

FLEEING HOMOPHOBIA

QUESTIONNAIRE

European Research Project

FLEEING HOMOPHOBIA, SEEKING SAFETY IN EUROPE,

Best Practices on the (Legal) Position of LGBT Asylum Seekers in the EU Member States

Introduction

Each year, thousands of lesbian, gay, bisexual, transgender and intersex (LGBTI) people apply for asylum in the European Union. Although the EU Qualification Directive recognises that they might qualify for international protection (Article 10(1)(d)), it does not address the particular difficulties they are confronted with. As a result of this considerable differences exist in the ways in which applications of LGBTI asylum seekers are dealt with in the various EU Member States. Yet, data with respect to these issues are very scarce. Through this research project we hope to fill this data gap.

Your answers to this questionnaire (= the country reports) will supply the empirical data for the comprehensive, normative analysis we will draft. We will also make an inventory of statistical data, although our initial research shows that these are hardly available.

The data provided by the country reports will enable us to identify best practices regarding qualification for international protection and asylum procedures. We will draft a policy document, translating the best practices into policy recommendations for the EU and its Member States. We hope this will contribute to the development of a common European approach to address the specific needs of LGBTI asylum seekers and to a European practice of adequate protection for LGBTI asylum seekers.

Guidance to the questionnaire

In this questionnaire we ask you to describe legislation and policy, practice and case law concerning LGBTI asylum seekers. We use the EU Directives Articles only as a means to structure the questions.

It is clear that there are not only considerable differences in the handling of LGBTI asylum applications in each EU country, but in their numbers as well. The availability of these cases will also vary per country. If your country has a small number of cases available, we would like you to give a full description of these cases. An extra effort should be made to find more cases. If large numbers of LGBTI cases are available, your main effort will consist of studying them. Because it may not be possible to describe all cases, we would then like you to provide a more general picture. We ask you to report on the argumentation in legal practice: decisions and/or case law. Some of you may have access to decisions, but if this is impossible or too complicated, you can confine to case law.

We strongly advise you to cooperate with other stakeholders (refugee and/or LGBTI NGOs, lawyers, UNHCR, government officials etc.) in collecting cases and answers to the questionnaire. If you cannot answer a question yourself, if there is a gap in your knowledge, please involve other experts. For example: lawyers should ask NGOs and NGOs should ask lawyers.

We consider practices ‘good’ when they are in line with human rights standards and ‘bad’ when they are not. While we aim at identifying good/ best practices, we are also very interested in bad/ worst practices. So please don’t hesitate to mention all good and bad practices that came to your attention.

We would like you to point out and make explicit whether you refer to written law, decisions or practice. Please send decisions and/or case law as attachment, or a summary in English (French or German) when the question requires this. We would prefer English summaries and translations, but if this is a major obstacle for you, French or German will do as well.

If possible, please give comprehensive answers, although the maximum length of your answers should not exceed 50 pages (not including questions and attachments). In the grey boxes you can type longer answers, the yes/no boxes can be ticked with the space bar or by using your mouse. You can move through the questions with the tab key or arrow keys.

Thank you very much!

Best regards,

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General

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What is the basis of your expertise on LGBTI asylum issues?

Informationsverbund Asyl und Migration is a non-governmental non-profit association. Our main task is primarily to provide institutions and people who support refugees and migrants, but also authorities and courts with relevant background information for their work. A main part of our activities consists of the research and analysis of asylum and migration-related case law. Most of the decisions we collect are included in our database on www.asyl.net. We are in regular contact with many lawyers who specialise in migration law and with refugee counsellors from NGOs. Informationsverbund is also a cooperating partner of UNHCR.

What sources did you use in responding to this questionnaire (e.g. your own cases, case law, lawyers, NGOs, government representatives)?

- Case law database on www.asyl.net
- Case law database of Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge/BAMF) at <https://milo.bamf.de>
- Lawyers' networks
- UNHCR, Representation for Austria and Germany (Berlin and Nuremberg offices)
- Amnesty International, German section
- Database of parliamentary queries
- Other sources (including the Federal Office for Migration and Refugees) have been approached but have not been able to provide data within the given timeframe.

Frequency of LGBTI asylum claims

1) Statistics on LGBTI asylum seekers

- a) Does your government provide statistics on LGBTI asylum seekers (their numbers, countries of origin, proportion of L, G, B, T and I cases, positive or negative decisions, recognition rates etc.)?

No

In its response to a query by German parliament on the legal situation of homosexual refugees in Germany (16/2142 of 4 July 2006) the German government explained that asylum applications are not statistically analysed in terms of the reasons the asylum seekers have brought forward. According to this response the Federal Office for Migration and Refugees' assessment is that applications are "rarely" motivated by an alleged risk of persecution due to sexual orientation.

Yes. Please provide us with a copy/translation.

b) Do NGOs in your country provide statistics on LGBTI asylum seekers?

No

Yes. Please provide us with a copy/translation.

c) Do other sources in your country provide statistics on LGBTI asylum seekers?

No

Yes. Please provide us with a copy/translation.

2) If no national statistics are available, could you tell us how many asylum claims based on persecution for reasons of actual or perceived (imputed) sexual orientation and/or gender identity you know of in your country? Please explain the basis of your answer (published case law, lawyer network, LGBTI community, other NGOs, newspaper reviews, intuition) and indicate the time frame.

Inquiries at asylum lawyers' and other networks have not produced statistically relevant data. As Germany does not have an institutionalised system of legal assistance or other counselling for asylum seekers, there is no institution or organisation (apart from the authorities) which has access to all asylum seekers and could possibly have an overview of asylum claims. "Anecdotal evidence" suggests that the number of asylum seekers who motivate their claims with LGBTI-related reasons is low:

- Lawyers report that they only have had "some" or "several" LGBTI clients even if they have been practicing asylum law for many years.*
- UNHCR has a mandate to monitor German asylum practice and therefore may ask the Federal Office for access to asylum interviews and to case files if they are made aware of certain applications, particularly from applicants with special protection needs. UNHCR estimates that its Nuremberg office has thus been actively involved in asylum procedures of about 20 LGBTI asylum seekers within the last ten years. Furthermore, as part of its monitoring activities the office has learnt of 80 decisions on LGBTI cases within a period of about three years (2008 through 2010). According to UNHCR there is no systematic registration of LGBTI-related cases at the Federal Office (as opposed to "gender-related" decisions, a category which does not include LGBTI cases).*
- The regional office of Amnesty International for Berlin and Brandenburg offers regular office hours for asylum applicants and refugees. They estimate that they are approached by "perhaps one or two" LGBTI asylum seekers per annum (out of 100 to 150 asylum seekers or refugees who contact them p.a.).*
- Sources agree that the main reason for the low number of LGBTI asylum applications is most probably to be found in the reluctance of many asylum seekers to refer to their sexual*

orientation during the asylum procedure. This assumption is supported by case law which shows that asylum seekers in several cases brought forward LGBTI-related motivations not during their initial asylum procedures but in the course of follow-up applications, sometimes years after the first application had been rejected; cf. VG Potsdam, 19.1.2010, 11 K 397/06.A, a woman from Cameroon whose initial application had been rejected in 2006 and who applied again for asylum after her civil union (i.e. “same-sex marriage”, German: “Lebenspartnerschaft”) had been registered in 2009.

- *In this context it should also be noted that the rate of successful asylum applications has increased significantly in recent years in Germany with protection rates well above 30 per cent in the years 2008 and 2009. This implies that many applicants have received some sort of protection before they got into contact with a counsellor or lawyer, let alone a court. It could also mean that some applicants who received a protection status on other grounds saw no need to mention their sexual orientation in their asylum procedures.*

3) L, G, B, T, I separately

- a) What is the approximate number of lesbian cases within these asylum claims?

Again, only anecdotal evidence is available, suggesting that the number of lesbian asylum seekers is significantly lower than that of gay asylum seekers.

What are the main issues in these cases?

In the cases which have become known to UNHCR applicants indicated fear of persecution or serious harm by non-state actors, mostly family members, as reason for their applications.

- b) What is the approximate number of gay cases within these asylum claims?

Cf. above, 3a.

What are the main issues in these cases?

Fear of persecution or serious harm from state actors, non-state actors, often including family members.

- c) Did you find bisexual asylum cases within these asylum claims?

No

Yes. Indicate the number of male and female cases. What are the main issues in these cases?

One male, VG Ansbach, 21 August 2008, AN 18 K 08.30201, the claimant had based a former asylum claim (in 1997) on an alleged risk of persecution because of an extramarital affair (with a woman). He claimed to be bisexual in a new application in 2007. His appeal was rejected as the court had significant doubts about the claimant's credibility. Furthermore it decided that the claimant's homosexual orientation was “just a disposition” (“eine bloße Neigung”) next to the still practiced heterosexual orientation and thus not sufficiently formative for the claimant's identity (“identitätsprägend”) to make him a part of a social group (of homosexuals) in the context of Art. 10 Qualification Directive.

- d) Did you find transgender asylum cases?

No

Yes. Indicate the number of male-to-female and female-to-male cases.

What are the main issues in these cases?

Only male-to-female cases were referred to in case law:

- *VG Sigmaringen, 23.06.2010, A 7 K 987/09, the court bars the authorities from deporting a transsexual to Kosovo because of a lasting need of medical treatment which could not be provided in Kosovo (i.e. hormonal treatment following surgery for breast enhancement).*
- *VG Dresden, 15 May 2009, A1 K 30157/07, alleged risk from both state and non-state actors in Venezuela (rejection of appeal, particularly because of internal protection alternative in big cities in Venezuela).*
- *VG Hannover, 24.04.2008, 12 A 4601/06, refugee status for a transsexual from Russian Federation*
- *VG Würzburg, 24.3.2005, W 3 K 03.31234, refugee status for a transsexual (the court refers to a “transvestite”) from Ecuador following mistreatment by police officers.*

In addition UNHCR has learned of two cases of male-to-female transgenders, both granted refugee status in their procedure at the Federal Office for Migration and Refugees (one had already undergone hormone therapy and several surgeries, the other one had not begun medical treatment at the time of the asylum procedure).

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

UNHCR Nuremberg reports one case (successful application at the Federal Office).

4) What are the most common countries of origin of LGBTI asylum seekers in your country? If possible, quantify.

*1 Iran: it is impossible to quantify for lack of an overall figure, but about 26% of of the case law (12 out of 46) referred to in a collation of important cases prepared by Andreas Schwantner/Amnesty International concerns asylum seekers from Iran (mostly male homosexuals).
2 The only other country of some significance in this collation is Iraq with four decisions (8.7%), all other countries register with fewer decisions than that.*

The screening of cases by UNHCR produced a similar result: While no exact statistics were compiled, UNHCR confirms that Iran was clearly the most prominent country of origin (about 30% of the cases under survey), with considerable distance Iraq and Afghanistan were second and third.

5) Are you aware of L,G,B,T or I people who do not apply for asylum because of fear of the consequences?

No

Yes. Please explain.

Lawyers report that clients did not apply for asylum for fear that the sexual orientation would become known to friends and family.

6) When asylum/ protection is granted to LGBTI asylum seekers, is this generally:

refugee status based on membership of a particular social group? (If so, what is the description of the particular social group, e.g. lesbian women in Pakistan)

In recent years granting of refugee status has become more common which is mainly due to the transposition of the Qualification Directive. One of the main effects of the transposition is that persecution by non-state actors is now a relevant part of the refugee definition (as of 1st January 2005, recognition of refugee status had been excluded on principle in cases of non-state persecution before that date). It should be noted that granting of refugee status on the Convention ground “social group” is also a fairly recent phenomenon in German jurisdiction and has only been of significance since 2005. The established legal definition of a refugee from before 2005 had little room for the concept of the social group as it described a refugee as a person who was targeted individually and on purpose by the actors of persecution.

The Federal Office for Migration and Refugees' handling of cases is described in a response to a parliamentary query from 18 May 2010 (17/1505) with regard to asylum seekers from Iran who claim to be at risk of persecution because of their sexual orientation. According to this statement by the government, the decisive element in the refugee determination procedure is someone's disposition or “sexual identity” rather than his or her belonging to a social group:

“In a prognosis on the probability of persecution the future conduct of an asylum seeker in his home country which is triggering the persecution is irrelevant in principle. This is not the case if this conduct has to be expected more or less inevitably and accordingly the risk for the asylum-seeker has become manifest in a way that it has to be considered to be as relevant as an immediate threat in terms of the asylum law [...]. The outcome therefore is dependent on whether the asylum-seeker's sexual disposition is such that in his/her individual case a respective conduct is to be expected, which is likely to become known to the Iranian authorities with a relevant degree of probability.”

“Bei der Prognose über die Wahrscheinlichkeit einer Verfolgung ist ein die Verfolgung erst auslösendes zukünftiges eigenes Verhalten des Asylsuchenden in seinem Heimatstaat grundsätzlich nicht zu berücksichtigen. Etwas anderes gilt, wenn dieses Verhalten mehr oder weniger zwangsläufig zu erwarten ist und damit die Gefährdung des Asylsuchenden in so greifbare Nähe gerückt ist, dass sie wie eine unmittelbar drohende Gefahr als asylrechtlich beachtlich eingestuft werden muss (Bundesverwaltungsgericht, Urteil vom 15. März 1988, 9 C 278/86). Es kommt also darauf an, ob der Asylsuchende sexuell so geprägt ist, dass im Einzelfall eine entsprechende Betätigung zu erwarten ist, die den iranischen Behörden mit der erforderlichen Wahrscheinlichkeit bekannt werden wird.”

“As a rule, Iranian homosexual asylum seekers who have suffered from persecution before they left the country are recognized as being entitled to asylum [according to the German constitution] or to refugee status. If they have left the country without having suffered from persecution before, the outcome is dependent on a prognosis of their future conduct. If it has to be expected that homosexual activities will take place which will become known to the Iranian authorities with a relevant degree of probability, a recognition of asylum or refugee status is carried out. If it follows from this prognosis that a persecution is not likely to take place with relevant probability, there will be no recognition of asylum or refugee status. In such cases subsidiary protection is not to be granted either, as there is no risk of serious harm.”

“Vorverfolgt ausgereiste homosexuelle Asylsuchende aus dem Iran werden in der Regel als Asylberechtigte oder Flüchtlinge anerkannt. Bei unverfolgt ausgereisten Asylsuchenden kommt es auf die Prognose des zukünftigen Verhaltens an. Ist eine entsprechende homosexuelle Betätigung zu erwarten, die den iranischen Behörden mit der erforderlichen Wahrscheinlichkeit bekannt werden wird, erfolgt eine Anerkennung als Asylberechtigter oder Flüchtling. Ist nach dieser Prognose eine Verfolgung nicht beachtlich wahrscheinlich, erfolgt keine Asyl- oder Flüchtlingsanerkennung. In diesen Fällen ist auch kein subsidiärer Schutz zu gewähren, da kein ernsthafter Schaden droht.”

Case law is not consistent when it comes to the classification of refugee status, although the recognition of refugee status on the basis of the social group concept seems to become more and more accepted in recent years. Thus several courts explicitly refer to the concept of the social group (e.g. VG Oldenburg, 13.11.2007, 1 A 1824/07, homosexuals in Nigeria a social group in terms of Art. 10 (1) d), others seem to take it into account but do not elaborate on the subject. In some cases refugee status is granted without any discernible reference to the social group context or to any other Convention ground but on the basis of an understanding which emphasizes the individual's right to his/her sexual identity, cf. VG Chemnitz, 11. July 2008, A 2 K 304/06: the claimant cannot reasonably be expected to hide or to disclaim his sexual orientation as “this would infringe upon his right to personal autonomy (“Persönlichkeitsrecht”) in an unacceptable manner and therefore in a way which is asylum relevant.”

Especially lawyers point out in this context that for the outcome of procedures the underlying legal concepts are often less important than individual aspects, such as the applicant's/claimant's credibility, his/her “soft skills” and performance during the interview or hearing and not least the decision-maker's/judge's personal attitudes.

refugee status for fear of persecution for reasons of sexual orientation or gender identity based on another Convention ground (political opinion, religion, nationality, race) If so, please explain.

subsidiary protection? On which basis?

Cf. 7a

7) Do you have any information on LGBTI asylum seekers receiving another form of protection on the basis of national law, such as:

a) humanitarian grounds?

No

Yes. Please quantify and explain.

The concepts of subsidiary protection, of humanitarian and of other grounds are not easy to distinguish in German law and jurisprudence. A whole range of other forms of protection is summarized under “prohibitions of deportation” (“Abschiebungsverbote”) in the Residence Act and these include serious risks of harm as defined in Art. 15 c Qualification Directive as well as, for example, an ongoing need of medical treatment. Therefore, these provisions are sometimes labelled “other forms of subsidiary protection” to distinguish them from the subsidiary protection

as defined in Art. 15 c Qualification Directive. Such other forms can be granted in cases when the authorities or courts do not consider the criteria for refugee status to be fulfilled.

- Cf. Question 3d: VG Sigmaringen, 23.06.2010, A 7 K 987/09: Denial of refugee status for transsexual from Kosovo, but prohibition of deportation for medical reasons.
- VG Weimar, 20.8.2008, 7 K 20268/06 We: Denial of refugee status to black (male) homosexual from Russian Federation (for lack of active role of the state in persecution), but prohibition of deportation because of risks of attacks by criminals, skinheads and racist officials.

Moreover, UNHCR has learned of two recent cases in which the Federal Office granted a form of subsidiary protection to homosexual male asylum-seekers because they were found to be in need of ongoing medical treatment (for HIV and PTSD respectively).

b) other grounds (discretionary leave)?

No

Yes. Please quantify and explain.

Cf. above, 7a).

8) Do you have information about LGBTI applicants in your country who are, according to your national law, under the age of consent?

No

Yes. Please quantify and explain.

Expertise, Support

9) Do you know general or specialised NGOs supporting LGBTI asylum seekers in your country?

No

Yes. Provide their name and explain what kind of activities specifically aimed at LGBTI asylum seekers they undertake.

a) What are the main problems they face while providing support?

b) Do they employ staff or do they work with volunteers only?

c) Are they supported by bigger LGBTI and/or refugee umbrella organisations?

No Yes. Which organisation(s)?

d) Do they work with lawyers or with UNHCR on LGBTI issues?

No Yes. In what form?

e) Do they have contact with the government?

No Yes. In what form?

10) Special training for NGOs

a) Do people working for general refugee NGOs receive special training on LGBTI issues?

No Yes

b) Do people working for LGBTI NGOs receive special training on refugee law?

No Yes

c) Do people working for LGBTI Asylum NGOs receive special training on refugee law?

No Yes

11) Lawyers' expertise on LGBTI

a) Are there lawyers with expertise in LGBTI asylum cases?

No Yes

b) Are there networks of lawyers with expertise in LGBTI asylum cases?

No Yes. Please provide the web address of the network

Some lawyers gained special expertise in LGBTI issues simply by working on behalf of several LGBTI clients. The Lesbian and Gay Association's Berlin and Brandenburg branch lists three lawyers as their legal counsellors for asylum issues. One of them estimates that he has had about 50 LGBTI clients in about 20 years, so even in his case LGBTI asylum issues can hardly be described as a core activity of the law firm.

No specialised networks of lawyers have been known of by the sources we consulted.

12) Sometimes potential asylum seekers are not aware of the fact that sexual orientation or gender identity is a ground for asylum. Are they informed about this?

No

Yes. Who gives the information and how is such information given? (If it is given through a booklet or leaflet, please attach.)

Policy, legislation, case law

13) Specific law and/or policy

- a) Does your country have specific law and/or policy concerning LGBTI asylum seekers? (primary or secondary legislation, guidelines, internal instructions and/or circulars, etc.)?

No

Yes. Please give English (French/German) translations **and** attach the text in the original language. Are these binding? No Yes

There are no LGBTI provisions in the law or in the Federal Office for Migration and Refugees' instructions for decision-makers (Dienstanweisungen), as far as those are publicly available.

- b) Does your country have gender guidelines for the handling of asylum claims?

No Yes

Are these guidelines used in LGBTI claims? No Yes. Please explain.

There are guidelines for gender-related persecution in the publicly available instructions (Dienstanweisungen), and the Federal Office for Migration and Refugees has specialists for gender-related asylum issues (and for unaccompanied minors). However, the focus in the Dienstanweisungen is on asylum seekers at risk of Female Genital Mutilation, while it has to be noted that an important part of the guidelines (e.g. the one dealing with the definition of "social group") is labelled "for internal use" only. It has been reported that the instructions on "social group" do not contain any provisions on LGBTI-cases.

- 14) Does your country have explicit law and/or policy on LGBTIs coming from specific countries of origin, for instance to grant asylum to LGBTIs from a specific country? (We do not ask for Country Reports.)

No

Yes. Please describe them.

The country reports by the Foreign Office which are considered one of the most important sources for decision-making by the authorities usually have a small paragraph on the situation of homosexuals within the paragraph on gender-related persecution. It is likely that at least some of the "country guidelines" of the Federal Office have sections on the handling of LGBTI asylum claims but these again are labelled "for internal use" only. The government's statement on the handling of Iranian LGBTI asylum claims (quoted above, Question 6) provides some insight into the Federal Office's policy. It can be assumed that the principles stated here are typical of the handling of LGBTI asylum claims from other countries as well.

- 15) Do you have leading or binding court decisions on LGBTI asylum?

No

Yes. Please provide a brief summary of the case. Provide full citation and attach judgment.

A leading decision in LGBTI cases has been Federal Administrative Court/Bundesverwaltungsgericht, 15. March 1988, C 278.86. Several, highly controversial principles were established in this

decision (the following is based on the summary of the decision in Klaudia Dolk/Andreas Schwantner, "Homosexualität und (Abschiebungs-)schutz in Deutschland", in: Amnesty International, Asyl-Info 7-8/2007):

i) Criminalisation of homosexual activities is not in itself a "targeted intrusion" ("gezielter Eingriff") into the homosexual disposition and as such is not in itself relevant for the asylum definition. As long as such criminal sanctions are aimed at the protection of public morality, for example the protection of public order and decency and the protection of citizens from molestations and insults and as long as there is an urgent public demand for such measures in the respective country, a risk of persecution is not relevant for the asylum definition, unless a risk of targeted intrusions which go beyond criminal prosecution has to be taken into account.

ii) However, criminal prosecution in this context passes the threshold of political persecution if it is "obviously unbearably tough or simply unsuitable under any conceivable aspect for the sanctioning of an offence against public morality".

iii) As a principle it has to be assumed that homosexual activities are often based on an "irreversible" determination, i.e. the asylum-seeker is by his/her "fate" ("schicksalhaft") and inescapably ("unentrinnbar") determined to be homosexual. Only in cases of "latent" homosexuality, i.e. if the respective person can decide according to his/her free will to pursue homosexual activities or not, the asylum-seeker can be reasonably asked to evade persecution by turning towards a heterosexual "lifestyle".

Although the last point suggests that an asylum-seeker's claim to be homosexual in general should not be cast into doubt, it has often been drawn upon by the Federal Office for Migration and Refugees and by courts to ask the applicant/claimant to come up with evidence as to the "extent" of his/her homosexual determination. In several cases asylum-seekers were asked for psychiatric or psycho-medical statements on their homosexuality. Sometimes asylum-seekers brought forward such assessments on their own behalf (or upon advice of their lawyers) in order to provide the evidence deemed necessary by the authorities or the courts (cf. Question 20).

The principles from the Federal Administrative Court's 1988 decision have occasionally been challenged by lower courts. In a recent decision by the Administrative Court of Frankfurt (Oder) (VG Frankfurt/Oder, 11. November 2010, VG 4 K 772/10.A) the notion that criminalization of homosexual activities was not relevant in itself is challenged with recourse to the Qualification Directive, Art. 9 (2)c:

The risk of punishment for the claimant in Cameroon because of homosexual activities is at the same time "persecution" [within the refugee definition of German alien law] and not only common criminal prosecution [...]. "Persecution" according to [the refugee definition in conjunction with Art. 9 (2)c of the Qualification Directive] is, inter alia, "disproportionate or discriminatory prosecution or punishment". The risk of internment in Cameroon because of consensual homosexual intercourse with adults falls under this definition.

Die in Kamerun drohende Bestrafung des Klägers wegen homosexueller Betätigung ist auch "Verfolgung" im Sinne des § 60 Abs. 1 S. 1 AufenthG, und nicht nur gewöhnliche Strafverfolgung, wie sie nach § 60 Abs. 6 AufenthG einer Abschiebung nicht entgegen stünde. "Verfolgung" im Sinne des § 60 Abs. 1 S. 1 AufenthG ist nach § 60 Abs. 1 S. 5 AufenthG i.V.m. Art. 9 Abs. 2 c) Richtlinie 2004/83/EG unter anderem die "unverhältnismäßige oder diskriminierende Strafverfolgung oder

Bestrafung." Eine solche stellt die dem Kläger in Kamerun drohende Inhaftierung wegen einverständlichem homosexuellen Geschlechtsverkehr mit Erwachsenen dar.

A similar argument can be found in a decision by VG München, 30. January 2007, M 21 K 04.51494 (M10835). Several other courts still adhere to the principles from the Federal Administrative Court's 1988 decision, e.g. VG Düsseldorf, 11.3.2009, 5 K 1875/08.A. It is important to note that this was the decision which has led the High Administrative Court of Nordrhein-Westfalen to refer this case to the European Court of Justice for a preliminary ruling (OVG Nordrhein-Westfalen, 23. November 2010, 13 A 1013/09.A). One of the questions referred to the ECJ concerns the Federal Administrative Court's principle on criminalisation of homosexual activities:

(c) Are specific prohibitions for the protection of public order and morals relevant when interpreting and applying Article 10(1)(d) of Directive 2004/83/EC or should homosexual activity be protected in the same way as for heterosexual people?

c) Sind spezielle Verbote zum Schutz der öffentlichen Ordnung und Moral bei Auslegung und Anwendung des Art. 10 Abs. 1 Buchst. d) der Richtlinie 2004/83/EG beachtlich oder ist die homosexuelle Betätigung wie bei einem heterosexuellen Menschen geschützt?

However, the referral to the ECJ was withdrawn later on by the High Administrative Court (Oberverwaltungsgericht Nordrhein-Westfalen, 15 February 2011, 13 A 1013/09.A) after the parties had declared the case as settled. This took place after the claimant's refugee status had been recognized by the Federal Office which based its decision on the fact that the claimant's full name had been made public by the ECJ.

16) Did you find any references to the Yogyakarta Principles¹ and/or to UNHCR's Guidance Note on Refugee Claims Related to Sexual Orientation and Gender Identity² in decisions or case law?

No

Yes. Please specify where you found these references.

¹ Yogyakarta Principles: <http://www.yogyakartaprinciples.org/>

² UNHCR Guidance Note: <http://www.unhcr.org/refworld/docid/48abd5660.html>

Article 4 Qualification Directive: Credibility (of sexual orientation/ gender identity)

17) How is sexual orientation/ gender identity generally established?

According to the feedback we got it is impossible to formulate a general rule for the way credibility is affirmed or denied, this is to a large extent dependent on the asylum-seekers' "performance" but also on the decision-maker's or judge's attitudes and approaches to the subject.

18) Could you describe cases in which credibility of the stated sexual orientation/ gender identity was the reason for denying asylum?

No. Please go to question 19.

Yes. Please answer questions 18A and 18B.

18A) If the stated sexual orientation or gender identity was not believed, what was the reason given for this?

As with any other asylum applications the main arguments to challenge the credibility of an asylum-seekers statement are implausibility and inconsistency. Two examples:

Decisions and/or case law. Good/bad practices.

The Administrative Court of Frankfurt (Oder) (VG Frankfurt/Oder, 11. November 2010, VG 4 K 772/10.A) summarizes the credibility aspects of the Federal Office for Migration and Refugee's decision as such:

*The applicants' claim to have engaged in homosexual activities in Cameroon is not credible as this would have meant to expose himself to danger. His description of his life as a homosexual in Cameroon is not precise enough.
[The Administrative Court disagrees on both points.]*

The Administrative court of Sigmaringen (VG Sigmaringen, 26.04.2010, A 1 K 1911/09) quotes from a Federal Office for Migration and Refugee's decision:

The applicant's (a Sunni Arab from Mosul/Iraq) statement is implausible: if his homosexual activities had indeed become known and he would have been persecuted he would also have been convicted under Section 400 of the Iraqi Penal Code. [The Administrative Court disagrees.]

18B) Which patterns - if any - do you perceive in rejecting LGBTI cases based on credibility?

No such patterns were discernible in case law or were reported.

³ Qualification Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>

19) Is supporting evidence required and/or accepted to prove sexual orientation/ gender identity, apart from the declaration of the person concerned?

No.

Yes. What does the supporting evidence include (e.g. witness statements from other people than the applicant, membership of LGBTI organisations, declarations of LGBTI organisations, other)?

Witness statements are generally accepted.

Decisions and/or case law. Good/bad practices

Witness statement and a statement by a psychotherapist were accepted as supporting evidence in a decision by Administrative Court Potsdam, 11. September 2006, 9 K 189/03.A (M17511)

20) Is medical/ psychological/ psychiatric/ sexological evidence requested or accepted in proving the sexual orientation?

No

Yes

a) Who is considered a 'medical expert' in this respect?

Cf. Question 15, statements by psychologists, psychiatrists or other medical experts are sometimes asked for or provided by asylum-seekers/claimants on their own initiative (as this sometimes seems the only way to convince the courts, especially in cases when the asylum-seeker did not talk about his/her homosexuality in the initial asylum procedure and claims to be homosexual at a later stage). Both UNHCR and Amnesty International comment that the need to obtain such expert opinions could be ascribed in first place to the notion of "irreversibility" as defined in the landmark decision of the Federal Administrative Court of 15 March 1988. This issue seems to have been the main concern of such opinions, although experts asked to submit their opinions were often hesitant to come to definite conclusions on the issue of irreversibility:

A "sexual medical" expert opinion (sexualmedizinisches Gutachten) submitted in a trial at Administrative Court of Frankfurt/Oder (VG Frankfurt/Oder) in 2003 may serve as an example: The expert is a specialist in psychotherapeutic medicine and professor at the Charité university hospital of Berlin. An excerpt of this expert opinion was passed on to Informationsverbund in an anonymised version. This excerpt consists of a 22-page "digression" on the methodological difficulties in determining sexual orientation and on the interdependency of biological (pre-)disposition with psychological and socio-cultural criteria which according to the author are equally relevant for the formation of someone's sexual "structure". This excerpt shows that (in this case, at least) the expert went to lengths to emphasise that a number of factors have to be considered in order to make a statement on someone's sexual orientation and that such statements could hardly be taken as definite (cf. also below, opinion cited by Administrative Court Munich/München in its decision of 20 January 2004).

In contrast, a paper by Andreas Schwanter/Amnesty International also refers to an expert opinion submitted in 1998 which is quoted from in a decision by the High Administrative Court of Bremen of 9 February 2000 - 2 A 441/98.A: In his statement the expert referred to "Kinsey et al. (1948)" and a scale used by Kinsey to determine people's homo/heterosexuality. This scale ranges from 0, meaning exclusively heterosexual, to 6, meaning exclusively homosexual. In the case at hand the expert concluded that the correct classification would be "6" because of "the claimant's biography

and the practices described” (“...anhand seiner Biographie und den Schilderungen der Praktiken”). As only few details have become known about the content of expert opinions it can neither be confirmed nor refuted whether similar opinions are (still) common or not.

b) What does the examination include?

In a newspaper article from Süddeutsche Zeitung from 16. January 2009 Martin Dannecker, professor for sexual sciences and founding member of the former Frankfurt Institute for Sexual Sciences, is quoted as having “regularly” written expert opinions on the perceived homosexuality of asylum-seekers (the case at hand is one of a Nigerian homosexual man who is portrayed in this article; the medical statement was actually paid for by Amnesty International). According to this article his statements were based on “one or two [interview] sessions”. Source:

<http://www.sueddeutsche.de/politik/weltweit-verfolgt-homosexuelle-toedliche-kuesse-1.488972>

c) Does it include any inhuman/degrading element? Please explain.

No information on inhuman or degrading treatment during such examinations has become known.

d) What weight is given to the ‘expert’s’ opinion?

In principle, the court has to reach a conclusion on the case at hand by considering all the evidence that was presented to him. Expert opinions therefore can only be one out of several aspects to be considered by the judge. Nevertheless, they can be of particular importance if they support the claimant's credibility.

Decisions and/or case law. Good/bad practices

An example (rather than good or bad practice) for the role that expert opinions can play in the procedure: Administrative Court Wiesbaden (VG Wiesbaden, 24. September 2008 - 6 K 478/08. WLA(2)); in this case of an Iranian asylum-seeker an expert opinion was used as evidence to support the claimant's credibility which the authorities had doubted:

“The claimant explained in his interview at the Federal Office that he first had homosexual contacts during his military service. [...] The court does not doubt these statements, particularly as the claimant made identical statements when questioned by the clinical centre of the university of [...] and the sexological-psychological expert opinion concludes that the claimant has an irreversible homosexual disposition. [...]”

“Der Kläger hat im Rahmen seiner Anhörung vor dem Bundesamt erklärt, erste homosexuelle Kontakte habe er während seiner Wehrdienstzeit gehabt. [...] Das Gericht hat keine Zweifel an der Richtigkeit diese Aussagen, zumal der Kläger gegenüber dem Klinikum der ... Universität gleichlautende Angaben machte und das erstellte sexualwissenschaftlich-psychologische Gutachten zu dem Ergebnis kommt, bei dem Kläger liege ein irreversible homosexuelle Veranlagung vor. [...]”

In a decision by the Administrative Court Munich (VG München 20. January 2004, M 9 K 03.51197) the value of such expert opinions is negated:

“The expert opinion obtained in another procedure [...] only relies on the statements of the “test person” (proband) to reach the conclusion that the “formulation of an irreversible homosexual personality cannot be answered in a concrete and concluding manner from a

psychiatric perspective”. It does not need an expert opinion to come to such an assessment , this assessment can and has to be undertaken by the court in the context of the credibility test of the claimant”

“Das in einem anderen Verfahren eingeholte Gutachten (Au 8 K 98.31067) zieht im Grunde ebenfalls nur die Angaben des Probanden heran, um zum Ergebnis zu kommen, dass sich "die Formulierung einer unabänderlichen homosexuellen Persönlichkeit aus psychiatrischer Sicht nicht konkret und abschließend beantworten" lässt. Für eine solche Wertung bedarf es keines Gutachtens, diese Wertung kann und muss durch das Gericht im Rahmen der Glaubwürdigkeitsprüfung des Klägers durchgeführt werden.”

21) Is medical/ psychological/ psychiatric/ sexological evidence requested or accepted in proving the gender identity?

No (*i.e. no such cases were reported*)

Yes

a) Who is considered a ‘medical expert’ in this respect?

b) What does the examination include?

c) Does it include any inhuman/degrading element? Please explain.

d) What weight is given to the ‘expert’s’ opinion?

Decisions and/or case law. Good/bad practices

22) Are explicit questions asked about sexual activities?

No

Yes. Please describe them and include the source of the information.

They may be asked in the course of interviews at the Federal Office or during sessions which take place for the production of expert opinions (cf. above, question 20, reference to “practices described” in an expert opinion submitted in 1998), but case law does not present indications that this would be a common practice.

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

Cf. Question 22.

24) Are questions asked with respect to familiarity with gay scenes or membership of LGBTI groups in the country of origin or in the country where asylum is claimed?

No

Yes. Please describe decisions and/or case law in which such questions were relevant.

Cf. above, question 18A, description of gay scene in Douala/Cameroon was asked for both by the Federal Office for Migration and Refugees and by the court; Administrative Court of Frankfurt (Oder) (VG Frankfurt/Oder, 11. November 2010, VG 4 K 772/10.A)

25) Did you find cases in which the sexual orientation/ gender identity was not believed because the applicant was married or had children?

No Yes. Decisions and/or case law. Good/bad practices

Cf. above, question 3c, VG Ansbach, 21 August 2008, AN 18 K 08.30201

The fact that the claimant was married in Holland [between a first application in Germany in 1997 and the second one in 2007] and the existence of a child which resulted from this marriage make it clear, that the claimant is not to a sufficient degree determined by his homosexuality – which may exist next to the heterosexuality – in order to fulfill the criteria of belonging to a “certain social group” within the definition of Art. 10 (1) d of the Qualification Directive.

Auch die in Holland von ihm mit einer Frau geschlossenen Ehe und die Existenz eines aus dieser Ehe hervorgegangenen Kindes zeigen deutlich, dass der Kläger eben nicht in erforderlichem Umfange durch seine - möglicherweise neben der Heterosexualität vorhandene - Homosexualität in einem die Zuordnung zu einer "bestimmten sozialen Gruppe" im Sinne des Art. 10 Abs. 1 d der Qualifikationsrichtlinie fordernden Maße geprägt ist.

Administrative Court Bremen, 28.04.06 – 7 K 632/05.A; Iraq:

The (claimant's) assertion according to which an outing of his homosexual predisposition had only been possible for him following his departure from Iraq (him being married with two daughters), when this disposition became clear to him in Germany, is absolutely implausible and obviously “made-to-measure” the trial at hand.

Die Behauptung, ein “Outing” seiner homosexuellen Veranlagung sei ihm als verheirateten Ehemann und Vater zweier Töchter erst nach seiner Ausreise aus dem Irak möglich gewesen, als ihm diese Veranlagung in Deutschland bewußt geworden sei, ist völlig unglaubhaft und offenbar auf das vorliegende Verfahren zugeschnitten.

It has to be noted that the Administrative Court Bremen in this decision does not give any further explanation as to why it considers the claimant's statement to be “absolutely implausible”. This is the more remarkable as it is initially recorded in the decision that the claimant was not present at the trial so there was no opportunity for the court to gain a personal impression on which it could base this opinion.

Article 4-3 Qualification Directive; Article 8-2 Procedures Directive: Country of origin information

26) Do decision makers/ courts /tribunals have effective access to Country of Origin Information (COI) concerning the position of LGBTI asylum seekers?

No Yes

No specialised source for LGBTI-related COI has been known of, but decision-makers and courts have unrestricted access to the Federal Office of Migration and Refugees' database (<https://milo.bamf.de>). The Federal Office also has a COI department which produces background papers and analyses on topics and on countries (most of which are "for internal use" only). However, it has to be noted that both the Federal Office and most of the courts do not always make proper use of these (or other publicly available) COI sources but consider only a limited body of evidence (i.e. the Foreign Office's report and a few other reports and expert opinions besides). Material in foreign languages is generally ignored, particularly by the courts.

27) Does your country have national COI researchers?

No. Please go to question 29

Yes. Are they trained in investigating LGBTI issues? No Yes

Please give details.

28) Does the COI from these national researchers report that state protection is available for LGBTIs?

No

Yes. Could you describe this information?

29) Can the legal representative of the applicant consult and instruct an independent COI expert?

No

Yes

a) Can the expert draft a report? No Yes

b) How is the expert paid for?

Basically, it is up to the court to decide which evidence it considers relevant and whether it deems it necessary to gain further evidence. To do this it may ask competent institutions or persons to submit expert opinions which could relate to any relevant aspect of the case (e.g. medical opinions as well as COI in asylum cases). The lawyer can formally request the court to do so by bringing forward a motion to take evidence (Beweisantrag). In this case the court covers the costs. However, if the

court decides to reject a motion to take evidence it is highly difficult to take action against this decision.

In rare cases lawyers ask experts to submit an opinion on their own initiative. Usually, the client or the lawyer would have to pay for these opinions (unless an NGO or other “sponsor” covers the costs).

c) What weight is given to the expert’s report?

Cf. answer to question 29: In most cases an expert opinion is considered an important piece of evidence, but in the end it is the court which decides how much weight it places on it. The underlying principle in the German legal system is called “free evaluation of evidence” (freie Beweiswürdigung), the legal definition of which says that the court has to base its decision “on its free conviction formed from the overall result of the proceedings” (Section 108, Code of Administrative Court Procedure Section). This principle implies that there are no statutory rules which give superiority to one kind of evidence over the other.

30) How is the available COI concerning the position of LGBTI asylum seekers dealt with by decision making authorities, and by judges?

It is impossible to give a summary answer as the process of COI collection and assessment is usually not made transparent in the written decisions or judgments: Decisions by the Federal Office are based on (internal) country guidelines and the Office also uses text blocks on the general COI situation but decision-makers can consider further evidence or ask the COI department at the Federal Office for advice. However, whether such additional COI material has been considered and how it has been evaluated is not discussed in the written reasons for the decision. Court decisions show considerable variety in terms of use and presentation of COI: Sometimes a whole range of sources is referred to and analysed in the decisions. However, it has to be noted that use of non-German language material is still an exception even in those cases. In many cases courts would just refer to one or two sources (usually German Foreign Office) and otherwise just declare that they have additionally taken account of all the material mentioned on the court's list of COI (“Erkenntnismittelliste”).

31) Do your decision makers or courts consider the reasons why reports of persecution may be unavailable in some countries?

No

Yes. Please give examples.

Considerations concerning the availability or unavailability of COI may take place in individual decisions but not prominently and certainly not systematically.

32) Sometimes a lack of information on lesbian/ bisexual/ trans/ intersex people or a lack of criminal sanctions against same-sex conduct by women or against trans/intersex individuals is regarded as a lack of evidence of persecution. Did you find examples of this?

No Yes. Please describe the examples.

Cf. below, questions 36 A and 44: Lack of information on persecution sometimes leads to the conclusion that there is a certain tolerance towards a gay/lesbian scene in certain countries of origin (e.g. with regard to Northern African countries).

33) Sometimes general COI which is not relevant for the situation of the LGBTI concerned is used as a basis for a decision (e.g. information on gay men used wrongly to assess the risk for lesbians or trans people; information on heterosexual women's status used for lesbians). Did you find examples of this?

No Yes. Please describe the examples.

Article 5 Qualification Directive; Article 32 Procedures Directive: Coming-out late

34) Does it occur that LGBTIs who have “come out” after leaving the country of origin, are recognised as refugees or as being in need of subsidiary protection?

No

Yes. Please explain with decisions and/or case law. Good/bad practices

In principle it is possible that a “coming out” after leaving the country of origin would be regarded as an activity or reason arising sur place and therefore not be considered relevant for refugee status (the German law has a similar principle as the one to be found in Art. 5 (3) Qualification Directive in Section 28 Asylum Procedure Act). In such cases only subsidiary protection or a status on humanitarian grounds could be granted. However, no incidence of such a constellation could be found in recent case law.

On the contrary, the Administrative Court Potsdam in a decision of 19 January 2010 - 11 K 397/06.A – asserted (without further discussion) that a claim to political asylum or refugee status which was based on the grounds of being a member of “the group of same-sex orientated humans” (“Gruppe der gleichgeschlechtlich orientierten Menschen”) could not be precluded under Section 28 Asylum Procedure Act. In this case refugee status was granted to a lesbian woman from Cameroon who had based her asylum claim (in 2005) on a risk of harrassment and attacks from family members of her deceased (male) partner in Cameroon. Her “coming out” apparently took place later on and the court was notified in 2009 that the claimant had entered a same-sex marriage (Lebenspartnerschaft).

The Administrative Court Hamburg decided on 18 December 2006 (21 A 311/05) that revocation of refugee status was illegal in the case of an Iraqi homosexual man who had been granted refugee status in 1999 on different grounds. After the Federal Office had issued the revocation of refugee status im 2004 (on the grounds that the former risk of persecution could be omitted), the claimant had notified the court of his “coming out” and of his same-sex marriage (Lebenspartnerschaft) which had taken place in the meantime.

35) Does it occur that LGBTIs who – for instance out of fear or shame – did not speak about their sexual orientation or gender identity immediately, but do so later (in a later phase of their first procedure, or in a repeat procedure), are recognised?

No

Yes. Please explain with decisions and/or case law. Good/bad practices

Recognition of refugee status is not excluded in such cases (cf. question 34) but statements which are made at later stages of procedures or in repeat procedures are likely to be met with heightened suspicion by authorities and courts. If no convincing explanation for the delay is brought forward such statements may be dismissed as “upgraded submission” (“gesteigertes Vorbringen”). However, this is a general principle of asylum procedures and not specific to the LGBTI context.

The Administrative Court Cologne/Köln, 8 September 2006 - 18 K 9030/03.A – decided that the fact that a statement had been made more than three years after arrival in Germany was not disqualifying the claimant from refugee status:

The claimant has explained in a credible manner that he could only decide to admit to his homosexuality publicly (“to the outside”) after a lengthy inner process and a difficult inner struggle, the end of which was marked by the finding of his own sexual identity.

Der Kläger hat dem Gericht glaubhaft dargelegt, dass er sich erst nach einem langen inneren Prozess und einem schwierigen inneren Kampf, dessen Abschluss das Finden seiner eigenen sexuellen Identität gewesen sei, habe entschließen können, sich nach außen zu seiner Homosexualität zu bekennen.

Article 6 Qualification Directive: Persecution by the state

36) Are LGBTI applicants granted asylum if in their country of origin homosexual acts and/or identity is criminalised (by explicit ‘sodomy laws’ or by other criminal law provisions)?

No. Please go to question 37.

Yes. Proceed with question 36A.

BUT cf. above, question 15: According to the Federal Administrative Court's 1988 decision criminalisation as such is not a sufficient reason for granting asylum. On this principle only excessive punishment (such as the death penalty or corporal punishment in Iran) are considered to be relevant. However, some courts disagree and the question has been referred to the ECJ (albeit withdrawn later on, see above).

36A) Is it required that those criminal law provisions are actually enforced, or is the existence of those criminal law provisions sufficient? Please provide further information. Decisions and/or case law. Good/bad practices

Examples from case law include:

- *Administrative Court Potsdam, 11 September 2006 - 9 K 189/03.A: The court notes that inhuman and degrading punishments (including cases of stoning reported in 2002) have been carried out in Sudan. However, the court does not seem to regard this application of Sharia law in practice as an indispensable precondition for refugee status as it goes on to explain that the risk of inhuman and degrading punishment (Art. 9 (1) a Qualification directive) and the risk of disproportionate and discriminatory prosecution (Art. 9 (2) c Qualification Directive) are relevant for the granting of refugee status.*

- *Administrative Court Frankfurt/Oder, 11 November 2010, VG 4 K 772/10.A, notes that arrests and convictions of homosexuals are rare but do take place in Cameroon. These arrests could take place on the basis of denunciations or defamations. Therefore the court concludes that the claimant would face a considerable risk of arrest upon return (even if his statement concerning an alleged former arrest at the Cameroon gendarmerie is not considered credible). The court thus overrules a decision by the Federal Office of 13 July 2010, 5377307-262: The Federal Office had dismissed the applicant's statement summarily as implausible and had expressed strong doubts that the applicant was homosexual at all.*

UNHCR notes that in asylum procedures at the Federal Office it is sometimes argued by the authorities that lack of enforcement of criminal sanctions against homosexual conduct in a country of origin could be regarded as a lack of evidence of persecution. This, however, seems to depend strongly on the country of origin and on the individual case.

- *In a similar manner the High Administrative Court Berlin-Brandenburg, 04 February 2010 - 3 S 120.09 – refused to grant a subsidiary form of protection to a Moroccan citizen who claimed to face criminal persecution upon return because he had been engaged in a same-sex partnership (Lebenspartnerschaft) in Germany which, however, had been dissolved in 2009 (the claimant had asked for a prolongation of his residence permit after the dissolving, so this was not an asylum procedure). The High Administrative Court refers to the country report of the Foreign Office of October 2009, according to which the practice of the Moroccan authorities in prosecuting same-sex relationships was “rather pragmatic” (“eher pragmatisch”). Hence a risk of serious harm had not been established according to the court.*

Article 6 Qualification Directive: Persecution by non-state actors

37) Do you have examples of LGBTIs who have suffered or feared persecution or serious harm inflicted upon them by non-state actors?

- No. Please go to question 38,
- Yes. Proceed with questions 37A and 37B.

UNHCR notes that it is actually in the majority of LGBTI related asylum procedures at the Federal Office that claims are motivated by a perceived risk of persecution by non-state actors.

37A) Did they get protection?

Yes

No. Do you know what were the reasons to consider that they did not have a well founded fear of future persecution or serious harm?

Cf. question 6: Persecution by non-state actors has been introduced into German law as a valid reason for refugee status in 2005 and has been increasingly applied since then both by the Federal Office for Migration and Refugees and by the courts (particularly in cases of Iraqi asylum-seekers). Examples of granting of refugee status for homosexuals because of persecution by non-state actors include

- *Administrative Court Sigmaringen, 26 April 2010, A 1 K 1911/09 (Iraq)*
- *Administrative Court Chemnitz, 11 July 2008, A 2 K 304/06 (Afghanistan)*
- *Administrative Court Hamburg, 18 December 2006, 21 A 311/05 (Iraq)*

However, in several cases a risk of persecution by non-state actors was considered insufficient for the granting of refugee status as courts pointed to an internal relocation alternative, e.g. Administrative Court Berlin, 27.03.2007 - 38 X 79.05- (Bangladesh), quoted below, question 40A.

37B) Did you find that persecution by non-state actors was relatively more common in lesbian or transgender/ intersex claims?

No Yes. Decisions and/or case law. Good/bad practices

Neither to be confirmed or refuted due to the small number of lesbian or transgender/intersex claims which were available for survey.

Article 7-2 Qualification Directive: State protection + effective legal system

38) Are LGBTI asylum seekers who fled persecution from non-state actors required to have sought protection from the police or other authorities prior to fleeing their country of origin in order to prove that the authorities are unable or unwilling to provide this protection?

No. Please go to question 39

Yes. Proceed with questions 38A, B and C.

If availability or non-availability of state protection is an issue, then it is discussed on the basis of available COI rather than on the basis of the applicant's/claimant's personal experience with state authorities. However, it is possible that decision-makers conclude from their analysis of COI that state protection would have been available at the time when acts of persecution by non-state actors allegedly took place and therefore would also be available in case of a return to the country of origin (see question 38B).

38A) Is seeking protection from the police or other authorities also expected when the LGBTI asylum seeker came from a country that threatens homosexuality, homosexual acts (and/or transgender identity) with criminal laws?

No Yes. Please give details. Decisions and/or case law. Good/bad practices.

38B) Is seeking protection from the police also expected when the LGBTI asylum seeker came from a country where the police has a reputation of being homophobic, transphobic, etc.?

No Yes. Please give details. Decisions and/or case law.

Generally this is not expected, but one exception could be found in a case of a transgender claimant from Venezuela (Administrative Court Dresden, 15 May 2009, A1 K 30157/07): One reason for the Federal Office's rejection of the asylum application was that the claimant should have reported threats from a criminal gang to the police. In spite of the applicant's claim that he had been frequently subjected to degrading treatment by state authorities and that he could not get protection from the police as they were corrupt and cooperating with the criminal gang in question, the court agrees with the Federal Office's assumption. It should be added, though, that both for the Federal Office and the court the main reasons for the rejection of the asylum claim were significant doubts concerning the applicant's/claimant's credibility.

38C) Is the requirement to seek protection dependent on country of origin information showing that protection would generally be available for LGBTIs?

No Yes. Decisions and/or case law. Good/bad practices

39) Do your decision makers and courts acknowledge that the existence of criminal sanctions against LGBTIs, even if not enforced, contribute to a homophobic atmosphere in which persecution by state and/ or non-state actors can flourish?

No

Yes. Could you give examples?

Article 8 Qualification Directive: Internal relocation

40) Has an internal relocation alternative been held available for LGBTI asylum seekers?

No. Please go to question 41.

Yes. Please answer questions 40A and 40B.

40A) Could you give examples of reasoning to consider places or situations in the country of origin a good relocation alternative?

- *Administrative Court Berlin, 27.03.2007 - 38 X 79.05: The claimant is from Bangladesh. The German Foreign Office was able to confirm that an inofficial “village court” had sentenced the claimant and his cousin to death in 1997 because of homosexual activities. The court is also convinced that authorities in Bangladesh are unwilling to provide state protection against punishments carried out under the supervision of village courts. Nevertheless the court concludes that big cities such as Dhaka and Chittagong had provided an internal relocation alternative both in 1997 (when the claimant left the country) and at present (in 2007). The court's assumption is based on several statements by the German Foreign Office according to which there are no legal obstacles to someone's taking up residence in other parts of Bangladesh and that it was possible to make a living there on a level which could be considered reasonable “in local circumstances”. Only prominent persons would face a risk of being recognised by third persons in a city like Dhaka. In addition, it was not conceivable in the court's opinion that he would meet people from his village let alone being recognised by them as nine years had gone by since the verdict of the village court.*

40B) If so, was discretion reasoning involved in this matter, i.e. could the LGBTI be open about her/his sexual orientation or gender identity in the relocation alternative or was he/she expected to hide there?

No Yes. Decisions and/or case law. Good/bad practices

Cf. below, question 44: The discretion argument is employed particularly with regard to North African countries in connection with the assumption that (discreet) homosexual activities were tolerated in the big cities, e.g. Administrative Court Düsseldorf 14.1.2010 - 11 K 6778/09:

In this context it has to be taken into account that in the present situation - as it is described in statements and other information on the country - homosexuality is tolerated in Morocco as long as it is not acted out in public. Hence homosexuals do not face risk of persecution if they treat their sexual life discreetly, as it is also common, by the way, for heterosexuals in Islamic countries [The court goes on to explain that therefore an internal protection alternative according to Art. 8 Qualification Directive was available for the claimant].

In dem Zusammenhang ist einzustellen, dass nach der aktuellen Auskunfts- und Erkenntnislage Homosexualität in Marokko geduldet wird, solange sie nicht öffentlich gelebt wird, so dass dort Homosexuelle bei diskreter Behandlung ihres Sexuallebens, wie dies im Übrigen in islamischen Ländern auch für Heterosexuelle üblich ist, keine Gefahr von Verfolgung besteht.

Article 9 Qualification Directive: Acts of persecution

41) Could you describe what kind of persecution or serious harm LGBTI asylum seekers who fled to your country experienced in their country of origin (physical violence, (“corrective”) rape or

other sexual violence, detention, other criminal penalties, execution, honour killings, medical abuse (as a “cure”), harassment, threats, blackmail, intimidation, forced marriages, other psychological violence, no access to education, health care, housing, welfare, employment, judiciary, and so on...)?

This is impossible to summarize because of the diversity of the cases under survey. UNHCR notes that many LGBTI claims were motivated by a perceived risk of persecution from non-state actors. The survey of case-law also suggests that applicants frequently claim that they have been facing threats from family members or other non-state actors after their sexual orientation became known in their communities.

41A) Which of these experiences have been recognised as persecution or serious harm, and which were found to be insufficient to constitute persecution or discrimination that did amount to persecution?

No generalised answer can be given here, as this depends on the country of origin and on the question of whether the authorities or the court find the applicant's/claimant's statements to be plausible or not. Accordingly, acts of harassment or intimidation which have not yet led to more serious consequences may be considered sufficient in a country like Iraq (e.g. Administrative Court Sigmaringen, 26 April 2010, A 1 K 1911/09: The claimant had been threatened by his uncle and by an Islamic militia).

41B) Please describe differences in the nature of persecution experienced by men and women respectively, due to their gender (in all of the categories of LGBTI).

42) Is attention being paid to non-conformity to heterosexual gender roles and social roles in the decisions and/or case law?

No

Yes. Please give examples.

Cf. above, question 15, and below, question 44: The matter of conformity is an important aspect of legal debate following the 1988 landmark decision by the Federal Administrative Court and also of the “discretion” argument.

Article 9 Qualification Directive: Discrimination /persecution

43) Are LGBTI asylum seekers refused because the harm/ persecution they experienced is labelled as discrimination instead of persecution?

No

Yes. Please give examples. Decisions and/or case law. Good and bad practices.

The focus of legal debate lies on the question of whether a certain risk amounts to persecution or not. No occurrence could be found that authorities or courts tried to introduce “discrimination” as a legal category which would be situated somewhere between persecution and “non-persecution”.

Article 9-1-a,b, f /10-1-d Qualification Directive: Discretion (upon return)

44) Decision makers sometimes argue that LGBTI people will not be persecuted as long as they act discreetly or hide their sexual orientation or gender identity to avoid persecution (‘go home and be discrete’). Do the asylum authorities in your country use this reasoning?

No

Yes. Could you provide further information and describe decisions and/or case law in which this happens? Good and bad practices.

On the authorities' position cf. above, question 6: The German government in its comments on the decision-making concerning Iranian homosexuals (response to a parliamentary query from 18 May 2010, 17/1505) dismisses this argument, claiming that only a prognosis on the future conduct of the applicant – i.e. if the applicant has to be expected to engage in homosexual activities after his/her return – is decisive:

It [the outcome of the asylum procedure] depends on whether the asylum-seeker will behave in a manner which will lead to persecution after his/her return (...). It is irrelevant whether he/she may be reasonably expected to behave in an alternative manner.

Es kommt darauf an, ob sich der Asylsuchende nach Rückkehr in verfolgungsauslösender Weise verhalten wird (...). Auf die Zumutbarkeit eines alternativen Verhaltens kommt es dabei nicht an.

However, as mentioned above, the government also argues that it has to be checked whether there is “a relevant degree of probability” that homosexual activities will become known to the country of origin's authorities (“...mit der erforderlichen Wahrscheinlichkeit bekannt werden”).

Case law is divided on the subject. The “discretion argument” is still common particularly with regard to North African countries like Egypt, Algeria and Morocco:

- *Administrative Court Trier, 9.9.2010 – 1 L 928/10.TR – quoted here as the most recent example, the claimant is from Algeria:*

“The applicant can be expected to live (i.e. practice) his orientation without attracting attention. There is a certain tolerance for this in big cities, in which a homosexual scene has established itself in a discreet manner (...)”

Dem Antragsteller ist daher zuzumuten, seine Veranlagung ohne öffentliche Bemerkbarkeit zu leben. Denn hierfür besteht eine gewisse Toleranz in Großstädten, in denen sich eine homosexuelle Szene in diskreter Weise etabliert hat (...)

Similar arguments can be found in:

- *Administrative Court Düsseldorf 14.1.2010 - 11 K 6778/09 (Morocco)*
- *Administrative Court Düsseldorf 27.8.2009 – 11 K 1003/09.A*
- *Administrative Court Düsseldorf 11.3.2009 - 5 K 1875/08.A (Iran: No considerable risk of persecution “as long as they [homosexuals] practice same-sex sexual life covertly and as long as they have not been drawn to the attention of the Iranian authorities”*

“...soweit sie ihr gleichgeschlechtliches Sexualleben im Verborgenen praktizieren und nicht bereits die Aufmerksamkeit der iranischen Strafverfolgungsbehörden auf sich gezogen haben.”

- *Administrative Court Regensburg, 15.09.08 - RN 8 K 08.30020 (Algeria)*
- *Administrative Court Düsseldorf 21.02.08 - 11 K 2432/07.A (Egypt)*
- *Administrative Court Bremen, 28.04.06 – 7 K 632/05.A; Iraq: The court cites an expert opinion according to which homosexuals would “keep a low profile” in their own interest. This argument is only employed as an additional one, though, while the main reason for the rejection of the appeal is that the court considers the claimant's statements to be “absolutely implausible” (cf. above, question 25)).*

Other courts disagree on the grounds that it was principally unacceptable to ask a claimant to keep his/her sexual identity secret, e.g.

- *Administrative Court Frankfurt/Oder, 11. November 2010, VG 4 K 772/10.A*
- *Administrative Court Chemnitz (on male homosexual from Afghanistan), 11. July 2008, A 2 K 304/06, quoted above, question 6*
- *Administrative Court Neustadt/Weinstraße, 8 September 2008, 3 K 753/07.NW.*

An unusually fierce rejection of the discretion argument has been brought forward by the Administrative Court Munich/München (30. Januar 2007 - M 21 K 04.51404 -) in a case of a Nigerian homosexual man:

As far as the expression of homosexual sexuality is concerned this is principally not restricted by any legal measures or discriminations, unless the rights of vulnerable persons are affected which are protected by section 174 and the following sections of the Penal Code (e.g. persons under someone's care, children and youth, and the prohibition to enforce sexual intercourse by violent means).

By contrast, the Nigerian legal system punishes that which is taken for granted in Germany with harsh penalties (...). Basically, this means that Nigerian legal opinion punishes the fact that someone is homosexual and admits to this fact rather than the fact that rights of other people which are worthy of protection would be affected (as it is the case in the German legal system).

This represents an act of persecution under Art. 9 of the Qualification Directive, namely prosecution or punishment, which is disproportionate or discriminatory, within the meaning of Art. 9 (2) c Qualification Directive. This is because according to European/German legal opinion prosecution is disproportionate and discriminatory, if it pertains to a natural characteristic of a human being who does nothing else but live his life as he wants. Therefore such prosecution violates his inalienable human rights. (...)

The court does not share the opinion of the Administrative Court Düsseldorf, according to which the right to sexual self-determination is not unconditionally protected by the right to asylum, but only within the limits of moral law [i.e. Sittengesetz, according to Art. 2 of the German constitution], and the same was true for Art. 8 ECHR, and [according to the Administrative Court Düsseldorf] a homosexual could be expected not to make his orientation and activities become known to the outside world but to constrict these to the sphere of his closest personal environment.

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

Soweit es um das Ausleben homosexueller Sexualität geht, unterliegt diese grundsätzlich weder gesetzlichen Einschränkungen [...] noch Diskriminierungen, es sei denn, es wird in die Rechte schutzwürdiger Dritter eingegriffen, die strafrechtlich durch die §§ 174 ff. StGB geschützt sind (z.B. Schutzbefohlene, Kinder und Jugendliche, sowie das Verbot, mit Gewalt sexuellen Verkehr zu erzwingen).

Im Gegensatz dazu bestraft die nigerianische Rechtsordnung das, was in Deutschland selbstverständlich ist, mit sehr hohen Strafen (...). Bestraft wird damit im Grunde nach nigerianischer Rechtsauffassung bereits letztendlich die Tatsache, dass jemand homosexuell ist und sich dazu bekennt, und nicht, wie in der deutschen Rechtsordnung, die Tatsache, dass in schützenswerte Rechte Dritter eingegriffen wird.

Damit liegt eine Verfolgungshandlung im Sinne des Art. 9 Qualifikationsrichtlinie vor, und zwar im Sinne einer unverhältnismäßigen und diskriminierenden Strafverfolgung oder Bestrafung nach Art. 9 Abs. 2 c Qualifikationsrichtlinie. Denn nach europäisch/deutscher Rechtsauffassung ist eine Strafverfolgung, die an eine natürliche Ausprägung eines Menschen anknüpft und der weiter nichts tut, als so zu leben, wie er möchte, unverhältnismäßig und diskriminierend und verletzt damit dessen unveräußerlichen Menschenrechte. (...)

Das Gericht teilt nicht die Auffassung des VG Düsseldorf (...), dass der asylrechtliche Schutz des Rechts auf sexuelle Selbstbestimmung nicht uneingeschränkt gilt, sondern nur in den Schranken des Sittengesetzes gewährleistet sei und gleiches gelte, wenn man Art. 8 EMRK beachte, und dass es somit einem Homosexuellen zugemutet werden könne, seine homosexuelle Veranlagung und Betätigung nicht nach außen hin bekannt werden zu lassen, sondern auf den Bereich seines engsten persönlichen Umfelds zu beschränken.

Das Gericht gewährt dem Kläger Schutz nach § 60 Abs. 1 AufenthG, weil er sich auf die Wahrnehmung eines Menschenrechts auf Freientfaltung seiner Persönlichkeit berufen kann, das nach europäisch-deutscher Rechtsauffassung universell gilt und gerade nicht im Hinblick auf die Rechtsordnungen anderer Länder eingeschränkt werden darf. Denn wenn man zulässt, dass der Schutz von Menschenrechten sich in Deutschland danach zu richten hat, was in anderen Ländern Praxis ist, dann landet man unweigerlich in Guantanamo als besonderen eklatanten Beispiel für die Verletzung grundlegender Menschenrechte durch ein Land, das sich als demokratisch und zivilisiert betrachtet.

The arguments of Administrative Court München have been rejected in turn by the Administrative Court Düsseldorf in its decision of 21 February 2008 (cf. above). A comment on the dispute between the two courts can be found here:

Klaus Dienelt, "Vermeidungsverhalten zur Abwendung von Verfolgung - Vereinbarkeit mit der Qualifikationsrichtlinie": <http://www.migrationsrecht.net/nachrichten-asylrecht/1178-eu-qualifikationsrichtlinie-rl-200483eg-religion-verfolgung.html>

Article 10-1-d Qualification Directive; Article 37-38 Procedure Directive: Implementation

45) Does your law or practice recognise explicitly that people who flee because of their sexual orientation can belong to a particular social group?

No

Yes. Are there any differences between L, G and B applicants, and if so, what differences?

Cf. above, question 6 – there is no explicit reference to sexual orientation in law. The authorities' approach as described above shows that they are hesitant to generally subsume sexual orientation under the social group category. Instead, they argue that the individual sexual identity is decisive.

Courts seem to be divided on the issue with some referring explicitly to the social group category and others apparently employing it without discussing the matter (cf. question 6).

46) Does your law or practice recognise explicitly that people who flee because of their gender identity can belong to a particular social group?

No. Does your country have any other policy that provides protection to transgender asylum seekers?

Yes. If there is explicit policy or legislation, please give a translation into English (French or German).

Excerpt Section 60, German Residence Act (Aufenthaltsgesetz):

When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group.

(English translation of the German Residence Act available at <http://www.iuscomp.org/gla/statutes/AufenthG.htm>)

Auszug § 60 Aufenthaltsgesetz (AufenthG):

Eine Verfolgung wegen der Zugehörigkeit zu einer bestimmten sozialen Gruppe kann auch dann vorliegen, wenn die Bedrohung des Lebens, der körperlichen Unversehrtheit oder der Freiheit allein an das Geschlecht anknüpft.

47) Does your country apply Article 10(1)(d) of the Qualification Directive in such a way that members of the group must not only share an immutable/innate/ fundamental characteristic, **and**

also the condition that the group has a distinct identity, because it is perceived as being different by the surrounding society, or is one of these requirements sufficient?

No Yes

Not too many courts seem to have been engaged in this discussion, with the few decisions on the subject indicating that both conditions have to be fulfilled (e.g. Federal Ministry of the Interior, Instructions on the Application of the Qualification Directive, October 2006; High Administrative Court Hessen 21 February 2008 - 3 UE 191/07.A - ; cf. Roland Bank/Friederike Foltz. Flüchtlingsrecht auf dem Prüfstand. Die Qualifikationsrichtlinie im deutschen Recht. Teil 1: Flüchtlingsschutz. Beilage zum Asylmagazin 10/2008, p. 11).

As far as the issue has been raised in LGBTI cases it does not seem to have posed a problem as the courts considered both criteria to be fulfilled, anyway:

- *Administrative Court Oldenburg, 13.11.2007, 1 A 1824/07 (Nigeria)*
- *Administrative Court Frankfurt/Oder, 11. November 2010, VG 4 K 772/10.A (Cameroon)*

48) How is the Qualification Directive's concept of 'gender related aspects' taken into consideration in your legislation?

The formulation concerning the "gender related aspects" of the third sentence of Art. 10 (1) d Qualification Directive has not been taken into consideration in legislation nor does it seem to have played any role in jurisprudence so far.

Article 11-1-e, 14 Qualification Directive: Cessation/Withdrawal of asylum status

49) Do you have examples of LGBTI asylum seekers whose asylum status was withdrawn, because the credibility of their lesbian, gay, bisexual orientation or gender identity was doubted later on?

No

Yes. What was the reason?

50) Do you have examples of LGBTI asylum seekers whose asylum status was withdrawn, because their lesbian, gay, bisexual orientation or gender identity had changed?

No

Yes. What was the reason?

51) Are there cases in which asylum status was withdrawn because the position of LGBTIs in the country of origin had improved?

No

Yes. Please give examples.

If the answer to questions 49 and/or 51 was yes:

51A) Did the authorities examine whether the person involved could still be at risk in the country of origin for being a perceived LGBTI?

No Yes. Please give details.

Article 20-3 Qualification Directive: Vulnerable persons

52) Are LGBTI asylum seekers considered part of a 'vulnerable group' or a 'group having special needs' in your national legislation/policy/practice?

No

Yes. Please give details

Article 13 Procedures Directive: The interview

53) Can asylum seekers ask for an interviewer and/or interpreter of the gender (sexual orientation/ gender identity) of their own choice?

No

Yes. Is such a preference usually recognised? No Yes

The Federal Office asserts that it usually complies with such requests if it receives them with sufficient notice (which is a problem if the interview takes place shortly after arrival in a reception centre).

54) Can asylum seekers express a preference for an interviewer and/or interpreter who is not a member of their own ethnic community?

No

Yes. Is such a preference usually recognised? No Yes

The Federal Office tries to comply with such requests if it receives them with sufficient notice, but in practice this may prove difficult as for some languages only few interpreters are available.

55) Do you have trainings on LGBTI issues available for officers who take interviews and decisions?

No. Please go to question 56.

Yes. Please answer questions 55A, B, C, D, E and F.

55A) Is this part of a general training or is it a specific training?

Some decision-makers are trained as specialists for gender-specific issues but this training does not comprise LGBTI elements (that is, such elements were not part of the design that the Federal Office presented some years ago for these trainings).

55B) Is the training:

- Obligatory No Yes. For whom?

- Optional No Yes. How many people follow this training (coverage)?

55C) Who has access to this training?

55D) Are judges included in these trainings?

⁴ Procedures Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

No Yes

55E) What is the level and frequency of these trainings?

55F) Who does the training?

56) Do you have trainings available for interpreters on the appropriate terminology for use with LGBTI asylum seekers?

No Yes

Article 23-3,4 Procedures Directive: Accelerated procedure

57) Does your country have accelerated asylum procedures?

No

Yes. Is an exception made for claims of LGBTI asylum seekers?

No Yes. Please explain.

There are no accelerated asylum procedures at the administrative stage. e.g. for certain countries of origin or for certain groups of asylum-seekers. If an application is rejected as “manifestly unfounded” by the authorities, a shortened time limit for legal remedy applies and the procedure as a whole may come to an end quickly as an appeal in “manifestly unfounded” cases does not automatically have a suspensive effect against deportation. There are no exceptions for LGBTI asylum-seekers.

58) Are applications from LGBTI asylum seekers prioritised by the national authorities?

No Yes. Please explain.

Articles 29-31 Procedures Directive: Safe countries

59) Do the asylum authorities use lists of ‘safe countries of origin’?

No. Please go to question 60.

Yes. Please answer questions 59A and B.

59A) Does the list include countries that have criminal provisions against same-sex conduct (or obvious homophobic practice)?

No

Yes. Please give the names of these countries.

The German “list” consists of Ghana only (Senegal having been removed from the list in 1996):

- *According to the COI report on Ghana by the UK Border Agency (of 30 September 2010, in turn quoting from reports by the US Department of State and ILGA) the Penal Code of Ghana defines consensual homosexual acts as a “misdemeanour”. In contrast to the USDOS report the ILGA report states that the relevant section of the Penal code does only criminalise same-sex activity between men and not between women.*

59B) Does the list provide exceptions for LGBTIs from specific countries?

No Yes. Please explain.

Article 27, 36 Procedures Directive: Dublin Regulation

60) Did you find examples of LGBTI asylum cases in which the European country responsible for examining the asylum application (Dublin Regulation) was not considered a safe country (because of LGBTI aspects of the case)?

No

Yes. Please give details.

Administrative Court Schleswig-Holstein, 07 September 2009 - 6 B 32/09 -: The court granted an interim measure to stop the transfer of an Iranian asylum-seeker to the Czech Republic:

In this case the (...) preconditions for granting an interim measure in Germany are fulfilled, because the applicant can claim – and this claim has not been disputed – that he was going to be subjected to a sexological and phallometric examination in the Czech Republic. He presents a document from Czech authorities according to which someone's refusal to undergo a sexological examination could lead to termination of the asylum procedure. Within the summary proceedings no details on the execution of such a sexological and phallometric examination nor information on whether such an examination is adequate to ascertain the homosexuality alleged by the applicant have become known. Therefore the court is convinced that it has been established with a degree of certainty at least sufficient for summary proceedings that the applicant would face an impediment to accessing the

asylum procedure, the conformity of which with human rights standards seems at least very much in doubt according to the state of affairs as it can be assessed at the moment.

Vorliegend sind die vorgenannten Voraussetzungen für die Gewährung von Eilrechtsschutz in Deutschland gegeben, weil der Antragsteller unwidersprochen geltend machen kann, dass er in der Tschechischen Republik einer sexologischen und phallometrischen Untersuchung unterzogen werden soll und ein Schriftstück tschechischer Behörden vorlegt, wonach die Weigerung sich einer sexologischen Untersuchung zu unterziehen, die Beendigung des Asylverfahrens nach sich ziehen kann. Nähere Einzelheiten zur Durchführung einer solchen sexologischen und phallometrischen Untersuchung sind in diesem Eilverfahren ebenso wenig bekannt geworden, wie Erkenntnisse über die Eignung einer solchen Untersuchung zur Feststellung der vom Antragsteller behaupteten Homosexualität. Damit steht zur Überzeugung des Gerichts zumindest mit der für dieses Eilverfahren hinreichenden Sicherheit fest, dass der Antragsteller in der Tschechischen Republik einem Zugangshindernis zum Asylverfahren begegnen wird, dessen Menschenrechtskonformität nach dem gegenwärtig überschaubaren Sachstand mindestens sehr zweifelhaft erscheint.

Article 10 Family Reunification Directive: Family members

61) Does your country recognise same-sex marriage or same-sex partnership for nationals?

- No. Please go to question 62.
 Yes. Please answer question 61A.

61A) Does your country provide family reunification rights based on same sex relationships for partners of refugees?

- No Yes. Please explain under which circumstances.

Section 27 (2) of the German Residence Act states that the relevant sections on family reunification apply mutatis mutandis/by analogous application to same-sex partnerships (Lebenspartnerschaften):

§ 27 (2): Für die Herstellung und Wahrung einer lebenspartnerschaftlichen Gemeinschaft im Bundesgebiet finden die [Regelungen zum Familien- und Ehegattennachzug] entsprechende Anwendung.

In practice authorities state that this section only applies to same-sex partnerships “as defined by German law or to partnerships recognized by another state which are based on essentially the same principles as those defined by German law” (guidelines of the Federal State of Baden-Württemberg, <http://www.service-bw.de/zfinder-bw-web/processes.do?vbid=865753&vbmid=0>).

⁵ Family Reunification Directive:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0086:EN:HTML>

Reception Directive⁶

Article 17 Reception Directive: Reception

62) Do LGBTI asylum-seekers face problems (harassment, ill-treatment etc.) while in reception/ accommodation centres or in immigration detention, based on their sexual orientation/ gender identity?

- No. Please go to question 63.
- Yes. Please answer questions 62A, B and C.

62A) By whom are these problems caused?

A few cases have become known in which gay asylum-seekers reported harrassment by other asylum-seekers in reception or accomodation centres.

62B) Are the authorities aware of these problems?

- No
- Yes. How do they react?

It is difficult to give a summary answer as there are 16 reception centres in each of the Federal States and hundreds of accomodation centres (with a great variety in size and quality) for asylum-seekers on district or municipality level, in which asylum-seekers are often accomodated together with rejected asylum-seekers who are granted a temporary "tolerated" stay. Lawyers report that complaints are sometimes ignored in reception centres or that authorities tend to "wait them out" as the maximum period of stay in the reception centres is three months. On the level of the locally organised accomodation centres a common observation (not particularly with regard to LGBTI asylum-seekers, but in general) is that responsibilities for the handling of complaints are not clear so authorities on one side and the organisations or companies which run the centres on the other side may both declare themselves incompetent.

62C) Does a complaints mechanism exist?

- No
- Yes. Is it effective? No Yes

Cf. 62 B: Asylum-seekers can complain to the authorities and to the management of the respective reception or accomodation centres, but the response seems to be strongly dependent on the local arrangements and on the goodwill of the individual person in charge. Therefore one can hardly speak of an effective mechanism. One case has been reported in which complaints by a gay asylum-seeker because of harrassment by other asylum-seekers did not lead to any actions by the centre's management. Only after a lawyer, NGOs and UNHCR intervned the asylum-seeker was accomodated in another room on another floor of this centre.

⁶ Reception Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0009:EN:HTML>

63) Does the possibility of housing in private accommodation exist during the asylum procedure?

No

Yes. Please explain

Following their stay in the reception centres (with a maximum period of three months) asylum-seekers “as a rule” should be housed in accommodation centres (Section 53 Asylum Procedure Act). However, interpretation of this “rule” could hardly be more diverse: Federal States' statistics show that percentage of asylum-seekers in accommodation centres ranges from 83% (in Bayern/Bavaria, where the above-named rule is strictly enforced) and 71% (Brandenburg) to 9% (in Rheinland-Pfalz) or 12% (Berlin, as at end of 2008, statistics compiled by Pro Asyl). What is more, in several States no uniform policy applies but municipalities and districts are mainly responsible for the accommodation. Hence the situation in these regions might differ from one town to another.

In principle the law states that in the process of assignment to an accommodation centre or to another form of accommodation “the foreigner’s interests shall be taken into account” (Section 53 Asylum Procedure Act), but this allows for a large margin of discretion for the authorities and case law has only acknowledged a right to live in so-called decentralised accommodation (i.e. flats) in exceptional cases, e.g. if accommodation in a flat of one's own is necessary for medical reasons or if an asylum procedure has gone on for an exceptionally long period of time.

64) Is it possible in reception/ accommodation centres or immigration detention to be placed in an accommodation separate from people from the same country and/or religious background?

No

Yes. Are asylum seekers informed about this possibility? No Yes

It is possible that some reception or accommodation centres have established a system which allows for taking into account the individual situation of an asylum-seeker. However, this would be exceptional and does not constitute a legal right for such claims to be considered. In one landmark case a demand to move out of an accommodation centre has been accepted by the High Administrative Court of Nordrhein-Westfalen (in a 1986 decision) as it was considered unacceptable for the claimant to live together with members of hostile ethnic or religious groups. However, it is not known whether a similar claim has ever been brought forward (successful or not) by an LGBTI asylum-seeker.

Articles 17 and 15 Reception Directive: Transgenders/ intersex

65) Do transgender and intersex people have the possibility to choose whether they want to be housed in a women’s or men’s (section of) reception/ accommodation and detention centre?

No Yes

The persons and institutions contacted for this survey do not think it likely that there is a rule in place for such cases. Whether the reception or accommodation centres adhere to such a request probably has to be decided on an ad hoc basis.

66) Do transgender/ intersex applicants have access to specific health care and support,

a) during the asylum procedure

No Yes

For the duration of the asylum-procedure they are entitled to social benefits under the Act on Benefits for Asylum-seekers (Asylbewerberleistungsgesetz). According to this Law only the treatment of acute illnesses and states of pain is provided for (Section 4 Act on Benefits for Asylum-Seekers).

b) after they are granted asylum?

No Yes

67) If your country provides the possibility to legally change a person's name and sex, does this also apply to trans/ intersex asylum seekers and trans/ intersex refugees?

No Yes

This is regulated in Germany by the "Act on change of first names and determination of gender affiliation in exceptional cases - Act on Transsexuals" (Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen - Transsexuellengesetz). Following an amendment in 2009 change of name and/or sex is now possible for German citizens, stateless persons with permanent residence in Germany, refugees and persons granted asylum, and to foreigners with indefinite or at least prolongable residence permits if the law of their countries of origin do not allow for a respective change of name and/or sex. This means that asylum-seekers do not have a right to change name and sex whereas it is possible for refugees.

Any other issues

68) Are you aware of any other specific problems for LGBTI asylum seekers?

69) Are you aware of any other good practices concerning LGBTI asylum seekers?

70) Please add any other comments on the situation of LGBTI asylum seekers in your country.

Persons contacted for feedback have noted that in many cases the underlying legal concepts prove less crucial for the outcome of procedures than other factors mentioned above (individual background and "performance" of the asylum-seeker, decision-maker's or judge's attitudes etc.).

Therefore, the legal issues which the questionnaire concentrates upon were not always considered useful to gain a proper impression of the situation of LGBTI in the asylum procedure.

Thank you!

SHORT LGBTI GLOSSARY

Age of consent

The minimum age at which a person is considered to be legally competent of consenting to sexual acts.

Bisexual

An individual who is physically, romantically and/or emotionally attracted to both men and women. Bisexuals need not have had equal sexual experience with both men and women. In fact, they need not have had any sexual experience at all to identify as bisexual.

Coming out

A lifelong process of self-acceptance. People forge a lesbian, gay, bisexual or transgender identity first to themselves and then may reveal it to others. Publicly identifying one's sexual orientation may or may not be part of coming out.

Gay

Used to describe people whose enduring physical, romantic and/or emotional attractions are to people of the same sex (e.g., *gay man*, *gay people*). Often used to describe a man who is sexually attracted to other men, but may be used to describe lesbians as well.

Gender

Refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.

Gender Identity

Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. It includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Intersex

Refers to a condition of having sexual anatomy that is not considered standard for a male or female. Intersex can be used as an umbrella term covering differences of sexual development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical. The term *intersex* is not interchangeable or a synonym for *transgender*.

Lesbian

A woman whose enduring physical, romantic and/or emotional attraction is to other women.

Sexual Orientation

Refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.

Sodomy Laws

Laws that define certain sexual acts as crimes. The precise sexual acts meant by the term sodomy are rarely spelled out in the law, but are typically understood by courts to include any sexual act deemed unnatural. Consensual homosexual acts between adults are illegal in about 70 to 80 countries in the world; in 40 of these, only male-male sex is outlawed.

Transgender

An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Transgender people may or may not decide to alter their bodies hormonally and/or surgically.