Witness statements;
- Questioning methods;
- Assumed knowledge and behaviour (including non-familiarity with gay scenes; heterosexual marriage and parenthood; poor knowledge of criminal sanctions; conduct too risky to be true).

### 6.2 INTERNATIONAL AND EUROPEAN STANDARDS ON CREDIBILITY – GENERAL CONSIDERATIONS

The general provision of Article 4 Qualification Directive, as well as the standards of paragraphs 195-205 of the UNHCR Handbook must serve as the starting point. Applied to credibility assessment these standards indicate that applications should be examined with a keen eye for the problems asylum seekers may have in submitting evidence (Article 4(5) Qualification Directive; par. 196 UNHCR Handbook<sup>168</sup>) whereby the authorities and the applicant should cooperate in order to assess the relevance of the elements of the application (Article 4(1) Qualification Directive).

Article 13(3)(a) of the Procedures Directive provides that Member States shall *ensure* that interviewers are competent to take account of the personal or general circumstances surrounding the application, including the applicant's culture or vulnerability, insofar as this is possible.<sup>169</sup> The UNHCR Handbook points to the possibility that applicants may feel apprehensive towards any authority (par. 198), and emphasizes that it is necessary for the examiner to gain the confidence of applicants in order to assist them in putting forward their case and in fully explaining their opinions and feelings (par. 200).

More specifically, on LGBTI claims, the UNHCR Guidance Note states:

35. *Self-identification as LGBT should be taken as an indication of the individual's sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation, and/or there is a lack of sufficiently specific country of origin information, the decision-maker will have to rely on that person's testimony alone. If the applicant's account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt.*
36. *In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular "flamboyant" or feminine demeanour in gay men, or "butch" or masculine appearance in lesbian women. Similarly, a person should not automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes. Enquiries as to the applicant's realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant's credibility.*
37. *It is important that LGBT applicants are interviewed by trained officials who are well informed about the specific problems LGBT persons face. The same applies for interpreters present at the interview. Relevant ways to increase officials' awareness, include short targeted trainings, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, accessing websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure.<sup>170</sup>*

<sup>168</sup> See about the difficulties for asylum seekers in supplying evidence ECtHR 19 February 1998, *Bahaddar v. the Netherlands*, Appl. No. 25894/94, RJ&D ECHR 1998-I, par. 45.

<sup>169</sup> The most recent version of the recast proposal of the Procedures Directive explicitly mentions sexual orientation and gender identity in this respect in Article 15(3), see the Commission's Amended Proposal, COM(2011) 319 final, Brussels, 1 June 2011.

<sup>170</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008.



### 6.3 MEDICAL EXAMINATIONS

In various European countries, medical examinations (psychiatric examinations, physical response to pornographic images, i.e. the so-called 'phallometric testing') are used in order to establish whether or not the applicant is an LGBTI person. Examples of examinations performed by psychologists, psychiatrists and sexologists to assess someone's sexual orientation were reported in 8 countries: **Austria, Bulgaria, the Czech Republic, Germany, Hungary, Poland,<sup>171</sup> Romania and Slovakia.**

In a **Hungarian** case of a 16-year-old Iranian applicant, three medical examinations were made. A forensic "expert" established that he was heterosexual, while the psychiatrist of the Cordelia Foundation (a Hungarian NGO) confirmed his homosexuality. The decision-maker not knowing what to decide asked for a third expert's opinion. This psychologist stated that it was impossible to determine the sexual orientation of an adolescent at this young age when personality can still change a lot with time. This took about half a year, cost a lot of money for the asylum authority, with the applicant being finally recognised as a refugee.

#### 6.3.1 INTERNATIONAL AND EUROPEAN STANDARDS

##### 6.3.1.1 DEPSYCHIATRISATION

Variations in sexual orientation and gender identity are common and are to be considered an integral part of human life. Thus, sexual orientation or gender identity cannot be considered as medical conditions or psychological deviations.

Homosexuality has ceased to be considered as a medical or psychiatric condition since 1990, when the World Health Organisation (WHO) dropped it as a medical category. Hence, medical or psychiatric experts have no relevant expertise as to whether or not applicants are LGB.

Although the current WHO's ICD-10 (International Classification of Diseases) includes "Transsexualism", "dual-role transvestism", "gender identity disorder of childhood" in the category of "gender identity disorders" in the list of "Mental and behavioural disorders", LGBTI NGOs are calling for the depsychiatrisation of all gender identities. Similarly, according to the Council of Europe's High Commissioner for Human Rights "these classifications are in turn problematic and increasingly questioned by civil society actors and health care

<sup>171</sup> We include Poland in this list, because the Polish Office for Aliens reportedly recommends the applicant to provide additional evidence, e.g. results of psychological tests, medical opinions from sexologists. We do not have concrete evidence that these examinations were really performed in Poland.

professionals. Such classifications may become an obstacle to the full enjoyment of human rights by transgender people, especially when they are applied in a way to restrict the legal capacity or choice for medical treatment.<sup>172</sup> Like sexual orientation, gender identity is part of an individual's self awareness, even though in a number of instances, trans people do opt for a medical intervention that is necessary for their wellbeing. More than 230 organisations worldwide have joined the STP-2012 initiative (Stop Trans-Pathologization) calling for removal of gender identities from the diagnosis manuals (ICD and DSM, the "Diagnostic and Statistical Manual of Mental Diseases" of the American Psychiatric Association). We share this view, and take the position that gender identity is an identity on which medical or psychiatric experts have no relevant expertise.

Obviously, medical or psychiatric experts (as well as psychologists) do have expertise as to the problems LGBTI people may have as a consequence of the way in which society deals with non-standard sexual orientations and gender identities, but the establishment of a person's sexual orientation and gender identity is a matter of self-identification, not a medical issue.

##### 6.3.1.2 INHUMAN TREATMENT; PRIVACY

Whether or not sexual orientation and gender identity are considered to be medical issues is important, because medical, psychiatric and psychological examinations are intrusive, and may constitute a violation of a person's privacy when they serve no legitimate aim. A compulsory medical intervention, even if of minor importance, must be considered as an interference with the right to privacy laid down in Article 8 ECHR.<sup>173</sup> A medical examination equally falls into the scope of the concept of privacy. If such an examination is required in order to realise an entitlement, it must be in accordance with the law, serve a legitimate aim, and be necessary in a democratic society (i.e. proportionate).<sup>174</sup> This has also been formulated in Article 18 of the Yogyakarta Principles, which states: 'No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.'<sup>175</sup>

<sup>172</sup> Council of Europe's High Commissioner for Human Rights, *Issue Paper (2009)2 on Human Rights and Gender Identity*, 29 July 2009, available at: [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2009\)2&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CommDH/IssuePaper(2009)2&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679).

<sup>173</sup> Appl. 8278/78, X v Austria, D&R 18 (1980), p. a55, at 156.

<sup>174</sup> ECtHR 5 July 1999, *Matter v Slovakia*, appl. no. 31534/96 concerning a psychological examination; ECtHR 27 November 2003, *Worwa v Poland*, appl. no. 26624/95 concerning a psychiatric report.

<sup>175</sup> International Panel of Experts in International Human Rights Law and on

The so-called “phallometry” (see below, par. 6.4.5) arguably violates Artt. 3 and 8 of the European Convention on Human Rights.<sup>176</sup> In the context of a criminal convict, the European Court of Human Rights, while accepting that phallometry is humiliating, held it not to be a violation of Article 3 in that particular case, mainly because measures considered to be a therapeutic necessity cannot be considered as degrading.<sup>177</sup> The therapeutic aim being absent in the asylum context, it must be considered as a violation of Article 3. In the context of Article 8, the intense invasion of a person’s privacy brought about by phallometric testing might in theory be justified if it were necessary in a democratic society. But the aim of this testing (establishing credibility) can be reached by other means; and it is disputed whether the test can lead to relevant outcomes for establishing a person’s sexual orientation. This makes clear that, on a balance of interests, the infringement of an individual’s privacy brought about by phallometric testing cannot be justified, and constitutes a violation of Article 8 ECHR.

**6.3.1.3 CONSENT**

Furthermore, there is a consent problem. Even if the medical, psychiatric or psychological expert opinion is drafted at the request of the asylum applicant,<sup>178</sup> it can hardly be maintained that someone has freely consented if the motivation for granting consent to the examination is the painful knowledge that failure to agree necessarily implies a refusal of the asylum application and possible exposure to persecution in the country of origin. This context effectively exerts serious pressure on asylum seekers to undergo such examination. As sexual orientation and gender identity are not valid medical, psychiatric or psychological categories, this makes the ‘consent’ of asylum seekers to such examinations highly questionable.

**6.3.2 STATE PRACTICE: MEDICAL EXPERTISE REQUESTED BY THE AUTHORITIES**

In order to examine the credibility of sexual orientation, the **Hungarian** Office of Immigration and Nationality (OIN) sometimes requests an “expert opinion” of a forensic expert (without any specific

professional interest in or training on sexual orientation or gender identity). The ‘examination’ is usually limited to a simple discussion between the ‘expert’ and the applicant. In some cases the medical expert used Rorschach and Szondi psychological tests. These examinations are applied even in clear-cut cases, when no doubts arise regarding the applicant’s credibility (e.g. when the applicant has been living together with his same-sex partner for several months in Hungary and this fact could have easily been checked and considered sufficient factual evidence). The OIN seems to only refrain from this practice in case of trans persons or gay men who look or behave in a very effeminate manner.

Similar practices are reported for **Bulgaria**.

**6.3.3 STATE PRACTICE: MEDICAL EXAMINATIONS AT THE INITIATIVE OF THE APPLICANT**

In response to negative credibility findings, applicants may feel compelled to turn to sexologists, psychologists or similar experts in order to get an expert confirmation of their sexual orientation.

In **Germany**, statements by psychologists, psychiatrists or other medical experts are sometimes provided by asylum-seekers at their own initiative. In some cases this seems to be the only way to convince the courts, especially in cases when the asylum-seeker did not talk about his/her sexual orientation in the initial asylum procedure and claims to be L, G or B at a later stage (compare on that issue Chapter 7).

The matter of expert opinion is further complicated in Germany by the notion of “irreversibility” as defined in the landmark decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 15 March 1988. In this leading case, the Court held that it is decisive whether the applicant has an irreversible homosexual orientation (*irreversible Homosexualität*). A mere inclination (*blosse Neigung*) is not decisive to same-sex activities upon which the person concerned can choose to act or refrain from acting as s/he pleases. Only the inescapable fateful fixation on homosexual behaviour or urge fulfilment - “*unentrinnbare schicksalhafte Festlegung auf homosexuelles Verhalten bzw. Triebbefriedigung*”- making it impossible *not* to engage in same-sex behaviour may be a ground for granting asylum. This leading case, cast in terms which are unmistakably those of classical sexology, results in the asylum authorities or courts requiring applicants to submit a psychiatric expert opinion about the extent to which they are homosexual.<sup>179</sup>

Sexual Orientation and Gender Identity, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

176 Comp. Judgment of the German Administrative Court (Verwaltungsgericht) Schleswig-Holstein, 7 September 2009, 6 B 32/09; European Union Agency for Fundamental Rights (FRA), *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – 2010 Update*, 10 December 2010, pp. 59-60; ORAM, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings*, 2011; UNHCR, *Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, available at: <http://www.unhcr.org/refworld/docid/4daeb07b2.html>.

177 ECtHR 14 September 1999, appl. no. 37231/97 (*Toomey v. United Kingdom*).

178 In this respect, it is important to note that the so-called phallometry was introduced at the instigation of the lawyer of an asylum seeker; see for more details the Czech questionnaire.

179 A Professor of sexual sciences and founding member of the former Frankfurt Institute for Sexual Sciences is quoted as having “regularly” written expert opinions on the perceived homosexuality of asylum-seekers. The case at hand is one of a Nigerian homosexual man who is portrayed in this article; the medical statement was actually paid for by Amnesty International. According

An example of the role that expert opinions can play in the procedure, is the case of an Iranian applicant in which an expert opinion was used as evidence to support his credibility which the authorities had doubted: "The claimant explained in his interview at the Federal Office that he first had homosexual contacts during his military service. [...] The court does not doubt these statements, particularly as the claimant made identical statements when questioned by the clinical centre of the University of [...] and the sexological-psychological expert opinion concludes that the claimant has an irreversible homosexual disposition. [...]"<sup>180</sup>

On the other hand, some German courts are beginning to doubt the value of sexologist expert opinions. In one court decision the value of expert opinions is denied: "The expert opinion obtained in another procedure [...] only relies on the statements of the 'test person' (proband) to reach the conclusion that the 'formulation of an irreversible homosexual personality cannot be answered in a concrete and concluding manner from a psychiatric perspective'. It does not need an expert opinion to come to such an assessment, this assessment can and has to be undertaken by the court in the context of the credibility test of the claimant."<sup>181</sup> Sexologists themselves also seem hesitant. An expert opinion (sexualmedizinisches Gutachten) submitted in another court case may serve as an example. In this case, the expert was a specialist in psychotherapeutic medicine and professor at the Charité University Hospital of Berlin. An excerpt of this expert opinion was passed on to a German NGO in an anonymised version and consisted of a 22-page "digression" on the methodological difficulties in determining sexual orientation and on the interdependency of biological (pre-) disposition with psychological and socio-cultural criteria which according to the author are equally relevant for the formation of someone's sexual "structure."<sup>182</sup> This excerpt shows that the expert went to lengths to emphasise that a number of factors have to be considered in order to make a statement on someone's sexual orientation and that such statements could hardly be taken as definitive.

According to our information, similar practices occur in **Austria**<sup>183</sup> and **Romania**. In **Poland**, the asylum authorities recommend the applicant to provide additional evidence, e.g. results of psychological tests, opinions from sexologists or other medical doctors.

to this article his statements were based on "one or two [interview] sessions". Source: <http://www.sueddeutsche.de/politik/weltweit-verfolgt-homosexuelle-toedliche-kuesse-1.488972>, *Süddeutsche Zeitung* 16 January 2009.

180 Administrative Court (Verwaltungsgericht) Wiesbaden, 24. September 2008 - 6 K 478/08.WI.A(2).

181 Verwaltungsgericht (Administrative Court) München, 20 January 2004, M 9 K 03.51197.

182 Verwaltungsgericht (Administrative Court) Frankfurt/Oder in 2003.

183 Asylgerichtshof (Asylum Court) 20 July 2009, C5 257.855-0/2008; UBAS (Federal Asylum Review Board) 5 August 2005, 238.353/5-VIII/22/0.

In most other countries, like for instance in **France**, medical expert opinions may be relied on by applicants in order to establish the physical or psychological problems they may have encountered in relation to their sexuality, but they cannot serve as proof of sexual orientation. The statements of applicants about their experiences are decisive.

#### 6.3.4 STATE PRACTICE: TRANS AND INTERSEX CASES

Trans and intersex asylum applicants may already be in contact with doctors. However, people who identify themselves as a T or I person but who do not seek medical intervention may not be, and may not want to be, in contact with medical experts. Only one example of disbelief concerning a trans person was reported by a national expert. In the **United Kingdom**, an applicant from Pakistan originally applied on the basis of being a lesbian and then later made a fresh claim as a trans man, which was denied by the UK Home Office with respect to disbelief regarding the trans identity. It took over a year for the UK Home Office to refer to the applicant as 'him' instead of 'her'. In February 2011, the Home Office accepted that trans men from Pakistan are an 'at risk' group, and afforded him refugee status.<sup>184</sup>

The reason for the scarcity of credibility issues in trans and intersex cases could be that in practice trans and intersex applicants *do* submit medical reports. For instance, in a **Finnish** case of an intersex applicant there were statements by a doctor and by a pediatric endocrinologist.

In **Ireland**, two intersex cases were identified by practitioners. In both cases, the decision-maker accepted medical evidence from the applicants' treating consultant confirming the applicants' condition, such reports being accepted by the decision-makers as conclusive proof that the applicants were intersex persons. These medical reports arose in the context of ongoing medical treatment for the applicants - the reports were not required by the decision-maker, but once submitted in support of the asylum application, the reports were accepted.

In **Austria**, a 2004 decision ruled: "As Mr. X is a transsexual, who has undergone a sex change operation in Georgia, the necessary minimum standard for medical/therapeutic treatment of transsexuals is certainly not guaranteed in the country of origin, and the legal guarantees will be completely absent. The diagnosis was transsexualism as well as a clear fear mixed with a depressed disturbance."<sup>185</sup>

184 AB (Pakistan) (unreported, 2009) Administrative Court.

185 UBAS (Federal Asylum Review Board) 10 May 2004, 240.479/0-VIII/22/03.

## CREDIBILITY ASSESSMENT

In the **Netherlands**, an applicant's gender identity was supported by the letter of the VU University Medical Centre, from which it appears that the applicant has a "serious gender identity disorder". This evidence was crucial in the court decision to quash a negative asylum decision.<sup>186</sup>

### 6.3.5 STATE PRACTICE: 'PHALLOMETRIC' TESTING

A rather controversial method is that of phallometric testing, which was applied in the **Czech Republic**, introduced for the first time by a legal representative of an asylum seeker, and not by the Czech authorities. When applicants were not generally credible or when their statements related to LGBTI identity were contradictory or unconvincing, the asylum authorities required additional proof. This additional proof meant a complex "sexodiagnostic examination", and included an interview with a sexologist and the so-called "phallometric testing". Although this phallometric testing was only one part of the examination, it carried a decisive weight in the asylum authorities' conclusions on the credibility of the applicant's assertion of his or her sexual identity.

The examination was performed by a professional sexologist and only with the person's written consent, after being informed about the technique of the examination.<sup>187</sup> This "sexodiagnostic examination" was similar to tests applied to sex offenders.

Put simply, phallometric testing focussed on the applicants' physical reaction to pornographic material. This pornographic material included heterosexual, gay, lesbian, adolescent and child pornography. According to reactions of the applicant to these types of pornographic materials, the sexologist arrived at a conclusion. In medical terminology, phallometric testing of men is called penile plethysmography (also known as "PPG") and its counterpart for women is called vaginal photoplethysmography (also known as "VPG").<sup>188</sup> The Czech asylum authorities claim that this procedure was conducted in 2008 and 2009 in less than 10 cases in total. Both PPG and VPG were used in the Czech Republic.

The criticism of the Fundamental Rights Agency, the European Commission, NGO's and UNHCR led to suspending this practice. According to all available sources phallometric testing was stopped in 2009 and since then it has not been used.

186 Rechtbank (Regional Court) Den Bosch, 30 December 2009, nr. 09/7231.

187 But note that the Czech NGO *Organization for Aid to Refugees* (Organizace pro pomoc uprchlíkům), questioned whether asylum seekers were informed about the procedure itself in a way that is understandable for them; see FRA Report of 2010, p. 60. According to UNHCR, the form that applicants had to sign before "sexodiagnostic examination" contained information that if they refused to do so, the examination of their application for international protection could be discontinued. Hence, the applicants were in fact coerced to undergo this "sexodiagnostic examination", Replies of UNHCR from 4 March 2011 (on file with the Czech expert).

188 For a more detailed description of these two methods, see ORAM, *supra*.

Phallometric testing was used at least once in **Slovakia** in 2005.

### 6.3.6 GOOD PRACTICE: SELF-IDENTIFICATION; MEDICAL REPORTS ON TRAUMA

In the decisions made available by the **Portuguese** asylum authority SEF regarding LGBTI asylum seekers, sexual orientation was always determined by self-identification of the asylum seeker and not questioned (at least not expressly) in the decision.

The Asylum Instruction on Sexual Orientation in the **United Kingdom** states: "Generally speaking, self-identification as lesbian, gay, bisexual or trans will be the normal starting point as an indication of a person's sexual orientation or gender identity."<sup>189</sup>

In **Italy**, the sexual orientation or gender identity that is considered relevant in the asylum context is the applicant's *current* sexual orientation or gender identity. Sexual orientation or gender identity is generally established through an evaluation of the declaration of the asylum seeker and of supporting evidence (if available). Court decisions have been reported that considered credible the sexual orientation based on the declaration of the claimant, without any other evidence.<sup>190</sup>

Medical reports made because of the *psychological or physical trauma* suffered by the applicant sometimes mention the sexual orientation of the person concerned. In case of doubt regarding the sexual orientation of the applicant these reports may be used as supporting proof of the ill-treatment suffered on the basis of sexual orientation or gender identity, but not of actual sexual or gender identity. These medical reports could also support a narrative of someone who came out in a later procedure because of shame, fear, or internalised homo- or transphobia or whose credibility was in doubt anyway (e.g. in **Ireland, Finland, the Netherlands, Italy**). These types of reports are not objectionable, because they are not about establishing a sexual orientation or gender identity *per se*. This use of medical reports in such contexts can even be considered a good practice. It is to be strongly preferred that such reports are written by experts who are already treating and/or counselling the applicants as this will spare them the suffering which may be involved in undergoing a separate expert examination.

189 UK Home Office, Asylum Instruction: Sexual Orientation issues in the Asylum Claim (6 October 2010, revised on 13 June 2011) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary> <<last accessed 16th July 2011>>.

190 Tribunale (Tribunal) Caltanissetta 7 June 2010 (gay, Tunisia), Tribunale (Tribunal) Catania 4 March 2010, n. 1081/10; Tribunale (Tribunal) Caltanissetta 10 February 2010 (gay, Ghana).

### 6.3.7 CONCLUSION

Medical, psychological or psychiatric examinations can be emotionally painful and humiliating for those who have suffered persecution because of their sexual orientation or gender identity. If such examinations are to be used in order to establish whether the applicant is LGBTI, it is clear that these examinations serve no legitimate purpose. Since LGBTI identities do not constitute legitimate medical, psychological or psychiatric categories, medical or psychiatric experts have no expertise on this point. All examinations by psychologists, psychiatrists and sexologists performed to assess someone's sexual orientation or gender identity (found in 8 countries: **Austria, Bulgaria, the Czech Republic, Germany, Hungary, Poland,<sup>191</sup> Romania, Slovakia**) are to be considered a violation of the right to privacy under Article 8 ECHR. This provision has been elaborated within the context of sexual orientation and gender identity in Article 18 of the Yogyakarta Principles.

The 'phallometry' test used in the **Czech Republic** and in **Slovakia** to assess the sexual orientation of gay and lesbian asylum seekers constitutes inhuman and degrading treatment (Article 3 ECHR) as well as an invasion of applicants' privacy (Article 8 ECHR) and it is right that this practice has now been abandoned. It is to be recommended that domestic law in the Czech Republic and Slovakia is amended in such a way that it is clear that 'phallometric testing' cannot be applied in asylum cases.

## RECOMMENDATIONS

- As a general principle, establishing sexual orientation or gender identity should be based on self-identification of the applicant.
- Medical and psychiatric expert opinions are an inadequate and inappropriate method for establishing an applicant's sexual orientation or gender identity.

<sup>191</sup> We include Poland in this list, because the Polish Office for Aliens reportedly recommends the applicant to provide additional evidence, e.g. results of psychological tests, medical opinions from sexologists. We do not have concrete evidence that these examinations were really performed in Poland.

## 6.4 WITNESS STATEMENTS

In an **Austrian** case an Iranian was not believed to be gay, because he brought inaccurate evidence from an Iranian court and he was married. His social worker confirmed that he is gay and for that reason he had problems with other asylum seekers in his accommodation, but the first instance asylum authority also did not find the applicant credible. After he brought in more witnesses (among them a male sex-partner) the court, in appeal, finally believed that he was gay. He received refugee status.<sup>192</sup>

### 6.4.1 INTERNATIONAL AND EUROPEAN STANDARDS

Because there are no specific norms about the role of witness statements, the general provision of Article 4 of the Qualification Directive, as well as the standards of para. 195-205 of the UNHCR Handbook must serve as the starting point. Applied to the relevance of witness statements, these standards indicate that applications should be examined with a keen eye for the problems asylum seekers may have in submitting evidence (Article 4(5) Qualification Directive; par. 196 UNHCR Handbook).<sup>193</sup> Consequently, the authorities and the applicant should cooperate in order to assess the relevance of the elements of the application (Article 4(1) Qualification Directive).

### 6.4.2 STATE PRACTICE

Apart from the applicant's own testimony, witness statements are submitted and declarations or 'attestations' from LGBTI organisations were reported in **Austria, Belgium, Cyprus, the Czech Republic, France, Ireland, Italy, Norway, Spain** and the **United Kingdom** to solve credibility problems. The following examples can serve as an illustration.

In **Cyprus**, declarations of LGBTI organisations and membership of LGBTI social networking sites are taken into account. However, although this evidence will be accepted and examined, it may often be dismissed in the final decision as either incredible, depending on the country and/or organisation issuing it, or it may be dismissed as general supportive evidence that does not prove the statement of the applicant.

In the **United Kingdom**, evidence of witnesses and declarations of LGBTI organisations, who have worked closely with the asylum seeker, such as the UK Lesbian and Gay Immigration Group, are

<sup>192</sup> Asylgerichtshof (Asylum Court) 17 February 2009, E2 255.708-2/2008.

<sup>193</sup> See about the difficulties for asylum seekers in supplying evidence ECtHR 19 February 1998, Appl. No. 25894/94, Reports 1998-I, (*Bahaddar v the Netherlands*) par. 45.



## CREDIBILITY ASSESSMENT

taken into consideration. Membership of LGBTI organisations can also be submitted, as well as proof of appointments at clinics which treat sexually transmitted diseases, and cater specifically for gay or bisexual men.

An example of how witness statements can be useful in the wider context of a case is an **Irish** case. Some decision-makers proved adept at distinguishing between what might be termed 'peripheral' credibility findings, e.g. disbelief as to mode of travel, absence of identity documentation, failure to seek asylum in safe first country, and 'core' credibility issues, namely the sexual orientation or gender identity of the claimant and their fear of persecution. In one case involving an Iranian gay man, various 'peripheral' credibility findings were made against the applicant, including his lack of identity documents and certain discrepancies in respect of the evidence which had been given by the applicant at interview and his evidence on appeal. Nonetheless, the decision maker in deciding the case weighed these negative findings against the evidence given in support of the applicant, including oral evidence heard from a member of the applicant's own ethnic community. The decision-maker concluded:

"The Applicant, in the manner in which he gave his evidence throughout the whole hearing whether on direct examination or examination by the Presenting Officer, or questions at various stages during the hearing, was persuasive in relation to key matters which he stated. This was added to by the evidence of his witness who was very compelling and essentially the applicant's case turns on this. He confirmed the two most important elements of the applicant's case that he is an Iranian and that he is gay. When one considers what is important, all other matters become peripheral. This witness gave the impression, and I formed the opinion, that what he was saying was truthful. When pressed he was able to give very specific details. Their combined evidence was coherent and plausible. On balance I am prepared to accept that the Applicant is both credible and that he gave truthful evidence in the main thrust of his evidence. I accept that the Applicant is a homosexual from Iran."<sup>194</sup>

### 6.4.3 CONCLUSION

Witness statements may be relevant in any asylum context, including LGBTI cases. However, what it means to 'be' L, G, B, T or I is contested, and 'being' L, G, B, T or I has different meanings to different people: it may be about identification, or about feelings of attraction, or about acts, or about any combination of these. In addition, in some countries other identities, such as MSM – men having sex with men – are used precisely in an effort to deal with/evade homophobia by not using a gay identity. The terms lesbian, gay, bisexual, trans

and intersex may be terms which are completely alien to an asylum seeker who can only associate her or his identity with negative terms to describe sexual or gender identity. For example, in Jamaica a gay man is referred to by others as a 'batty man' and a lesbian is referred to as a 'sodomite'. Therefore, evidence, including witness statements, should focus on whether an applicant has a well-founded fear of being persecuted on account of an actual or perceived membership of a particular social group. Witness statements of an applicant's participation in activities of LGBTI organisations (be it in the country of origin or the country of refuge) or statements of people who had sexual contacts with applicants, therefore may be relevant for the credibility of applicants, provided that they are evaluated in the wider context of the case.

## 6.5 QUESTIONING METHODS

Credibility may crucially depend on the approach to questioning and types of questions asked (such as open or closed questions). Putting questions in ways which applicants find offensive or otherwise disturbing may lead to answers which are suspicious to asylum authorities. People may relate to themselves in ways which are unfamiliar to the interviewer, or they may have difficulties in putting into words how they see themselves. They may be hesitant to disclose their sexual orientation or gender identity, or may be in the process of figuring out how they see themselves. If asylum interviewers give applicants a sufficient 'safe space' to tell their story, this is most likely to lead to statements which are useful in the context of refugee status determination. Of course, statements are not necessarily to be found credible (or to lead to recognition as a refugee). However, the way in which the interview may be conducted can interfere with status determination by introducing the possibility that the applicant's statements have been unduly influenced by the method of conducting the interview.

### 6.5.1 INTERNATIONAL AND EUROPEAN STANDARDS

Article 13(3)(a) of the Procedures Directive provides that Member States shall *ensure* that interviewers are competent to take account of the personal or general circumstances surrounding the application, including the applicant's culture or vulnerability, insofar as it is possible to do so.<sup>195</sup> The UNHCR Handbook points to the possibility that applicants may feel apprehensive vis-à-vis any authority (par. 198), and emphasizes that it is necessary for the examiner to gain the confidence of applicants in order to assist them in putting forward their case and in fully explaining their opinions and feelings (par. 200).

<sup>194</sup> Refugee Appeals Tribunal, 2009.

<sup>195</sup> The recast proposal of the Procedures Directive explicitly mentions sexual orientation and gender identity in this respect in Article 15(3), see the Commission's Amended Proposal, COM(2011) 319 final, Brussels, 1 June 2011.

The UNHCR Gender Guidelines contain passages which are appropriate in the context of LGBTI asylum claims as well.

*“Both ‘open-ended’ and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews.”<sup>196</sup>*

*“Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview.”<sup>197</sup>*

### 6.5.2 SEXUALLY EXPLICIT QUESTIONS

A prevalent practice consists of asking sexually explicit questions; often, the responses to such questions are labelled as ‘evasive’, hence not credible by decision makers.

In a **Dutch** case, during the asylum interview, an Iranian applicant had already been made to declare that he and his friend had been caught while they were naked in the bed of his friend; that they were sitting; that they touched each other on erotic body parts; and that they were having sex. The account was found not credible by the asylum authorities because the answer to the question *in which position exactly* he was caught with his friend was evasive. The Regional Court quashed this decision, ruling that it cannot be required of the applicant to give further details in order to be found credible on the point of his homosexuality.<sup>198</sup>

In **Belgium**, questions may be asked such as: When did you first touch private parts, when did you engage in tongue kissing, fellatio, coitus? There is also a reported tendency among Belgian decision-makers to consider a relationship only as relevant for an LGB claim, if it includes (anal or oral) sexual activity or to consider the date of the first sexual intercourse as the starting date of the relationship, even if the applicant has indicated an earlier date as the beginning of a relationship.

Some **Irish** practitioners reported that homosexual applicants were questioned about the number of sexual partners and frequency of sexual relationships; this was perceived by practitioners in some

cases as implying that the decision-maker had expectations of promiscuous behaviour by gay men.

In **Bulgaria** questions were reported like: How many partners did you have? Are you passive or active in your sexual contacts?

In the **United Kingdom**, anecdotal evidence includes questioning bordering on the pornographic with respect to a lesbian woman, and asking a gay man when he first committed “buggery” with his boyfriend.<sup>199</sup>

Also in **Austria**, explicit and degrading questions about sexual positions and the number of partners were reported in interrogations at the Federal Asylum Office (*Bundesasylamt*) as well as at the Asylum Court. A young man from Somalia was asked in his interrogation at the *Bundesasylamt Graz* when he had a homosexual encounter for the first time in a very inappropriate wording (“Bubensex” – boy sex, a term with predominantly pornographic connotations).

In **Cyprus**, a gay applicant was asked if he was a member of any gay social network site. When he answered positively, he was requested to give his personal password in order to check this statement. This overly intrusive question gives the impression that the asylum authorities want to know not just whether he was a member of a gay network site, but what sexual activities he engaged in on that site.

### 6.5.3 REFLECTING HOMO- AND TRANSPHOBIA

Interviewers of the **Romanian** Office for Immigration asked: “What do you think about homosexuality? Is it a normal relationship or a physical or psychological problem? Did you consult a doctor?” and: “Did you receive money for it?” These questions may well be experienced by applicants as reflecting forms of homophobia (homosexuality as an illness or as prostitution) similar to the ones they fled. This is extremely damaging to the trust required during asylum interviews.

On the other hand, one can imagine that such questions could be appropriate, depending on the context. One can imagine a claimant testifying about realising that s/he was LGBTI, and the adjudicator asking how the claimant perceived this realization. This might illicit a useful narrative about claimants’ personal views of themselves, and the views their society held of homosexuality. A claimant may indeed have consulted a doctor, because many societies still consider a homosexual orientation an illness.

196 UNHCR Guidelines on International Protection: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, 36, vii.

197 *Supra*, 36, ix.

198 Rechtbank (Regional Court) Haarlem 8 December 2009, 08/40650; the IND appealed at the Council of State, still pending.

199 Unreported case before the First-Tier Tribunal (Immigration and Asylum Chamber), 2010. This case has been heard by the Upper Tribunal (Immigration and Asylum Chamber) on the 12th of July 2011 with the Senior Immigration Judges finding that the approach of the Immigration Judge to his negative findings on the appellant’s sexual identity were perverse and allowed the asylum appeal of the gay man from Uzbekistan (having applied the HJ/HT guidelines). The UK country expert is awaiting further information on whether the case will be reported.

## CREDIBILITY ASSESSMENT

The most important part of a claim is the claimant's narrative, and sometimes questions are useful to move the narrative along and solicit additional information. Such narrative may be detailed and in many cases starts from childhood, prior to any realisation of sexual feelings. Because the social context may be different than the European context, asking questions that would be offensive to many western LGBTI people might in fact be very relevant to LGBTIs from other countries. It is impossible to work with standard instructions on this point. It is crucial that interviewers are understanding, and are aware that what they consider as LGBTI awareness may be experienced as reflecting homo- or transphobia by the applicant, and vice versa: what the interviewer considers as unacceptable may be experienced as supportive and understanding by the applicant. This is precisely the point: the asylum interview should focus on the applicant's perspective.

### 6.5.4 GOOD PRACTICE

Examples of good practices can be given as well on this point. In some Member States, interview officers will ask applicants to tell their story about their sexual orientation: when they realized they were LGBTI, whether, and if so when, they had their first relationship, responses of their friends and family; what kind of problems the applicant and his/her partners may have had on account of their sexual orientation. These questions assist applicants in telling their story, and do not steer them in any particular direction. A few examples:

From **Hungary**, it was reported to be prevalent that the authority asks about the "history" of the sexual orientation, and characteristics of the relationships, e.g. when the applicant realised his/her gay orientation, when he/she had the first gay relationship, how the partners got to know each other, how long the relationship lasted, did the partners live together, how many partners the applicant had.

The deputy Head of the Procedural Department of **Slovakia** stated during the interview for the purposes of this research that firstly the LGBTI asylum seeker is asked to speak freely about his problems and sexual orientation; then the decision-maker asks concrete additional questions, which can include explicit questions about sexual activities. Usually, the questions will be more general and will not include direct questions, such as the description of sexual intercourse. The asylum interviews of the cases researched included such questions as: when and how the applicant found out he was homosexual; if the family and community knew about his sexual orientation; if any of applicant's partners or friends had been persecuted because of sexual orientation and how; how police became aware of his homosexuality; what was the attitude of his family towards his sexual orientation; did he maintain personal

contacts with persons of the same sexual orientation in the country of origin; did he publicly manifest his orientation; etc.

The **United Kingdom** in their June 2011 Asylum Instruction on *Gender Identity issues in the asylum claim*, the UK Border Agency accepts:

*"The credibility of an individual's claim and the degree of risk on return should primarily be tested by a sensitive enquiry into the applicant's realisation and experience of gender identity. Altering one's birth sex is not a one-step process, but a complex process that occurs over a period of time. Transition may include some, or all of the following personal, legal and medical adjustments: telling family, friends and colleagues, changing one's name and/or sex on legal documents; dressing, behaving and/or living as a different sex; hormone therapy; and possible surgery. Interviewing officers should ask open questions that allow applicants to describe the development of their identity and how this has affected their identity and how this has affected their experiences both in their own country and in the UK."<sup>200</sup>*

### 6.5.5 CONCLUSION

In some Member States, sexually explicit questions are asked, and evasive responses are considered to damage applicants' credibility. This is highly problematic because the purported evasiveness of the responses may be related as much to the shock of being asked questions about sexual details as to a lack of veracity. In addition, such intrusive questioning constitutes an invasion of applicants' privacy in the absence of an overriding necessity to do so.

A second issue is that questions – whether sexually explicit or not – may rely on stereotypes. Examples are the notion that homosexuality is an illness, has much to do with prostitution, is about intercourse, or is by itself promiscuous. Such stereotypical presumptions may be offensive to applicants and, as a consequence, interfere with the asylum interview. They may also lead to conclusions which are as incorrect as the presumptions, such as: if an applicant has had relations with only one other person and wants things to stay that way, this simply does not imply that the person is not L, G, B, T or I. Asylum interviewers should seek to establish the perspective of the applicant, which may be influenced by stereotypes interviewers do not share. Applicants may experience their sexual orientation as an illness (but believe they should not be punished for it); or

<sup>200</sup> UK Border Agency Asylum Instruction on *Gender Identity issues in the asylum claim*, 13 June 2011, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary>, last accessed 16 July 2011. See for a similar instruction on sexual orientation: UK Border Agency, *Sexual Orientation issues in the asylum claim* (6 October 2010, revised on 13 June 2011).



they may refuse to label themselves as gay because they find this implies promiscuity. The other way around, well intended questions, such as whether applicants sought assistance when they came out to themselves, may hurt applicants who were forced to undergo 'assistance' in changing their sexual orientation.

Sensitive interviewing requires permanent reflection by interviewers on the interview. If, for example, an interviewer finds the applicant evasive, the interviewer should reflect on what could be the cause for this. Is the applicant making something up (and if so, why); is the applicant reluctant to share painful facts; has the applicant been offended by something the interviewer (or the interpreter) said? In order to enable interviewers to be reflective in this way, training is needed both at the beginning of an interviewer's career, as well as in the form of professional development and training updates. LGBTI issues should preferably be both the subject of specific trainings and part of general trainings on interviewing methods, since they both warrant specific attention and need to be mainstreamed. In addition, LGBTI specific aspects of interviewing techniques have a lot in common with issues concerning gender, victims of systemic discrimination, and victims of torture. These LGBTI aspects need to be incorporated into the European Asylum Curriculum (training modules for civil servants) as well as into the training for the judiciary.

## RECOMMENDATION

- Interviewers, decision makers, the judiciary and legal aid providers need to be competent and capable of taking into account the sexual orientation and gender identity aspects of asylum applications, including the process of 'coming-out' and the special needs of lesbian, gay, bisexual, trans and intersex applicants. To this end, they should be professionally trained, both in a specific basic training module and during general permanent education modules.

## 6.6 ASSUMED KNOWLEDGE AND BEHAVIOUR

In many cases, credibility findings were closely related to assumptions on the part of the interviewer or the decision maker as to how a 'true' lesbian, gay, bisexual, trans or intersex person behaves, or about what LGBTI people know. In this paragraph, a few common assumptions are dealt with.

### 6.6.1 FAMILIARITY WITH GAY SCENES

Questions are often asked with respect to familiarity with gay scenes in the country of origin and in the country of refuge. Although some

authorities state that these types of questions are only asked as a means of extra proof, people are frequently refused asylum when they do not know the correct answers. This is problematic, because gay scenes in the country of origin may not exist, or applicants may not want to be part of that environment. The same goes for gay scenes in the country of refuge: whether or not an applicant is interested in LGBTI neighbourhoods or venues is hardly relevant for establishing sexual orientation, especially where they do not have the economic or social means to access the meeting spaces these areas consist of.

In the case of a gay Ugandan male, an **Irish** decision maker stated "it was put to the applicant that his knowledge of homosexual meeting points, websites, clubs or rallies against homosexuality was very limited, to which he replied that he did not want to campaign for the rights of homosexuals, he was happy with [his partner] and did not need to include other people or find out how they lived. The applicant is a well educated person and it is not credible that as an alleged homosexual man he would show such little interest or knowledge in matters that affect him. This casts doubt upon the credibility of the applicant."<sup>201</sup>

#### 6.6.1.1 STATE PRACTICE

Questions asked in **Belgium** on gay life in the country of origin include: Do you know popular stars with the reputation of being LGBT in your country of origin? How can you recognise another gay person on his conduct? Where do LGBTs meet in the city? Are there cruising places? Where did you go to negotiate same-sex sexual desires?

In the **United Kingdom**, the First-Tier Tribunal could not accept that a Ugandan lesbian woman was not more familiar with lesbian books and magazines.<sup>202</sup> Comparable examples are reported from **France** and the **Netherlands**.

Other countries report a more nuanced situation, where it will depend on the statements of the applicant whether s/he is expected to know gay scenes. In **Finland**, the representative of the Finnish Migration Service says, that "these kind of questions can be asked in some cases, if there is a reason to believe, that the applicant would know about them. However, this kind of knowledge is not a prerequisite for a positive decision."

<sup>201</sup> Refugee Applications Commissioner, 2009.

<sup>202</sup> Immigration and Asylum Chamber 30 January 2011, BN (Uganda), reported on LGBT Asylum News website.

## CREDIBILITY ASSESSMENT

Obviously, sometimes knowledge of gay scenes actually supports an asylum claim; this, however, does not imply that lack of knowledge of gay scenes is a solid ground for rejecting a claim. In the case of an Albanian applicant in **Hungary**, the declaration of his gay orientation was believed by the authority, his statements were supported by the existence of the web pages containing gay-friendly information, which had been set up and operated by the applicant. The application was strengthened as well by the fact that the Albanian claimant was a member of a gay association which was supported by COC Netherlands.

One **Irish** practitioner reported a gay asylum applicant being asked if he was familiar with a well known gay bar in Dublin. A negative credibility finding was made on the grounds that he was not familiar with this bar; the decision-maker could not accept that a gay man living in Dublin would not have been to this bar. Similar questioning is reported from **France** and **Romania**.

### 6.6.1.2 GOOD PRACTICE

The **Swedish** LGBT Guidelines contain a good practice: "The fact that the homosexual has not been in contact with organizations for homosexuals, whether in Sweden or in the country of origin, is seldom a factor that would gainsay his or hers fears regarding a return to the country of origin, and thereby negatively affect the assessment. In addition, in many countries there are no such organizations to consult."<sup>203</sup>

### 6.6.1.3 CONCLUSION

When part of an applicant's statements is that she or he participated in LGBTI organisations or has visited LGBTI venues, this may influence the credibility of these statements. However, the simple fact that an applicant claiming to be L, G, B, T or I has no knowledge of particular LGBTI organisations or meeting places does not allow for direct conclusions as to their credibility. They may not be aware of these, they may be unwilling to be part of them, they may not be 'out' enough to do so, have financial means to access such venues – there are many other reasons besides a lack of credibility. In addition, asking questions such as these may contribute to an examination-like atmosphere during the interview, which is detrimental to the quality of the interview.

## RECOMMENDATION

- The fact that an applicant lacks familiarity with lesbian, gay, bisexual, trans and intersex organisations or venues cannot in itself be considered as an indication that the applicant's

<sup>203</sup> Migrationsverket, *Sexual Orientation Guidelines*, 2002.

purported fear of being persecuted on account of sexual orientation or gender identity is not credible.

### 6.6.2 HETEROSEXUAL MARRIAGE AND PARENTHOOD

In many Member States, the fact that an applicant claiming to be L, G, B, T or I has been married - or does so in the country of refuge – is considered grounds for finding it not credible that the applicant is an LGBTI person. This ignores the common feature of LGBTI's identities, which still exist even in Europe, of the 'double lives' LGBTI's lead.

#### 6.6.2.1 INTERNATIONAL STANDARDS

The UNHCR Guidance note states that "a person should not automatically be considered heterosexual merely because he or she is, or has been, married, [or] has children."<sup>204</sup>

#### 6.6.2.2 STATE PRACTICE

In the case of a lesbian applicant in **Cyprus** the fact that she had two previous marriages was considered reason not to believe her sexual orientation, even though she had claimed that both marriages were forced and that the first was not consummated, which led to it being annulled, and the second was forcefully consummated and also ended in divorce. In **Spain** a lesbian was refused because she had a baby in Algeria. In the **Netherlands** a decision stated: "It is strange that a man who previously had a homosexual relationship for four years, marries a woman without objections."<sup>205</sup>

Marriage outside the country of origin is also considered to damage the credibility of the sexual orientation of applicants. In **Malta** there was the case of a Libyan national who was in a steady relationship with a Maltese man. Once his family in Libya discovered his homosexuality he was threatened and ordered to leave Libya. He left for Malta and entered a marriage of convenience with a Maltese woman, viewed as the only legal way of remaining in Malta, since he was unaware that homosexuality could be a ground for international protection. His Maltese wife eventually filed a police report admitting to the marriage of convenience, on the basis of which the police initiated deportation proceedings. At this point, the applicant applied for refugee status, but - due to the expiry of the required deadline - his case was deemed to be invalid. In a last attempt to challenge his deportation, the applicant initiated court proceedings challenging his pending deportation under Articles 3 and 8 of the

<sup>204</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, par. 36. Comp. In the Danish study mentioned above, only 19% of LBT women and 29% of the GBT men stated they were not interested in having children. Thus, the vast majority of LGBT-persons actually had or would like to have children, Leyla Gransell and Henning Hansen, *Equal and unequal? The living conditions and well being of gay and lesbian people, bisexuals and transgenders in Denmark*, Copenhagen: Casa 2009, available at [www.casa-analyse.dk/default.asp?Action=Details&Item=387](http://www.casa-analyse.dk/default.asp?Action=Details&Item=387).

<sup>205</sup> Decision IND 28 January 2011, Burundi, nr. 0607-27-04150.

ECHR, which proceedings were never finalised since the applicant was deported prior to any court hearing. Since no court hearing was held, no court decision is available. Of interest, however, are the submissions presented by the Attorney General in support of the applicant's deportation. The submissions wholly dismissed the applicant's claims regarding his homosexuality on the basis that the applicant's credibility was irreparably damaged by the marriage of convenience.<sup>206</sup>

A Nigerian applicant married a lesbian woman (in the U.S.A.), because he wanted to have children. He stated he was more interested in men than in women, and he could only have sex with a woman after consuming lots of alcohol. According to the **Dutch** authorities, these statements added to the lack of credibility of his statements on his homosexuality. The decision was upheld by the Regional Court.<sup>207</sup>

In case of marriage or children in **Finland** it is not necessarily expressed directly that the sexual orientation would not be believed. More often it is stated that it is not probable that there would be a serious danger of persecution based on the claimed sexual orientation. Because of the heterosexual relationship and children the applicant would not be perceived to be homosexual, and hence s/he has no fear of persecution.

In **Germany**, the concept of sexual orientation based on classical sexology also appears in a decision in 2008. The fact that one claimant was married in the Netherlands and had a child as a result of this marriage established, according to the Administrative Court, that the claimant was not to a sufficient degree "determined by his homosexuality" in order to fulfil the criteria of belonging to a particular social group within the definition of Art. 10 (1) d of the Qualification Directive.<sup>208</sup>

Also in **Hungary** marriage and children seem to significantly reduce the probability that the applicant is deemed credible. A lesbian applicant was married and had a child, born after she had recognized her lesbian orientation. The Office of Immigration and Nationality declared that she would not have lived together and married a man, had she been a lesbian.

In several countries, even declared bisexual applicants were rejected because the applicant was married and/or has children.

In **Bulgaria**, according to the country expert, anyone falling out of the stereotypes for LGBs is considered as not credible. Marriage

and children are believed to be one of the main indicators for the assessment of the sexual orientation of a person. There was a case of a bisexual man from Lebanon being rejected because he had a wife and children.

An applicant in **Finland** changed his claim from homosexual to bisexual, immediately after he married a woman. Although in the interview he repeatedly pointed out that he is not homosexual, but bisexual, and he held the difference between these two orientations very significant, he did not know the right term for bisexuality, at the time of writing his application. This was not found to be credible and his claim was rejected in 2010.

An Algerian applicant in **Hungary** was refused protection, because he could not sufficiently substantiate the probability of his persecution in Algeria. It was not stated explicitly that the reason for the rejection was his bisexuality; however, he had a wife and children.

#### 6.6.2.3 GOOD PRACTICE

In a number of Member States it is recognised that marriage does not necessarily imply that the applicant is not an LGBTI person. This is to be considered as a good practice, in line with the UNHCR Guidance Note.

In **Italy**, a gay Moroccan was married in Morocco and had a child within the marriage. He said that he got married at the age of 28 (he was 40 at the time of claim) because he was forced to do so by his family. He declared he was not sure he was the father of the child, but he felt obliged to help his wife and child economically. He said his wife did not accept a divorce out of fear of social repercussions. He was granted refugee status.<sup>209</sup>

In **Slovakia**, the only applicant who was granted asylum because of his (bi)sexual orientation was previously married in the country of origin and had four children.

In **Denmark**, it is well understood that an applicant being L, G, B, T or I and being married is not incompatible. In one case the applicant was granted refugee status because of homosexual conduct in his home country, while living with a woman in Denmark. In **France**, the asylum authorities as well as the Court do not consider marriage and family as a key element which could be the ground for a refusal, but in case of doubt this element can be considered among others.

206 W. El-H vs Principal Immigration Officer (First Hall, Civil Court), initiated on 29 July 2008.

207 Rechtbank (Regional Court) Haarlem, 12 January 2010, nr. 09/48023.

208 Verwaltungsgericht (Administrative Court) Ansbach, 21 August 2008, AN 18 K 08.30201.

209 Commissione territoriale per il riconoscimento della protezione internazionale di Milano (Regional committee for the recognition of international protection of Milan), decision, 2010.

## CREDIBILITY ASSESSMENT

**Sweden** has an explicit policy rule, holding: 'The fact that the homosexual is married, and perhaps has children with a person of the opposite sex should not in any way rule out the fact that he or she has a homosexual orientation.'<sup>210</sup>

The recent **United Kingdom** Asylum Instruction holds in this respect: 'Neither should (heterosexual) relationships or parenthood (both of which may need to be explored at interview) be automatically taken as evidence of lack of credibility.'<sup>211</sup>

Also **Austria, Belgium,** and the **Czech Republic** report no problems on this point.

### 6.6.2.4 CONCLUSION

It can be concluded that in many Member States, marriage and children and being an L, G, B, T or I person are deemed incompatible. While this is a totally untenable position when it comes to bisexuals, it also does not make sense for LGTI applicants. The social pressures applicants face may be enormous, forcing LGTI people to marry against their will. The notion that being married or having children can be of any relevance for the credibility of an applicant's sexual orientation, seems to be one of the remnants of the medical view of sexual orientation and gender identity, which considers LGTI identities in terms of lack or incapacity. The implicit notion is that a person will only be LGTI if s/he has no other option and cannot help being LGTI. Only when LGBTI identities are seen as resulting from necessity (not choice) does it make sense to think that, if a person was married or had a child, s/he cannot really be LGTI.

## RECOMMENDATION

- The fact that an applicant is or has been married or cohabiting in a heterosexual relationship, possibly with children of that relationship, should not in any way rule out the fact that he or she may be lesbian, gay, bisexual, trans or intersex.

### 6.6.3 KNOWLEDGE OF CRIMINAL SANCTIONS

**Belgium, France, Netherlands, Norway and Switzerland** reported that not knowing the exact criminal sanctions or the exact wording of the criminal provisions against sexual orientation in their country of origin, may affect the applicant's credibility.

This denies the reality of the lives of many LGBTI people, where social sanctions (pressure or – threats of – violence from relatives of

social surroundings) can be of much more importance than formal sanctions. Therefore, applicants being unaware of the (exact) criminal sanctions against sexual orientation in their country of origin should not in itself be a ground for finding the applicant not credible.

### 6.6.4 STATED CONDUCT TOO RISKY TO BE TRUE

In several cases, asylum applications are rejected because applicants have engaged in activities which were dangerous for themselves; this is deemed to be implausible.

A **German** court summarized a negative decision as follows: "The applicant's claim to have engaged in homosexual activities in Cameroon is not credible as this would have meant to expose himself to danger. His description of his life as a homosexual in Cameroon is not precise enough." The reviewing Administrative court disagreed on both points and quashed the decision.<sup>212</sup>

Comparably, a German court quoted from a Federal Office for Migration and Refugees decision as follows: "The applicant's (a Sunni Arab from Mosul/Iraq) statement is implausible: if his homosexual activities had indeed become known and he would have been persecuted he would also have been convicted under Section 400 of the Iraqi Penal Code." The Administrative Court disagreed and quashed the decision.<sup>213</sup>

In **Slovenia** an applicant was found not credible because he stated that he had sexual relations with a friend whose wife got to know about it, after which they did not hide their relations for the wife. The Slovenian authorities also found it strange that the wife reported them to the police only after knowing about this for two years.

In the **Netherlands** the asylum authorities did not find it plausible that a Pakistani boy had sex with his boy-friend in his room while other (Muslim) family-members were present in the same home, nor that they did not lock the door properly, knowing the risks involved.<sup>214</sup>

If this kind of reasoning is taken to its logical conclusion, the claim of virtually every asylum seeker who has had, or attempted, a same-sex relationship in their country of origin, or who has expressed a trans identity, is implausible because of the inherent risk it entailed.<sup>215</sup>

212 Verwaltungsgericht (Administrative Court) Frankfurt (Oder), 11 November 2010, VG 4 K 772/10.A.

213 Verwaltungsgericht (Administrative Court) Sigmaringen, 26 April 2010, A 1 K 1911/0.

214 Rechtbank (Regional Court) Haarlem, 29 September 2009, nr. 09/32801.

215 Jenni Millbank, 'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, *International Journal of Refugee Law*, 2009-1, p. 22.

210 Migrationsverket, *Sexual Orientation Guidelines* 2002.

211 UK Home Office, *Asylum Instruction: Sexual Orientation and Gender Identity in the Asylum Claim*, 6 October 2010, revised on 13 June 2011.

More generally, the fact that behaviour put an applicant at risk is more likely to be a reason to *grant* asylum than to *deny* it. This reasoning should be abandoned.

### 6.6.5 OTHER STEREOTYPED CRITERIA

There are scores of other stereotypical notions which have been (ab) used to conclude that an applicant is not an LGBTI person. A non-exhaustive list of examples:

Topic	Member State	Example
Military service	Cyprus	A gay applicant was questioned regarding his service in the army. The fact that he did not try to avoid the army, which is mandatory in his country, was found to be contradictory with stereotypical gay conduct.
Cultural taste	France	Questions may concern a person's dressing habits, leisure time, cultural tastes (music, film, television), knowledge of and/or participation in culture considered gay.
Language	Hungary	In the case of a Nigerian woman the asylum authorities deemed it improbable that the applicant would use "Latin terminology" (such as "homosexual") given her educational background. The authority supposed that the applicant heard or invented the story of her homosexuality to attain a refugee status. The medical examination resulted in the assessment of "strong feminine sexuality". It has to be noted that other elements also questioned the credibility of the applicant.
Language	Spain	A Mauritanian gay man who called himself "maricon". The Court was of the opinion that this word is rarely used by a gay person. <sup>216</sup>
Demeanour	Ireland	Some decision-makers reached negative decisions based on their own judgments of an applicant's demeanour (i.e. whether, in the view of the decision-maker, the applicant presented as a homosexual person). For example, in refusing a refugee appeal by an Algerian gay man, a Tribunal Member stated "from his demeanour (at the appeal) I have no doubt that the applicant advanced the claim that he is a homosexual to enhance his application to be declared to be a refugee". The basis of the Tribunal Member's expertise to determine sexual orientation based on demeanour is not addressed. <sup>217</sup>
Demeanour	Bulgaria	A common opinion is that a gay man should necessarily "look feminine" and "display" his sexual orientation, the same applies to homosexual women.
Sex work	Belgium	Homosexual sex workers have been rejected, because of "engagement in illegal homosexual acts motivated by economic and opportunistic reasons." <sup>218</sup>
Sex work	Spain	A trans woman from Costa Rica suffered all kind of discrimination; the Court held that her problems and discrimination occurred because she worked in prostitution, not because of her gender identity. <sup>219</sup>
Cultural tastes	UK	stereotypes and ignorance, including expecting a gay man to know about the works of Oscar Wilde. <sup>220</sup>
No other choice	UK	A woman's sexual conduct in prison was considered a continuation of teenage sexual experimentation; in prison, she had "no choice, bar celibacy" and therefore it was not found credible that she was a lesbian. The finding was reversed by the Court of Appeal. <sup>221</sup>
Genetics	Netherlands	A Jamaican's bisexuality was not found credible, because he stated that his homosexual orientation was "not in his genes." <sup>222</sup>
Monogamy	Netherlands	An Iraqi applicant stated that, although he had a sexual relationship with a man for five years, he was not sure whether he was in fact homosexual, because he never had feelings towards other men. The IND believed the relationship, but was of the opinion that the policy for homosexuals from Iraq did not apply to him, because he was not a homosexual. "In Arabic countries young men often turn to men for sexual satisfaction, because they cannot satisfy their sexual needs with a woman", according to the IND. The Regional Court of Groningen saw no reason why this speculation was applicable here. Appeal allowed. <sup>223</sup>

Obviously, when an applicant *does* meet stereotype expectations, this can be to the applicant's advantage: in **Hungary** in the case of a Tunisian applicant, the decision mentioned that he dressed in a feminine way and wore make-up.

In the **United Kingdom**, a Yemeni gay man wore tight T-shirts and tight jeans and had long hair, which he associated with the expression of his sexual identity. He refused to accept any modification to his dress, or cut his hair on return, to fit with the clothes and hair-styles of straight Muslim men on return. The Tribunal in 2009 allowed his appeal and he was granted refugee status.<sup>224</sup>

216 Audiencia Nacional (National Court) 19 December 2008, rec. n° 1399/2007.

217 Refugee Appeals Tribunal, 2010.

218 Raad voor de Vreemdelingenbetwistingen (Council for Aliens Cases) 21 October 2008, 17.431; Raad voor de Vreemdelingenbetwistingen (Council for Aliens Cases) 22 October 2008, 17.471; 19.383; 19.842; 19.837; 21.996.

219 Audiencia Nacional (National Court), 21 July 2008, rec. n° 679/2006.

220 Reported in Nathanael Miles, No Going Back, Lesbian and Gay People and the Asylum System, Stonewall, May 2010, www.stonewall.org.uk.

221 Court of Appeal (England and Wales), August 2009, NR (Jamaica) v SSHD [2010] INLR 169.

222 Rechtbank (Regional Court) Haarlem, 18 December 2007, nr. 07/26891, Council of State, 18 April 2008, 200800353/1.

223 Rechtbank (Regional Court) Groningen, 3 September 2010, nr. 10/6506.

224 Unreported case before the Asylum and Immigration Tribunal.

## 6.7 CONCLUSION

The stereotypes on LGBTI people may be clustered into three main groups, which do not cover all but most of the examples. Please note that most examples concern gay men. This is probably due to the prevalence of gay male applications.

The three main categories of stereotypes are:

- *Lacking the 'real thing'*: LGBT persons are considered as having gender trouble: gays are not real men: they do not (want to) serve in the army, they do not marry nor have children, they do not dress in a masculine way; they do not have a relationship with only one man. Lesbians are not real women: they do not marry nor have children, they do not dress in a feminine way. The German classical-sexological presumptions are very much alive in many Member States. For example, same-sex sexual activity in an all-female or all-male environment, such as a prison, is considered no expression of being lesbian, gay or bisexual, because it does not reflect a 'fateful and irreversible' attraction to the same sex. Marriage or children establish that a person is not LGBT.
- *A social group*: LGBT people form a coherent group, with common cultural tastes, common media, they share particular physical social spaces, patterns of behaviour, attitudes.
- *Coming out*: LGBT applicants are presumed to have found out about and dealt with their sexual orientation in a particular way: they are presumed to have had feelings of guilt, to have a stable sexual orientation about which they have deep feelings.

These stereotypes are based on the idea that sexual orientation is strictly ordered according to a set of categories with heterosexuality as the obvious and stable central category. This allows for gays and lesbians as equally stable peripheral categories of identity; for trans and intersex people as medical categories; and for bisexuals as people who might count as lesbian or gay when they have finally succeeded in making up their minds. In this way, lesbians and gays are shaped in the image of heterosexuals – reassuringly peripheral identities which mimic the stability of heterosexuality. Trans and intersex people are confusing for this categorisation, and are comfortingly labelled as medical problems. Bisexuals have no problem because they can 'choose' between assuming the position of lesbians/gay men or that of straight people. This orderly way of dealing with non-straight sexualities reinforce heterosexuality and cisgender as the dominant norm.

The above way of looking at sexual orientation is to be seen at work in all credibility issues. The medical expert opinions are based on categories which have officially been rejected (gender dysphoria, inversion, etc) and essentially seek to establish the stability of a person's sexual orientation. Germany is merely explicit in requiring a stable sexual identity (*Schicksalhafter Festlegung* – fateful fixation). In other Member States as well, decision makers and courts try to distinguish between frivolous behaviour (*merely* same-sex sexual activities, which should not lead to asylum, even if it has led to inhuman treatment in the country of origin) and applicants who feel *compelled* to engage in same-sex sexual activities, or who are *really* trans or intersex. One gets the impression that applicants are required to be earnest about their sexuality. Apparently, it is not usual to be gay without enquiring about criminal law specifics; to be lesbian but not read lesbian media; to have a relationship with another man but not know about gay meeting places in Teheran parks. All these examples testify that credibility findings are based on very specific expectations, which treat sexual orientation as something akin to political or religious convictions, with the expected participation in party meetings, focussing on the formal public sphere of public media and legislation. Obviously, sexuality is political in many ways, but sexual politics, while it may take place in classical venues such as media and parliaments, is more often (and maybe predominantly) played out in settings which are labelled as private, such as the family, the neighbourhood or the workplace.

It cannot be claimed that every asylum applicant claiming to have a well-founded fear of being persecuted on account of being L, G, B, T or I speaks the truth and qualifies for asylum. That said, the examples of asylum interview practice provide evidence of untenable methods of establishing credibility, riddled with questionable assumptions about how 'true' LGBTI applicants behave. The main conclusion to be drawn from this state of affairs is that credibility can only be established on the basis of an interview which allows the applicant to freely tell her or his own story. This means that it should be geared towards enabling applicants to tell the story of the sexual orientation as they have experienced it, in a detailed manner and in a safe space. As LaViolette has established, this will lead to three main lines of enquiry during asylum interviews: (i) Personal and Family (ii) Lesbian and Gay Contacts in both sending and receiving countries and (iii) Experience/Knowledge of Discrimination and Persecution.<sup>225</sup> The **Swedish** and **UK** guidelines, as well as the UNHCR Guidance Note contain a description of a useful approach. Of course, requests for clarifications or for more details may be asked. But anything that smacks of an exam, asking for 'the right answer'

<sup>225</sup> Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group', prepared for the Canadian Immigration and Refugee Board, 2004.

(where are gay meeting places; what is the criminal provision for lesbian sex; what position were you in when you were discovered) is counterproductive (a) because they may disturb the trust an asylum interview requires, and (b) because they reflect presumptions which may be incorrect or not applicable in the particular case.

## RECOMMENDATION

- During the personal interview in the meaning of Article 12 Procedures Directive, lesbian, gay, bisexual, trans and intersex applicants should be given the opportunity to describe how their sexual orientation or gender identity has developed, including responses of the environment; experiences with problems, harrassment, violence; and feelings of difference, stigma, fear and shame.





## 7 LATE DISCLOSURE

In general, people applying for international protection are supposed to relate the reasons why they fear persecution immediately and in a clear, consistent and coherent manner. Raising the issue of sexual orientation or gender identity at a later stage (for example: during the appeal stage; or in a subsequent application) often casts doubt on the applicant's credibility and therefore such late claims can easily be rejected. However, there may be several valid reasons why LGBTI asylum seekers may not have disclosed their sexual orientation or gender identity at the moment of their initial application, such as:

- Sometimes children seek asylum, while some years later they become aware of their sexual orientation or gender identity.
- Many LGBTI asylum seekers do not dare to talk about their sexual orientation or gender identity due to feelings of difference, stigma, shame or fear. These feelings can be based on internalised homophobia or transphobia and they might be reinforced by the necessity to disclose their sexual orientation or gender identity to an officer of the asylum authority, or by the fear of what could happen if their sexual orientation or gender identity became known in other settings, such as accommodation centres.
- They may be in the process of 'coming-out': they may not have fully come out to others or even to themselves about their sexual orientation or gender identity.
- Some LGBTI asylum seekers and their advisers are not aware that their sexual orientation or gender identity may be relevant for the assessment of their claim.

A **German** Court decided that the fact that a statement had been made more than three years after arrival in Germany did not disqualify an Iraqi claimant from refugee status: The claimant explained in a credible manner that he could only decide to publicly admit to his homosexuality after a lengthy inner process and a difficult inner struggle, the end of which was marked by the finding of his own sexual identity.<sup>226</sup>

### 7.1 INTERNATIONAL AND EUROPEAN STANDARDS

The Procedures Directive states that a subsequent application for asylum shall be subject to a preliminary examination as to whether

<sup>226</sup> Verwaltungsgericht (Administrative Court) Köln, 8 September 2006, 18 K 9030/03.A, Informationsverbund Asyl & Migration M17466.

new elements or findings relating to the examination of whether the individual qualifies as a refugee, have arisen or have been presented by the applicant. If new elements or findings arise which significantly add to the likelihood of the applicant qualifying as a refugee the application should be further examined.<sup>227</sup>

Within the framework of the current recast of the Procedures Directive, the European Commission proposed to explicitly encompass sexual orientation and gender identity within the definition of "applicants in need of special procedural guarantees."<sup>228</sup> The Commission also proposed that Member States should ensure that those applicants are identified in due time and that relevant provisions also apply "if it becomes apparent at a later stage of the procedure that an applicant is in need of special procedural guarantees". Also "Member States shall ensure that applicants in need of special procedural guarantees" are "granted sufficient time and relevant support to present the elements of their application as completely as possible and with all available evidence."<sup>229</sup>

The UNHCR Guidance Note states in this respect:

"The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim."<sup>230</sup>

<sup>227</sup> Article 32 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>228</sup> The proposed Article 2 (d) of the Procedures Directive: "applicant in need of special procedural guarantees" means an applicant who due to age, gender, sexual orientation, gender identity, disability, serious physical illness, mental illness, post traumatic disorders or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive." Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), Brussels, 1 June 2011, COM(2011) 319 final, 2009/0165 (COD).

<sup>229</sup> The proposed Article 24: "1. Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. (...) Member States shall ensure that this Article also applies if it becomes apparent at a later stage in the procedure that an applicant is in need of special procedural guarantees; 2. Member States shall take appropriate measures to ensure that applicants in need of special procedural guarantees are granted sufficient time and relevant support to present the elements of their application as completely as possible and with all available evidence."

<sup>230</sup> UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, par. 38.

## 7.2 STATE PRACTICE

The survey of LGBTI asylum practice in EU Member States shows that cases in which LGBTI asylum applicants disclose their sexual or gender identity as grounds for their asylum claim only later on during the asylum procedure face two kinds of problems:

- their ‘coming out’ is not taken into account at all: some asylum systems apply a notion of *res judicata* in some form, which allows for a fresh examination only if the circumstances mentioned in a later stage constitute new facts
- their ‘coming out’ is taken into account, but is met with mistrust; if circumstances are mentioned only in a later stage, they may be untrue, opportunistic and merely mentioned in order to improve the chances of being granted asylum.

### 7.2.1 MINORS

Some examples were reported of asylum seekers who fled as minors and only realised their sexual orientation some years later, for instance the following case:

A Somalian asylum seeker had entered the **Netherlands** as a child. His mother had submitted two subsequent asylum applications on his behalf. Eight years after the first asylum application he became aware of his sexual orientation and he submitted an application by himself, claiming he would face problems upon return to Somalia. This was considered as a sufficiently specific asylum motive, eminently personal and it had not been dealt with in the earlier procedures. For those reasons, it was considered a new fact justifying a fresh examination of his asylum claim.<sup>231</sup>

This is a refugee *sur place* situation and, if the claim is found credible, it will often lead to recognition. Examples of this type of claim, submitted by applicants who entered the country of refuge as minors, were also found in **Austria, France, Italy, Norway, Poland** and the **United Kingdom**, while country experts from the **Czech Republic, Germany** and **Malta** assumed that people in this position would have a good chance.

### 7.2.2 RES JUDICATA

Some countries have an asylum system which regards an asylum case about which a final decision has been taken as a *res judicata* (i.e. a case which has already been decided). The only thing that is to be decided upon in a subsequent application is whether later

declarations represent ‘new facts or circumstances’. If the answer is negative, the subsequent application will not be examined; the credibility of a sexual orientation claim submitted later is not even assessed or taken into account. We found clear examples of this in **Austria** and the **Netherlands**.

In the **Netherlands**, the lower courts have acknowledged that ‘coming-out’ is a complex process that can take a long time, whereby various stages of awareness are distinguished (aware, but not fully, still searching, insecure and scared, not able to talk about it, still in the phase of acceptance, slumbering homosexuality, fearing the consequences, struggling etc.) and that people are sometimes not able to talk about their sexual orientation immediately upon arrival.<sup>232</sup>

The Dutch Council of State, however, applies a stricter criterion: someone who is (albeit slightly) aware of homosexual feelings should mention this immediately upon arrival, also when he or she has never expressed these feelings ever before.

A Somali man always had been aware that he was different and only looked at men, but he expressed his sexual orientation for the first time some years after he came to the Netherlands. The Court of Assen ruled that because he only became fully aware of his homosexuality and acted accordingly after his first application, this was a new fact.<sup>233</sup> In appeal the Council of State overruled this judgement: because he declared he had always been aware of his sexual orientation, he could and should have told about it at the time of his first application. The fact that he engaged in a homosexual relationship only after some years of staying in the Netherlands does not change this.<sup>234</sup> This approach does not have regard to the fact that in this case late disclosure was due to the fact that he was only able to express his sexual identity for the first time in the Netherlands.

This formalistic procedural issue may stand in the way of the practical application of liberal substantive policies. Although the Netherlands has the policy of granting asylum to LGBTs from Iran, this very strict line in judicial practice concerning new facts and circumstances even results in rejections of late Iranian LGBT claims, not because their sexual orientation or gender identity is not believed, but because it is simply not taken into account.<sup>235</sup>

231 Afdeling bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 3 October 2003, 200305027/1, Jurisprudentie Vreemdelingenrecht 2004/3, Nieuwsbrief Asiel- en Vluchtelingenrecht NAV 2003/310.

232 Rechtbank (Regional Court) Zwolle, 26 September 2007, 06/55693 (Afghanistan); Voorzieningenrechter (the provisional measures judge) Rechtbank (Regional Court) Groningen, 17 November 2006, 06/52447 (Iraq); Rechtbank (Regional Court) Haarlem, 7 December 2007, 07/44180 (Angola).

233 Voorzieningenrechter (the provisional measures judge) Rechtbank (Regional Court) Assen, 2 February 2006, nr. 06/54668, appeal allowed; the IND appealed against this judgement.

234 Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State), 14 April 2006, 200601113/1, MigratieWeb ve06000557.

235 Iranians whose homosexuality was not regarded as a new fact.

In **Austria**, a case was reported of a gay man from Iran, who came to Austria in 2001 as a minor together with his parents. Finally, in 2009, the application was rejected. A few months later he applied for asylum once more, because he had not mentioned his homosexuality before, although he had been aware of it for two years. The Federal Asylum Office rejected the application as a *res judicata* and denied a procedure in merits. The Asylum Court cancelled this decision and said that there had to be a detailed procedure in merits regarding the situation in Iran, and because the newly developed homosexuality was a new circumstance. The Asylum Court held:

*"[T]hat for answering the question whether in the present case there is a new fact, relevant is not only that the applicant had purportedly already become aware of his homosexual orientation at a moment at which the previous procedure had not yet been formally ended; it should be considered as more decisive to clarify when the applicant disclosed his homosexuality to others for the first time, whether and at which moment the applicant has become homosexually active for the first time, or when the sexual inclination of the applicant has become publicly known; the asylum authorities have not inquired or otherwise established this."*<sup>236</sup>

This decision shows that an asylum system relying on *res judicata* is not necessarily inflexible. The normal circumstance of a new fact, is a fact which occurred after the preceding asylum procedure. The Asylgerichtshof decided that the moment at which this fact occurs is not necessarily the moment at which the claimant became aware of his homosexuality, but may be the moment at which he 'came out' to others, or the moment at which he became sexually active.

### 7.2.2.1 CONCLUSION

In some Member States, the requirement that asylum applicants disclose all facts on which they base their asylum claim at the first possible occasion, results in denial of asylum on the procedural ground of *res judicata*. The reasons why the applicant 'came out' later are not considered at all. This can lead to a *refoulement* which would be contrary to the Refugee Convention, resulting in exposing an

applicant to a risk of persecution on the basis of sexual orientation or gender identity.

We do realise that efficient procedures are in the interest not only of states, but also of asylum seekers. But the capacity of LGBTI asylum seekers to make immediate declarations about their experiences may very well have been limited by those very experiences, and the lack of a 'safe space' to express themselves. They may find it hard to talk about intimate matters to complete strangers; they may have learnt to expect violence at the merest disclosure of their sexual orientation or gender identity; they may suffer from internalised homophobia or transphobia; they may not have had the occasion to overcome the shame which their socialisation has instilled in them. In asylum systems which require that all relevant facts are disclosed immediately, asylum should not be denied on the sole ground of late disclosure, when relevant reasons have been put forward to explain this. Such reasons should always be taken into account and should, where applicable, be considered an acceptable explanation for initial reticence.

We point out that, even within a strict *res judicata* system, there are options for doing this, for example by considering the moment at which an asylum seeker 'came out' to others as the relevant moment, i.e. at this moment the new fact occurred.

Although everything depends on how such options are applied in practice, the Austrian example shows that maintaining a *res judicata* system is not necessarily incompatible with an LGBTI sensitive asylum procedure.

### 7.2.3 CREDIBILITY

Many LGBTI asylum applicants speak about their sexual orientation or gender identity later. Some of them are successful, for example when their late disclosure is considered as a phase in their coming out process, or their reasons to be initially hesitant are accepted and regarded as credible. Others are treated with suspicion for trying to 'improve' their asylum motives and as a result their claims are rejected for lack of credibility.

We have found examples of such suspicion in almost all Member States. Some examples may give an impression of this practice.

In an **Irish** case, the Refugee Appeals Tribunal refused the appeal of a Pakistani gay man *inter alia* on the basis that he had not applied for asylum immediately upon arrival in Ireland but had entered into employment for a substantial period of time and only when he was arrested on suspicion of immigration offences, he applied for asylum. The Tribunal did not accept the applicant's explanation that

Voorzieningenrechter (the provisional measures judge) Rechtbank (Regional Court) Assen, 12 September 2008, 08/30179, Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State), 10 December 2008, 200807075/1, Jurisprudentie Vreemdelingenrecht 2009/85, MigratieWeb ve09000038; Rechtbank (Regional Court) Arnhem, 27 November 2009, 09/40762, Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State), 23 December 2009, 200909367/1/V2; Rechtbank (Regional Court) Haarlem, 8 December 2009, appeal allowed, but the IND appealed at the Council of State: still pending; Rechtbank (Regional Court) Zwolle, 17 June 2010, 10/18620, Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 8 July 2010, 201006033/1/V2.

236 Asylgerichtshof (Asylum Court) 10 February 2010, E1 217.905-4/2010.

## LATE DISCLOSURE

the reason for his delayed disclosure was that he had only begun to come to terms with his sexuality after his arrival in Ireland and after he had experienced his first homosexual relationship.<sup>237</sup>

In **Denmark** it is quite common that LGBT asylum seekers indicate their sexual orientation late in the procedure. This is always a problem, because it can be difficult to distinguish the genuine LGBT applicants from applicants who 'add homosexuality' to their claim to improve chances of refugee status.<sup>238</sup>

In a **Dutch** case the Court found that the applicant should have referred to his sexual orientation during the interview, even if only summarily, for example by indicating that there is something he does not dare to declare about. He had been informed of the fact that he could speak freely and should not withhold information.<sup>239</sup>

In **Spain**, a gay man from Cuba only told about his problems related to the Cuban dictatorship in his first petition before the Asylum Office. Only after the Appeal Court ordered his admission to the procedure, he explained the real reason of his asylum claim was the persecution he has faced in Cuba because of his sexual orientation. However, his claim was rejected by both the Asylum Office and the National Court due to non-credibility. They were of the opinion that he was an economic immigrant who did not deserve protection.<sup>240</sup>

However, in some cases the suspicion is overcome:

In **Romania**, an Afghan asylum seeker based his asylum claim on conflicts with the Taliban and the insecurity in Afghanistan. His application was rejected by the Romanian Immigration Office and the First Court. During the procedure in front of the Second Court (Tribunal) he had the courage to speak up about his real reasons to fear persecution - being a homosexual and cross-dresser in a Muslim fundamentalist society. He was afraid to tell this earlier because of fear and shame towards the Afghan community in the asylum seekers centre. During the hearing the judge did not doubt the truth of his statement and considered his new reason for asylum a very serious one. He received subsidiary protection in December 2010.

Also in **Italy**, a case was found of a gay man who presented a first claim in 2007 based on other grounds. The claim was rejected. In 2009, he presented a new claim based on sexual orientation: at the personal interview he explained that he did not mention this earlier

because he feared that people in the reception camp would find out and he would suffer violence as a consequence. He was granted refugee status.<sup>241</sup>

The only LGBTI applicant who was recognised as a refugee in **Slovakia** was someone who revealed his bisexual orientation only in a repeat asylum procedure.

In **France**, the Asylum Court has noted that late submissions can be met with mistrust, but on the other hand, the authorities can grant asylum to applicants who have disclosed and/or assumed their sexual orientation only after they entered France, sometimes a long time after their arrival. Such decisions are motivated by the sincerity and credibility of the expressed fear of persecution, and by the fact that the situation of LGBTI people in the country of origin is particularly bad.

In an **Irish** case an application was subjected to accelerated procedures on the basis of the failure to seek asylum as soon as possible after arrival. On appeal, the Tribunal overturned this finding having regard to the applicant's explanation of the reason for his delayed revelation, namely the impact of the persecution suffered in the country of origin (Egypt), fear of arrest and disclosure of his sexual orientation in Ireland. The Tribunal held that he had a well founded fear of persecution arising from his sexual orientation and granted refugee status.<sup>242</sup>

### 7.2.3.1 GOOD PRACTICE

The Swedish Guidelines on sexual orientation acknowledge that it can be difficult to disclose one's sexual orientation directly.<sup>243</sup> However, according to our Swedish expert, the Swedish decision makers do not always follow their own guidelines.

The Swedish policy document about this subject acknowledges that it is not uncommon that sexual orientation is invoked later in the asylum procedure. In such cases the sole fact of late disclosure

237 Refugee Appeals Tribunal, 2009.

238 Flygtningenævnet (Refugee Appeals Board) 1 June 2004.

239 Rechtbank (Regional Court) 's-Gravenhage 24 June 2009, 09/5070, appeal dismissed by the Afdeling Bestuursrechtspraak van de Raad van State (Judicial Division of the Council of State) 15 September 2009, 200905386/1/V2.

240 Audiencia Nacional (National Court) 28 November 2008, rec. n° 5265/2005.

241 Commissione territoriale per il riconoscimento della protezione internazionale di Crotone (Regional committee for the recognition of international protection of Crotone) decision 2009.

242 Refugee Appeals Tribunal, 2005.

243 "In certain cases, homosexuality is cited as a ground at a relatively late stage in the process. There may be several reasons for this, and this can be understandable. (...) An applicant can have powerful feelings of shame about his homosexuality. It is difficult for many applicants from countries with a great deal of repression to discuss their homosexuality with outsiders, and especially those in authority. (...) Sexual violence and insults due to homosexuality can be associated with powerful trauma and especially with feelings of guilt and shame. In the investigation, the individual homosexual often carries an image of himself coloured by these prejudices, and may choose, consciously or subconsciously, not to state his actual reasons until a later stage in the process." Guidelines for investigation and evaluation of asylum cases in which persecution based on given sexual orientations is cited as a ground. Migrationsverket (Migration Board) 28 January 2002.

should not affect the credibility of the claimant. Country information should be taken into account in the assessment of the late coming-out and also whether the claimant has a valid reason for not stating sexual orientation earlier on. It should also be considered that a homosexual or bisexual orientation can be a taboo subject to talk about even in comparatively liberal societies.<sup>244</sup>

The **United Kingdom's** policy document also accepts that a negative finding should not be made when there was non-disclosure at the screening stage.<sup>245</sup>

### 7.3 CONCLUSION

Minors who 'came out' for their sexual orientation or gender identity as adults in the country of refuge have a good chance of being recognised. However, we are of the opinion that, also regarding applicants who entered the country as adults, it is quite understandable if they do not speak about their sexual orientation or gender identity until later in the procedure, out of feelings of fear, stigma or shame resulting in not being able to fully 'come out'.

In some of these cases, late disclosure of sexual orientation or gender identity leads to an adverse finding on credibility, while in others, the reasons for late disclosure are accepted. It is remarkable that in some Member States, disbelief seems to be the general practice while in other Member States a much more nuanced picture is reported by our national experts.

It is not to be considered *per se* unreasonable that late disclosure of sexual orientation or gender identity leads to caution on the side of asylum authorities, or that such cases are treated with greater scrutiny. However, the reasons for late disclosure should be considered carefully.

Whether late disclosure of sexual orientation or gender identity during the asylum procedure contributes to a finding of lack of credibility is obviously a matter that is examined on a case-by-case basis. It cannot be excluded that asylum seekers at a later stage of the procedure formulate claims which are not truthful; however, it can equally not be excluded that such claims are truthful, and that the late moment at which they are formulated has to do with the applicant's 'coming out process' or with other factors that do not

affect the truthfulness of the claims. Due to this, a negative credibility finding cannot be based solely on the late moment at which the applicant came forward with LGBTI related flight motives. In order to assess this, it is necessary that interviewers and decision makers are trained in sexual orientation and gender identity issues, including 'coming-out processes'.

### RECOMMENDATIONS

- Reasons for late disclosure should be considered carefully with due attention to the relevant factors adduced by applicants.
- The notion of "new elements" in Article 32(3) Procedures Directive should not be interpreted in a highly procedural way but, on the contrary, in a protection-oriented manner. In this way, an unduly inflexible application of the *res judicata* principle can be avoided.
- A negative credibility finding cannot be based solely on the belated disclosure of the sexual orientation or gender identity.

<sup>244</sup> Rättschefens rättsliga ställningstagande om förföljelse på grund av homo- eller bisexuell läggning, 12 October 2009 (RCI 04/2009), official statement of the Director of Legal Affairs at the Swedish Migration Board (<http://www.migrationsverket.se/include/lifos/dokument/www/091019101.pdf>).

<sup>245</sup> See UK Border Agency Asylum Instruction on 'Sexual Orientation issues in the asylum claim', page 11 (6 October 2010, revised on 13 June 2011).



## 8 COUNTRY OF ORIGIN INFORMATION

Country of Origin Information (COI) is significant to enable decision-makers to relate a purported fear of persecution to the human rights situation of LGBTIs in the country of origin. For instance in cases in which LGBTI applicants report they have been persecuted or prosecuted by state parties, COI is important. Are homosexuality, transgender identity and other non-dominant sexual orientations or gender identities criminalised in the country of origin? What is the general attitude of the authorities towards LGBTIs? Acts of persecution vis-à-vis LGBTIs are often committed by fellow citizens, such as relatives, gangs, colleagues, neighbours and classmates. In these cases, which are numerous, it is crucial to have information about the incidence of persecution by non-State actors, as well as about the availability and effectiveness of State protection. Also, independent objective and reliable COI is crucial whenever the asylum authorities purport that the asylum seeker could find protection in another part of the country of origin (see also Chapter 5). In these cases COI is required on the legal and social position of LGBTI people, on the availability of effective state protection for LGBTIs, as well as on the situation in different parts of the country.<sup>246</sup>

In 2004, a transwoman from Romania appealed before a **Dutch** court. With respect to the events experienced by the applicant, the Immigration and Naturalisation Service (IND) concluded that, since nothing is recorded on the position of trans people in Romania, it must be assumed that this group does not experience any problems. However, the Court did not agree with this assumption. The Human Rights Watch Report 2002 showed that police officers in Romania often used violence and that lesbians and gay men were harassed by the police. According to the Court it was not clear why the position of transsexuals would be more favourable.<sup>247</sup>

### 8.1 INTERNATIONAL AND EUROPEAN STANDARDS

The EU Qualification Directive states that the assessment should take into account “all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied.”<sup>248</sup> The Procedures Directive adds that an

246 See also N. LaViolette, ‘Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process’, *International Journal of Human Rights* 2009-13, p. 437–76.

247 Rechtbank (Regional Court) Amsterdam, 22 January 2004, 02/94109.

248 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, Article 4(3)(a).

appropriate examination should be carried out and to that end “member states shall ensure that precise and up-to-date information is obtained from various sources, such as the UNHCR, as to the general situation prevailing in the countries of origin of applicants for asylum.”<sup>249</sup>

The European Parliament voted in 2011 to amend this article as follows: “Member states shall ensure that (...) the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child, gender, religious or *sexual orientation* issues.”<sup>250</sup>

Furthermore, UNHCR’s Gender Guidelines acknowledge that it is important “to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.”<sup>251</sup>

### 8.2 STATE PRACTICE

In our questionnaire we incorporated questions on the availability of COI and the way in which Member States deal with the (un)available information.

#### 8.2.1 LACK OF LGBTI RELEVANT COI

We found many examples of decisions based on a lack of specific information as to the situation of LGBTIs in the country of origin. The dominant pattern is that a lack of information is taken to mean that LGBTIs have no problems. These examples include:

Two Vietnamese gay men applied for asylum in **Romania**. They invoked persecution by the communist authorities against

249 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 8(2)(b).

250 European Parliament Legislative Resolution of 6 April 2011, A7-0085/2011 (amendment for Article 9(3)(d)). However, in the Amended proposal of the Commission, this suggestion has not been incorporated, COM (2011) 319 final, Brussels, 1 June 2011, Article 10(3)(d). The refusal to incorporate this has not been explained by the Commission, COM (2011) 319 final ANNEX, Brussels, 1 June 2011.

251 UNHCR Guidelines on International Protection: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, par. 37.

## COUNTRY OF ORIGIN INFORMATION

homosexuals, and anti-gay government policies. However, according to the investigation by the documentation centre of the Romanian Immigration Office (BITO) on the ILGA website and the online magazine Gay Times, there was no information about criminal sanctions against same-sex conduct in Vietnam. The decision quoted a U.S. State Department Report 2008: "There is low public awareness of homosexuality and little evidence of discrimination based on sexual orientation." The decision concluded: "While the asylum seeker stated that homosexuals are persecuted by the Vietnamese police, according to Globalgayz.com (accessed January 2008) the police generally leaves gay people alone, at least in Saigon. Further information on treatment by the Vietnamese police could not be found among the sources consulted." They were both rejected.<sup>252</sup>

In **Spain**, a lack of information is quickly taken by the asylum authorities to mean that there is no problem. For instance, the National Court, despite accepting the criminalization of homosexuality in the Algerian Penal Code, stated there was not persecution because "none of the consulted sources report whether somebody has been condemned in Algeria because of sodomy."<sup>253</sup> On the other hand, in the case of a Cuban gay the National Court argued that the Asylum Office had presented a document from the internet establishing that there is no persecution in Cuba – without, however, specifying the source more exactly than by a reference to "internet."<sup>254</sup>

In **Germany**, a lack of information on persecution sometimes leads to the conclusion that there is a certain tolerance towards a gay/lesbian scene in certain countries of origin, especially regarding North African countries.

In **Italy** a case was found of a gay man from Sierra Leone whose application was rejected at first instance with the reasoning that "the circumstances do not amount to persecution also because there is a lack of information on homosexuals in Sierra Leone."<sup>255</sup>

The following four examples illustrate the lack of country of origin information concerning trans asylum seekers.

In the **Czech Republic**, the Supreme Administrative Court arrived at the conclusion that there is no difference between homosexuality and transsexuality for the purposes of assessment of the claim of the asylum seeker from Ukraine. The Court based this conclusion on COI, stating

252 Decisions by the Romanian Immigration Office, dated February 2010 and June 2010.

253 Audiencia Nacional (National Court) 7 November 2008, rec. n° 1563/2007.

254 Audiencia Nacional (National Court) 20 May 2005, rec n° 414/2003.

255 Commissione territoriale per il riconoscimento della protezione internazionale di Milano (Regional committee for the recognition of international protection of Milan) Decision, July 2007. However, the claimant was granted protection on humanitarian grounds for reasons we were not able to identify.

that Ukrainian society is tolerant towards homosexuality. Therefore, it can be reasonably inferred that it is also tolerant towards transsexuality.<sup>256</sup>

In **Spain** persecution by non-state actors is usually labelled as 'discrimination' only, and no asylum is granted. For instance in the case of a transwoman from Nicaragua. She was discriminated against in the fields of education, health care, work as well as by her family. Then she became a prostitute, and was sexually abused by both clients and policemen. There was no possibility to get effective protection from the authorities. However, the Asylum Office said that this was no persecution, only discrimination. The National Court agreed, and emphasized that there was no evidence of persecution and that "in Nicaragua there is no persecution or discrimination based on sexual orientation or gender identity."<sup>257</sup>

In **Sweden**, applications from Iranian trans asylum seekers have been rejected, because in Iran it is possible to undergo a sex reassignment operation. However, the situation of trans persons seems far more complex than that. As is noted in the report 'Unknown people': People who transgress gender norms in Iran are given the choice of living as criminals or go through sex reassignment surgery.<sup>258</sup>

In the **United Kingdom**, there are only two reported cases on trans asylum claims. The Court of Appeal in 2006 in *Rahimi* fell into the same evidential trap as the Swedish case of basing a lack of risk on the existence of surgical procedures in Iran:

"Homosexual acts clearly are criminal, but there is little to suggest that a person who is homosexual in orientation is subject to serious ill-treatment or persecution as a result. The position of transsexuals seems to be very similar. The condition is one that is recognised by the state and the state makes provision for appropriate treatment for those who wish to undergo it. There is little to support the suggestion that merely to be a transsexual in Iran will expose one to serious ill-treatment or persecution."<sup>259</sup>

256 Supreme Administrative Court (Czech Republic), 14 November 2007, No. 6 Azs 102/2007. The Czech courts generally do not sufficiently distinguish between various groups covered by the term LGBTI; they tend to use "gays" as the relevant reference group for all LGBTI cases. In two bisexual cases, the SAC did not pay attention to the specific position of bisexuals but used the terms "homosexual" and "bisexual" interchangeably (see Decision of the SAC of 25 November 2008, No. 9 Azs 79/2008; and Judgment of the SAC of 1 April 2009, No. 2 Azs 5/2009). Similar patterns exist in most lesbian cases as well. In these cases, the SAC tends to use the term "homosexual orientation" so as to encompass both gay and lesbian relations (see, e.g. Judgment of the SAC of 2 August 2006, No. 3 Azs 268/2005 on lesbians in Armenia).

257 Audiencia Nacional (National Court) 13 May 2010, rec. n° 296/2009.

258 Elina Grandin and Anna-Maria Sörberg, *Unknown people, The vulnerability of sexual and gender identity minorities and the Swedish Migration Board's country of origin information system* ('Okänt folk. Om förståelse av genusproblematiker och utsatthet på grunden sexuell läggning och könsidentitet i Migrationsverkets landinformation'), Migrationsverket, January 2010.

259 *Rahimi v Secretary of State for the Home Department* [2006] EWCA Civ 267, para



A different view was taken by the Court of Appeal in 2007, when it allowed the appeal of a trans woman (incorrectly referred to by the Court as “he”) and remitting the case back to the Tribunal as her lawyers “had established the potential availability of objective evidence supporting the appellant’s case that transsexuals in Iran may face harassment and even persecution from, among others, the police.”<sup>260</sup>

#### 8.2.1.1 GOOD PRACTICE

Courts sometimes consider that a *lack of information* is not sufficient to reject a claim.

In several **Austrian** cases of gay applicants from Gambia there was a serious lack of information concerning homosexuality. The Federal Asylum Office decided negatively because of that lack of information, but the Asylum Court cancelled these decisions and ordered the Asylum Office to make detailed research about the situation of homosexuals in Gambia.<sup>261</sup>

The **Dutch** Country Report on Azerbaijan 2004 states that “Transsexuality is a taboo subject in Azerbaijan society. Therefore it was not possible to find information on the position of transsexuals in Azerbaijan.” From this information the Immigration and Naturalisation Service concluded that there was no recorded information on transsexuality in Azerbaijan. However, according to the Court, considering the wording of the Country Report, their position could be judged as alarming. The applicant won the case.<sup>262</sup>

Since October 2010, the **United Kingdom** Home Office in their Asylum Instruction have accepted: “It is very important, however, to note that there may be very little evidence on ill-treatment of lesbians in the country of origin. It may be the case that if gay men are found to face persecution, then lesbians, as a corresponding group which does not conform to an established gender role, may also be at risk.”<sup>263</sup>

Some countries provide *specific COI* which is relevant to LGBTIs.

In the **United Kingdom**, since late 2005, there has been a specific section in all COI Reports with respect to risk to LGBTIs. These reports are then used as source documents on the UK Home Office’s policy approach to LGBTI claims from specific countries in documents called Operational Guidance Notes.

Since 2001 the Tribunal, now the Upper Tribunal (Immigration and Asylum Chamber) also decides cases on specific countries, called Country Guidance cases.<sup>264</sup> Currently, the list includes with respect to LGB claims - Afghanistan (gay men),<sup>265</sup> Albania (lesbians),<sup>266</sup> Eritrea (gay men),<sup>267</sup> Iran (gay men),<sup>268</sup> Jamaica (gay men<sup>269</sup> and lesbians<sup>270</sup>), Kenya (gay men),<sup>271</sup> Macedonia (gay men),<sup>272</sup> Serbia and Montenegro (Kosovo) (gay men),<sup>273</sup> Turkey (gay men),<sup>274</sup> Uganda (gay men),<sup>275</sup> Ukraine (gay men).<sup>276</sup>

- 264 Country Guidance cases are cases where the senior specialist Tribunal in the UK hears evidence on the country background evidence of a specific country to provide guidance on risk to a specific group. Such guidance must be applied unless there is post-hearing evidence to depart from the findings of the Tribunal. The list of cases is correct as of 1 August 2011 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Tribunals/tribunals-country-guidance-list-updated-130711.pdf>>>
- 265 *AJ (Risk to Homosexuals) Afghanistan* [2009] UKAIT 00001 (successful appeal of gay man where it was accepted that his boyfriend and family had been murdered by the Taliban following their knowledge that the appellant was gay, and this news would travel to Kabul if he were to relocate, and therefore this would not be a viable alternative and discretion would not be available to him).
- 266 *MK (Lesbians) Albania CG* [2009] UKAIT 00036 (unsuccessful appeal by lesbian in Albania as country background evidence did not corroborate real risk. Currently seeking leave to appeal to the Court of Appeal).
- 267 *YF (Risk – Stateless – Homosexual – Illegal) Eritrea CG* [2003] UKIAT 00177 (appellant had not come to the attention of the authorities prior to departure and therefore would not do so on return. There existed conflicting evidence on prosecutions and persecution of gay men).
- 268 *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117 (gay men who come to the attention of the Iranian authorities will be at real risk of arrest and prosecution on return).
- 269 *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT 00168 (successful appeal of gay man who was found to have suffered persecution in the past. Secretary of State conceded that the authorities in Jamaica will not provide gay men with effective state protection.)
- 270 *SW (Lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251. Lesbians (actual or perceived) are subjected to curative rape and possibly murder, and will have to adopt a heterosexual narrative to evade persecution, i.e. have a boyfriend, children and possibly marry.
- 271 *JMS (Homosexual – Behaviour – Persecution) Kenya CG* [2001] UKAIT 00007 (having accepted that the appellant was detained and ill-treated in the past, discrete homosexuals are not at risk of prosecution or persecution on return).
- 272 *MS (Risk – Homosexuality – Military Service) Macedonia CG* [2002] UKAIT 03308 (no criminal law prohibiting sexual conduct of a gay man, and not disproportionate to remove on the basis of a “registered” one year long relationship with a UK national. Nevertheless, appeal allowed under article 3 of the ECHR on the basis that appellant would be imprisoned for one year on the basis of military desertion and prison conditions breached article 3 of the ECHR).
- 273 *YK and RL (Kosovo – Risk to homosexuals) Serbia and Montenegro CG* [2005] UKIAT 00005 (no country background evidence of persecution, even from lesbian and gay campaigning groups).
- 274 *MS (Risk – Homosexual) Turkey CG* [2002] UKIAT 05654 (appellant may face discrimination on return but this will not result in persecution, and the fact that he had been subjected to rape in the past by police officers only resulted in a fanciful risk of this occurring in the future).
- 275 *JM (Homosexuality: risk) Uganda CG* [2008] UKAIT 00065 (no evidence of actual arrests or prosecution of gay men and the appellant will act in such a way not to cause offence – approach affirmed by the Court of Appeal in *JM (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ. 1432, but distinguished by the Administrative Court in *R (on the application of SB (Uganda)) v Secretary of State for the Home Department* [2010] EWHC 338 (Admin)) Upper Tribunal currently identifying possible new CG case to analyse current risk in Uganda.
- 276 *UK (Risk – Homosexuals) Ukraine CG* [2003] UKIAT 00005 (no real risk to homosexuals in cities as long as they do not “advertize (*sic*) themselves”).

8, 15 February 2006.

260 *AK (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ. 941, 8 July 2008, para 28 Appeal allowed on remittal to the Asylum and Immigration Tribunal.

261 Asylgerichtshof (Asylum Court) 9 June 2010, A2 405.597-2/2010; 22 October 2009, A2 409.086-1/2009; 14 September 2009, A2 408.439-1/2009.

262 Rechtbank (Regional Court) Roermond, 4 November 2005, nr. 02/20771.

263 UK Home Office, Asylum Instruction on *Sexual Orientation issues in the asylum claim*, page 12 (6 October 2010, revised 13 June 2011).

## COUNTRY OF ORIGIN INFORMATION

In 2006 in the Netherlands, the Minister for Immigration stated that: “the Minister of Foreign Affairs shall try to investigate to what extent the authorities offer protection to homosexuals against persecution by third parties in countries that criminalise homosexuality or where, in practice, grave discrimination or punishment takes place.”<sup>277</sup> But to date, in Dutch Country Reports, information on the availability of state protection for LGBT people is scarce. None of the reports gives information like “the state authorities are in general willing and/or able to protect LGBTs”. The information that is reported is usually about the difficulties in obtaining protection, as in the reports on Armenia,<sup>278</sup> Georgia<sup>279</sup> and Turkey.<sup>280</sup>

We also found some examples in which national asylum authorities cooperate with LGBT NGOs.

In the **United Kingdom** the UK Lesbian & Gay Immigration Group (UKLGIG, an NGO) is involved in on-going meetings with the senior management in the COI section to highlight concerns with respect to the LGBTI sections in the reports.

At the initiative of the NGO WISH (working group of international solidarity with LGBTs), the **Belgian** Office of the Commissioner General for Refugees and Stateless Persons<sup>281</sup> cooperates with LGBT activists from certain African countries of origin to exchange information on the specific situation in these countries.

### 8.2.2 THE USE OF COI

If COI is available, it is crucial that it is used appropriately. Above, it was already noted that an absence of information cannot automatically be taken to mean that LGBTs face no serious problems in the country of origin. Similarly, it was pointed out that information about gay men cannot automatically be applied to the situation

of lesbian, bisexual, trans and intersex applicants.<sup>282</sup> Another issue is the tendency to interpret available information selectively, or as indicating a lack of risk.

In the case of an asylum seeker from Kazakhstan the **Lithuanian** Migration Department based its negative decision on selective use of COI, ignoring information concerning gay discrimination in Kazakhstan, gay persecution in the workplace and educational institutions, the fact that gay organisations in Kazakhstan are not registered and that the police does not protect gay rights.

In cases of gay Iranians often the Iranian Penal Code is cited, for instance in a negative decision from **Cyprus** in 2009: “according to Iranian law, a sexual offence can only be proven if there were four witnesses present during the sexual act, if it occurred in a public space and offended the public sense of decency.” This decision ignored that according to Iranian law evidence might also be obtained through the personal knowledge of a Sharia judge.

In an **Irish** decision refusing the refugee appeal of a Kenyan gay man, the Tribunal referred to country of origin information, stating “An article from the website ‘Behind the Mask’ mentions the recent creation of Minority Women in Action (MWIA), an organization advocating for the rights of lesbians and other minority and marginalized women in Kenya, which ‘aims to become a haven to many lesbians’ who are subjected to discrimination in Kenya because of their sexual orientation.” However, the relevance of this material in the context of the gay male applicant was not addressed.<sup>283</sup>

In **Spain**, the Law has been amended and provides that in LGBT cases decisions must take into account “the prevailing circumstances in the country of origin.” However, decision makers often do not take any COI into account, or the Court values the COI used by the Asylum Office much more than the COI presented by the asylum seeker or by NGOs supporting the case. For instance, the National Court rejected the COI presented by an applicant, because “it just reports general intolerance and repression in Algeria against people with a different sexual orientation, thus is not about the applicant.”<sup>284</sup> While in other decisions the same Court did accept general information used by the government, despite the fact that the government did not cite the source, in addition to the fact that this information is most likely general and therefore does not concern the applicant personally.

277 Replies by Minister Verdonk of 28 November 2006 to the Parliamentary questions of Lambrechts of 3 October 2006 (Aanhangsel Handelingen II, 2006/07 nr. 394).

278 Dutch Country Report Armenia (August 2010): If homosexuals ask for help and protection from the police, there is no guarantee that they will get it in an adequate way and therefore they rarely turn to the police for help. Homosexuals could find themselves in a vulnerable position, if they come into contact with the police, because of the risk that police officers will take (financial) advantage of the situation by threatening to publicly ‘out’ them. In the past, there were reports on police officers who visited gay meeting places in order to blackmail men.

279 Dutch Country Report Georgia (December 2009): A transsexual person who turns to the police for protection, does not run the risk of being prosecuted for the sole fact that he or she is a transsexual.

280 Dutch Country Report Turkey (September 2010): The Turkish law and the Turkish authorities do not offer sufficient protection to LGBTs. In general LGBTs do not dare to ask for protection. Many LGBTs do not trust the police due to existing prejudices. Insofar as LGBTs report cases of discrimination and/or threats to the Turkish authorities, their reports are generally not taken into consideration.

281 Commissariat Général aux Réfugiés et aux Apatrides (CGRA)/Commissariaat Generaal voor de Vluchtelingen en de Staatlozen (CGVS).

282 As stated above, if only information about gays is available, and this information shows their position is problematic, then in the absence of further information about lesbian, bisexual, trans and intersex people their position must be presumed to be problematic as well. The problem is not in using information for one group to examine applications by applicants from other groups, but the often unconscious subsumption of LGBTs under gays.

283 Refugee Appeals Tribunal, 2010.

284 Audiencia Nacional (National Court) 10 December 2008, rec. nº 1592/2007.

Apart from information on criminalisation of homosexuality, reliable information considering the situation of LGBTIs in countries that (recently) abolished the criminalisation of homosexuality is needed. It seems that asylum authorities do not always sufficiently realise that decriminalisation does not necessarily mean persecution by society and police has ended.

For instance, in **Spain** the Asylum Office waited until the Nicaraguan penal code changed to deny all applications from that country. Despite this change in law the situation of LGBTI people in Nicaragua did not improve: the homophobia and discrimination/persecution remained the same as before.

In **Denmark**, immediately after decriminalization of homosexuality in Russia in the mid-90s, LGBTI applications were rejected, while there was still evidence of discrimination and assaults from private parties and lack of protection by the Russian authorities.

#### 8.2.2.1 GOOD PRACTICE

In 2003, the **Dutch** Secretary of State was of the opinion that meeting places for homosexuals exist in Jerevan, Armenia, resulting in Jerevan being a good protection alternative for two lesbian applicants. The Court, however, did not agree with this view, finding this insufficient indication for the availability of protection for lesbians.<sup>285</sup>

In **Norway**, there were some examples in which the asylum seekers were granted asylum because there was doubt about the situation of LGBTIs in the country of origin, for instance in cases from Northern Iraq and Iran.

### 8.3 CONCLUSION

We found many examples that indicate a substantial lack of COI concerning human rights violations of LGBTIs in most countries from which people flee. The information that is available mainly deals with gay men. Information on risk to lesbians and trans claimants is very scarce, while information on bisexuals and intersex persons seems non-existent. In order for the decision makers to “take into account all relevant facts as they relate to the country of origin”<sup>286</sup> and to obtain “precise and up-to-date information”<sup>287</sup> on the situation of LGBTIs in the countries of origin, LGBTI relevant COI should be collected. For all countries from which LGBTI asylum seekers originate, the information available from human rights organisations, including

LGBTI organisations, as well as from UN agencies, complemented by information gathered by Member State diplomatic posts, and alternative forms of information<sup>288</sup> should be put together. Guidance about the assessment of information from different sources (including the limitations which adhere to information gathered through diplomatic representations) has been given by the European Court of Human Rights.<sup>289</sup> As one of the main tasks of the European Asylum Support Office (EASO) is to collect country of origin information, EASO should give priority to collecting this particularly problematic type of COI.

As long as little or no reliable COI is available on the situation of lesbians, gays, bisexuals, trans or intersex people in a particular country, this should not be considered as a sign that human rights violations of LGBTI people do not occur in that country.

### RECOMMENDATIONS

#### *Pertinent country of origin information*

- In the light of Article 4(3)(a) Qualification Directive, for all countries of origin, information pertinent to lesbian, gay, bisexual, trans and intersex applicants must be gathered and disseminated.
- Country of origin information must be based on reports of human rights organisations, UN agencies, complemented by information from Member State diplomatic posts as well as local lesbian, gay, bisexual, trans and intersex organisations - where these exist. This information should be supplemented by alternative forms of information, such as the testimonies of other lesbian, gay, bisexual, trans and intersex people similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.
- In the light of Article 4(3)(a) Qualification Directive, country of origin information should include information about direct and indirect criminalisation of sexual orientation or gender identity.
- In the light of Article 4(3)(a) Qualification Directive, country of origin information should include precise and up-to-date information as to the position of lesbian, gay, bisexual, trans and intersex people, in particular:

285 Rechtbank (Regional Court) Groningen, 18 March 2003, 02/43135, 02/43145.

286 Article 4(3) Qualification Directive, see above.

287 Article 8(2) Procedures Directive, see above.

288 UNHCR Guidelines on International Protection: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, par. 37.

289 ECtHR 17 July 2008, *NA v the United Kingdom*, appl. no 25904/07, para. 118-122.



## COUNTRY OF ORIGIN INFORMATION

- the occurrence of state and non-state persecution
  - homophobia and transphobia in government institutions and agencies such as the police, prisons, education
  - homo- and transphobia in daily life (on the street, the workplace, schools, housing)
  - the willingness and ability of the authorities to provide effective protection against homophobic and transphobic violence, and whether lesbian, gay, bisexual, trans and intersex people have access to such protection
  - the availability of effective state protection in different parts of the country, with a view to the possibility of internal protection.
- Country of origin information should be specific about the situation of lesbians, gays, bisexual women and men, trans (including trans women and men and transvestites) and intersex people.

are not mentioned explicitly in criminal law, it should be assumed that lesbian, bisexual, trans and intersex persons risk persecution too, until it has been established that this is not the case.

- Considering countries where sexual orientation is criminalised, while gender identity is not mentioned explicitly in criminal law, it should be assumed that trans and intersex people risk persecution too, until it has been established that this is not the case.

### *Appropriate use of available country of origin information*

- As long as little or no reliable country of origin information is available on the human rights situation of lesbians, gays, bisexuals, trans or intersex people, this should not be considered per se as a sign that human rights violations against these groups do not occur. Decision makers and the judiciary should keep in mind that homophobic and transphobic violence may be under-reported in certain countries. The principle of the benefit of the doubt is of particular importance in such situations.
- Scarcity of information about enforcement of the criminalisation of sexual orientation or gender identity should not be taken as an indication that enforcement does not take place.
- When relying on country of origin information pertinent to lesbian, gay, bisexual, trans or intersex applicants, information about one subgroup should not automatically be presumed to be applicable to the other subgroups as well, unless there are good reasons to make this presumption. At the same time, the absence of information on one subgroup should not be understood as evidence that there is no risk for the members of other subgroups.
- Considering countries where gay sexual orientation is criminalised, while lesbian, bisexual, trans and intersex persons

## 9 RECEPTION

The present research has focused on refugee and subsidiary protection status and the asylum procedure, to the expense of issues concerning LGBTIs in reception centres, accommodations centres and in detention. Therefore, we can only outline some issues here. However, we do want to stress that the national reports make it clear that homophobic and transphobic harassment and violence against LGBTI applicants is a widespread and serious issue in most European countries. The situation of LGBTI applicants in reception centres, accommodations centres and in detention should be subject to further enquiries, and merits separate and profound attention.

### 9.1 EUROPEAN STANDARDS

With respect to preventing violent incidents in reception and accommodation centres, Article 14(2)(b) of the current Reception Directive states:

*Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres (...).*<sup>290</sup>

The recent recast proposal of the European Commission makes the wording of this paragraph more explicit regarding gender and gender based violence:

Article 18 (3): “Member States shall *take into consideration gender and age specific concerns and the situation of vulnerable persons* in relation to applicants within the premises and accommodation centres (...).” (emphasis added)

Article 18 (4): “Member States shall *take appropriate measures to prevent assault and gender based violence including sexual assault*, within the premises and accommodation centres (...).” (emphasis added).<sup>291</sup>

The current version of the Directive contains provisions for persons with special needs also referred to as “vulnerable persons”. Article 17 (1) of the current Reception Directive contains an open definition of vulnerable persons:

*“Member States shall take into account the specific situation of vulnerable persons **such as** minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents*

<sup>290</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

<sup>291</sup> European Commission, Amended proposal for a Directive of the European Parliament and of the Council, laying down standards for the reception of asylum seekers (Recast) COM (2011)320, 2008/0244 (COD) 1 June 2011.

*with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. (emphasis added)”*

The latest version of the European Commission's proposes a new Article 22 on the identification of the special reception needs of vulnerable persons:

“Member States shall establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs, also indicating the nature of such needs. (...) Member States shall ensure that these special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure. Member States shall ensure adequate support for persons with special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.”<sup>292</sup>

Though we are not of the opinion that all LGBTI asylum seekers are always vulnerable persons in the sense of the Directive, many of them should be considered as vulnerable, due to the nature of the acts of persecution suffered, which in LGBTI cases often include torture, rape, serious psychological, physical or sexual violence, possibly leading to post-traumatic disorders. At the same time, LGBTI asylum seekers may face a high level of discrimination and taboo in reception centres. For this reason they will often have special reception needs.

In addition, to make the paragraphs more inclusive, ILGA-Europe supports amendments to mention sexual orientation and gender identity explicitly, as well as other forms of biased violence.<sup>293</sup>

### 9.2 STATE PRACTICE

Homophobic and transphobic incidents towards LGBTI asylum

<sup>292</sup> European Commission, Amended proposal for a Directive of the European Parliament and of the Council, laying down standards for the reception of asylum seekers (Recast) COM (2011)320, 2008/0244 (COD) 1 June 2011.

<sup>293</sup> Article 18 (3): Member States shall take into consideration gender, *sexual orientation, gender identity* and age specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b). Article 18 (4): Member States shall take appropriate measures to prevent assault and violence based on *ethnicity, gender, sexual orientation, gender identity, disability, religion or belief, age*, including sexual assault, within the premises and accommodation centres referred to in paragraph 1(a) and (b). ILGA Europe, Policy Paper: The recast of the EU asylum Procedure and Reception Directives, July 2011. [http://www.ilga-europe.org/home/publications/policy\\_papers/the\\_recast\\_of\\_the\\_eu\\_asylum\\_procedure\\_and\\_reception\\_directives\\_july\\_2011](http://www.ilga-europe.org/home/publications/policy_papers/the_recast_of_the_eu_asylum_procedure_and_reception_directives_july_2011).



## RECEPTION

seekers in reception centres, accommodation centres and in alien detention occur in most EU countries, as is clear from the replies of the national experts to our questionnaire.

Often there is social exclusion, verbal and physical harassment, and sometimes even sexual abuse, mostly by other asylum seekers, in particular people from the same country of origin. Also incidents by staff members and by guards and police officers in detention are reported.

In some countries asylum seekers are housed in the countryside, where the local inhabitants have a low tolerance towards LGBTIs and from where it is not possible to reach LGBTI NGOs in the capital (this was reported from Austria and Ireland). Sometimes LGBTI asylum seekers are so afraid of other asylum seekers that they do not dare to mention their sexual orientation or gender identity to the asylum authorities; as a consequence they cannot be granted refugee or subsidiary protection on that ground. In some cases trans or gay people were moved to a single room. This may provide a quiet and safe environment. In many countries asylum seekers are allowed to find their own private accommodation, although in most countries they lack the financial means.

Whenever there is a complaint system, in the majority of countries this does not work effectively, partly because LGBTI asylum seekers often fear disclosure of their sexual orientation or gender identity.

In some countries it is common to place asylum seekers in detention for varying periods of time (Greece, Hungary, and Malta). In Malta, for example, the person will only be released if the procedure lasts longer than twelve months. In these countries, the precarious position of LGBTIs in detention is particularly acute.

Good practices that were reported on this point are:

- After the first six months asylum seekers in Portugal receive the same social allowance as Portuguese citizens. They also receive an accommodation subsidy in order to arrange private accommodation and they are allowed to work. Provided the housing market is not hampered by homo- and transphobia, this may allow LGBTI applicants to find accommodation where they feel safe. Comparably, in Cyprus it is possible to receive money in order to arrange private accommodation.
- In Belgium and in Finland the perpetrator of harassment can be transferred to another centre, instead of the victim (which is the usual 'solution').

- In Italy, one deportation-centre has a separate section for trans asylum seekers (Milano). To the extent that they are safe from harassment and violence, this may contribute to the safety of trans men and women.
- Finland has a reception centre for minors and families with children, where information meetings are held on sexuality and sexual diversity.
- In Sweden, the national LGBT organisation RFSL distributes information flyers in asylum centres, including on the right to obtain asylum, based on sexual orientation or gender identity.
- In Belgium, there is a LGBT network of asylum seekers in reception centres which holds monthly meetings (Rainbows United and Oasis). Their travel costs are paid by the Belgian government.

## 9.3 RECOMMENDATIONS

- Reception authorities in Member States should pay particular attention to the special needs of lesbian, gay, bisexual, trans and intersex asylum seekers in reception, accommodation and detention centres, and should develop appropriate procedures, guidelines and training modules in order to address their special needs.
- Since many homophobic and transphobic incidents are reported in reception, accommodation and detention centres, relevant special needs relating to sexual orientation and gender identity should be explicitly addressed in the drafting of a new Reception Directive, while prevention and protection from homophobic and transphobic assaults should be ensured in reception centres.
- Member States must put in place proper and effective complaint systems for dealing with harassment and violence against lesbian, gay, bisexual, trans and intersex applicants in reception, accommodation and detention centres.
- Lesbian, gay, bisexual, trans and intersex applicants must be given the possibility of moving to a single room or to another accommodation if they are facing harassment or violence in the original location; or the perpetrators must be transferred to another accommodation.
- Member States should facilitate lesbian, gay, bisexual, trans and intersex organisations to work in reception, accommodation and detention centres.

## RECOMMENDATIONS

This text puts together all recommendations put forward in the different chapters.

### GENERAL

In the light of Article 3 of Regulation 439/2010 establishing a European Asylum Support Office, the Office should give priority to promoting and coordinating the identification and pooling of good practices regarding the examination of applications of lesbian, gay, bisexual, trans and intersex asylum applicants.

### CRIMINALISATION

- Article 4(3)(a) Qualification Directive should be applied in such a way that it leads to refugee status for lesbian, gay, bisexual, trans and intersex applicants originating from countries where sexual orientation or gender identity are criminalised, or where general provisions of criminal law are used in order to prosecute people on account of their sexual orientation or gender identity.
- Countries of origin which criminalise sexual orientation or gender identity cannot be considered as 'safe countries of origin' for lesbian, gay, bisexual, trans and intersex applicants.

### STATE PROTECTION AGAINST NON-STATE PERSECUTION

- Article 7 of the Qualification Directive should be applied in such a way that lesbian, gay, bisexual, trans and intersex applicants are only required to turn to the authorities for protection, if it has been established that effective protection of a non-temporary nature would generally be available for lesbian, gay, bisexual, trans and intersex people in that country.
- Article 7 of the Qualification Directive should be applied in such a way that, when sexual orientation or gender identity is criminalised in the country of origin, lesbian, gay, bisexual, trans or intersex applicants are not required to invoke the protection of the authorities.
- Article 7 of the Qualification Directive should be applied in such a way that when potential actors of protection are likely to be homophobic/transphobic, lesbian, gay, bisexual, trans or intersex applicants are not required to have invoked the protection of the authorities.

### THE DISCRETION REQUIREMENT

- The well-founded fear element of the refugee definition should be applied in such a way that lesbian, gay, bisexual, trans and intersex applicants are not required or presumed to hide their sexual orientation or gender identity upon return to the country of origin in order to avoid persecution.

- The persecution ground element of the refugee definition should be applied in such a way that, for a sexual orientation or gender identity based particular social group to exist, the lesbian, gay, bisexual, trans or intersex applicant is not required to have already disclosed her/his sexual orientation or gender identity in the country of origin.

### INTERNAL PROTECTION

- Article 8 of the Qualification Directive should be applied in such a way that internal protection is deemed unavailable in cases of lesbian, gay, bisexual, trans and intersex applicants from countries which criminalise sexual orientation or gender identity.
- In all other cases, the decision-making authorities should make a careful assessment of the situation of lesbian, gay, bisexual, trans and intersex people in the proposed internal protection area, including whether it is possible to live openly as lesbian, gay, bisexual, trans or intersex persons there and whether effective state protection is available for them.
- Applicants should not be required or presumed to hide their sexual orientation or gender identity in the internal protection area in order to be protected against persecution.

### CREDIBILITY

- As a general principle, establishing sexual orientation or gender identity should be based on self-identification of the applicant.
- Medical and psychiatric expert opinions are an inadequate and inappropriate method for establishing an applicant's sexual orientation or gender identity.
- Interviewers, decision makers, the judiciary and legal aid providers need to be competent and capable of taking into account the sexual orientation and gender identity aspects of asylum applications, including the process of 'coming-out' and the special needs of lesbian, gay, bisexual, trans and intersex applicants. To this end, they should be professionally trained, both in a specific basic training module and during general permanent education modules.
- The fact that an applicant lacks familiarity with lesbian, gay, bisexual, trans and intersex organisations or venues cannot in itself be considered as an indication that the applicant's purported fear of being persecuted on account of sexual orientation or gender identity is not credible.

## RECOMMENDATIONS

- The fact that an applicant is or has been married or cohabiting in a heterosexual relationship, possibly with children of that relationship, should not in any way rule out the fact that he or she may be lesbian, gay, bisexual, trans or intersex.
- During the personal interview in the meaning of Article 12 Procedures Directive, lesbian, gay, bisexual, trans and intersex applicants should be given the opportunity to describe how their sexual orientation or gender identity has developed, including responses of the environment; experiences with problems, harassment, violence; and feelings of difference, stigma, fear and shame.

### LATE DISCLOSURE

- Reasons for late disclosure should be considered carefully with due attention to the relevant factors adduced by applicants.
- The notion of “new elements” in Article 32(3) Procedures Directive should not be interpreted in a highly procedural way but, on the contrary, in a protection-oriented manner. In this way, an unduly inflexible application of the *res judicata* principle can be avoided.
- A negative credibility finding cannot be based solely on the belated disclosure of the sexual orientation or gender identity.

### COUNTRY OF ORIGIN INFORMATION

#### *Pertinent country of origin information*

- In the light of Article 4(3)(a) Qualification Directive, for all countries of origin, information pertinent to lesbian, gay, bisexual, trans and intersex applicants must be gathered and disseminated.
- Country of origin information must be based on reports of human rights organisations, UN agencies, complemented by information from Member State diplomatic posts, as well as local lesbian, gay, bisexual, trans and intersex organisations - where these exist. This information should be supplemented by alternative forms of information, such as the testimonies of other lesbian, gay, bisexual, trans and intersex people similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.
- In the light of Article 4(3)(a) Qualification Directive, country of origin information should include information about direct and indirect criminalisation of sexual orientation or gender identity.
- In the light of Article 4(3)(a) Qualification Directive, country of origin information should include precise and up-to-date

information as to the position of lesbian, gay, bisexual, trans and intersex people, in particular:

- the occurrence of state and non-state persecution
  - homophobia and transphobia in government institutions and agencies such as the police, prisons, education
  - homo- and transphobia in daily life (on the street, the workplace, schools, housing)
  - the willingness and ability of the authorities to provide effective protection against homophobic and transphobic violence, and whether lesbian, gay, bisexual, trans and intersex people have access to such protection
  - the availability of effective state protection in different parts of the country, with a view to the possibility of internal protection.
- Country of origin information should be specific about the situation of lesbians, gays, bisexual women and men, trans (including trans women and men and transvestites) and intersex people.

#### *Appropriate use of available country of origin information*

- As long as little or no reliable country of origin information is available on the human rights situation of lesbians, gays, bisexuals, trans or intersex people, this should not be considered *per se* as a sign that human rights violations against these groups do not occur. Decision makers and the judiciary should keep in mind that homophobic and transphobic violence may be under-reported in certain countries. The principle of the benefit of the doubt is of particular importance in such situations.
- Scarcity of information about enforcement of the criminalisation of sexual orientation or gender identity should not be taken as an indication that enforcement does not take place.
- When relying on country of origin information pertinent to lesbian, gay, bisexual, trans or intersex applicants, information about one subgroup should not automatically be presumed to be applicable to the other subgroups as well, unless there are good reasons to make this presumption. At the same time, the absence of information on one subgroup should not be understood as evidence that there is no risk for the members of other subgroups.



- Considering countries where gay sexual orientation is criminalised, while lesbian, bisexual, trans and intersex persons are not mentioned explicitly in criminal law, it should be assumed that lesbian, bisexual, trans and intersex persons also risk persecution, until it has been established that this is not the case.
- Considering countries where sexual orientation is criminalised, while gender identity is not mentioned explicitly in criminal law, it should be assumed that trans and intersex people risk persecution too, until it has been established that this is not the case.

### RECEPTION

- Reception authorities in Member States should pay particular attention to the special needs of lesbian, gay, bisexual, trans and intersex asylum seekers in reception, accommodation and detention centres, and should develop appropriate procedures, guidelines and training modules in order to address their special needs.
- Since many homophobic and transphobic incidents are reported in reception, accommodation and detention centres, relevant special needs relating to sexual orientation and gender identity should be explicitly addressed in the drafting of a new Reception Directive, while prevention and protection from homophobic and transphobic assaults should be ensured in reception centres.
- Member States must put in place proper and effective complaint systems for dealing with harassment and violence against lesbian, gay, bisexual, trans and intersex applicants in reception, accommodation and detention centres.
- Lesbian, gay, bisexual, trans and intersex applicants must be given the possibility of moving to a single room or to another accommodation if they are facing harassment or violence in the original location; or the perpetrators must be transferred to another accommodation.
- Member States should facilitate lesbian, gay, bisexual, trans and intersex organisations to work in reception, accommodation and detention centres.



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