



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *M.B. v. Spain* (Appl. No 15109/15) before the
European Court of Human Rights**

1. Introduction*

1.1 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.¹ Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') by its letter of 16 December 2015.

1.2 In this submission, UNHCR briefly addresses the risk of persecution of Lesbian, Gay, Bisexual, Transgender and Intersex (hereafter 'LGBTI')³ individuals from Cameroon to provide the context in which the decision of the Spanish authorities must be situated (part 2). It then addresses the domestic legislative framework and practice applicable to the admissibility procedures in Spain and its inadequacy in assessing sexual orientation and gender identity ('SOGI') claims (part 3). Lastly, it provides UNHCR's interpretation of the relevant international refugee and human rights law principles (part 4).

2. The risk of persecution based on sexual orientation and forced marriage for asylum-seekers from Cameroon

2.1. The risk of persecution based on sexual orientation and/or gender identity

2.1.1 Since 1972 consensual same-sex sexual activity has been illegal in Cameroon. Article 347 bis of the Cameroonian Penal Code states "[w]hoever has sexual relations with a person of the same sex shall be punished with imprisonment from six months to five years and fine of from 20,000 to 200,000 [Cameroonian] francs" (US\$40 to US\$400).⁴ The law applies to both men and women and has been aggressively enforced since 2005.⁵ According to a number of recent reports, violence, detention, intimidation, harassment and discrimination against LGBTI individuals is a serious concern in Cameroon.⁶

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.* para. 8(a).

³ The term "LGBTI individuals", which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity, irrespective of their exact orientation and/or identity. Not all applicants will self-identify with the LGBTI terminology and constructs, or may be unaware of these labels. Decision-makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim.

⁴ Human Rights Watch, *Criminalizing Identities, Rights Abuses in Cameroon based on Sexual Orientation and Gender Identity*, 4 November 2010, ISBN: 1-56432-704-3, p. 10, <http://www.refworld.org/docid/4cd7d9c82.html>.

⁵ *Ibid.*

⁶ Amnesty International, *Amnesty International Report 2014/15 - Cameroon*, 25 February 2015, <http://www.refworld.org/docid/54f07e0c12.html>; United States Department of State, *2014 Country Reports on Human Rights Practices - Cameroon*, 25 June 2015, <http://www.refworld.org/docid/559bd57928.html>; Amnesty International, *Homophobia Still Tolerated by Governments Around the World*, 16 May 2014,

2.1.2. In addition to the prosecution, criminalization and imprisonment of LGBTI individuals in Cameroon, it is also important to note that laws criminalizing same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations.⁷ The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors, as well as promote political rhetoric that can expose LGBTI individuals to risks of persecutory harm. Moreover, they can also prevent LGBTI individuals from seeking and obtaining State protection.⁸

2.2. The risk of forced and levirate marriage

2.2.1. Forced marriage remains endemic in Cameroon despite being unlawful.⁹ The minimum legal age for marriage is 15 for girls and 18 for men, although many families reportedly try to marry off their girls before the age of 12.¹⁰ Furthermore, even then, the legal requirement that marriage should only be contracted between two consenting partners is hardly enforced.¹¹ On average, more than one out of three girls is married before they turn 18 in Cameroon, but prevalence rates vary widely across regions.¹²

<http://www.refworld.org/docid/537b32974.html>; People, *Inside the Struggle for LGBT Rights in Cameroon: 'It's Normal to Kill Somebody for Being Gay'*, 12 August 2015, <http://www.people.com/article/born-this-way-inside-struggle-lgbt-rights-cameroon>; Amnesty International, *Why should people be attacked because they are gay? - Defying homophobia in Cameroon*, 14 July 2015, <http://www.refworld.org/docid/55ae02564.html>.

⁷ The authorities seem unwilling or unable to effectively protect the persons concerned from discrimination and/or homophobic acts and to prosecute such acts. International Federation for Human Rights, *Cameroon: Homophobic climate maintained by state inaction*, 3 February 2014, <http://www.refworld.org/docid/5329b10514.html>; Immigration and Refugee Board of Canada, *Cameroon: Situation of sexual minorities, including legislation; treatment by government and society, including state protection and support services (2011-January 2014)*, 17 January 2014, CMR104749.E, <http://www.refworld.org/docid/537336864.html>. The UN Committee on the Elimination of Discrimination Against Women has also expressed concerns about the lack of adequate protection and assistance for disadvantaged groups of women in Cameroon including lesbian, bisexual and transgender women who are victims of discrimination and criminalization. It has also expressed deep concern about "child and forced marriages" as well as the stigmatization of widows and widowhood rites" UN CEDAW, *Concluding Observations*, 28 February 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/CMR/CO/4-5&Lang=En

⁸ Where the country of origin maintains laws criminalizing consensual same-sex relations, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is – in the view of the law – a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant. For judicial recognition and confirmation of this principle, see also, ECtHR, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 22 October 1981, <http://www.unhcr.org/refworld/docid/47dfaf7d.html>.

⁹ Global Network for Rights and Development, *GNRD campaigns against child marriages in Cameroon*, 2 June 2015, <http://gnrd.net/seemore.php?id=1665>; Canada: Immigration and Refugee Board of Canada, *Cameroon: Prevalence of forced marriage in southern Cameroon, particularly in the Southwest Region, including state protection available; forced marriage as practiced by chiefs, and whether the girls or women that are forced to marry chiefs must be virgins and childless*, 10 April 2013, CMR104378.E, <http://www.refworld.org/docid/5193855a2bdb.html>

¹⁰ United States Department of State, *2014 Country Reports on Human Rights Practices - Cameroon*, 25 June 2015, <http://www.refworld.org/docid/559bd57928.html>

¹¹ Inter Press Service, *Cameroonian Women and Girls Saying No to Child Marriage*, 16 December 2015, <http://www.ipsnews.net/2015/06/cameroonian-women-and-girls-saying-no-to-child-marriage/>

¹² Girls Not Brides, *Child Marriage Around the World: Cameroon*, <http://www.girlsnotbrides.org/child-marriage/cameroon/>

2.2.2. The practice of levirate marriage is classified as a ‘forced’ marriage and remains widespread throughout Cameroon even though the practice, like all forced marriages, is contrary to Cameroonian law.¹³ Levirate marriage refers to the custom whereby when a man dies, his widow is expected to marry her deceased husband’s brother or relative. “It is customarily referred to as ‘widow inheritance’”.¹⁴

2.2.3. In light of the general situation described above, the claims of asylum-seekers from Cameroon who fear persecutory harm on account of their actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or societal norms, as well as women who fear persecutory harm based on forced or levirate marriage cannot be considered manifestly unfounded and should normally be subject to a close and rigorous scrutiny due to the complex nature of such claims.

3. Legislative framework and practice regarding the accelerated admissibility procedures in Spain

3.1. The legislative framework

3.1.1 The accelerated asylum procedure at the border (also applied to asylum claims filed at a detention centre for migrants Aliens Internment Centre) is governed by the Law no. 12/2009 of 30 October 2009 regarding asylum and subsidiary protection (hereafter “the Spanish Asylum Law”) and more particularly its articles 18, 21 (in relation with Article 20.1 and 25.c, d, f) and 22.¹⁵ Articles 34¹⁶ and 35 provide UNHCR with a direct advisory role as “a guarantee of the fair functioning of the system”.¹⁷ Each asylum application processed through the accelerated admissibility procedure is systematically communicated to UNHCR, which issues a non-binding recommendation on each case.¹⁸ This recommendation is limited to determining whether the case should be transferred to the regular asylum procedure for its determination. It does not involve an assessment of the merits of the case at this stage of the procedure.

3.1.2 The procedure can be summarized in three distinct steps:

¹³ Forced marriage is criminalized under s. 356 of the Penal Code, 1967. Immigration and Refugee Board of Canada, *Cameroon: The practice of levirate marriage, including the regions of Cameroon where this tradition is widespread and the ethnic groups that practice it; the consequences if a widow refuses to take part in this practice, recourse and protection available, including police intervention in the cities of Douala and Yaoundé (June 2013-December 2014)*, 23 December 2014, CMR105020.FE, <http://www.refworld.org/docid/551e5f07d.html>. The practice of levirate in Cameroon “stems from the perception that women are the ‘property’ of their husbands”, and that “they may be bequeathed to other family members”. Ibid. See also, UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 4th periodic reports of States parties : Cameroon*, 11 May 2009, CCPR/C/CMR/4, <http://www.refworld.org/docid/4a891ec10.html>

¹⁴ African Study Monographs, 36(2): 75-100, June 2015, *Conflict Between Customary Law and Human Rights in Cameroon: the Role of the Courts in Fostering an Equitably Gendered Society*, Mikano Emmanuel KIYE, Department of Law University of Buea, Cameroon, http://jambo.africa.kyoto-u.ac.jp/kiroku/asm_normal/abstracts/pdf/36-2/14-6-5.pdf

¹⁵ Article 18 regulates the rights and obligations of asylum seekers. Article 21 and 22 regulate the procedure that governs applications lodged at border points.

¹⁶ Article 34: The submission of applications for international protection shall be communicated to UNHCR, which may request information about the situation of the case files, to be present at the hearings to the applicant and to submit reports for inclusion in the case files. To this purpose, it shall have access to the applicants, including those located at the border point premises, or alien internment centers or prisons.

¹⁷ Preamble to the 12/2009 asylum law Sec I. Pag.90862, 4th paragraph.

¹⁸ Article 35(2): The UNHCR representative, shall “be immediately informed of the submission of the applications at the borders and may interview, if so desired, the applicants. UNHCR shall be heard prior to the issuance of the decisions set forth in paragraphs first, second and third of Article 21 of this Law.”

- 1) A determination is made as to whether the case is admissible to be determined in depth in the ordinary procedure. If not, the claim is rejected.¹⁹
- 2) If rejected, a reexamination of the claim by the same authority can take place upon the applicant's request.
- 3) If the reexamination is rejected, the applicant has the right to file an appeal before the National High Court (Audiencia Nacional).

3.1.3. While the procedure includes several safeguards, such as the provision of compulsory free legal aid, access to an interpreter if needed and UNHCR's advisory role, the admissibility accelerated procedure in Spain is characterised by a number of significant gaps, which may lead to the *refoulement* of persons in need of international protection.

3.1.4. Firstly, the time frames to submit an asylum application and to examine it are excessively short. The Spanish authorities are bound to determine the admissibility of the initial asylum claim within four working days. This time frame is reduced to two working days for the submission by the applicant of a reexamination request in case of rejection and two additional working days for the authority to examine such request.

3.1.5. In case of judicial appeal, the National High Court also has to decide on the request to suspend the removal as an interim measure within two days, and then must confirm or overturn the interim suspension of removal after a hearing within the next three working days.²⁰ Secondly, the scope of the examination of the asylum application is limited to assessing the admissibility of the claim but does not involve any in-depth determination of the merits of the case, as this is meant to take place within the regular asylum procedure only if the case is declared admissible. Thirdly, the appeal before the National High Court does not have automatic suspensive effect. The suspension of the removal pending the review by the National High Court of the decision to reject the claim can be considered by that court only upon the applicant's request but is not automatically granted.²¹

¹⁹ Cases can be rejected based on both formal and substantive grounds. See Article 21 in relation with Article 20.1 and 25.c), d) and f).

I. The application can be declared **inadmissible** if it falls under any of the admissibility ground established in Article 20.1: '**Lack of competency of the Spanish authorities to assess the claim**' such as applications of EU Dublin Regulation, or when it is not Spain's responsibility to examine the claim in accordance to the International Conventions to which Spain may be a party. '**Lack of requirements**' such as the application of the first country of asylum concept; the Safe third country concept; the reconsideration of a previously rejected claim in Spain, or a new application with different personal data provided new relevant circumstances are not alleged with regard to the particular conditions or the situation in the country of origin; or if the claimant is a national of an EU Member State.

II. The claim can be **rejected on the following substantive grounds established in Article 21.2**: If they exclusively claim grounds unrelated to the examination of the requirements for recognition of refugee status or subsidiary protection; if the applicant's country of origin can be considered safe, in the terms of article 20.1.d) in relation to Article 27 of EU Procedures Directive 2005/85) provided s/he is a national, or if stateless, the applicant has habitual residence there; if the person is included in any of the articles regulating exclusion or denial of refugee status (which include article 33.2 of the Geneva Convention of 1951); if the claim is based upon allegations that can be considered inconsistent, contradictory, improbable or insufficient or contradicting COI that has been sufficiently corroborated, making the claim clearly unfounded in relation to his/her having a well-founded fear of persecution or suffering serious harm.

²⁰ If the Court does not grant a suspension of removal, the person is expelled from the territory. The case will still be reviewed by the Court but the appellant will have to pursue their appeal from outside of Spain.

²¹ Article 135 of the Law on the administrative jurisdiction and procedure (Ley de la Jurisdiccion contencioso-administrativa y del procedimiento administrativo común).

1. When the parties allege the existence of especially urgent circumstances, the single or multi-judge bench, within two days, may resolve as follows, without hearing the opposing party.
 - a) The judicial authority may perceive the existence of especially urgent circumstances and adopt or deny the measure, pursuant to Section 130. No appeal may be entered against this ruling. In

3.1.6. The European Court of Human Rights (hereafter “the Court”) has repeatedly held that the speed of remedies should not be at the expense of the effectiveness of the guarantees intended to protect the concerned persons against an arbitrary deportation to a real risk of ill-treatment.²² More particularly and of direct relevance to the present case, the Court already found in the case *A.C and Others v. Spain*, that the lack of an automatic suspensive effect of the administrative appeal before the National High Court constituted a violation of the right to an effective remedy within the meaning of Article 13 in conjunction with Article 3 ECHR.²³

3.2. The accelerated procedures in practice

3.2.1. The accelerated procedure described above is systematically applied irrespective of the complexity of the asylum claim, whether the asylum application is made at the border or at a detention centre for migrants (Aliens Internment Centre). This is in contrast to the inland or territorial procedure applied to asylum-seekers who file their petition inside the country, who can only be found inadmissible on formal grounds.²⁴ In further contrast to the accelerated procedures, the ‘regular’ stream takes one month to process.

3.2.2. Over the past years the number of asylum applications channeled through the accelerated procedure has increased from 687²⁵ applications in 2013, to 1620²⁶ in 2014 and 6851²⁷ in 2015, the latter being mainly composed of Syrians claiming asylum at the Melilla border post, officially opened in March 2015. While Syrian and Palestinian applicants are admitted almost automatically to the regular procedure (with an admissibility rate of 100% in 2014 and 99.59% in 2015), the admissibility rates for all other nationalities was quite low (21.65% in 2014 and 22.86 % in 2015).²⁸

3.2.3. As stated above, (at 2.1.1), UNHCR issues a non-binding recommendation on all applications processed under the accelerated procedures as to whether the application should be admitted into the ordinary asylum procedure for an in-depth study. In 2013, 75 recommendations out of 132 issued were accepted by the asylum authorities, 713 of 859 were accepted in 2014, of which 543 referred to Syrian applicants and 170 out of 264 to non-Syrian or Palestinian applicants, and in 2015, 3051 UN-

the same decision, the single or multi-judge bench shall grant the opposing party a hearing within three days of adoption of the measure. Once the allegations have been received, the deadline therefore has lapsed or the hearing has been held, the single or multi-judge bench shall decide to lift, maintain or modify the measure adopted. The decision may be appealed in keeping with the general rules. The provisions contained in section 63 shall be applicable to the recording and documentation of the hearing.

b) The judicial authority may perceive no especially urgent circumstances and rule that the request for precautionary measures shall be processed as laid down in section 131, during which the parties concerned may request no new measure via application of the present section.

2. In cases relating to actions performed by the administration involving foreign citizens, political asylum or refugee status entailing the return of minors to their country of origin, the judicial authority shall hear the public prosecutor prior to delivering a ruling referring to the first paragraph of this section.

²² ECtHR, *I.M. v. France*, Appl. No. 9152/09, 2 February 2012, para. 145, <http://www.refworld.org/docid/4f2932442.html>.

²³ ECtHR, *A.C. and Others v. Spain*, Appl. No. 6528/11, 22 April 2014, para. 105, <http://www.refworld.org/docid/5357733b4.html>

²⁴ See footnote 19.

²⁵ Official Ministry of Interior data.

²⁶ *Ibid*

²⁷ Data from January 1st 2015 to 30 November 2015, including applications filed at the Melilla border post of Beni Enzar.

²⁸ UNHCR data compiled from its participation in the procedure.

HCR recommendations for admissibility out of 3057 referring to the Syrian/Palestinian caseload were accepted by the authorities while 79 out of 367 referring to other nationalities were accepted.²⁹

3.2.4. In the present case, UNHCR stated in its first report that “although there were some aspects of the applicant’s account that should be clarified, the seriousness of the account related to the gender-based violence suffered and the situation of LGBTI individuals in Cameroon, leads UNHCR to recommend that the applicant be processed within the framework of the regular asylum procedure, in order to allow for a more in-depth and thorough examination of the case”. Article 46 of the Spanish Asylum Law allows for the need to take the necessary measures to give a differentiated treatment to claims filed by persons in vulnerable situations.³⁰ The report also indicated that the framework of the accelerated border procedure was not adequate to allow for an in-depth analysis of this type of cases.³¹

3.2.5. At the re-examination phase, UNHCR upheld its recommendation, stating again that “taking into consideration the profile of the asylum seeker, who comes from a family of traditional values, and the country of origin information regarding the situation of women, of persons with HIV, and the LGBTI community, the account of the asylum seeker could not be considered manifestly unfounded. Furthermore, for these types of cases, concerning women who have suffered some sort of gender related violence, this Representation would like to make reference to the recommendations contained in the UNHCR Guidelines on Gender related persecution of 2002 with regard to the procedure and processing of these types of claims (paragraphs 35 and 36) and the consequent need to apply to this case an adequate treatment according to the specially vulnerable situation of the applicant, in accordance with article 46 of law 12/2009. Bearing in mind the above, UNHCR maintains its previous recommendation (referred to the first report) and states that the claim should be admitted into the regular procedure to allow for an assessment adapted to the profile of the asylum seeker, in the framework of the ordinary procedure in order to adequately determine the claimant’s international protection needs.”³²

3.2.6. In light of the above, UNHCR is concerned that the accelerated procedure applied at the border and in detention centres in Spain is not adequate to fairly and efficiently determine the admissibility of complex asylum claims and may lead to the *refoulement* of persons in need of international protection.

4. International refugee and human rights law standards regarding accelerated asylum procedures and asylum claims based on sexual orientation

4.1. The right to seek and enjoy asylum, derives from Article 14(1) of the Universal Declaration of Human Rights, and is supported in particular by the legal framework of the 1951 Convention and its

²⁹ *Ibid.*

³⁰ Article 46. *General system of protection.*

1. In the framework of this Law, and according to the terms of its implementing regulations, the specific situation of applicants or beneficiaries of international protection in situations of vulnerability, such as minors, separated minors, disabled persons, elderly persons, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, as well as victims of human trafficking shall be taken into account.

2. Given their specific vulnerability, necessary measures will be taken to provide a differentiated treatment, when necessary, to applications for international protection made by the persons referred to in the previous paragraph. In addition, there will be a specific treatment to those who by reason of their personal characteristics may have been the object of persecution by several of the reasons specified in this Law.

3. For humanitarian reasons other than those identified in the status of subsidiary protection, the permanence in Spain of the applicant for international protection may be authorised according to the conditions provided by the aliens and immigration regulations in force.

³¹ UNHCR Recommendation was issued on 11 March 2015

³² UNHCR Recommendation on re-examination was issued on 16 March 2015.

1967 Protocol, to which Spain is a State party. Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.³³ The *non-refoulement* obligation is also restated in international and European human rights law.³⁴

4.2. While the 1951 Convention does not indicate what type of procedures are to be adopted to ensure a proper inquiry is made, it is accepted that, as a general rule, in order to give effect to the obligations under the 1951 Convention, including the prohibition on *refoulement*, refugees have to be identified.³⁵ Furthermore, according to the Executive Committee of the High Commissioner's Programme (Executive Committee),³⁶ asylum procedures should satisfy a number of basic requirements, aimed at allowing an individual assessment of an asylum application³⁷ by a competent authority.³⁸

4.3. UNHCR recalls that the consequences of an erroneous assessment of an asylum claim are potentially dramatic for the person concerned. In this regard, the Court underlined the importance of Article 3 ECHR and "the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises".³⁹ In the same vein, the Court of Justice of the EU (hereafter "CJEU") under-

³³ See, in particular, UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>; ExCom Conclusions No. 15(XXX) – 1979, (b); 17(XXXI) – 1980 (b); 25(XXXIII) – 1982, (b); 68(XLIII) – 1992, (f). See also, Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, *Hirsi Jamaa and Others, Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, p. 67, <http://www.unhcr.org/refworld/docid/4f4507942.html>; UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>.

³⁴ More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's judgment in *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>.

³⁵ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, para. 189, <http://www.unhcr.org/3d58e13b4.html>

³⁶ The Executive Committee of the High Commissioner's Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office". This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions"), which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues". See UNHCR, *General Conclusion on International Protection*, 13 October 1989, No 55 (XL) - 1989, para. (p). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee including Spain since 1994.

³⁷ Although UNHCR acknowledges and encourages the use of prima facie recognition of refugee status, a 'prima facie approach operates only to recognize refugee status. Decisions to reject require an individual assessment.' UNHCR, *Guidelines on International Protection*, No. 11, *Prima Facie Recognition of Refugee Status*, para. 6, <http://www.refworld.org/pdfid/555c335a4.pdf>

³⁸ ExCom Conclusion No. 8 (XXVIII) 1977, para. (e); ExCom Conclusion No. 30 (XXXIV) 1983, para. (e) (i).

³⁹ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, para. 293, <http://www.refworld.org/docid/4d39bc7f2.html>

lined that such assessment “must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union”.⁴⁰

4.4. UNHCR recognises the usefulness of establishing accelerated asylum procedures in order to deal with certain categories of asylum claims. However, any accelerated processing which includes lesser procedural safeguards, should be strictly limited to clearly abusive and/or manifestly unfounded claims, that is those claims “which are clearly fraudulent or not related to the criteria for the granting of refugee status”, as indicated by the Executive Committee in its Conclusion No 30.⁴¹ Furthermore, a number of minimal safeguards should still be included in accelerated asylum procedure.⁴²

4.5. The Court has also acknowledged that the re-examination of an asylum claim through an accelerated procedure did not necessarily raise an issue under Article 13 ECHR, provided that the claim had already been assessed fully on the merits in the his regular asylum procedure.⁴³

4.6. In UNHCR’s view, due to their often complex nature, claims based on sexual orientation are generally unsuited to accelerated processing⁴⁴ as they raise particular challenges for adjudicators, as well as for applicants.⁴⁵ Firstly, sexual orientation may be actual or perceived. Furthermore, abuse or persecution of concerned individuals on account of their sexual orientation often emanate from non-State actors. Determining the protection needs of LGBTI individuals therefore involves an assessment of the willingness or ability of the authorities of the country of origin to protect them against such abuse or persecution. Moreover, the cultural, economic, family, political, religious and social environment strongly influences the way the persons concerned will express their sexual orientation⁴⁶ or the fact they may not live it openly. This warrants an in-depth understanding and a culturally sensitive assessment of their experiences.

4.7. In addition, discrimination is a common element in the experiences of LGBTI asylum-seekers. The assessment of the form and seriousness of the persecution they fear will often involve determining whether the cumulative effect of such discrimination rises to the level of persecution, which must be made by reference to reliable, relevant and up-to-date country of origin information.⁴⁷

⁴⁰ CJUE, *Salahadin Abdulla and others v. Bundesrepublik Deutschland*, 2 March 2010, Joined cases C-175/08, C-176/08, C-178/08 et C-179/08, § 90.

⁴¹ ExCom Conclusion No. 30 (XXXIV), 1983.

⁴² *Ibid.* para. (e) Recommends that: “(i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status; (ii) the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status; (iii) an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give favourable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.”

⁴³ ECtHR, *Sultani v. France*, Appl. No. 45223/05, 20 September 2007, paras 64-65, <http://www.refworld.org/docid/470cf3432.html> ; ECtHR, *I.M. v. France*, para. 142.

⁴⁴ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, para. 59, <http://www.refworld.org/docid/50348afc2.html>. Hereafter “UNHCR SOGI Guidelines”.

⁴⁵ UNHCR, *Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13)*, 21 August 2013, C-148/13, C-149/13 & C-150/13, para. 3.3, <http://www.refworld.org/docid/5215e58b4.html>

⁴⁶ UNHCR SOGI Guidelines, para. 19.

⁴⁷ UNHCR SOGI Guidelines, paras. 17 and 20-25.

4.8. Finally, ascertaining the applicant's LGBTI background is essentially an issue of credibility which can only be undertaken in an individualised and sensitive way and involves exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame, rather than focusing on sexual practices.⁴⁸ As a consequence of such experiences, the capacity of the persons concerned to present their case may be greatly diminished⁴⁹ and may even lead them to deny their sexual orientation.⁵⁰ It is therefore essential that the assessment is carried out in an impartial and objective manner and contains neither superficial understandings of the experiences of lesbians, gays and bisexual persons, nor erroneous, culturally inappropriate, or stereotypical assumptions. This precludes the use of offensive questions.⁵¹ As recognised by the Court of Justice of the EU, this assessment involves sensitive questions relating to a person's personal identity and, in particular, their sexuality in order to ensure full respect of the relevant rights of the Charter of Fundamental of the EU in particular the right to dignity.⁵²

4.9. Accordingly, a number of specific measures should be borne in mind in order to ensure that asylum applications based on sexual orientation are properly considered including⁵³:

- An open and reassuring environment is often crucial to establishing trust between the interviewer and applicant and will assist the disclosure of personal and sensitive information;
- Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions;
- Self-awareness and specialized training on sexual orientation claims for decision makers, interviewers, interpreters, advocates and legal representatives are critical aspects to a fair and efficient determination of the claims;
- For claims based on sexual orientation and/or gender identity by women, additional safeguards are necessary.⁵⁴

5. Conclusion

5.1. UNHCR considers that the accelerated procedures applied in Spain do not allow for a fair and efficient examination of complex asylum claims, in particular those based on sexual orientation and gender identity, and may lead to the *refoulement* of persons in need of international protection.

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⁴⁸ UNHCR SOGI Guidelines, para. 62.

⁴⁹ UNHCR SOGI Guidelines, para. 59

⁵⁰ *Idem*, para. 63(i)

⁵¹ UNHCR, *Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13)*, 21 August 2013, C-148/13, C-149/13 & C-150/13, paras. 3.4. and 3.5. <http://www.refworld.org/docid/5215e58b4.html>

⁵² CJEU, *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, C-148/13 to C-150/13, 2 December 2014, para. 69, <http://www.refworld.org/docid/547d943da.html>

⁵³ UNHCR SOGI Guidelines, para. 60.

⁵⁴ UNHCR, *Guidelines on Gender-Related Persecution*, paras. 35-37, <http://www.unhcr.org/3d58ddef4.pdf>