

# GOOD PRACTICES

RELATED TO  
LGBTI ASYLUM  
APPLICANTS

IN EUROPE



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# Introduction

In the past few years there have been several developments related to lesbian, gay, bisexual, trans and intersex (LGBTI) asylum seekers in Europe. The Fleeing Homophobia research,<sup>1</sup> a study on policy and practice in 25 European countries, showed huge diversity in the handling of LGBTI asylum claims in the various EU Member States, and identified several challenges: the relevance of laws in the country of origin criminalising consensual same-sex sexual acts or the expression of non-standard sexual or gender identities; the requirement for LGBTI applicants to conceal their sexual orientation or gender identity upon return to the country of origin in order not to “provoke” violence and discrimination; the requirement to seek protection from homo- or transphobic state authorities in the country of origin; the growing trend of rejections based on non-credibility of the sexual orientation or gender identity itself, in many cases based on stereotypes; the problem of late disclosure to the asylum authorities and the increased disbelief that it causes; discrimination and violence faced by LGBTI applicants in reception facilities; the lack of complete and reliable human rights information about LGBTIs in countries of origin.

However, there has been progress over the same period and ILGA-Europe advocated for an improvement of EU legislation, in the frame of the recasting process of three asylum directives: the Qualification Directive (QD), the Asylum Procedures Directive (APD) and the Reception Conditions Directive (RCD).<sup>2</sup> Under the Qualification Directive<sup>3</sup>, Member States now have an obligation to explicitly recognise not only sexual orientation, but also gender identity, as a reason for persecution which could lead to the granting of international protection. In addition, under the newly adopted Procedures Directive people who conduct asylum interviews should be professionally trained in LGBTI issues. They should also be capable of recognising the need for special procedural guarantees based on applicants’ personal characteristics. The Reception Directive does not include provisions specific to LGBTI applicants, but some of its general provisions do apply to this group. In particular, all forms of violence in accommodation facilities, including gender-based violence, are to be prevented.

These new provisions require considerable legislative and practical policy developments in order to be fully and correctly implemented by the national authorities. Various EU Member States have already started to develop policies to improve their knowledge and their handling of LGBTI-related claims. However, most of the necessary steps are yet to be taken in the majority of countries. A comprehensive approach would need to include the adoption of policy guidelines, the availability of country of origin information on sexual orientation and gender identity, the mainstreaming of sexual orientation and gender identity issues within the training curricula of case adjudicators, interviewers and interpreters, the identification of the so-called “special needs” in asylum procedures and reception conditions, the prevention of violence and guarantees of non-discrimination in accommodation centres.

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<sup>1</sup>Sabine Jansen and Thomas Spijkerboer, “Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe”, COC Netherlands/VU University Amsterdam, September 2011. <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/research-reports/index.asp>.

<sup>2</sup>Qualification Directive 2011/95/EU, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011L0095:EN:NOT>; Asylum Procedures Directive 2013/32/EU, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32013L0032](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32013L0032); Reception Conditions Directive 2013/33/EU, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32013L0033](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32013L0033). The Directives apply to the entire EU with the exception of Denmark, Ireland and the United Kingdom. These countries have opted out of the Reception Conditions Directive and the Procedures Directive (see Recitals 58 and 59 APD, Recitals 33 and 34 RCD). These two Directives therefore do not apply to these three countries. The Qualification Directive should have been implemented in the national asylum systems before 21 December 2013. The Procedures and Reception Directives should be implemented before 21 July 2015.

<sup>3</sup>Article 10 (1)(d) Qualification Directive 2011/95/EU.

European Courts are also being used to address issues regarding the rights of LGBTI asylum seekers. The Dutch Council of State sought guidance from the Luxembourg-based Court of Justice of the European Union (CJEU) on the handling of LGBT asylum cases. Recently, the Court answered the first set of questions on the issues of discretion and criminalisation.<sup>4</sup> This judgement should now be interpreted and implemented within national asylum policies. The Dutch Council of State's question regarding the assessment of the credibility of an applicant's statements to define his or her sexual orientation is still pending before the CJEU.<sup>5</sup> Meanwhile, a case regarding the interpretation of the concept of concealment of sexual orientation or gender identity in the country of origin is pending before the European Court of Human Rights (ECtHR).<sup>6</sup>

ILGA-Europe believes that one of the keys to achieving a Common European Asylum System, while ensuring respect for fundamental rights,<sup>7</sup> is practical cooperation to improve convergence in asylum decision-making by Member States. ILGA-Europe aims to encourage and facilitate this process, including through this publication, by providing research based on good practices with respect to the handling of LGBTI asylum claims, which can be disseminated and used in advocacy strategies.

Although there is currently no ideal national model, different elements of policy and practice from various countries represent useful good practices. This report provides information on the current state of affairs in EU Member States and good practices from 13 countries.<sup>8</sup> This report seeks to inspire and encourage LGBTI NGOs and like-minded stakeholders to talk to and cooperate with their government officials in order to achieve improvements on the basis of consistent conceptual frameworks and practical methods. We hope this will lead to a European policy and practice which will offer safety to all those who flee homo- and transphobia.

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<sup>4</sup>The Court of Justice of the European Union, joined cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel, 7 November 2013, available at: <http://curia.europa.eu/juris/document/document.jsf?text&docid=144215&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=330885>.

<sup>5</sup>Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 25 March 2013, A and others v Staatssecretaris van Veiligheid en Justitie, joined cases C-148/13, C-149/13, C-150/13, Official Journal of the European Union, C 171/16, 15 June 2013. The judgement is expected by the end of 2014.

<sup>6</sup>See "Written comments of FIDH (Fédération Internationale des Ligues des Droits de l'Homme), ICJ (the International Commission of Jurists) and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)", 9 April 2013, on M.E. v Sweden, Application no. 71398/12, [http://www.ilga-europe.org/home/how\\_we\\_work/litigation/ecthr\\_litigation/interventions](http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions).

<sup>7</sup>See for instance: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Policy Plan on Asylum and Integrated Approach to Protection across the EU, Brussels, 17.6.2008 COM(2008) 360 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>.

<sup>8</sup>Austria, Belgium, Finland, France, Germany, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Sweden and the United Kingdom.

<sup>9</sup>Available at: [http://www.ilga-europe.org/home/publications/reports\\_and\\_other\\_materials](http://www.ilga-europe.org/home/publications/reports_and_other_materials).

The present document has been developed in parallel with ILGA-Europe's *Laying the ground for LGBTI sensitive asylum decision-making in Europe, Transposition of the recast Asylum Procedures Directive* and of the recast Reception Conditions Directive. ILGA-Europe has also published *Guidelines on the transposition of the Asylum Qualification Directive*. These *Guidelines* are legal studies indicating precisely how national governments and legislatures should transpose EU asylum law and particularly the provisions that have an impact on asylum claims relating to sexual orientation and gender identity. These documents are available on ILGA-Europe's website.<sup>9</sup>

In the present document *Good practices related to asylum applicants in Europe* you will find references to the *Guidelines* and their relevant sections. This will enable you to make combined use of the different publications issued by ILGA-Europe, and to understand in more detail the exact obligations of Member States under EU law. The joint use of the present document *Good practices related to asylum applicants in Europe* and of the *Guidelines* will allow you to find more information to frame comprehensive advocacy, capacity building, awareness raising or litigation strategies.

# 1

# National policies and policy guidelines on the handling of LGBTI asylum cases

Some Member States have adopted formal policy documents on the handling of asylum applications related to sexual orientation and gender identity. This ensures the visibility of specific LGBTI issues so they cannot be ignored by caseworkers, decision makers, courts and other stakeholders.

The Swedish Migration Board issued a Handbook which contains guidelines for the migration authorities' personnel on all aspects of the asylum procedure, including a specific chapter to assist case workers in interviewing LGBTI asylum seekers, and on deciding upon these types of claim. The Handbook is regularly updated by the Migration Board, and people are encouraged to notify the Migration Board about any mistakes or out-of-date information that may be found in it. The Handbook was recently published on the Migration Board's website.<sup>10</sup> However, this document is not legally binding on the Migration Board.

In the Netherlands a specific section of the policy rules (Aliens Circular 2000) is dedicated to LGBTs.<sup>11</sup> These policy rules are binding on the Immigration and Naturalisation Service (IND) in their assessment of LGBT asylum applications.

Following the landmark judgment HJ/HT<sup>12</sup> the United Kingdom Border Agency drafted specific Guidelines on the handling of sexual orientation and gender identity cases.<sup>13</sup> When they assess claims based on sexual orientation or gender identity, caseworkers should follow these guidelines.

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<sup>10</sup>The Swedish Handbook is available (in Swedish) at: <http://www.migrationsverket.se/Om-Migrationsverket/Vart-uppdrag/Lagar-och-regler/Handbok-i-migrationsarenden.html>.

<sup>11</sup>Guidelines on the Implementation of the Aliens Law 2000 (Vreemdelingendecret 2000) C2/3.2, available (in Dutch) at: <https://zoek.officielebekendmakingen.nl/stcrt-2014-5333.html>.

<sup>12</sup>Supreme Court of the United Kingdom, HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, 7 July 2010.

<sup>13</sup>United Kingdom Border Agency (UKBA), "Sexual orientation issues in the asylum claim" (2011), "Gender identity issues in the asylum claim" (2011), see also "Gender issues in the asylum claim" (2010), available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/).

# 2 Criminalisation

## 2.1. What is at stake?

Seventy-six countries around the world criminalise consensual same-sex sexual relations between adults.<sup>14</sup> In most of these countries the punishment is a prison sentence, varying from six months to life. In five countries same-sex sexual acts are punishable by death. These facts are very relevant in the assessment of LGBTI asylum claims, because LGBTI people from these 76 countries risk persecution from state actors, as well as from non-state actors, since no state protection is available. Criminalisation automatically puts them beyond the protection of the law. In the asylum context, there is discussion as to whether the criminalisation *per se* is an act of persecution, which should lead to refugee status, or whether enforcement of the criminal provisions is required.

## 2.2. Criminalisation of same-sex relations is a violation of human rights

ILGA-Europe supports the opinion that the very existence of these criminal provisions should be considered as persecution and should lead to the recognition of refugee status. Criminalisation of consensual same-sex relations is inherently discriminatory and it contributes to an atmosphere of state-supported homophobia, a hostile climate stigmatising lesbians, gays and bisexual people and arguably trans people as well. Enforcement of such criminal provisions can take an unofficial form, for instance through police inflicted violence or detention, without prosecution of the perpetrators. In addition, because of the existence of legislation criminalising consensual same-sex relations, non-state actors can persecute or harm LGB people with impunity. In such a situation LGB people are defenceless against homophobic violence, discrimination and extortion.<sup>15</sup> ILGA-Europe is therefore of the opinion that the criminalisation of consensual same-sex

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<sup>14</sup> Lucas Paoli Itaborahy & Jingshu Zhu, "State-sponsored Homophobia, a world survey of laws: Criminalisation, protection and recognition of same-sex love", ILGA, International Lesbian, Gay, Bisexual, Trans and Intersex Association", 8th edition, May 2013. [www.ilga.org](http://www.ilga.org).

<sup>15</sup> See for instance Amnesty International, "Making Love a Crime, Criminalization of Same-sex Conduct in Sub-Saharan Africa", April 2013; Human Rights Watch, "Guilty by Association, Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law", 21 March 2013; Human Rights Watch, "They Hunt Us Down for Fun, Discrimination and Police Violence Against Transgender Women in Kuwait", 15 January 2012; Human Rights Watch, "Fear for Life, Violence against Gay Men and Men Perceived as Gay in Senegal", 30 November 2010. The Committee Against Torture noted "that the State party's argument that Bangladeshi authorities are not actively persecuting homosexuals does not rule out that such prosecution can occur." CAT, Uttal Mondal v. Sweden, 7 July 2011.



sexual relations constitutes an act of persecution *per se* towards LGB people, including in cases where the enforcement of such provisions is not documented.<sup>16</sup> Furthermore, returning LGBTI people to such a state would in practice compel them to conceal their sexual orientation or gender identity.<sup>17</sup>

## 2.3. EU law's ambiguities on criminalisation<sup>18</sup>

Several decades ago, the issue of criminalisation of sexual orientation was judged in a European context. In 1988 in a case questioning the Irish criminal provisions, the European Court of Human Rights referred to the “detrimental effects which the very existence of legislative provisions can have on the life of a person of homosexual orientation.”<sup>19</sup> The mere existence of the criminal provisions regarding same-sex sexuality in Ireland was considered a violation of the right to privacy of the applicant, protected by Article 8 of the European Convention on Human Rights.<sup>20</sup>

In April 2012, the Dutch Raad van State (Council of State) asked for guidance, by means of so-called “preliminary questions”, from the Court of Justice of the European Union in the cases of three gay men from Senegal, Sierra Leone and Uganda.<sup>21</sup> One of the questions was whether the mere existence of criminal provisions against homosexuality would constitute an act of persecution. In its judgement *X, Y and Z v Minister voor Immigratie en Asiel*, the CJEU answered that “the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution.”<sup>22</sup>

However, the Court did acknowledge that “a *term of imprisonment* which sanctions homosexual acts and *which is actually applied* in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.” (§ 61, emphasis SJ) As the CJEU does not ask for extra requirements, such as the occurrence of a *systematic practice* or an *active enforcement policy*, the conclusion must be that whenever there is evidence that someone has been detained based on a provision against homosexuality or homosexual acts, refugee status must be granted to other LGBTI people who fled the same country, out of fear of persecution based on their sexual orientation or gender identity.

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<sup>16</sup> See Statement of ILGA-Europe, [http://www.ilga-europe.org/home/news/latest/statement\\_cjeu\\_august\\_2012](http://www.ilga-europe.org/home/news/latest/statement_cjeu_august_2012); see also Statement of Amnesty International and the International Commission of Jurists, 2 October 2013, AI Index: POL 33/003/2013.

<sup>17</sup> See also Fleeing Homophobia report p. 21-26.

<sup>18</sup> See also ILGA-Europe, “Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers”, by Evangelia (Lilian) Tsourdi, 2012, available at: [http://www.ilga-europe.org/home/publications/reports\\_and\\_other\\_materials](http://www.ilga-europe.org/home/publications/reports_and_other_materials), § 3(a), p. 4-5.

<sup>19</sup> ECtHR 26 October 1988, *Norris v. Ireland*, Appl. No. 10581/83.

<sup>20</sup> ECtHR 26 October 1988, *Norris v. Ireland*, Appl. No. 10581/83. See also ECtHR 22 October 1981, *Dudgeon v. United Kingdom*, Appl. No. 7525/76; ECtHR 22 April 1993, *Modinos v. Cyprus*, Appl. No. 15070/89. These judgements led to the abolition of the criminal provisions against consensual same-sex sexual acts in respectively Ireland, Northern Ireland and Cyprus.

<sup>21</sup> Afdeling Bestuursrechtpraak Raad van State (Judicial Division of the Council of State) 18 April 2012, 201109928/1/T1/V2; 201106615/1/T1/V2; 201012342/1/T1/V2, available in English at: <http://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=67806>.

<sup>22</sup> Judgement of the Court of Justice of the European Union, *X, Y and Z v Minister voor Immigratie en Asiel* (Joined cases C-199/12, C-200/12 and C-201/12), 7 November 2013, § 55; see also ILGA-Europe: [http://www.ilga-europe.org/home/news/for\\_media/media\\_releases/eu\\_court\\_of\\_justice\\_lgbt\\_people\\_are\\_eligible\\_group\\_for\\_claiming\\_asylum\\_in\\_eu\\_and\\_they\\_cannot\\_be\\_requested\\_to\\_conceal\\_their\\_sexual\\_orientation](http://www.ilga-europe.org/home/news/for_media/media_releases/eu_court_of_justice_lgbt_people_are_eligible_group_for_claiming_asylum_in_eu_and_they_cannot_be_requested_to_conceal_their_sexual_orientation); Amnesty International and the International Commission of Jurists, <http://www.amnesty.org/en/for-media/press-releases/eu-court-ruling-setback-refugees-2013-11-07>; Human Dignity Trust, <http://www.humandignitytrust.org/pages/NEWS/News?NewsArticleID=164>; S. Chelvan, “C-199/12, C-200/12, C-201/12 - X, Y, Z v Minister voor Immigratie en Asiel: A Missed Opportunity or a New Dawn?”, *European Law Blog*, 13 November 2013, available at: <http://europeanlawblog.eu/?p=2042>; Matthew Fraser, “The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel”, European Database on Asylum Law (EDAL), 18 November 2013, available at: <http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>

The Court also considered that criminalisation of people engaging in same-sex acts supports the finding that these people are members of a particular social group potentially subjected to persecution (§ 48-49). This means that LGBTI applicants coming from countries where such legislation exists must be regarded as members of a particular social group. A serious assessment of the existence of possible persecution must be conducted, even where the criminal legislation is not enforced.

This consideration of the Court does not mean that - *a contrario* - LGBTI applicants coming from countries where same-sex acts are *not* criminalised could not be members of a particular social group. It is clear that they could also have a well-founded fear of persecution for reasons of their sexual orientation or gender identity, and therefore be in need of international protection.

## 2.4. UNHCR's Position

In the Guidelines on Sexual Orientation and Gender Identity<sup>23</sup> UNHCR acknowledges that criminalisation could lead to persecution, even when it is seldom or never enforced:

**§ 27:** *Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations.*

**§ 28:** *The legal system in the country concerned, including any relevant legislation, its application, interpretation and actual impact on society as well as the applicant needs to be examined. The word "fear" refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where there is no conclusive country of origin information upon which it is possible to determine if and how the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence that LGBTI persons are nevertheless being persecuted or are at risk thereof.*

## 2.5. Good policies and practices on criminalisation at the national level

### Italy

In 2011, the Fleeing Homophobia research found that in Italian asylum practice it is not an issue whether or not the criminal sanctions against LGB persons are enforced. In Italy lesbians, gays and bisexual asylum seekers from countries which criminalise sexual orientation are granted refugee status.<sup>24</sup> This practice was confirmed by the Italian Supreme Court: "The circumstance that homosexual acts are criminalised in the country of origin is relevant, because it is a severe interference in homosexual citizens' private life, threatening personal freedom and creating an objective situation of persecution that would justify the grant of international protection."<sup>25</sup>

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<sup>23</sup> UN High Commissioner for Refugees, 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, Geneva, 23 October 2012, footnotes omitted. Available at: <http://www.refworld.org/pdfid/50348afc2.pdf>. See also UN High Commissioner for Refugees, UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z*, (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive, 28 September 2012, <http://www.refworld.org/docid/5065c0bd2.html>.

<sup>24</sup> See Fleeing Homophobia report, p. 23-24.

<sup>25</sup> La Corte Suprema di Cassazione (Supreme Court), 20 September 2012, no. 15981/2012, available at: <http://archive.equal-jus.eu/1104/>.

According to the Italian Supreme Court a “criminal penalty for homosexual acts *per se* constitutes a general situation of deprivation of the fundamental right to live freely one’s sexual and private life. Persons with a homosexual orientation are forced to violate the criminal law (...) and expose themselves to severe penalties (...). This represents a severe interference in the private life of (...) homosexual citizens, greatly compromising their personal freedom. This violation of a fundamental right is set out in the Italian Constitution, in the European Convention on Human Rights and in the Charter of Fundamental Rights of the EU, which is binding in this matter, and it automatically affects the individual situation of homosexual persons, as it places them in a situation of objective persecution.”<sup>26</sup>

Following the Supreme Court’s judgement, the Court of Appeal of Bari added: “the fact that the criminal sanctions against homosexual acts are not enforced, is not relevant. Even the threat of a criminal sanction, which may only become a reality by abandoning the alleged discretionary custom of tolerance, in fact gives rise to a well-founded fear, and constitutes an impairment of the personal freedom of gays.”<sup>27</sup>

## Poland

The Polish Refugee Board granted refugee status to a gay man from Uganda, considering that in Uganda the situation for homosexuals, and LGBTI persons in general, is so bad, that it leads to the conclusion that LGBTI persons in Uganda run a real risk of persecution.<sup>28</sup>

## Malta

The Refugee Board of Malta based its consideration that a gay man from Nigeria was a member of a particular social group on the aforementioned 7th of November 2013 judgement of the CJEU, and cited a UK Border Agency report,<sup>29</sup> in which the criminal sanctions against homosexuality in Nigeria were described. He was granted refugee status.<sup>30</sup>

## The Netherlands

The Dutch Council of State considered, in their interpretation of the answers of the CJEU regarding criminalisation, that the asylum authorities must also investigate how the criminal legislation is applied and works out in practice. This investigation should not be restricted to the actual enforcement of imprisonment and other sentences, but should also take into account prior police and judicial investigations, and the effects of criminalisation on the general situation of homosexuals in society.<sup>31</sup>

As a general rule, Dutch policy holds that whenever the applicant originates from a country where homosexuality or homosexual acts are criminalised, it is not expected that s/he seeks protection from the authorities against non-state persecution.<sup>32</sup> This policy is also laid down in the country-specific policy guidelines. The Netherlands also has a policy to grant refugee status to Iranian LGBTs, and since recently to Ugandan LGBTs as well.<sup>33</sup>

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<sup>26</sup>Ibidem.

<sup>27</sup>La Corte di Appello di Bari (Court of Appeal of Bari), gay man from Gambia, 5 March 2013, nr. 640/2012, available at: <http://www.refworld.org/docid/521600454.html>.

<sup>28</sup>X v. the Head of the Office for Foreigners, Poland, Refugee Board Warsaw, 25 July 2012, available at: <http://www.refworld.org/docid/5037a3892.html>.

<sup>29</sup>United Kingdom Home Office, Operational Guidance Note on Nigeria, 4 October 2012.

<sup>30</sup>Maltese Refugee Appeals Board, 14 November 2013; The Malta Independent, “Gay man granted asylum in Malta due to persecution in Nigeria”, 24 November 2013, <http://www.independent.com.mt/articles/2013-11-24/news/gay-man-granted-asylum-in-malta-due-to-persecution-in-nigeria-3278143490/#.UpMV0WaXRoc.email>. This article states that this was the only case in which asylum was granted to a gay man in Malta, which is not correct.

<sup>31</sup>Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State), 18 december 2013, 201012342/1/V2.

<sup>32</sup>Vreemdelingencirculaire 2000 (Aliens Circular), C2/3.2.

<sup>33</sup>Iran: WBV 2006/38, decision of 17 November 2006; Uganda: WBV 2014/14, Stcrt. nr. 8914, 26 March 2014.

## United Kingdom, safe countries<sup>34</sup>

With respect to the “safe countries” list (which includes the countries Jamaica, Nigeria and Gambia, where LGBTIs suffer a real risk of persecution), the Court of Appeal of England and Wales ruled on the 12th of June 2013, on the basis of the country evidence, and two Country Guidance Cases<sup>35</sup> that Jamaica could not be considered a “safe country”.<sup>36</sup>

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<sup>34</sup>See on the “safe countries” concept ILGA-Europe’s, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive”, by Evangelia (Lilian) Tsourdi, May 2014, § 5.2, available at: [http://www.ilga-europe.org/home/publications/reports\\_and\\_other\\_materials](http://www.ilga-europe.org/home/publications/reports_and_other_materials).

<sup>35</sup>DW (Jamaica) (2005) and SW (Jamaica) (2011).

<sup>36</sup>R (on the application of JN (Jamaica)) v Secretary of State for the Home Department [2013] EWCA Civ 666, <http://www.bailii.org/ew/cases/EWCA/Civ/2013/666.html>. However, it is understood that this matter is currently subject to an application by the Home Office to appeal to the UK Supreme Court.

# 3 Discretion

## 3.1. What is at stake?

LGBTI asylum seekers often have their applications rejected on the basis that they could avoid persecution by concealing or hiding their sexual orientation upon return to the country of origin. They would have nothing to fear, as long as they remain “discreet”, pretending not to be gay, lesbian, bisexual, trans or intersex, in other words: they could hide in the closet. At the time the Fleeing Homophobia research was carried out (2010-2011), the discretion requirement was applied in at least 17 European countries.<sup>37</sup> *Discretion reasoning* has proved to be very persistent and appears in many forms and with many different faces.<sup>38</sup> The most normative and rude version is: “Go home and hide!”; in France until recently an *indiscretion* requirement was applied: “You only risk persecution, when you explicitly manifest your sexual orientation”. In other versions, the idea that the person would and could hide in the closet is not presented as an obligation, but as a mere finding of fact. This all leads to the conclusion that no international protection would be needed. What these variations have in common, is that they are all based on the idea that living in the closet is acceptable, and that it is not an infringement of a fundamental right.

## 3.2. EU law ruled out the “discretion requirement”

In its preliminary questions the Dutch Raad van State (Council of State) also asked the Court of Justice of the European Union whether concealment or restraint regarding sexual orientation could be required, and if so, to what extent.<sup>39</sup>

The Court considered that neither concealment nor restraint can be required: “it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a

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<sup>37</sup> Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Norway, Poland, Romania, Spain and Switzerland, see Fleeing Homophobia report, page 34.

<sup>38</sup> Discretion reasoning has been compared to a many-headed monster: once one head has been chopped off, it turns out to have many others. See Thomas Spijkerboer, “Sexual identity, normativity and asylum”, in: T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York: Routledge/Taylor & Francis Group 2013, p. 217-238.

<sup>39</sup> Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State) 18 April 2012, 201109928/1/T1/V2; 201106615/1/T1/V2; 201012342/1/T1/V2, available in English at: <http://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=67806>.

characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it."<sup>40</sup> (...) "the person concerned must be granted refugee status, (...) where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution (...). The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect."<sup>41</sup>

The effect of the CJEU judgement is that policy and practice in all EU Member States should be adapted in such a way that no LGBTI<sup>42</sup> asylum seeker can have their case rejected on the ground that they could avoid persecution through discretion, concealment, a certain restraint or other similar behaviour.<sup>43</sup> Instead of reasoning from the idea that people could hide their sexual orientation or gender identity, asylum authorities and courts must adopt an approach based on information regarding the situation for LGBTIs in the country of origin and on an assessment of the well-foundedness of the fear once the sexual orientation or gender identity of the applicant becomes known in the country of origin.

## 3.3. UNHCR's approach on discretion

UNHCR is also of the firm view that a requirement for discretion should be rejected.

In the Guidelines on Sexual Orientation and Gender Identity<sup>44</sup> UNHCR states:

**§ 12:** *A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are, and need not hide that.*<sup>45</sup>

**§ 31:** *That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. (...) LGBTI people are as much entitled to freedom of expression and association as others.*

**§ 32:** *(...) It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. (...)*

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<sup>40</sup>Court of Justice of the European Union, joined cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel, 7 November 2013, § 70. Cf. Article 10(1)(d) of the Qualification Directive: "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."

<sup>41</sup>Ibidem, § 75.

<sup>42</sup>As the cases underlying the questions were about three gay men, the judgement only refers to sexual orientation, but it applies to trans and intersex persons as well.

<sup>43</sup>For instance in Spain the discretion argument continued to be applied with regard to most countries of origin, according to UNHCR's representative for Southern Europe in a presentation at a UNHCR/Council of Europe conference in Rome, 10-11 October 2013.

<sup>44</sup>UN High Commissioner for Refugees, 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, Geneva, 23 October 2012, footnotes omitted, available at: <http://www.refworld.org/pdfid/50348afc2.pdf>.

<sup>45</sup>See also UN High Commissioner for Refugees, UNHCR Observations in the cases of Minister voor Immigratie en Asiel v. X, Y and Z, (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive, 28 September 2012, <http://www.refworld.org/docid/5065c0bd2.html>.

**§ 33:** *Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution.*

In addition, UNHCR's Guidance Note clarifies: *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. (...) 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>46</sup>

## 3.4. Good policies and practices on discretion at the national level

The CJEU judgement *X, Y and Z v. Minister voor Immigratie en Asiel* is a very recent development at the time of writing. However, prior to the CJEU's judgement, the discretion requirement had already been rejected in several EU Member States.<sup>47</sup>

### The United Kingdom

In July 2010 the landmark judgement of the United Kingdom Supreme Court in *HJ (Iran) and HT (Cameroon)* rejected the discretion requirement and stipulated that "every gay man should be able to live freely and openly." and that "gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution."<sup>48</sup> In this judgement the UK Supreme Court also proposes a "test" on how to handle LGBT claims, which can be summarised as follows:<sup>49</sup>

- 1) Is the applicant gay, or would he be perceived as gay in the country of origin?
- 2) If so, would gay people who live openly be liable to persecution in that country of origin?
- 3) If not, would the applicant live openly on return?
  - a) If he would, he is a refugee.
  - b) If he would live discreetly, why would he live discreetly?
  - c) If he would live discreetly out of fear of persecution, then he is a refugee.
  - d) If he would live discreetly because he wanted to do so, or because of societal pressures (e.g. not wanting to distress his parents or embarrass his friends) then he is not a refugee.

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<sup>46</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.

<sup>47</sup>Discretion was abolished earlier in countries outside Europe, see: High Court of Australia, *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*; [2003] HCA 71, 9 December 2003; New Zealand, *Refugee Appeal no. 74665/03*, 7 July 2004; 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); Federal Court of Canada 8 October 2008, *Atta Fosu v. the Minister of Citizenship and Immigration*, 2008 FC 1135.

<sup>48</sup>Supreme Court of the United Kingdom, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, 7 July 2010.

<sup>49</sup>Lord Rodger's test, § 82 of the *HJ/HT* judgement.

The Supreme Court judgement HJ/HT is an important good practice in that it rejects the previous United Kingdom *reasonable tolerability* test, which held that people could reasonably tolerate to conceal their sexual orientation upon return. Following this judgement and the drafting of the Asylum Policy Instructions on Sexual Orientation and Gender Identity Issues in Asylum Claims,<sup>50</sup> there has been an improvement in decision making in the United Kingdom, as was reported by UKLGIG, the United Kingdom Lesbian and Gay Immigration Group. Where case workers do follow the policy instructions, they have demonstrated sensitivity and well-reasoned responses to lesbian and gay asylum claims.<sup>51</sup>

However, the judgement did not completely abolish discretion. The proposed test is in fact still constructed around discretion, as is demonstrated by the distinction between *living openly* and *living discreetly*, and the distinction between concealment for fear of persecution and concealment due to societal pressure.<sup>52</sup> In the latter case no international protection would be needed, in the eyes of the Supreme Court: if someone hides her or his sexual orientation in order not to upset their parents, this would be a matter of “free choice”, also referred to as “voluntary” or “natural” discretion.<sup>53</sup> However, apart from the always imminent risk of being involuntarily found out,<sup>54</sup> remaining in the closet in countries with a high prevalence of homophobia, including homophobic legislation, such as Uganda, can never be considered a free choice since coming out in such a country would always entail a serious risk of persecution. In addition, as a result of the test, the decision maker will have to evaluate the motivation for concealment, and this leads to a higher burden of proof, because the applicant has to show that his future discretion is out of fear of persecution.<sup>55</sup>

In UK practice case workers now try to figure out how “out” lesbians and gay men are. A question that is often asked in the interview, is: “Did you lead an openly gay or a discreet lifestyle?” In cases where a gay man or lesbian has stated to be “discreet” due to the social stigma attached to being a “homosexual” the Home Office will reject the claim. For instance in the case of a bisexual woman from Malawi, who did not come out in the UK, this was considered her free choice. The Tribunal concluded: “If she can hide it in the United Kingdom, where tolerance rules, then she can hide it in Malawi.”<sup>56</sup>

## Finland and Norway

Scandinavian countries followed the United Kingdom’s approach. Finland and Norway through judgements of their respective Supreme Courts;<sup>57</sup> in Sweden the asylum authorities implemented the reasoning of the UK Supreme

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<sup>50</sup>United Kingdom Border Agency (UKBA) Policy Instructions “Sexual Orientation Issues in the Asylum Claim”; “Gender Identity Issues in the Asylum Claim” and “Gender Issues in the Asylum Claim”; available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions).

<sup>51</sup>United Kingdom Lesbian and Gay Immigration Group (UKLGIG), “Missing the Mark, Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims”, September 2013, p. 9, available at: [http://www.uklgig.org.uk/docs/publications/Missing\\_the\\_Mark.pdf](http://www.uklgig.org.uk/docs/publications/Missing_the_Mark.pdf).

<sup>52</sup>See for a thorough analysis on this subject Janna Weßels, “Discretion in sexuality-based asylum cases, an adaptive phenomenon”, in: T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York: Routledge/Taylor & Francis Group 2013; Janna Weßels, “HJ (Iran) and another – reflections on a new test for sexuality-based asylum claims in Britain”, paper submitted at the Fleeing Homophobia Conference, VU University Amsterdam, 5-6 September 2011, [http://www.rechten.vu.nl/nl/Images/Wessels\\_tcm22-230739.pdf](http://www.rechten.vu.nl/nl/Images/Wessels_tcm22-230739.pdf).

<sup>53</sup>See Upper Tribunal (Immigration and Asylum Chamber) 24 June 2011, SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251.

<sup>54</sup>Millbank and 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.

<sup>55</sup>For an example of how the test is translated in policy, see UKBA “Operational Guidance Note The Gambia”, 21 June 2013, p. 22: “If an individual chooses to live discreetly because he/she wants to avoid embarrassment or distress to her or his family and friends he/she will not be deemed to have a well founded fear of persecution and will not qualify for asylum. This is because he/she has adopted a lifestyle to cope with social pressures and not because he/she fears persecution due to her or his sexual orientation.”

<sup>56</sup>Tribunal decision, August 2010, cited in UKLGIG, Missing the Mark report, p. 24.

<sup>57</sup>Finnish Supreme Court (Korkein Hallinto-Oikeus), 13 January 2012; Norwegian Supreme Court (Norges Høyesterett – Dom), 29 March 2012.



Court in their policy rules.<sup>58</sup> All three countries adopted the HJ/HT judgement and the test outlined above, including its flaws.<sup>59</sup>

## Sweden

Also from Sweden, there has been criticism of the questions the LGBTQ experts<sup>60</sup> ask during the asylum interviews.<sup>61</sup> One common question is: “How will you manifest your sexual orientation upon return to your country of origin?” Applicants first have to credibly show that they are LGBT, then that they will manifest this openly and that they will be persecuted for this reason. If they say they will not live openly, they have to convince the authorities this is caused by a fear of persecution. If they say they would not live openly, due to “social pressure”, their application will be rejected. However, for an asylum seeker it is often impossible to draw a line between a fear of persecution and “social pressure”, as reasons for living in the closet are often inseparable. In addition, the question on the “manifestation” of sexual orientation gives rise to confusion in Sweden, because the asylum applicants do not understand the meaning of this concept and the LGBTQ experts find themselves incapable of explaining it.

## France

The French Council of State (Conseil d'État) ruled in a landmark decision that the requirement of indiscretion that was previously applied in France should no longer be used.<sup>62</sup> Granting refugee status for reasons of persecution related to membership of a social group based on sexual orientation should not be subject to “the public manifestation of the sexual orientation” of the applicant.<sup>63</sup>

## Germany

In Germany the Council of State (Bundesverwaltungsgericht) issued preliminary questions to the CJEU in 2011. In a case relating to members of the Ahmadiyya religious community in Pakistan the question was raised whether asylum authorities can expect an applicant to abstain from the manifestation or practice of certain religious acts. The EU Court found that this could not be expected.<sup>64</sup> Following this judgement the German asylum authority BAMF (Bundesamt für Migration und Flüchtlinge) stated in response to a parliamentary question that it had also abolished the discretion requirement regarding sexual orientation.<sup>65</sup> However, in German case law a new criterion has been introduced, resembling the former French indiscretion requirement: “It should be assessed how the asylum seeker will behave upon return regarding his sexual orientation and how important this conduct is for his identity (...) The more an asylum seeker

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<sup>58</sup> Judicial position of the Director for Legal Affairs with regard to investigation and assessment for the prospective risks faced by persons invoking grounds for protection based on sexual orientation, (Rättschefens rättsliga ställningstagande angående metod förutredning och prövning av den framåtsyftande risken för personer som åberopar skyddsåskälp på grund av sexuell läggning), 13 January 2011, RCI 03/2011.

<sup>59</sup> ILGA-Europe supports litigation strategies for this issue, “Joint written submissions in the case of M.E. v Sweden, Application no. 71398/12, before the European Court of Human Rights by the Fédération Internationale des Ligues des Droits de l'Homme, the International Commission of Jurists and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)”, 9 April 2013, available at: [http://www.ilga-europe.org/home/how\\_we\\_work/litigation/ecthr\\_litigation/interventions](http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions), the case is still pending.

<sup>60</sup> For more information on the Swedish LGBTQ experts see the chapter on training.

<sup>61</sup> These questions are directly based on the method in RCI 03/2011, which contains the Swedish translation of the HJ/HT judgement.

<sup>62</sup> “manifest his homosexuality through his exterior behaviour” (manifeste son homosexualité dans son comportement extérieur), see also Fleeing Homophobia report p. 36.

<sup>63</sup> Council of State (Conseil d'État), MBWENE, 27 July 2012.

<sup>64</sup> CJEU, *Bundesrepublik Deutschland v Y and Z*, Joined cases (C 71/11 en C 99/11), 5 September 2012.

<sup>65</sup> Letter from Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF), to Member of Parliament Volker Beck, 27 December 2012.

expresses his sexual orientation publicly, and the more important this conduct is for him, the higher the probability that he will be persecuted.”<sup>66</sup>

## The Netherlands

In the Netherlands the discretion requirement was initially abolished in 2007, when the policy guidelines stated: “people with a homosexual preference are not required to hide this preference upon return to the country of origin.”<sup>67</sup> However, in 2012 a new text was added: a “certain amount of restraint” could be required from these applicants, thereby formally reintroducing a discretion requirement.<sup>68</sup> After the CJEU answered the preliminary questions, in its interpretation of these answers, the Council of State introduced an aggravated version of Lord Rodger’s test.<sup>69</sup> The Dutch Council of State refers to §82 of HJ/HT, as well as to a judgement of the German Council of State on the expression of religion.<sup>70</sup> In this German judgement it is stated that the applicant must credibly demonstrate that the public expression of her or his religion is very important for maintaining religious identity. The result is that through questioning the applicant on the expression of her or his sexual orientation in the past, the present and the future, and comparing these statements, there is not only a focus that still heavily relies on the concept of discretion, but a new type of credibility assessment is introduced.

## Italy

It is reported from Italy that discretion reasoning regarding LGB asylum seekers does not occur in Italian practice.

## Belgium

According to a report from the Flemish Refugee Council, the Belgian asylum authorities (CGVS/CGRA)<sup>71</sup> no longer apply the discretion requirement. However, in May 2013, the Commissioner-General said that discretion could play a role in the assessment of credibility.<sup>72</sup>

In conclusion, the EU Court of Justice’s rejection of the idea of discretion is positive as is the fact that the most direct variety of the discretion requirement (“Go home and hide!”) has been overruled by national courts. However, the concept of discretion reasoning is very persistent, and the idea that LGBTI people can hide their sexual orientation or gender identity is still alive and kicking in European asylum practice.<sup>73</sup>

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<sup>66</sup>“Zu prüfen ist dabei, wie sich der einzelne Schutzsuchende bei seiner Rückkehr im Hinblick auf seine sexuelle Ausrichtung verhalten wird und wie wichtig diese Verhaltensweise für seine Identität ist. (...) Je mehr ein Schutzsuchender mit seiner sexuellen Ausrichtung in die Öffentlichkeit tritt und je wichtiger dieses Verhalten für seine Identität ist, desto mehr erhöht dies die Wahrscheinlichkeit, dass er verfolgt werden wird.” Verwaltungsgericht Baden-Württemberg, 7 March 2013 – A 9 S 1872/12, ASYLMAGAZIN 5/2013, 164.

<sup>67</sup>Vreemdelingencirculaire (Aliens Circular) 2000 C2/2.10.2.

<sup>68</sup>WBV 2012/11, Stcrt. 12179, 29 June 2012. This new text followed the criticism by COC Netherlands that the original policy rule was not applied in the right way, leading to a practice in which people were still being sent back into hiding. Ironically, the text which introduced “a certain amount of restraint” was accompanied by the statement that it meant to clarify the policy and bring it in line with the government’s reaction to the Fleeing Homophobia report.

<sup>69</sup>Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State), 18 December 2013, 201012342/1/V2, JV2-14/48, ve13002542.

<sup>70</sup>Bundesverwaltungsgericht (Council of State), 20 February 2013, BVerwG 10 C20.12 (ECLI:DE:BVerwG:2013:200213U10C20.12.0).

<sup>71</sup>Commissioner General for Refugees and Stateless Persons (Commissariaat-generaal voor de Vluchtelingen en de Staatlozen/ Commissariat Général aux Réfugiés et aux Apatrides).

<sup>72</sup>Vluchtelingenwerk Vlaanderen, (Refugee Council Flanders) “Holebi’s op de vlucht, een analyse van de beslissingen door de Belgische asielinstanties”, (LGBs Fleeing, an analysis of the decisions by the Belgian asylum authorities), May 2013, p. 33, available (in Dutch) at: <http://cavaria.be/mediatheek/holebis-op-de-vlucht-een-analyse-van-beslissingen-door-de-asielinstanties>.

<sup>73</sup>Millbank has noted: “Discretion” may be articulated as a normative standard or requirement of “reasonableness” but is often embedded as an assumption or factual finding that behavioral “modification,” “restraint” or “adaptation” will simply “happen.” There is often a narrow line in determinations between what is “expected” as a finding of fact, and required as a matter of law.” Jenni Millbank, “Sexual orientation and refugee status determination over the past 20 years: unsteady progress through standard sequences?” in: T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York, Routledge/Taylor & Francis Group 2013, p. 32-54.

ILGA-Europe supports careful monitoring of negative decisions in LGBTI claims in this respect, in order to ensure that the idea that LGBTI persons could hide their sexual orientation or gender identity no longer plays a role in decisions, and ultimately ceases to exist altogether. This may require training aimed at changing the mind-set of asylum authorities, asylum judges and other stakeholders.

# 4 Credibility

## 4.1. What is at stake?

Credibility assessment plays an important role in every asylum case. Do the asylum authorities believe the stated nationality, the events leading to the flight, the fear that followed, and other aspects of the narrative? However, in LGBTI asylum cases the issue of credibility is often understood by asylum authorities in a specific way: is the person who states that s/he fears persecution for reasons of sexual orientation or gender identity, really a lesbian, gay, bisexual, trans or intersex individual? In this chapter, when we speak of “credibility”, we refer to this type of credibility assessment.<sup>74</sup>

The number of lesbian, gay and bisexual asylum seekers who are rejected because their stated sexual orientation is not believed seems to be growing significantly. Jenni Millbank, who has undertaken extensive research on asylum practice in LGBT cases in Australia and other Anglo-Saxon jurisdictions, described in her article *From discretion to disbelief* how the trend emphasising credibility seems to be more of an issue in countries where practice has become more sensitive towards LGBTI applicants.<sup>75</sup> When discretion reasoning is abolished, the reasons for rejecting asylum claims shift from arguments based on discretion or the situation in the country of origin not being bad enough, to arguments based on not believing that the applicant is an LGBTI person. This trend is prevalent in several European countries.<sup>76</sup> Following the abandonment of the discretion requirement, the question of credibility has become increasingly important.

In the assessment of the sexual orientation or gender identity of asylum seekers several methods are being used which are contrary to human rights norms, not to mention the fact that it is questionable whether it is in fact possible to assess someone else’s sexual orientation or gender identity. One of the conclusions of the Fleeing Homophobia research was: “As a general principle, establishing sexual orientation or gender identity should be based on self-identification of the applicant.”<sup>77</sup> The Yogyakarta Principles also underline the importance of self-determination by stating that “Each person’s

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<sup>75</sup>Jenni Millbank, “From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom”, *The International Journal of Human Rights*, Vol. 13, No. 2/3, 2009, p. 391-414.

<sup>76</sup>See for instance O. Bowcott, “Gay asylum seekers feeling increased pressure to prove sexuality, say experts”, *The Guardian*, 3 February 2013; United Kingdom Lesbian and Gay Immigration Group (UKLGIG), “Missing the Mark, Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims”, September 2013; Sabine Jansen, “Herken de homo, over de beoordeling van de geloofwaardigheid van seksuele gerichtheid in asielzaken” (Recognising gays, on the assessment of credibility of sexual orientation in asylum cases), (in Dutch) Justitiële Verkenningen, WODC 5-13, August 2013.

<sup>77</sup>Sabine Jansen and Thomas Spijkerboer, “Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe”, COC Netherlands/VU University Amsterdam, September 2011, p. 79.

self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”<sup>78</sup>

Nicole LaViolette has noted that there is a huge diversity in the way in which people experience and understand their sexual orientation, “depending upon their country of origin, gender, culture, social class, education, religion, family background, and socialization. There is no uniform way in which lesbians and gay men recognize and act on their sexual orientation.”<sup>79</sup> In addition, UNHCR states in the report *Beyond Proof* that “There are no universal characteristics or qualities that typify LGBTI individuals, any more than there are for heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.”<sup>80</sup>

ILGA-Europe considers that decision-makers should develop a different vision of credibility. We acknowledge that LGBTI asylum authorities need to assess the general credibility of an applicant’s story in relation to the well-foundedness of the fear of persecution. However, this assessment differs from testing one’s sexual orientation or gender identity. ILGA-Europe is of the opinion that the assessment should acknowledge the self-identification of the person concerned and focus on the persecution this person has experienced or fears. This point of view has consequences vis-à-vis the policies to be adopted by asylum authorities in their examination of claims and in their training schemes.

## 4.2. EU law applicable to assessment of sexual orientation and gender identity

Following the questions in the cases *X, Y and Z v. Minister voor Immigratie en Asiel*,<sup>81</sup> the Dutch Council of State acknowledged that there is a problem with respect to the assessment of credibility of sexual orientation. As a result, in April 2013 the Council of State asked for guidance from the European Court of Justice on this point, in the cases of three men from Afghanistan, Gambia and Uganda, who argued that their sexual orientation should be assessed on the basis of self-identification.<sup>82</sup> The Council of State asked the Court of Justice: “What limits are drawn by Article 4 of the Qualification Directive and by the Charter of Fundamental Rights of the European Union,<sup>83</sup> specifically Articles 3 and 7 thereof, regarding the way in which the credibility of a stated sexual orientation is assessed? Do these limits differ from the limits

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<sup>78</sup>The Yogyakarta Principles are a set of principles which apply international human rights standards to sexual orientation and gender identity. The principles were drafted in 2006 in Yogyakarta, Indonesia, at an expert meeting held by the International Commission of Jurists and human rights experts, and they are explicitly endorsed by the Council of Europe: “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity”, 6 March 2007, available at [http://www.yogyakartaprinciples.org/-principles\\_en.pdf](http://www.yogyakartaprinciples.org/-principles_en.pdf).

<sup>79</sup>Nicole LaViolette, “Coming Out to Canada: the Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act”, McGill Law Journal 2004, Vol. 49, Nr. 4, p. 996-1003. Laurie Berg and Jenni Millbank warn against “the misapprehension that there is a single path to one “real” sexual identity (...). This reflects an essentialist view that sexual orientation is either innate or established early in life and defines what one “really is”, Laurie Berg and Jenni Millbank, “Constructing the personal narratives of lesbian, gay and bisexual asylum claimants”, *Journal of Refugee Studies*, 2009, 22(2), p. 195–223.

<sup>80</sup>United Nations High Commissioner for Refugees, “*Beyond proof, Credibility Assessment in EU Asylum Systems*”, Brussels, May 2013, p. 71.

<sup>81</sup>The Court of Justice of the European Union, joined cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013.

<sup>82</sup>Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State), 20 March 2013, 201110141/1/T1/V2; 201208550/1/T1/V2; 201210441/1/T1/V2.

<sup>83</sup>Charter of Fundamental Rights of the European Union (2010/C 83/02), Official Journal of the European Union, 30.3.2010: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

regarding the assessment of the credibility of other persecution grounds, and if so, how?" The CJEU will judge whether the currently applied methods of verification of sexual orientation are in accordance with the Charter of Fundamental Rights of the European Union. The response of the Court of Justice to the questions is expected by the end of 2014.

Apart from Article 3 (Right to the integrity of the person), and Article 7 (Respect for private and family life) other articles of the Charter are also relevant, in particular Article 1 (Human dignity), Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment) and Article 21 (Non-discrimination).<sup>84</sup>

Article 4 of the Qualification Directive provides general rules for the assessment of an asylum claim. For instance Article 4(1) states that the assessment of the relevant elements of the application should be done in cooperation between the asylum authorities and the applicant.

In addition, Article 8(2) APD (Article 10(3)(a) APD recast) is relevant: Member States shall ensure that "applications are examined and decisions are taken individually, objectively and impartially."

The European Court of Human Rights had earlier found that sexual self-determination is part of someone's private life and an interference with the exercise of this right cannot easily be justified. The case of Van Kück against Germany was about a German transwoman who filed a complaint against the refusal to pay her health insurance. She stated this was a violation of her right to privacy under Article 8 of the Convention. The Court was of the opinion that the refusal of the German state to reimburse Van Kück's medical expenses had a deteriorating effect on Van Kück's private life, specifically her right to her gender identity and personal development. The Court considered that "the right to respect for sexual self-determination is one of the aspects of the right to respect for private life."<sup>85</sup> Although the Van Kück case was not an asylum case, the Court's conclusion in this case should be followed in cases of LGBTI asylum seekers, as it is not for the State to determine a person's sexual orientation or gender identity.

## 4.3. UNHCR's position:

UNHCR's Guidelines<sup>86</sup> acknowledge that not all statements can be proven, and warns against stereotypical reasoning and a focus on sexual practices, and endorses the principle of self-identification:

**§ 60, ii:** *Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. (...) There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.*<sup>87</sup>

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<sup>84</sup>See also ILGA-Europe, "Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers", by Evangelia (Lilian) Tsourdi, 2012, available at: [http://www.ilga-europe.org/home/publications/reports\\_and\\_other\\_materials](http://www.ilga-europe.org/home/publications/reports_and_other_materials), § 3(b), p. 6-7.

<sup>85</sup>European Court of Human Rights 12 June 2003, *Van Kück v. Germany*, Application no. 35968/97.

<sup>86</sup>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, Geneva, 23 October 2012, footnotes omitted.

<sup>87</sup>See also United Nations High Commissioner for Refugees, "Beyond proof, Credibility Assessment in EU Asylum Systems", Brussels, May 2013, p. 71.

**§ 62:** Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.

**§ 63, i:** (...) Self-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity.

**§ 63, iv:** (...) The fact that a transgender applicant has not undergone any medical treatment or other steps to help his or her outward appearance match the preferred identity should not be taken as evidence that the person is not transgender.

**§ 64:** The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is lack of country of origin information, the decision maker will have to rely on the applicant's statements alone.

In addition, UNHCR's Handbook states (**§ 196**): there may also be statements that are not susceptible to proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.<sup>88</sup>

## 4.4. Misunderstandings and misleading practices regarding credibility

National judges have in some cases recognised that credibility assessments of sexual orientation by asylum authorities were based on subjective notions. For instance the Belgian Council for Aliens Disputes (RvV/CCE) underlined "the highly subjective character of the decision which stated that the applicant "took the fact of living as a homosexual in Burundi lightly and without questioning it, in spite of the homophobic climate that reigns in Burundi."<sup>89</sup> A United Kingdom Tribunal remarked: "There is nothing suspicious about the Appellant not having had sexual relationships in the United Kingdom between 2008 and 2011. Gay men are not required to have sexual relationships in order to "prove" that they are gay, in the same way as heterosexual men are not so required in order to show that they are "straight"<sup>90</sup>.

As the Fleeing Homophobia research showed, there is a huge diversity in European Member States in the way asylum authorities assess someone's sexual orientation.<sup>91</sup> In some states self-identification is the general means by which sexual orientation or gender identity is assessed. In other states sexologists, psychiatrists and psychologists are consulted, in order to perform this assessment. The most famous example is the highly controversial practice of phallometry, a method that has been applied in asylum cases in the Czech Republic and Slovakia to prove sexual orientation, by measuring the applicant's physical reactions while watching different types of pornographic material. The criticisms of the Fundamental

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<sup>88</sup>United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", September 1979, reedited January 1992.

<sup>89</sup>Council for Aliens Disputes (Raad voor Vreemdelingenbetwistingen/ Conseil du Contentieux des étrangers, RvV/CCE), N°54 407, 14 January 2011.

<sup>90</sup>UK Tribunal decision August 2012, cited in UKLGIG, Missing the Mark report, p. 18.

<sup>91</sup>Only one example was found in which someone's gender identity was not believed, see Fleeing Homophobia report, p. 51.

Rights Agency, the European Commission, UNHCR and NGOs on this intrusive and degrading method led to suspension of the practice in the Czech Republic in 2009. However, the Slovak authorities still applied phallometry in at least one asylum case in 2012.<sup>92</sup> In addition, other medical examinations by psychologists, psychiatrists and sexologists are used for the assessment of sexual orientation and gender identity in several countries. These examinations test the psychological reactions of asylum seekers in order to “prove” their sexual orientation.<sup>93</sup>

## Inappropriate questions

While interviewers are supposed to make applicants feel at ease, in the case of asylum interviews with LGBTI applicants inappropriate questions are often asked. There is often a focus on sexual practices. Examples of such questions in Dutch practice are: “How many people did you have sex with?”; “What did you do exactly when you had sex?”; “How did you feel while having sex?”<sup>94</sup> A report from UKLGIG revealed that in the United Kingdom questions were being asked, like: “You have never had a relationship with a man. How do you know you are a lesbian?” and “What have you found is the most successful way of pulling men?”<sup>95</sup> Apart from the fact that these kinds of questions are extremely intrusive, the answers do not provide any information on the credibility of a particular sexual orientation.

## Stereotypes

In European asylum practice decisions are often based on stereotypes about LGBTI persons and assumptions on how a “true” LGBTI person behaves or what they look like. In many cases asylum seekers are questioned on their knowledge of “gay life”, in the country of origin as well as in the country of asylum. They are presumed to know about organisations for LGBTs, special days for gays, gay meeting places, gay events, gay symbols, popular gay books, film, magazines, radio- and tv-programmes, famous LGBTs, and also the exact penalties that their country of origin imposes on same-sex acts. It is expected that LGBTs had a difficult coming-out process and a serious psychological struggle connected to it. At the same time it is expected that they can elaborate extensively on this coming-out process, and that they are very interested in their sexual identity, instead of just practising same-sex sexual acts. While gay men are often presumed to have frequent sexual activity, lesbians face other stereotypes, in which it is considered “concerning” when it turns out they have experience regarding one night stands or meeting other lesbians at parties in their countries of origin.<sup>96</sup> Furthermore, LGBTI people are often not believed because they engaged in behaviour which the decision maker considered too risky to be true.

These types of stereotype, prejudices and unfounded expectations, which have been documented in several Member States,<sup>97</sup> are based on a limited understanding of the complexity and subjectivity of sexual orientation and gender identity. Yet they are being used as arguments for rejecting claims of LGBTI people who do not fit into these categories. As the assessment of credibility of a sexual orientation as it is currently dealt with in most European States is based on stereotypes and subjective notions, this practice is in conflict with the requirement of an impartial and objective assessment.<sup>98</sup> Moreover, this will lead to a very high risk of mistakes and to a substantial risk that asylum seekers are

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<sup>92</sup>Letter of the Human Rights League Slovakia and ILGA-Europe to Commissioner Malmström, 19 July 2012.

<sup>93</sup>See *Fleeing Homophobia* report, p. 49-53.

<sup>94</sup>Lieneke Luit, “Pink Solutions, Inventarisatie situatie LHBT asielzoekers (Inventory situation LGBT asylum seekers”, COC Netherlands, May 2013, available at: <http://www.coc.nl/wp-content/uploads/2013/05/PinkSolutionsCOC.pdf>. However, the Minister states that according to policy interviewers do not explicitly ask how an asylum seeker expresses his sexual orientation sexually, or otherwise.

<sup>95</sup>United Kingdom Lesbian and Gay Immigration Group (UKLGIG), “Missing the Mark, Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims”, September 2013.

<sup>96</sup>UKLGIG, *Missing the Mark* report, p. 18.

<sup>97</sup>See *Fleeing Homophobia* report, p. 55-63.

<sup>98</sup>Article 8(2) APD, Article 10(3) APD recast.



rejected on false grounds, and thus to *refoulement*.<sup>99</sup> Inappropriate assessment methods can easily lead to one's sexual orientation or gender identity not being considered credible, even in cases of genuine L, G, B, T or I persons who have a well-founded fear of persecution.

## 4.5. Good policies and practices on credibility at the national level

### The United Kingdom

The Asylum Policy Instruction on Sexual Orientation of the United Kingdom Border Agency states: "stereotypical ideas of people – such as an "effeminate" demeanour in gay men or a masculine appearance in lesbians (or the absence of such features) should not influence the assessment of credibility. Nor should an adverse judgement be drawn from someone not having declared their sexual orientation at the screening phase. Generally speaking, self-identification as lesbian, gay or bisexual will be the normal starting point as an indication of a person's sexual orientation. The fact that an applicant has not had any same-sex relationship(s) in the country of origin or in the country of asylum does not necessarily mean that s/he is not lesbian, gay or bisexual – it may be that the individual was fearful of the implications of acting on his or her sexual orientation, and wary of doing so in the UK. Neither should (heterosexual) relationships or parenthood (both of which may need to be explored at interview) be automatically taken as evidence of a lack of credibility. Interviewing officers should be aware that lesbian and gay relationships in some countries may bear little resemblance to relationships in the UK."<sup>100</sup>

UKLGIG reports that the spirit of the *HJ/HT* judgement, in which the Supreme Court recognised the wide spectrum of behaviour between individuals when it comes to a person's sexual orientation, is reflected in some substantive interviews. UK Home Office case workers have recognised that claims and decisions should not be based exclusively on sexual practice or on "common stereotypes often associated with homosexuality".<sup>101</sup>

### Case law

#### Malta

The Maltese Refugee Appeals Board considered that certain questions asked by the Refugee Commissioner's Office about the sexual life of the appellant were not appropriate. According to the Board, the homosexuality of the applicant was established through the existence of certain clear facts, for example that he had a male partner for a continuous period, and that he involved himself in same-sex sexual encounters. The Board concluded that "further questioning about this aspect is purely irrelevant, if not lacking of respect for the dignity of the appellant."<sup>102</sup>

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<sup>99</sup> *Refoulement* is the expulsion of an asylum seeker who has the right to be recognised as a refugee. *Refoulement* is forbidden by the Refugee Convention and several other international Conventions.

<sup>100</sup> UKBA, Sexual Orientation Issues in the Asylum Claim, p. 10-11. However, UK practice does not seem to be in line with these policy instructions: as the vast majority (86%) of Home Office refusal letters in LGB cases were based on not believing the sexual orientation of the applicant, many of these decisions were based on misconceptions about the behaviour of lesbians and gays, stereotypes and minor discrepancies. See UKLGIG, Missing the Mark report.

<sup>101</sup> UKLGIG, Missing the Mark report, p. 18.

<sup>102</sup> Maltese Refugee Appeals Board, 14 November 2013.

## Ireland

The Irish High Court states in a judgement: "It would appear that the Tribunal Member (...) may have slipped into error as it appears that he failed to mention that the key part of any applicant's claim in such cases, as highlighted in the [Fleeing Homophobia] report, is his or her self-identification as an LGBTI." (...) "It is not simply a question of performing physical sexual acts with a member of the same sex as distinct from a member of the opposite sex: it is rather a defining feature of that very identity. We know from the work of Freud, Jung, Kinsey and others that sexual orientation defines key aspects of the individual's more general orientation to the world around them."<sup>103</sup>

## Poland

The Polish Refugee Board considered the appeal of a Ugandan man that the assessment of sexual orientation should be based on the applicant's declaration. The Board agreed with the conclusion of the Fleeing Homophobia report that medical expert opinions are inadequate and inappropriate in this respect.<sup>104</sup> The LGBT NGO Campaign Against Homophobia (KPH, Kampania Przeciw Homofobii) supported this case.

## The Netherlands

According to the Dutch Council of State, in its referring judgement to the CJEU, "the assessment of a sexual orientation through asking questions, especially questions regarding the way in which the applicant expresses his sexual orientation, sexually or otherwise, or the way in which he came to realise his sexual orientation could mean an infringement of the fundamental rights enshrined in the Charter, specifically Article 3 and Article 7."<sup>105</sup>

# 4.6. NGO/academic proposals for alternatives

Nicole LaViolette notes that "ignorance, fear and hostility can lead to poor decision making and substandard service and support delivery. As a result, refugee claims can be negatively impacted if any of the decision makers involved in the process are insensitive to LGBT issues or rely on stereotypes and prejudice to make their decisions."<sup>106</sup> LaViolette suggests developing an LGBT Cultural Competency Training, which, in order to encompass all aspects that play a role in a fair determination process, should consist of a training trilogy: Awareness & Attitudes (focussing on the preconceived notions people working with LGBTI asylum seekers have), Knowledge (about LGBTI relevant country of origin information and applicable legal norms) and Skills (mainly focussing on interaction with LGBTI asylum seekers).

S. Chelvan states that the main issue is not whether someone is lesbian, gay, bisexual or trans, but the fact that they do not conform to a stereotype of what it means to be straight, or not straight enough, in the eye of the persecutor. The

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<sup>103</sup> High Court (Ireland), P. v Refugee Appeals Tribunal & anor, 20 September 2013, [2013] IEHC 448; 2012/901 JR, available at: <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/e12dba7d944c396580257c1300372141?OpenDocument>.

<sup>104</sup> X v. the Head of the Office for Foreigners, Poland, Refugee Board Warsaw, 25 July 2012. Unfortunately, in another Ugandan case the Voivodship Court (Regional Administrative Court) in Warsaw was of the opinion that the sole declaration was not sufficient and that a "certificate" of medical examination should be taken into account as proof of sexual orientation, Voivodship Court Warsaw, 20 November 2012.

<sup>105</sup> Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State), 20 March 2013, 201110141/1/T1/V2. However, this statement did not prevent the Council of State from promoting such an investigation following the XYZ judgement of the CJEU.

<sup>106</sup> Nicole LaViolette, "Overcoming problems with sexual minority refugee claims: Is LGBT cultural competency training the solution?", in: T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York: Routledge/Taylor & Francis Group 2013, p. 193.

assessment should therefore be based on gender non-conformity, or on not living a heterosexual narrative, instead of on questions addressing sexual conduct.<sup>107</sup> The credibility assessment of sexual orientation should be based on an enquiry into the feelings of difference, stigma, shame and harm of the applicant, the so-called *DSSH-model*.<sup>108</sup>

Because in essence the issue is whether the claimant is perceived as L, G, B, T or I by society, Louis Middelkoop suggests focussing on other aspects of the narrative, instead of on the sexual orientation itself, for instance on aspects of the claimant's life that have resulted from having an alternative sexual orientation. Questions could be asked on the consequences of life as an L, G, B, T or I person in the country of origin, like the reaction of family, friends and society at large, to their sexual orientation or gender identity; or on the effect of having to hide it.<sup>109</sup>

One of the recommendations of a Belgian research report is that it is best to base a decision on the declaration of the asylum seeker instead of on stereotypes.<sup>110</sup> The Belgian NGO *çavaria* concludes that too much weight is given to verification of sexual orientation: "At the same time the assessment of the real risk of persecution in the country of origin receives less attention. Furthermore, there is no way to "test" whether someone is "holebi"<sup>111</sup>. The issue of verification of sexual orientation is in fact a non-discussion. In case of doubt an asylum seeker should be given the benefit of the doubt. It is better to grant protection to ten applicants too many, instead of rejecting one, when this leads to this person being persecuted in the country of origin."<sup>112</sup>

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<sup>107</sup> See also Upper Tribunal (Immigration and Asylum Chamber) 24 June 2011, *SW (lesbians – HJ and HT applied) Jamaica* CG [2011] UKUT 00251. In *SW* the United Kingdom Upper Tribunal has further 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.

<sup>108</sup> See "S. Chelvan – Protecting the rights of LGBT asylum seekers", Pink News (2nd September 2013) <http://www.pinknews.co.uk/2013/09/02/interview-s-chelvan-on-protecting-the-rights-of-lgbt-asylum-seekers/>.

<sup>109</sup> See also Informal Meeting of Experts on Refugee Claims Relating to Sexual Orientation and Gender Identity: UNHCR, IARLJ and ELENA: Bled: Slovenia, 10 September 2011, report published on 24th April 2012 [§ 32], pp. 10-11: <http://www.refworld.org/pdfid/4fa910f92.pdf>.

<sup>110</sup> L. Middelkoop, "Dutch Court asks Court of Justice to rule on the limits of verification of the sexual orientation of asylum seekers", *European Law Blog, News and Comments on EU law*, 23 April 2013.

<sup>111</sup> Vluchtelingenwerk Vlaanderen, "Holebi's op de vlucht, een analyse van de beslissingen door de Belgische asielinstanties", (LGBs Fleeing, an analysis of the decisions by the Belgian asylum authorities), Vluchtelingenwerk Vlaanderen, Refugee Council Flanders, May 2013 <http://cavaria.be/mediatheek/holebis-op-de-vlucht-eeen-analyse-van-beslissingen-door-de-asielinstaties>.

<sup>112</sup> Flemish acronym for homosexuals, lesbians and bisexuals.

<sup>113</sup> Press release *çavaria*, 15 May 2013, (in Dutch), available at: <http://www.cavaria.be/nieuws/cavaria-kaart-pijnpunten-bij-asielaanvragen-holebis-aan>.

# 5 Late disclosure

## 5.1. What is at stake?

In many cases LGBTI asylum seekers do not reveal their sexual orientation or gender identity directly upon arrival in the country of asylum. There may be several reasons for this: they may never have talked about it before, they may not have been fully aware of their sexual orientation or gender identity at the moment of their first asylum interview, they may be ashamed, they may suffer from internalised homo- or transphobia, they may be afraid that other people from their community will learn about it, they may fear the repercussions if their sexual orientation or gender identity becomes known in the reception facility where they are accommodated, they may not be aware of the fact that a well-founded fear of persecution based on sexual orientation or gender identity is a ground for asylum, or they may have been advised to make up an “easier” story. However, such late disclosure will often affect the credibility of their claim in the eyes of the asylum authorities.

## 5.2. The application of EU law to cases of late disclosure

This section can be read in conjunction with section 2.1 and 2.3 of ILGA-Europe, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive” on special procedural needs.<sup>113</sup>

Article 2(d) APD clarifies that an applicant in need of special procedural guarantees is “an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances”.<sup>114</sup>

Where an applicant makes a subsequent application the asylum authorities will often perform a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant.

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<sup>113</sup>See ILGA-Europe, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive”, by Evangelia (Lilian) Tsourdi, May 2014, § 5.2, available at: [http://www.ilga-europe.org/home/publications/reports\\_and\\_other\\_materials](http://www.ilga-europe.org/home/publications/reports_and_other_materials).

<sup>114</sup>See also Article 24(3) APD: Member states shall ensure that applicants in need of special procedural guarantees are provided with adequate support.

Article 40(4) APD states that “Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the new elements or findings (...) in the previous procedure.”<sup>115</sup>

ILGA-Europe stresses the fact that LGBTI asylum seekers originating from countries in which persecution and/or discrimination of LGBTIs are highly prevalent, are often incapable of speaking about their sexual orientation or gender identity right away, for instance due to shame or fear.

The following Recitals<sup>116</sup> of the Procedures Directive are also relevant to the fact that LGBTI applicants might need additional time, before they are capable of coming out. In particular, Recital 29 APD clarifies that the concept of “individual circumstances” covers sexual orientation and gender identity.

Recital 29 APD: “Certain applicants may be in need of *special procedural guarantees* due inter alia to their (...) sexual orientation, gender identity, (...). Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including *sufficient time*, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”

Recital 32 APD: “The complexity of gender-related claims should be properly taken into account in procedures based on (...) the notion of subsequent applications.”

## 5.3. UNHCR’s position

UNHCR is also aware of the problems surrounding late disclosure of sexual orientation and gender identity:

**§ 57:** *It should be noted that some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim sur place.*

**§ 59:** *Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant’s capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of “safe country or origin” concepts.<sup>117</sup>*

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<sup>115</sup>See Fleeing Homophobia report, p. 65-69.

<sup>116</sup>Recitals are guidelines for the interpretation of the provisions.

<sup>117</sup>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, Geneva, 23 October 2012, footnotes omitted.

## 5.4. Good policies and practices on late disclosure at the national level

### Sweden

In Sweden the binding document RCI 2011/03 refers to a previous Migration Board decision and to the Swedish asylum law, which states that the Swedish migration authorities cannot base a credibility assessment purely on the fact that a person comes out about her or his sexual orientation late in the asylum procedure. Unfortunately this policy is not always followed by case workers.<sup>118</sup>

### The United Kingdom

The United Kingdom Policy Instruction on Sexual Orientation states: “Lesbian and gay applicants may feel a strong sense of shame and stigma about their sexual orientation and may feel that persecution they have experienced was caused by this identity. They may also come from cultures where they have never openly discussed their sexual orientation. For these reasons lesbian and gay asylum seekers may struggle to talk openly about their sexual orientation.” (...) “Nor should an adverse judgement be drawn from someone not having declared their sexual orientation at the screening phase.”<sup>119</sup> However, this instruction is not always followed by case workers and immigration judges. People who did not mention their sexual orientation at the first opportunity are being rejected.

### The Netherlands

In the Netherlands the advocacy of COC led to an exception for LGBTs to the general rule of *res judicata*, the rule that new facts or circumstances are needed to justify a new procedure. This new policy states: “Whenever the applicant indicates only in a second or subsequent application that he is homosexual, and this information is considered credible, it will not be held against him that he did not mention his homosexual orientation in a previous procedure.”<sup>120</sup> However, the judiciary still follow the *res judicata* principle and the asylum authorities apply the new policy incorrectly: people are still being rejected on justifications such as: “we don’t believe your sexual orientation, *because* you did not mention it earlier”.

## Case law

### The Netherlands

The Dutch Council of State acknowledged in its referring judgement to the CJEU “that it could be harsh on a foreigner originating from a country in which certain sexual orientations are not accepted culturally or legally, to declare on this matter spontaneously and without restraint.”<sup>121</sup>

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<sup>118</sup>Of a similar content is RCI 04/2009: “Rättschefen gör bedömningen att om sexuell läggning åberopas först i en senare del av handläggningen eller processen av ett grundärende bör inte enbart detta faktum minska trovärdigheten av uppgiften.”

<sup>119</sup>United Kingdom Border Agency (UKBA), “Sexual orientation issues in the asylum claim” (2011).

<sup>121</sup>WBV 2012/21, 18 September 2012, Staatscourant 2012, nr. 19403.

<sup>122</sup>Afdeling Bestuursrechtspraak Raad van State (Judicial Division of the Council of State), 20 March 2013, 201110141/1/T1/V2.

A gay man from Iraq was rejected by the Dutch Immigration and Naturalisation Service IND after he declared his sexual orientation for the first time in his third procedure. The IND found it very strange that he considered himself gay only from the moment he entered into a same-sex relationship, aged 29, a year after arriving in the Netherlands. The IND was of the view that it could be expected that he already had such feelings in Iraq, even though he was unable to express them. The District Court Roermond disagreed with this point of view: “let alone the question whether it is relevant if he already had these feelings in Iraq, after the interview he pointed to the process of realisation, the suppression of his feelings in Iraq and the fact that he found it hard to speak about this matter to the interviewer.” Given the fact that the Council of State asked for guidance from the CJEU on the assessment of credibility, his appeal was allowed, and he later received refugee status.<sup>122</sup>

## Austria

The Austrian Asylum Court (Asylgerichtshof) rejected the appeal of a gay Nigerian, who came out during his second asylum procedure, on the grounds of *res judicata*, because he was already aware of his sexual orientation and it was his own decision not to report this in the previous procedure. However, the Constitutional Court ruled that the Asylum Court should have considered the new element of his sexual orientation not only in light of the Refugee Convention, but also under Article 3 of the European Convention on Human Rights.<sup>123</sup>

## Italy

A gay Moroccan applied for asylum eight years after his arrival in Italy, where he had remained in the closet for a long time. The Committee of Gorizia found it reasonable that the applicant waited for such a long time, because he feared revealing his sexual orientation to his countrymen and because he was not aware of the possibility of refugee status based on sexual orientation. The Committee granted him refugee status.<sup>124</sup>

In another decision the Committee of Gorizia found a gay applicant not credible, because he applied many years after his arrival in Italy. However, this decision was overturned by the Court of First Instance of Trieste. The Court considered that the reasoning of the Committee was wrong, and accepted the fact that his late application was due to fear of the consequences among his countrymen and ignorance of the possibility of refugee status based on sexual orientation.<sup>125</sup>

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<sup>122</sup>Voorzieningenrechter Rechtbank Roermond (Provisional measures judge District Court), 21 January 2014, 13/32654; 13/32657.

<sup>123</sup>Verfassungsgerichtshof (Constitutional Court Austria), 16 September 2013, U 1268/2013-14.

<sup>124</sup>Commissione territoriale per il riconoscimento della protezione internazionale di Gorizia – sezione distaccata di Verona (Regional committee for the recognition of international protection of Gorizia – branch of Verona – i.e. the first instance determining authority) 26 June 2012.

<sup>125</sup>The Court of first instance of Trieste (Tribunale), 18 October 2013.

# 6 Internal flight alternative

## 6.1. What is at stake?

It may be possible in asylum cases that the threat of persecution is only present in one part of the country of origin and the applicant could move to another region, where it is safe and where protection is available, the so-called “internal flight alternative” (also known as internal protection alternative or internal relocation alternative).<sup>126</sup> However, in countries criminalising same-sex sexuality, state protection for LGBTIs should be considered unavailable.<sup>127</sup> In other countries, the question of whether state protection would be available for LGBTIs in general should first be answered.

## 6.2. UNHCR’s position

UNHCR considers that an internal flight alternative (IFA) will often not be available for LGBTIs:

*§ 51: Protection would need to be available in a genuine and meaningful way. United Nations agencies, non-governmental organizations, civil society and other non-State actors are not a substitute for State protection.*

*§ 53: (...) if the country in question criminalizes same-sex relations and enforces the relevant legislation, it will normally be assumed that such laws are applicable in the entire territory. Where the fear of persecution is related to these laws, a consideration of IFA would not be relevant. Laws which do not allow a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on his or her documents, would also normally be applicable nationwide and should be taken into account when considering the proposed place of relocation.*

*§ 54: Furthermore, intolerance towards LGBTI individuals tends to exist countrywide in many situations, and therefore an internal flight alternative will often not be available. Relocation is not a relevant alternative if it were to expose the applicant to the original or any new forms of persecution. IFA should not be relied upon where relocation involves (re-)concealment of one’s sexual orientation and/or gender identity to be safe.*

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<sup>126</sup>See Sabine Jansen, “Introduction”, in T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York: Routledge/Taylor & Francis Group 2013, p. 1-31; see also Sabine Jansen and Thomas Spijkerboer, “Fleeing Homophobia”, COC Netherlands/VU University Amsterdam, September 2011, p. 41-45.

<sup>127</sup>This follows from Article 7(2) Qualification Directive: “Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors [of protection] 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 when the applicant has access to such protection.”

<sup>128</sup>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, Geneva, 23 October 2012, footnotes omitted.



**§ 56:** *In determining whether internal flight is reasonable, the decision maker needs to assess whether return to the proposed place of relocation would cause undue hardship, including by examining the applicant's personal circumstances; the existence of past persecution; safety and security; respect for human rights; and possibility for economic survival.*<sup>128</sup>

## 6.3. Good policies and practices on internal flight alternative at the national level

### The United Kingdom

The UK Asylum Instruction on Sexual Orientation states: "The Supreme Court in HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location: "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." (para 21) (...) In certain countries, financial, logistical, social, cultural and other factors may mean that a LGB person may face particular difficulties. This may be particularly the case for lesbians who are unmarried, or single/lone parents, especially in countries where women are expected to have male protection. Women may also face a particular form of discrimination in the place of relocation and thus be unable to work so that they cannot survive in the place of relocation."<sup>129</sup>

### Case law

#### The United Kingdom

In a positive judgement from the United Kingdom it is stated: "The reason that I conclude internal relocation is not a viable alternative is because the only basis upon which the appellant in reality could seek to live in Pakistan is by hiding his sexual orientation. That is clearly impermissible and the Supreme Court made that clear in its judgment in HJ (Iran)."

In another UK case regarding a gay man from Lebanon, the issue was whether internal relocation to Beirut would be safe. The Upper Tribunal considered that the judge should have been looking at whether it would be reasonable to expect the appellant to relocate and she should have taken account of his personal circumstances. In addition, the judge accepted that the Lebanese government introduced anal testing in order to identify gay men. The Upper Tribunal concluded "Whilst it may be that the public have condemned such testing, the fact that they are continuing does demonstrate the attitude of the state towards homosexuality. It therefore directly impacts on the appellant's ability to live freely and openly as a gay man in Lebanon", and allowed the appeal.<sup>130</sup>

#### Austria

A gay Russian of Chechen origin had been severely abused by his relatives, as well as threatened with a forced marriage. The Austrian Asylum Court considered that to avoid this situation of persecution he did not have an internal flight

<sup>129</sup> United Kingdom Border Agency (UKBA), "Sexual orientation issues in the asylum claim", 2011.

<sup>130</sup> Immigration judgement (United Kingdom), March 2013, Missing the Mark report, p. 25.

<sup>131</sup> Upper Tribunal, Immigration and Asylum Chamber (United Kingdom) (MK), AA/00304/2013, 4 July 2013, available at: <https://tribunalsdecisions.service.gov.uk/utiac/decisions/39140>.

alternative in Russia as his relatives had already found out his whereabouts in Moscow, and it was not to be expected that protection would be available there, because of the general homophobic atmosphere in Russia. The man was granted refugee status.<sup>132</sup>

## Italy

In Italy an internal flight alternative is not an option because the Italian Supreme Court considered that the recognition of the right to refugee status or subsidiary protection may not be excluded based on the possibility of an internal relocation alternative in another part of the country of origin. The provision on internal protection in Article 8 of the Qualification Directive<sup>133</sup> has not been implemented in Italian national legislation.<sup>134</sup> This principle is applicable to all asylum claims and not only to LGBTI claims.

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<sup>132</sup>Asylgerichtshof (Asylum Court) 16 July 2013, D3 434.775-1/2013.

<sup>133</sup>Directive 2004/83/EU.

<sup>134</sup>Corte di Cassazione Sezione Sesta Civile (Supreme Court, Sixth Civil Section), 16 February 2012, n. 2294; Corte di Cassazione Sezione Sesta Civile (Supreme Court, Sixth Civil Section), 28 May 2013, n. 13172.

# 7 Country of Origin Information (COI)

## 7.1. What is at stake?

Country of Origin Information is crucial for the assessment of asylum claims. It enables the decision maker to relate the fear put forward by the applicant to the human rights situation of LGBTIs in the country of origin. What is their legal and social position? What is the attitude of state authorities? Are non-standard sexualities and gender identities criminalised? How does the general populace react to LGBTIs? Is effective state protection available when needed? What is the situation in different parts of the country? However, in LGBTI cases COI is often incomplete, lacking or incorrectly used. Where no reliable COI on LGBTIs exists, asylum authorities should not draw the conclusion that their situation is safe enough to send them back to this country.<sup>135</sup>

## 7.2. EU law principles on COI

This section can be read in conjunction with section 5.1 of ILGA-Europe, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive” on COI.

Article 4(3) of the Qualification Directive states that the assessment of an application for international protection 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>136</sup> The (recast) Procedures Directive adds that decisions are taken after an appropriate examination and to that end “Member States shall ensure that precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants.”<sup>137</sup>

Article 4 EASO Regulation reads: “The Support Office shall organise, promote and coordinate activities relating to information on countries of origin, in particular: (a) the gathering of relevant, reliable, accurate and up-to-date information

<sup>135</sup>See also Fleeing Homophobia report, p. 71-76 and Nicole 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. 437-476.

<sup>136</sup>The CJEU also referred to this Article in the judgement XYZ v. Minister voor Immigratie en Asiel (S 58).with respect to legislation criminalising homosexual acts.

<sup>137</sup>Article 8(2)(b) APD, Article 10(3)(b) APD recast.

on countries of origin of persons applying for international protection in a transparent and impartial manner, making use of all relevant sources of information, including information gathered from governmental, non-governmental and international organisations and the institutions and bodies of the Union; (b) the drafting of reports on countries of origin, on the basis of information gathered in accordance with point (a).<sup>138</sup>

## 7.3. UNHCR's position

UNHCR mentions several problematic aspects of the collection of Country of Origin Information on LGBTI people, and makes some suggestions on how to handle these problems.<sup>139</sup>

**§ 66:** *Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant's claim is unfounded or that there is no persecution of LGBTI individuals in that country. The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant's situation in certain circumstances.*

**§ 64:** *Where there is a lack of country of origin information, the decision maker will have to rely on the applicant's statements alone.*

## 7.4. Good policies and practices on COI at the national level

### The United Kingdom

The UK Border Agency (UKBA) systematically includes extensive LGBT sections in their country reports, containing information from various sources.<sup>140</sup> As they are written in the English language, these reports are being used in several other countries as well.<sup>141</sup> The United Kingdom Lesbian and Gay Immigration Group (UKLGIG) 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. In addition, in the UK so-called Operational Guidance Notes (OGN's) are issued, which act as policy guidance notes for caseworkers, practitioners and judges, with respect to the Home Office's stance on claims from specific countries.<sup>142</sup>

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<sup>138</sup>Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

<sup>139</sup>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, Geneva, 23 October 2012, footnotes omitted.

<sup>140</sup>Available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/>.

<sup>141</sup>See also ecoinet: <http://www.ecoi.net/> and the Country Reports on Human Rights Practices issued by the United States State Department, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

<sup>142</sup>See <https://www.gov.uk/government/collections/country-specific-asylum-policy-operational-guidance-notes>.

The UKBA's Guidelines on Sexual Orientation Issues state: "The absence of objective information to corroborate a claimant's account will be an important factor, but should not necessarily be taken to mean that the claimed fact did not occur. Each case must be decided on its own merits. It is important, however, to note that there may be very little evidence on the 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>143</sup>

The UKBA's Guidelines on Gender Identity Issues state: "A climate of hostility to transgender persons can still exist in a particular country even where those acts are not specifically laid down as criminal in a penal code or legal statutes, or where laws do exist but are not enforced, or even where there is provision for gender reassignment surgery. A society which is intolerant of non-conformist behaviour in relation to gender and/or sexual activity is likely to be intolerant of transgender people. The absence of specific legislation on transgender men and women in particular may be an extension of their general marginalisation."<sup>144</sup>

## The Netherlands

Every country report issued by the Dutch Ministry of Foreign Affairs contains a special section on LGBTs. In addition, every time a new report is drafted, COC Netherlands, the national LGBT NGO, is invited to give input regarding the questions to be answered in the report, the so-called "Terms of Reference". Occasionally COC also provides specific COI on a certain country, like for instance in the case of Iraq. See also the chapter "More good practices".

## Sweden

The Swedish Migration Board has its own database, "Lifos", where all COI that is used by the Migration Board is collected. On some countries there is a lot of information regarding LGBTI persons' situation, on others there is none. ILGA reports are now accepted as credible COI by the Migration Board.

## Finland

The Country Information Service in the Finnish Immigration Service (FIS) collects COI from various sources, including UNHCR, NGOs, Finnish fact-finding missions, COI services in other countries and international news agencies. The FIS also acquires COI through official co-operation with COI experts in other EU Member States and in country meetings focusing on individual countries.

## Italy

The Italian authorities do not systematically collect COI information nor do they issue COI reports. However, the Committees and Courts accept country of origin information on LGBTIs from (LGBTI) NGOs.

## Case law

### Austria

In the case of a transwoman from Pakistan the Austrian Asylum Court (Asylgerichtshof) considered that "the circumstance that the discrimination in society has the effect that the only possibility to earn one's livelihood is to work as a prostitute, is

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<sup>143</sup>United Kingdom Border Agency (UKBA), "Sexual orientation issues in the asylum claim" 2011, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/).

<sup>144</sup>"Gender identity issues in the asylum claim", 2011, p. 15, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/).

not only an inhuman or degrading treatment prohibited by Article 3 of the ECHR, but also a form of discrimination amounting to persecution and therefore refugee status was granted.<sup>145</sup> The judgement contains very detailed information about several forms of trans discrimination in Pakistani society: hardly any possibility to obtain an education, repudiation by the family, limited access up to total exclusion to health services, and dangerous gender-reassignment operations. This judgement was based on a COI report from the Schweizerische Flüchtlingshilfe (Swiss Refugee Aid) on the situation of hijras in Pakistan.<sup>146</sup>

In another Austrian case the Constitutional Court annulled the judgement of the Asylum Court, because the Court should not just have followed the asylum authorities' statement that there is no general state persecution of gays and lesbians in Nigeria, a statement which was mainly based on the fact that they place "lonely hearts ads" in a newspaper every week. The Court should have made its own assessment of the available Country of Origin information on Nigeria, from which it can be concluded that homosexual acts are punishable with imprisonment up to 14 years, according to secular law, and with corporal punishment or death by stoning, according to sharia law.<sup>147</sup>

## The United Kingdom

A United Kingdom judgement stated that: "Despite the advances that Albania has made in decriminalizing homosexual acts in private, the country material makes it plain that gays are still heavily stigmatized, that police brutality against them takes place and that this is openly supported by one government minister. There is no guarantee that police will take action to protect a gay man who reports a homophobic crime." Asylum was granted.<sup>148</sup>

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<sup>147</sup>Verfassungsgerichtshof (Constitutional Court) 16 September 2013, U 1268/2013-14.

<sup>148</sup>UKLGIG, Missing the Mark report, p. 23.

# 8 Interviewers and interpreters

## 8.1. What is at stake?

The interview is a key step in the examination of an asylum claim and therefore the atmosphere during the interview is an important aspect of the procedure, as it can influence its outcome. As has been discussed in the previous chapter on credibility, decisions in LGBTI cases are often based on stereotypes and assumptions on the part of interviewers and decision makers.

## 8.2. EU law principles on interviewers and interpreters

This section can be read in conjunction with section 4.1 of ILGA-Europe, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive” on the obligations regarding training of asylum personnel.

Article 15(2) APD recast: “A personal interview shall take place under conditions which ensure appropriate confidentiality.”

Furthermore, Article 15(3) APD recast states that it should be ensured that the interview is conducted under conditions that allow applicants to present their story in a comprehensive manner, “Member States shall:

- (a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability;
- (b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests (...)
- (c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. (...) Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests.”

In addition, in an early stage of the procedure applicants in need of “special procedural guarantees” should be identified.

Recital 29 APD states: “Certain applicants may be in need of special procedural guarantees due inter alia to their (...) sexual orientation, gender identity, (...). Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”

## 8.3. UNHCR’s position

Regarding the interviewer and interpreter in the LGBTI context UNHCR considers, in § 60 of the Guidelines:<sup>149</sup>

*iii: The interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant’s sexual orientation, gender identity, sexual behaviour or relationship pattern (...).*

*v: The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant’s own language, is essential. Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, “homosexual” is also considered a derogatory term in some countries.*

*vi: Specific requests made by applicants in relation to the gender of interviewers or interpreters should be considered favourably. This may assist the applicant to testify as openly as possible about sensitive issues. If the interpreter is from the same country, religion or cultural background, this may heighten the applicant’s sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.*

*vii: Questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female. Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.*

*viii: For claims based on sexual orientation and/or gender identity by women, additional safeguards are presented in UNHCR’s Guidelines on Gender-Related Persecution (...).*

## 8.4. Good policies and practices at the national level

In most countries the asylum seeker can indicate the preferred gender (male or female) of the interviewer and the interpreter.<sup>150</sup> In some countries it is also possible for the asylum seeker or the legal counsel to request an interpreter who is not from the same country or someone who translates from English rather than the native language.

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<sup>149</sup> 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, Geneva, 23 October 2012, footnotes omitted.

<sup>150</sup> See for instance Asylgerichtshof (Austrian Asylum Court) 26 September 2013, A10 435.657-1/2013.



## Sweden

In Sweden this latter possibility exists. However, whether or not such a request is granted in practice depends on the individual case worker. In addition, some applicants can get telephone interpreters, so that their identity is not recognised. Sometimes such a request is granted and other times it is refused.

The Swedish Migration Board carried out a project aimed at improving the quality of interpretation of meetings between asylum seekers and the Swedish Migration Board.<sup>151</sup> Within this project seminars were held on the best way to interpret specific terminology. One of the seminars was dedicated to the interpretation of words related to gender and sexuality, including sexual orientation and gender identity. The project built on experiences in Norway, where these types of seminars have been carried out for many years.

## Norway

In Norway the asylum seeker is asked prior to the interview if s/he wants a female or male interpreter during the interview. It can also be arranged that the interpreter is not from the same region as the asylum seeker. In addition, Norwegian interviewers ask what terms the asylum seeker wishes to be used for him- or herself and this terminology is used throughout the interview. In Norway LGBTI asylum seekers experience the interview in different ways: some of them find it hard, but others find it liberating to finally be able to tell their story to someone who listens to them for a whole day, without prejudice.<sup>152</sup>

## The United Kingdom

In the United Kingdom it is also possible to arrange an interpreter from a different country of origin. However, the occurrence of homo- and transphobia among interpreters continues to be reported and documented.

## Finland

If the Finnish Immigration Service is aware of the grounds for the application and/or there is a specific request from the applicant or the lawyer, arrangements will be made on the interpreter's gender and also, if possible, nationality.

## Austria

In Austrian asylum practice interpreters are usually not from the same country of origin as the asylum seeker. In most cases they are of Austrian or other European origin. However, there are many reports of asylum seekers who felt the interpreter was homo- or transphobic. Where an asylum seeker claims in an appeal that s/he could not speak freely to the interpreter or s/he was homo/transphobic, the appeal might succeed, the negative decision can be cancelled and a new interview with another interpreter will be conducted.<sup>153</sup>

## Case law

### Germany

A gay man from Afghanistan first fled to the United Kingdom. He did not say anything about his sexual orientation, because he was ashamed, because in detention another gay asylum seeker advised him not to talk about it, and because

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<sup>151</sup>The name of this project is "Interpret me right - to enhance the quality of the meeting with asylum seekers" (Tolka mig rätt – att öka kvaliteten i mötet med den sökande), duration from January 2012 until February 2014.

<sup>152</sup>In Norway each asylum interview takes a full day, or more, if needed. Information from Kari Weider Lothe at a UNHCR/CoE conference in Rome, 10-11 October 2013.

<sup>153</sup>A relevant decision in this respect: Asylgerichtshof (Asylum Court) 13 February 2012, B5 422.095-1/2011

he was questioned by a female interviewer and a female interpreter. He was expelled to Afghanistan. A few months later he fled to Germany, where his interviewer and interpreter were both male. The German Court found it understandable that he dared not talk about his sexual orientation in the UK. The case was not a standard subsequent application, because he experienced a higher risk of persecution while he was in Afghanistan.<sup>154</sup>

# 9 LGBTI sensitivity training and special expertise

## 9.1. What is at stake?

Providing adequate general and specific training to all relevant categories of the asylum authorities' personnel is an obligation of EU Member States. ILGA-Europe considers this to include an obligation to train asylum personnel on the issues specifically prevalent in LGBTI cases. Adequately training asylum authorities' staff on LGBTI issues is also part of the response to different specific problems addressed in the previous sections of the present publication: discretion, criminalisation, late disclosure and credibility.

It is crucial that asylum authorities in charge of LGBTI cases understand the concepts of closeting and coming out and their consequences on the life of applicants, that they avoid stereotypes in credibility assessments, and that they are aware of the effects of criminalisation. In addition, if members of staff who interact with LGBTIs do not reflect on their own prejudices and assumptions about sexual orientation and gender identity, it is unlikely they will be able to fairly assess asylum claims or to provide sufficient support.<sup>155</sup>

## 9.2. An obligation under EU law

This section can be read in conjunction with section 4 of ILGA-Europe, "Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive" on training of national authorities.

From 2015 on, Member States will be obliged to provide adequate general and specific training to all relevant categories of the asylum authorities' personnel. As part of the Procedures Directive's implementation in national law, Member States must provide extensive training to their asylum authorities' personnel, so as to ensure their competency, including on sexual orientation and gender identity issues.

<sup>155</sup>See Nicole LaViolette, "Overcoming problems with sexual minority refugee claims, Is LGBT cultural competency training the solution?", in T. Spijkerboer (ed.), *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, London/New York: Routledge/Taylor & Francis Group 2013, p. 189-216.

According to Article 4(1) and 4(3) APD Member States have to ensure that the personnel of the determining authority is sufficiently competent and properly trained. Member States are obliged to provide for relevant training, including on issues related to the handling of asylum applications from vulnerable persons with specific needs and special attention to the reception conditions of vulnerable groups.

The relevant training established and developed by the European Asylum Support Office (EASO) should be taken into account in this respect.<sup>156</sup> EASO is currently developing a training module on gender, gender identity and sexual orientation, which is due to be available in December 2014.

## 9.3. UNHCR's position

UNHCR calls for specialised training on LGBTI issues for people involved in asylum decisions.<sup>157</sup>

**§ 60 iii:** (...) Interviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language. Self-awareness and specialized training are therefore critical aspects to a fair status determination.

**§ 60 iv:** Specialized training on the particular aspects of LGBTI refugee claims for decision makers, interviewers, interpreters, advocates and legal representatives is crucial.

## 9.4. Good policies and practices at the national level

As the Procedures Directive should be implemented in the national asylum systems in July 2015, several Member States have already started to provide LGBTI training to improve the competency of their interviewers and other asylum personnel.

### Belgium

Since 2005 the Belgian asylum authorities (CGRA/CGVS) have a "gender-cell", consisting of a coordinator, representatives of the geographical sections, the legal section, the documentation and research section (CEDOCA), and a coordinator of the FGM follow up.<sup>158</sup> The gender-cell organises trainings for asylum officers. In addition, in 2012 training days on gender issues were organised for the interpreters who work for the CGRA/CGVS. Half a day of the training was dedicated to the

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<sup>156</sup> Article 4(3) APD jo. Article 6(4)(a - e) of Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>. See also Amnesty International's END FGM European Campaign, the European Women's Lobby and ILGA-Europe, "En-gendering the European Asylum Support Office", May 2011, available at: [http://www.ilga-europe.org/home/publications/policy\\_papers/recommendations\\_easo](http://www.ilga-europe.org/home/publications/policy_papers/recommendations_easo).

<sup>157</sup> 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, Geneva, 23 October 2012, footnotes omitted.

<sup>158</sup> The "FGM follow up" refers to a range of measures to ensure that young girls are not subjected to Female Genital Mutilation (FGM) after granting refugee status on this ground.

issues of sexual orientation and gender identity. This part of the training was led by two representatives of LGBT organisations and it focussed on linguistic and emotional problems that might arise during the interpretation of LGBT asylum claims. There were practical exercises, based on concrete experiences of interpreters. Ninety-six interpreters took part in these training sessions.

## Sweden

The Swedish Migration Board has a special coordinator for gender and LGBTQ issues. In 2009-2010 the Swedish Migration Board carried out “Beyond Borders”, a project which aimed to reduce the risk of preconceived norms around sexuality and gender affecting the asylum process. As part of the project two reports were written by independent investigators, which serve as a basis for skills development and training of case officers.<sup>159</sup> Initially 600 migration officers were trained, including the Director General and leading officers. During the trainings the focus shifted from the LGBT-applicant to the officers and their own understanding of norms surrounding sexual orientation, gender identity, ethnicity, religion etc. Stereotypes on sexual orientation and gender expression were discussed, and problems related to invisibility and standards based on heterosexual norms, illustrated by examples taken from work specific situations.<sup>160</sup> Furthermore, the Swedish Migration Board has implemented a new policy: in every LGBTQ asylum case a specific LGBTQ expert has to be involved and consulted before a decision can be taken. These experts can be the case worker themselves. In the spring of 2013 LGBTQ experts received training, in which UNHCR and legal counsel specialised in LGBTQ asylum issues participated. The aim is to train one LGBTQ specialist at every asylum department of the Migration Board.

## The United Kingdom

In the United Kingdom interviewers and decision-makers receive one day of compulsory training in LGBTI issues. Lawyers attend trainings on a voluntarily basis. Judges have a brief of one hour at their annual training. Unfortunately, interpreters in the United Kingdom are not trained, which is a big problem. The United Kingdom Lesbian and Gay Immigration Group (UKLGIG) provides training on LGBT asylum issues to relevant service providers in the refugee and LGBT community, solicitors and other legal advisers, UKBA staff and the judiciary.

## Norway

The Norwegian authorities have developed a specific LGBTI asylum interview guide for internal use, with support from LLH, the Norwegian LGBT-organisation.<sup>161</sup> The guide stresses *inter alia* that:

- sexual orientation is not primarily about sexual practices, but can be about many different aspects of life, such as emotions, thoughts, attraction, relationships and ways of expressing yourself; there are large variations as to how LGBTI people experience life, depending on who they are and where they come from; it cannot be assumed that the discovery of sexual orientation or gender identity takes place at a particular stage in life; not everybody has a clear idea of their own sexual orientation or gender identity; some languages lack LGBTI terminology or the terminology that exists is very negative. There was, for instance, an Arab gay man who referred to himself as “a shoe”, using a derogatory Arabic term;
- there is no “check-list” for what to expect from LGBTI asylum seekers.

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<sup>159</sup> 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”, Migrationsverket, January 2010, English translation by Caroline Åberg and Elina Grandin, April 2011; Ramböll, “Norm Critical Study of the Swedish Asylum Examination”, Migrationsverket, February 2010. [http://www.migrationsverket.se/info/5745\\_en.html](http://www.migrationsverket.se/info/5745_en.html).

<sup>160</sup> For instance the misconception that a woman, who arrived at the Migration Board wearing a hijab, was perceived as straight only because her religion would not allow her to live a lesbian or transgender identity.

<sup>161</sup> For more information on LLH see: <http://www.llh.no/en/>.

## Italy

Although in Italy there is no obligatory training on LGBTI issues, since the launch of the Fleeing Homophobia report in 2011 at least three conferences and seminars on LGBTI asylum issues have been organised, attended by members of the Territorial Committees and judges. LGBTI NGOs and UNHCR participated and were also involved in the organisation of these events. In addition, one of the four members of each Territorial Committee is a representative of UNHCR. The participation of UNHCR in the Committees plays a major role in the development of good practices and provides the Committees with an expertise regarding LGBTI issues.

## The Netherlands

In the Netherlands a pilot project training for interviewers and decision makers was organised by COC Netherlands (in the framework of the Pink Solutions project)<sup>162</sup> in cooperation with the immigration authorities (IND). This training was led by an experienced LGBTI trainer. Two LGBT asylum seekers shared their experiences with the asylum interview; the Dutch representative of UNHCR and one of the authors of the Fleeing Homophobia report gave a presentation, LGBTI cases were practised and stereotypes of LGBTIs were discussed. In addition, a pilot training will be organised for employees of the Dutch Refugee Council.

## Finland

In Finland in 2012 SETA, a national NGO for LGBTI rights,<sup>163</sup> trained case workers on gender identity and sexual orientation. The Finnish Immigration Service (FIS) reports that prior to the Fleeing Homophobia report there was already a conversation within FIS about the reasoning of their decisions, and the report pushed the discussion further in the right direction. The case workers now feel more aware of the difficulties concerning LGBTI applicants and their ability to come out and tell a plausible story. They have been taught methods for creating a good atmosphere in the interviews and asking questions in a neutral and encouraging way. The FIS will implement the EASO training module on Gender, Gender Identity and Sexual Orientation, as soon as it is available.

## France

In October 2012 the French government expressed in the "Action plan against violence and discrimination for reasons of sexual orientation and gender identity"<sup>164</sup> the willingness to create training for the French asylum authority (OFPRA) in 2013 in order to improve the handling of LGBTI asylum cases. LGBTI associations would be consulted to provide input for this Action Plan in the framework of the transposition of the asylum acquis. The French LGBTI asylum NGO ARDHIS<sup>165</sup> offered to provide LGBTI sensitivity trainings for OFPRA officers. This proposal is mainly based on ARDHIS' analysis of interviews held by OFPRA with LGBTI asylum seekers, and of negative decisions in LGBTI cases.

In May 2013 the government declared it would cooperate with specialised organisations aiming for better handling of asylum applications of LGBT persons who are persecuted in their country of origin.<sup>166</sup> ARDHIS has met several times with OFPRA's Director-General, who seems sensitive to the idea of a better handling of LGBTI asylum seekers. However, at the time of writing, ARDHIS had still not received an invitation from OFPRA to engage in formal cooperation.

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<sup>162</sup> Lieneke Luit, "Pink Solutions, Inventarisatie situatie LHBT asielzoekers (Inventory situation LGBT asylum seekers", COC Netherlands, May 2013.

<sup>163</sup> For more information on SETA see: <http://seta.fi/in-english/>.

<sup>164</sup> "Programme d'actions gouvernemental contre les violences et les discriminations commises à raison de l'orientation sexuelle ou de l'identité de genre", 31 octobre 2012, p. 15.

<sup>165</sup> Association pour la reconnaissance des droits des personnes homosexuelles et transsexuelles à l'immigration et au séjour: <http://ardhis.org/WP3/>.

<sup>166</sup> Bilan intermédiaire (Intermediate Periodic Review), May 2013.

# 10 Conditions in reception facilities

## 10.1. What is at stake?

The situation for LGBTI asylum seekers in reception facilities (including detention centres) is often problematic: in most cases they fled alone, and they have neither the support of family members nor a network of fellow expatriates. In reception centres they face homo- or transphobia, discrimination, bullying, and violence, in many cases from their countrymen. It is not unusual that upon arriving in the country where they hoped to feel safe, they feel compelled to hide in the closet again.

## 10.2. EU law principles on the conditions in reception facilities

This section can be read in conjunction with section 7 and 6.3 of ILGA-Europe, “Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive” on safety in accommodation centres and on communication with UNHCR and NGOs.

The Reception Conditions Directive (RCD) includes some provisions that can be helpful in tackling the problems of LGBTI asylum seekers in reception centres.

Art. 18(3) RCD: “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”

Art. 18(4) RCD: “Member states shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres”

Art. 21 RCD: “Member States shall take into account the specific situation of vulnerable persons such as (...), and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (...) in the national law implementing this Directive.”

In addition, Recital 17 of the EU Directive on the Rights of Victims defines gender-based violence as “violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately”.<sup>167</sup>

ILGA-Europe is of the opinion that many LGBTI applicants should be considered as vulnerable, due to the nature of the acts of persecution suffered, mentioned in article 21 of the Reception Directive: torture, rape or other serious forms of psychological, physical or sexual violence. In addition, LGBTI asylum seekers could be vulnerable and accordingly have special reception needs, due to a high level of discrimination and taboos in reception centres.

## 10.3. Good policies and practices at the national level

### Austria

In Austria transgender asylum seekers are initially housed in large first reception centres. Transwomen are mostly placed in the house for unaccompanied women (no access for men). Where a medical expert states that the person needs hormone therapy, the asylum seeker will be accommodated in Vienna, as medical treatment is only available in the capital. In Vienna the homes are of relatively good quality, and there are more social workers, contacts with NGOs and German courses. In the majority of other cases in the large first reception centres there is transphobic violence or harassment by other asylum seekers. However, the police and security personnel in the reception centre take these offences very seriously and it usually speeds up the procedure for transfer to Vienna.

Lesbian, gay and bisexual persons are accommodated all over Austria in hostels or homes for asylum seekers (small reception centres). In many cases the asylum seeker receives a single room or is housed - upon request - separately from asylum seekers of his/her country of origin. In case of violence or harassment by other asylum seekers the situation is handled on an *ad hoc* basis: the victim might be transferred to other accommodation, or the offender might be transferred.

### Belgium

Upon arrival in a Belgian reception facility the in-house rules are explained, including the prohibition of any type of (incitement to) racism and discrimination, and information on the relevant Belgian laws is provided. Where discrimination or violence towards LGBTI asylum seekers occurs, the victim is informed of the right to file a complaint with the police. In addition, a disciplinary transfer of the perpetrator will be requested. Whenever the facts are very serious, the perpetrator can be temporarily removed from reception facilities. In Belgium LGBTI asylum seekers can be transferred to smaller reception facilities, or to centres where they feel safer, because there are fewer countrymen/-women. Fedasil (the Federal Agency for the Reception of Asylum Seekers) does not provide separate reception facilities for LGBTI asylum seekers, as this could lead to stigmatisation. Based on the Reception Law there are regular evaluations to identify the special needs of asylum seekers. The special needs of LGBTs will be included in these evaluations. If the special needs are not met, measures can be taken. For LGBTs this could mean, for instance, support by a specialised NGO like Merhaba or Omnya.<sup>168</sup> If the asylum seeker still feels unsafe, s/he can request a transfer to a more suitable location, for instance a smaller centre.

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<sup>167</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>.

<sup>168</sup> <http://www.merhaba.be/en/home>; Omnya organises activities for LGBTI people from north Africa and the Middle East, see: <http://cavaria.be/community/allochtone-holebis>.



Employees of Fedasil initiated the AHHA-aSOSda-project, with the aim of supporting LGBTI asylum seekers. The staff of the AHHA-aSOSda-group sensitises their colleagues working in the different reception facilities, and provides them with useful information, for instance on LGBTI organisations. One of their current projects is called “the workshops of the Rainbow House”. In cooperation with Rainbows United,<sup>170</sup> it offers a place for LGBT-asylum seekers where they feel safe and where they can get information on asylum, Belgian society etc. Information on this project has been disseminated throughout all reception facilities. Each reception employee can contact the group to obtain information on the project itself, or advice concerning individual LGBTI inhabitants. The AHHA-aSOSda-working group also plans to organise information meetings for reception staff. Fedasil will organise trainings in order to sensitise employees and inhabitants.<sup>171</sup>

## The Netherlands

The cooperation between COC Netherlands and COA (Central Agency for the Reception of Asylum Seekers) came about through joint advocacy towards the Ministry from COC and the Christian GAVE Foundation (for church and refugees) regarding the similar problems encountered by LGBTI and Christian asylum seekers in reception centres. This led to an independent research report<sup>172</sup> from which it became clear that asylum seekers who were confronted with discrimination based on their sexual orientation or their religion hardly ever reported these incidents. COA then started the project “Willingness to report in case of discrimination.” COC started the Pink Solutions project, in September 2013 followed by the Pink Security project. The aim of this last project is to establish a social network for LGBTI asylum seekers and to improve their safety. In 2009 COC Central Netherlands initiated *Cocktail*, a buddy-project for LGBTI asylum seekers<sup>173</sup> and COC member organisations throughout the Netherlands are now being supported in establishing similar groups. In 2014 in nine pilot reception locations a “pink network” will be established, formed by the local branches of COA, COC and the Refugee Council. COC Netherlands will organise trainings for reception staff on these pilot locations.

In 2012 two thematic days for COA employees regarding discrimination of LGBTs and (converted) Christians were organised. More than 100 employees took part in these meetings.<sup>174</sup> Within COA a working group was established, which can be approached about issues regarding discrimination. A protocol was drafted on how to deal with incidents towards LGBTI asylum seekers, and because of the recent awareness of the need to improve safety and prevent incidents, things are changing. Whenever possible, LGBTI-unfriendly people and LGBTIs are not housed in the same apartment. LGBTIs who are confronted with violence are placed within sight of security people. COA tells everybody (asylum seekers, employees, volunteers, security people, neighbours) that discrimination will never be allowed. In addition, two posters were made for the reception facilities to counter discrimination. The poster against homophobia shows a male couple holding hands, while standing on a wedding cake.<sup>175</sup>

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<sup>170</sup>Rainbows United is an initiative for LGBT asylum seekers, established in cooperation with Merhaba, Fedasil and Belgian Pride, see: <http://rainbowhouse.be/en/evenements/rainbow-united/>.

<sup>171</sup>See: “Interfederal action plan against homophobia and transphobia”, <http://www.milquet.belgium.be/sites/default/files/130603%20-%20IAP%20homotransfobie.pdf>.

<sup>172</sup>Deloitte, Rapport inzake een kwalitatief onderzoek onder (oud) bewoners van asielzoekerscentra, naar mogelijkheden ter verhoging van de meldingsbereidheid van incidenten op gebied van geloofsovertuiging en seksuele geaardheid”, (report of a qualitative research among (ex)inhabitants of asylum seekers centres, on the possibilities to improve the willingness to report incidents related to religion and sexual orientation), 20 december 2011.

<sup>173</sup><http://www.cocmiddenland.nl/cocmiddenland/node/519>.

<sup>174</sup>See Annual report COA 2012, p. 11: [http://www.coa.nl/sites/www.coa.nl/files/publicaties/bestanden/3576.1116\\_sociaal\\_jaarverslag\\_2012\\_engels\\_web.pdf](http://www.coa.nl/sites/www.coa.nl/files/publicaties/bestanden/3576.1116_sociaal_jaarverslag_2012_engels_web.pdf).

<sup>175</sup>See: <http://www.coa.nl/nl/nieuws/internationale-interesse-in-postercampagne-coa>.

## The United Kingdom

Some detention centres in the United Kingdom have officers dedicated to supporting LGBTI detainees. There are policies in place to deal with homo- and transphobic violence and bullying. However, trans people are kept in isolation as it is considered the only way to avoid their mistreatment and the Home Office does not accept that this situation should be a reason not to detain trans people whilst processing their asylum claims.<sup>176</sup>

## Norway

In Norway asylum seekers are told during the asylum interview that in Norway LGBTI people have the right to live openly, without being subjected to discrimination or violence, and that they also have this right in the reception centre. In addition, information is provided about the possibility of contacting the Norwegian NGO “Skeiv verden” (“Queer World”), a multicultural network of LGBTI-people, which arranges social gatherings.

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<sup>176</sup>See on the problems regarding the housing situation of LGBT asylum seekers in the United Kingdom also Michael Bell and Cole Hansen, Refugee Support, “Over Not Out, the housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers”, Metropolitan Support Trust, May 2009; available at: <https://www.metropolitan.org.uk/images/Over-Not-Out.pdf>; Alasdair Stuart, MBARC, “Over Not Out Refreshed 2012, An update on progress against the original recommendations of the Over Not Out Report”, Metropolitan Migration Foundation, available at: <https://www.metropolitan.org.uk/images/Metropolitan-MF-LGBT-Over-Not-Out2012-final1.pdf>.

# 11

## Other good practices

The good practices discussed in the previous sections do not form an exhaustive list. Below we present some other practices that could provide helpful tools in dealing with LGBTI applications, or in equipping national authorities to do so.

### Information Belgium

Belgium is the only EU country which issues reliable publicly available statistics on LGBT asylum seekers.<sup>177</sup> In 2012 in Belgium the total number of asylum applications based on sexual orientation or gender identity was 1059.<sup>178</sup>

### Sweden

The website of the Swedish asylum authorities (Migrationsverket) contains a special LGBTQ section with information in Arabic, English, French, Persian, Spanish and Swedish.<sup>179</sup>

### Advocacy Netherlands

In the Netherlands most improvements in LGBTI asylum policy came about through advocacy from COC Netherlands towards the Ministry. As a result, in 2006 a policy was adopted to grant LGBTs from Iran *prima facie* protection; in 2007 the discretion requirement was formally abolished;<sup>180</sup> in 2009 it was explicitly recognised that no state protection can be required from LGBTs originating from “criminalising” countries; and in 2012 the problems around late disclosure resulted in an exception to the rule that new facts are needed in a subsequent application. The Fleeing Homophobia report and the articles written by its authors raised further awareness on the issue.<sup>181</sup> In addition, COC Netherlands supported the lawyers in the cases in which the Dutch Council of State raised preliminary questions at the CJEU.

### United Kingdom

UKLGIG monitors relevant (legal) developments and issues and seeks to improve the quality of UKBA decision making.

### Sweden

Positive changes in Sweden are mainly a direct effect of RFSL's advocacy, education and awareness raising regarding LGBTI asylum issues.

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<sup>177</sup> See: [http://www.cgvs.be/nl/binaries/Jaarverslag\\_CGVS\\_2012\\_tcm127-227095.pdf](http://www.cgvs.be/nl/binaries/Jaarverslag_CGVS_2012_tcm127-227095.pdf), page 20-22.

<sup>178</sup> Their number is growing: in 2009: 376, in 2010: 528, in 2011: 823.

<sup>179</sup> [http://www.migrationsverket.se/info/5738\\_en.html](http://www.migrationsverket.se/info/5738_en.html).

<sup>180</sup> Although it returned later in another version, see the chapter on discretion in this report.

<sup>181</sup> Sabine Jansen and Thomas Spijkerboer, “De draaideurkast, homoseksuele en transgender asielzoekers, discretie en strafbaarstelling”, *Asiel- en Migrantenrecht* 2012, nr. 7, p. 320-329; Sabine Jansen and Thomas Spijkerboer, “Say it loud – en vlug een beetje, homoseksuele en transgender asielzoekers, laat uit de kast komen en geloofwaardigheid”, *Asiel- en Migrantenrecht* 2012, nr. 9, p. 456-463.

## Italy

In Italy improvements are a mixture of the work of NGOs, of jurisprudence, and of the role of UNHCR. NGOs disseminate knowledge of LGBTI asylum issues to migrants and other asylum stakeholders. They organised and took part in training events on LGBTI issues. In jurisprudence there is a general trend of awareness regarding LGBTI rights. UNHCR's role in the Territorial Committees and in training events is very important.

Media attention

## Austria

In 2011 the Austrian case "Yasar" in which a Turkish transwoman was threatened with deportation, generated a lot of protests and media attention.<sup>182</sup> In the end she was granted refugee status. This case led to a more sensitive attitude from the Austrian authorities towards LGBTI cases.

## Netherlands

In March 2012 COC informed the media of the very bad human rights situation of LGBTs in Iraq, which then led to an item on television, to parliamentary questions and ultimately to prima facie refugee status for Iraqi LGBTs.<sup>183</sup>

## Practical support

Support of individual LGBTI asylum seekers, provided by LGBTI NGOs:

Austria: ORQOA, Oriental Queer Organisation Austria.<sup>184</sup>

Belgium: MERHABA/Omnya.<sup>185</sup>

France: ARDHIS writes appeal letters, which regularly lead to a new hearing, and refugee status.<sup>186</sup>

Italy: The NGOs Arcigay and Avvocatura Diritti LGBTI (Lawyers for LGBT rights) – Rete Lenford, have set up groups to support and advise LGBTI asylum seekers. Their work helps the asylum seekers to submit better prepared claims and to find useful LGBTI COI.<sup>187</sup>

Netherlands: COCKTAIL and Pink Security provide social support (buddy-projects).<sup>188</sup>

Norway: "Skeiv verden" ("Queer World") is a multicultural network of LGBTI-people, which arranges social gatherings.

Sweden: RFSL.<sup>189</sup>

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<sup>182</sup> See for instance: [http://www.tgeu.org/Turkish\\_Trans\\_Woman\\_in\\_Austria\\_on\\_the\\_verge\\_of\\_deportation](http://www.tgeu.org/Turkish_Trans_Woman_in_Austria_on_the_verge_of_deportation).

<sup>183</sup> WBV 2012/19, Strct. 17337, 22 August 2012.

<sup>184</sup> <http://orqoa.at/en/english.html>.

<sup>185</sup> <http://www.merhaba.be/en/home>; Omnya organises activities for LGBTI people from north Africa and the Middle East, <http://cavaria.be/community/allochtone-holebis>.

<sup>186</sup> <http://ardhis.org/WP3/>.

<sup>187</sup> Arcigay: <http://www.arcigay.it/who-we-are/>; Rete Lenford:

<sup>188</sup> <http://www.cocmiddenederland.nl/cocmiddenederland/node/519>, or <https://www.coc.nl/engels>.

<sup>189</sup> RFSL, Riksförbundet för homosexuellas, bisexuellas och transpersoners rättigheter, (the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights): <http://www.rfsl.se/?p=3298>.

United Kingdom: UKLGIG provides support and information to LGBT asylum seekers via a helpline, in person and through a monthly support meeting. UKLGIG also visits detention centres and runs social support projects.<sup>190</sup>

## Research reports

In order to understand the specific issues of LGBTI applicants, research is essential.

- Fleeing Homophobia

The Fleeing Homophobia report described and compared policy and practice in 25 countries.<sup>191</sup> Sources from various countries said that the “Fleeing Homophobia” report was helpful in improving the position of LGBTI applicants. For instance, Austrian judges are reportedly usually very interested in the report and its recommendations. The report was widely disseminated in Italy, and it might have played a positive role. It also played a role in jurisprudence in Finland, Poland and Ireland. In addition, the report was instrumental in the two sets of preliminary questions issued by the Dutch Council of State.

- The Flemish Refugee Council in cooperation with the LGBT NGO *cavaria* published an analysis of LGB asylum decisions in May 2013.<sup>192</sup> This report contains recommendations regarding the assessment of credibility and well-foundedness. A debate was organised following publication of the report, and it was attended by the General Commissioner.

- COC Netherlands interviewed 29 asylum seekers regarding their experiences in the Dutch asylum system and published the results in the report *Pink Solutions*.<sup>193</sup>

- In Sweden, the asylum authorities issued two research reports:

- > 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”, *Migrationsverket*, January 2010

- > Ramböll, “Norm Critical Study of the Swedish Asylum Examination”, *Migrationsverket*, February 2010.<sup>194</sup>

- In the United Kingdom several reports were launched by NGOs, for instance:

- > UK Lesbian and Gay Immigration Group (UKLGIG), *Missing the Mark, Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*, September 2013;<sup>195</sup>

- > UK Lesbian and Gay Immigration Group (UKLGIG), “Failing the Grade: Home Office initial decisions on lesbian and gay claims for asylum”, April 2010;<sup>196</sup>

- > Stonewall, “No Going Back, lesbian and gay people and the asylum system”, by Nathanael Miles, 2010;<sup>197</sup>

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<sup>190</sup> <http://uklgig.org.uk/>.

<sup>191</sup> The report is also available in Finnish, French, German, Greek, Hungarian, Italian, Polish, Slovak, Spanish and Swedish, at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/research-reports/index.asp>.

<sup>192</sup> “Holebi’s op de vlucht, een analyse van beslissingen door de asielinstanties” (LGBs Fleeing, an analysis of decisions by the asylum authorities), Vluchtelingenwerk Vlaanderen, Refugee Council Flanders, 2013 available in Dutch: <http://cavaria.be/mediatheek/holebis-op-de-vlucht-eeen-analyse-van-beslissingen-door-de-asielinstanties>.

<sup>193</sup> Lieneke Luit, “Pink Solutions, Inventarisatie situatie LHBT asielzoekers” (Inventory situation LGBT asylum seekers), COC Netherlands, May 2013, available (in Dutch) at: <http://www.coc.nl/wp-content/uploads/2013/05/PinkSolutionsCOC.pdf>.

<sup>194</sup> Both reports are available in English at: [http://www.migrationsverket.se/info/5745\\_en.html](http://www.migrationsverket.se/info/5745_en.html).

<sup>195</sup> Available at: [http://www.uklgig.org.uk/docs/publications/Missing\\_the\\_Mark.pdf](http://www.uklgig.org.uk/docs/publications/Missing_the_Mark.pdf).

<sup>196</sup> Available at: <http://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade-UKLGIG-April-2010.pdf>.

<sup>197</sup> Available at: [http://www.stonewall.org.uk/documents/no\\_going\\_back\\_1.pdf](http://www.stonewall.org.uk/documents/no_going_back_1.pdf).

> Refugee Support, "Over Not Out, the housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers", by Michael Bell and Cole Hansen, Metropolitan Support Trust, May 2009;<sup>198</sup> "Over Not Out Refreshed 2012, An update on progress against the original recommendations of the Over Not Out Report", by Alasdair Stuart, MBARC, Metropolitan Migration Foundation.<sup>199</sup>

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<sup>198</sup> Available at: <https://www.metropolitan.org.uk/images/Over-Not-Out.pdf>.

<sup>199</sup> Available at: <https://www.metropolitan.org.uk/images/Metropolitan-MF-LGBT-Over-Not-Out2012-final1.pdf>.

# Table of good practices

The list below summarises the good practices described in the present publication.

## General

- The Netherlands, Sweden and the United Kingdom have explicit and publicly available policy guidelines for the handling of LGBT(Q) asylum applicants.
- Belgium is the only EU country which issues reliable publicly available statistics on LGBT asylum seekers.
- Advocacy of (LGBTI) NGOs has led to improvements in government policies regarding LGBTI asylum, including in the Netherlands, Sweden and the United Kingdom. In Italy UNHCR plays a particularly important role.

## Criminalisation

- The Italian Supreme Court confirmed the good practice that lesbian, gay and bisexual asylum seekers from countries which criminalise sexual orientation are granted refugee status.
- The Court of Justice of the European Union ruled that whenever there is evidence that a prison sentence for homosexual acts has been applied in the country of origin, this is an act of persecution. Therefore refugee status must be granted to LGBs who have fled such a country.
- As a general rule, Dutch policy holds that whenever the applicant originates from a country where homosexuality or homosexual acts are criminalised, it is not expected that s/he seek protection from the authorities against non-state persecution.
- It is policy in the Netherlands that Iranian LGBTs are granted refugee status and, since recently, Ugandan LGBTs are as well. The Netherlands also has a policy of the *prima facie* granting of refugee status to Iraqi LGBTs.

## Discretion

- The Court of Justice of the European Union rejected the discretion requirement.
- Prior to the CJEU's judgement, a discretion requirement had already been rejected in several EU Member States: UK Supreme Court (HJ/HT), July 2010; Swedish policy rules (RCI 03/2011), January 2011; Finnish Supreme Court (Korkein Hallinto-Oikeus), January 2012; Norwegian Supreme Court (Norges Høyesterett – Dom), March 2012; French Council of State (Conseil d'État) MBWENE, July 2012.
- In Italian practice discretion reasoning regarding LGB asylum seekers does not occur.

## Credibility

- The UK Asylum Policy Instruction on Sexual Orientation acknowledges that "stereotypical ideas of people should not influence the assessment of credibility" and that "self-identification as lesbian, gay or bisexual will be the normal starting point as an indication of a person's sexual orientation."
- National judges have overturned decisions in which credibility assessment of an applicant's sexual orientation was based on stereotypes and subjective notions regarding LGBTs.

- National judges have overturned decisions in which credibility assessment of an applicant's sexual orientation was based on inappropriate questioning or medical reports.

## Late disclosure

- Swedish policy holds that a negative credibility assessment cannot be based solely on a late coming-out.
- UK policy states that an adverse conclusion should not be drawn from someone not having declared their sexual orientation at the screening phase.
- Dutch policy holds that a coming-out in a subsequent procedure will not be held against the applicant, as long as it is credible.
- From Austria, Italy and the Netherlands positive case law was reported in which there was understanding of late disclosure.<sup>200</sup>

## Internal flight alternative

- In Italy an internal flight alternative as a reason for rejection is not applied.
- The United Kingdom Policy Instruction states: "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."
- Positive case law regarding the concept of an internal flight alternative was reported from the UK and from Austria.

## Country of origin information

- The United Kingdom Border Agency systematically includes extensive LGBT sections in their country reports.
- All country reports issued by the Dutch Ministry of Foreign Affairs contain a special section on LGBTs.

## Interpreters

- In most countries the asylum seeker can indicate the preferred gender of the interviewer and the interpreter. In addition, in Austria, Finland, Norway, Sweden, and the United Kingdom an interpreter can be requested who is not from the same country or someone who translates from English rather than the native language.
- In Belgium training on sexual orientation and gender identity issues was organised for interpreters.
- In Sweden a seminar was organised for interpreters on the interpretation of words related to gender, sexuality, gender identity and sexual orientation.



## Training and special expertise

- In anticipation of the implementation of the Procedures Directive several States have already started to organise LGBTI trainings for asylum authorities: Belgium, Finland, France, the Netherlands, Sweden and the United Kingdom.
- In Italy LGBT NGOs and UNHCR organised several conferences and seminars on LGBT asylum.
- Both Belgian and Swedish asylum authorities have a coordinator for gender and LGBT issues. The Belgian asylum authorities have a “gender-cell”. In Sweden specially trained LGBTQ experts are involved in LGBTQ asylum cases.
- The Norwegian asylum authorities developed an internal LGBTI asylum interview guide, in cooperation with the national LGBT organisation.
- In Italy the participation of UNHCR in the Territorial Committees leads to expertise in decision making vis-à-vis LGBTI issues.

## Reception conditions

- In Belgium the AHHA-aSOSda working group organises meetings and trainings for reception staff on LGBTI asylum issues.
- In the Netherlands the LGBT NGO COC cooperates with COA (the government’s Reception Agency) in the Pink Solutions and Pink Security projects to improve the situation in reception centres through trainings, awareness and pink networks. A poster against homophobia was designed and disseminated in the reception facilities.
- Some detention centres in the United Kingdom have officers dedicated to supporting LGBTI asylum seekers.

## Individual support

- In many countries individual LGBTI asylum seekers are provided support by LGBTI NGOs: France: ARDHIS; United Kingdom: UKGLIG; Sweden: RFSL; Belgium: MERHABA/Omnya/Rainbows United; Italy: Rete Lenford/ARCIGAY; Austria: ORQOA; Netherlands: COCKTAIL/Pink Security (buddy-projects); Norway: Skeiv Verden (social gatherings).

## Research

- Several research reports have been written, on a European level (the Fleeing Homophobia report) and on the national level, in Belgium, the Netherlands, Sweden and the United Kingdom.