

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,

Sabine Jansen, COC Netherlands

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General

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

research in Austria's judiciary database "ris" (<https://www.ris.bka.gv.at/Judikatur/>): all LGBTI-cases from Asylgerichtshof (AsylGH) between 01.07.2008 and 31.12.2010; all LGBTI-cases published from Unabhängiger Bundesasylsenat (UBAS) between 01.01.1998 and 30.06.2008

note: on 01.07.2008 Austrian law changed and former UBAS became AsylGH

questioning of LGBTI-NGOs: HOSI Salzburg (Johanna Reidl-Mathias), ORQOA - Oriental Queer

Organisation Austria (Dr. Gorji Marzban)

asylum NGOs: Caritas Wien (Daniel Zipfel), Deserteursberatung (Emanuel Matti), Asyl in Not (Michael Genner), UNHCR (Anja Schachinger)

Ministry of Interior (Kerstin Kowald)

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

own cases, reported cases from the above mentioned organisations, case law from ris, government representative (Ministry of Interior, Asylgerichtshof), NGOs

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

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.

I cannot tell how many LGBTI cases we have in total because there are no statistics available. I checked Austria's database from the Asylgerichtshof (this is our second instance in asylum cases) and UBAS (former second instance until July 2008) for LGBTI cases and found all together 57 cases. In 2010 there were 22 cases, in 2009 there were 21 cases. For the other years I cannot say how many cases the second instance decided because before UBAS was changed to Asylgerichtshof not every decision was published. These include also my own cases, which were all decided by the Asylgerichtshof. There are also some open cases at the Bundesasylamt and Asylgerichtshof I did not include in the counting of cases, but in the other questions where it made sense (e.g. how was the interrogation, ...). I included about seven of my own clients.

But this is not the total number of LGBTI asylum seekers, just the number of cases decided at the Asylgerichtshof in these years. Many of them applied for asylum many years ago and I don't know how many persons received asylum by the Bundesasylamt (Austria's first instance in asylum cases). In cases with severe persecution of LGBTI persons the first instance often gives asylum. Apart from these cases ORQOA reports about 10 people in 2010 based on their own cases and clients of other NGOs with whom they cooperate.

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

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

Very low. I found ten cases at the Asylgerichtshof and UBAS between 01.01.1998 and 31.12.2010, from 57 all together. But this has nothing to say about the decisions at the Bundesasylamt - many women, especially from Iran do get asylum there. However, in general the total number of lesbian cases within the LGBTI asylum claims is - compared to homosexual men - very low.

What are the main issues in these cases?

This depends on the country they come from.

The case from ris was a woman from Cuba who said she didn't get work because she is lesbian; she was in prison two times (each time for three hours) because she was at homosexual meetings; she

was questioned and told she was sick, she was harrassed and they claimed she was part of a conspiracy (AGH 15.11.2010, B16 319.586-1/2008).

In one case from Iran, this woman received the status as a refugee (AsylGH 11.11.2010 E17 411.562-1/2010), she left Iran because she is a lesbian. She lived with her girlfriend in Dubai for about five years, but her friend was sent back to Iran, so she went to visit her. They joined a homosexual party in Iran, but there was a razzia. She was hit and tortured by two policewomen. After three months in prison her family paid a caution and so she was released and left her home country. She fears for death by stoning in case of her return.

Many lesbian women come from Iran. They fear prosecution by the state, inhuman and degrading punishment, death penalty. They usually already have or had a spouse, were caught by neighbours or the police, or the family found out. They are often rejected from their families and have to hide their sexual orientation to prevent them from being punished. Once I met an Iranian lesbian couple who came to Austria together. In this case the father of one woman even tried to kill them two times. These cases are not in ris, but are from my own experience as a legal advisor.

ORQOA reports that in all cases the women suffered from life-threatening conditions in their families (based on three cases in 2010 they took care of).

I also had a lesbian activist from Russia as a client, who was threatened and hit by homophobic persons, who waited for her outside her office and asked her to stop her activities. This case is still open.

A woman from Turkmenistan told she was hated and persecuted by the police in Turkmenistan. She tried being "normal", but still had problems with her neighbours because of her sexual orientation. The police searched her apartment once, then they found homosexual literature and magazines, so she was arrested for a month. She also wrote homosexual poetry for a magazine. She was arrested a second time when she went out with her girlfriend, but was released the next day. She also was fired from her work without being paid, when her boss found out about her sexual orientation. A second time she was also fired after her boss found out about her sexual orientation. This procedure is still open, but seems promising (AsylGH 13.08.2009, D1 319.244-1/2008).

A woman from Nigeria reported she is lesbian and had a girlfriend. Her father wanted her to marry one of his friends, she refused that. Being homosexual is against Nigerian culture and law. Her father threatened to kill her in case she wouldn't marry his friend. He is also part of a secret cult. She and her girlfriend decided to run away, and her girlfriend died during that, but she doesn't know exactly how. Until she finally left Nigeria she lived in her father's house. She didn't receive protection because the Asylgerichtshof didn't believe her (01.07.2009, A13 407.007-1/2009).

Two women from Moldova left their home country together in 2002 because they had a lesbian relationship. They lived together in an apartment. Their sexual orientation was not tolerated by the community and they were harassed regularly. One of them was also hit once in a discotheque. So they fled to Europe to live a free and equal life. The communists in Moldova would cause them problems in case of their return because of their sexual orientation. (AsylGH 25.01.2010, D15 241.568-0/2008, D15 245.189-0/2008)

A woman from Gambia came to Austria together with her son. She left Gambia because she worked since 1990 in different hotels as a chamber maid, but she also offered sex to women. She always kept it a secret because Gambia is a muslim country. In 2002 her sexual activities became public and she had to spend two days in a police station, but finally was released again with the help of a policewoman. After that she became more careful concerning her sexual offers. In 2008 she went out with a white woman. The receptionist from the hotel she worked in warned her by telephone that the NIA was looking for her, so she immediately left the country. In case of her return she fears problems with the police. She might get killed by the government and homosexual love is forbidden by the president and the religion. (AsylGH 10.12.2009, A13 409.950-1/2009)

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

They are the majority of cases. From the Asylgerichtshof's and UBAS's 57 cases between 01.01.1998 and 31.12.2010 there were 39 gay cases.

What are the main issues in these cases?

This depends on the country of origin. In general the social stigma for homosexual men is worse than for women.

In Iran and Afghanistan they fear prosecution by the state (due to the criminal law, death penalty, ...) as well as from their family and neighbours, who often try to kill them. In Iran and Afghanistan the society feels threatened by homosexual men, the family feels violated in its honour, so they cannot live their sexual orientation free without being in danger. (AGH 10.03.2010, C10 257.854-0/2008; 20.07.2009, C5 257.855-0/2008; 17.02.2009, E2 255.708-2/2008; 14.07.2009, E2 405.216-1/2009)

ORQOA reports (based on seven cases they took care of) they feared being executed or lynched by the local authorities

In the former USSR (in Austria especially relevant: Russian Federation, Ukraine, Georgia, Serbia, Mongolia, Armenia) gay men mostly encounter problems with the society. Homosexuality is no longer forbidden by law, but the society still hasn't changed their opinion. Private persons hit them,

harrass them, even rapes happen quite often. The family often throws them out of the house and does not want to have contact when they find out. It is hardly possible to find work. The police does not protect them properly, often also hit them, sometimes even rape them, so they cannot expect protection. (AGH 12.02.2009, E9 232.050-0/2008; 10.06.2009, D12 241.089-0/2008; 30.10.2009, D12 230.429-2/2009/8E; 17.02.2009, B10 404.424.1/2009; 07.09.2009, B1 315.416-1/2008; 16.11.2009, B1 310.343-/2008; 16.06.2009, B1 266.627-0/2008; 13.01.2010, D3 243.467-0/2008; 10.05.2010, B1 268.012-0/2008; 05.07.2010, C10 308.744-1/2008).

In African cases (in Austria especially relevant: Nigeria) they fear persecution by the society, homosexuality is not accepted. Muslims have the additional problem that they fear the death penalty due to the Sharia. The family feels their honour violated and they often try to kill the homosexual men. In Gambia homosexuals have the special - additional - problem that male homosexuality is forbidden by criminal law too. So they can't live their sexual orientation without having problems. (e.g. AGH 19.03.2010, A12 311.341-1/2008; 09.06.2010, A2 405.597-2/2010; 11.06.2010, A12 407.330-1/2009; 25.06.2010, A12 401.644-1/2008; 27.07.2010, A2 412.613-1/2010; 13.10.2010, A4 253.668-0/2008; 20.10.2010, A12 405.717-3/2009; 03.08.2009, A2 402.885-1/2008).

The cases from Turkey fear discrimination by the society, often connected with the military, in one case connected with sexual abuse (AGH 20.08.2009, E10 244.434-0/2008-14E; 21.07.2008, C2 312.450-1/2008).

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?

From the Asylgerichtshof's 57 cases between 01.01.1998 and 31.12.2010 there were 5 bisexual cases.

Most of them said at the beginning that they are homosexual and corrected that later on to bisexual. The claims are the same as in gay and lesbian cases. There was one case of a bisexual man from Iran (AsylGH 14.07.2009, E2 405.216-1/2009) who did not get any form of protection. In this case the court believed he had homosexual encounters, but decided that these were not so deeply encraved in his sexual orientation, that it would be impossible for him to live in a heterosexual relationship.

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?

There were all together four transsexual cases. Three of them were male-to-female, one female-to-male.

AGH 28.12.2009, S13 409.528-1/2009: Ecuador, male-to-female

This was a Dublin case with Germany, so Austria did not make an asylum procedure in merits, but said that Germany is responsible to do that.

In 2003 she changed her sex with operations. Her family did not want any contact with her any longer because they thought he/she was homosexual. So she left her home country Ecuador in 2003. She had to work as a prostitute in Europe for the most time. She married in 2005 to a German who was her pimp later on, so the marriage was annulated. In 2008 she came to Austria with a Schengen-Visum from Germany and worked as a prostitute. Since then she went back to Germany several times. She also has a spouse in Austria and lives together with him. She is afraid to return to Germany because she does not have a visum any longer and is afraid to be deported to Ecuador. She also has severe psychological problems and it is important to continue the hormone therapy.

UBAS 10.05.2004, 240.479/0-VIII/22/03: Georgia, female-to-male

His foster mother went with him to a neuropathologist, who gave him very strong medication which made him stay in bed for three months. The aim of that was to change the personality so that he can learn how to think and feel like a woman. Then he started collecting literature about transsexuality and did not have any more contact with women and lived outward as a woman to avoid problems with the family. In 1999 he made a sex-changing operation, accompanied by television and he gave interviews concerning that. There were legal problems with changing the name in the official documents. The family refused contact with him, harrassed him, the church (he was religious) harassed him.

UBAS 28.03.2006, 244.745/0-VIII/22/03: Iran, male-to-female

She changed her biological sex. At the age of 17 she left her family because they said she was a shame to them. Because of the operation she had many problems and was arrested once for eight months, once for three months. She also worked as a prostitute. Once she also was convicted to a fine, 74 whippings and 3 years on parole.

UBAS 24.10.2002, 215.214/0-VIII/22/02: Irak, male-to-female

He changed his reasons for leaving his home country very often, but finally said he is transsexual, uses make-up and once he was stopped by the police when he was in a car with a man - wearing make-up. After that he was in prison for two months, hit and interrogated several times, because he behaved like a woman. His father was arrested longer time ago (for political reasons), his mother said he was a shame for the family and hid him from the neighbours and the rest of the family. That he is transsexual was proven by an expert.

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

ORQOA took care of one Klinefelter case in 2010.

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

1 Iran

2 Nigeria

3 Iraq

4 Ukraine

5 Russ. Federation

6 Gambia

7 Afghanistan

8 Georgia

9 Serbia

10 Mongolia

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.

HOSI reported two of such cases during the last six months.

ORQOA reported almost 30 LGBT people from Iran in Vienna region, mostly are not willing even to be recognized as LGBT, mostly are even not aware of their right as LGBT, they are mostly ashamed of what they are and consider their sexual-orientation as a kind of disease. Some were

willing to seek psychological help. Asylum seeking as LGBT is equal to an outing for that they are not permissive at all.

Caritas reports that they often don't tell this because they are afraid to be rejected by their community.

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)

LGBTIs can be considered a social group, they can get a refugee status when they fear persecution. The description is: social group of homosexuals, transsexuals, ... No explicit detailed descriptions of smaller groups within this group.

This is based on the Materials to Austrian Asylum Law 1991 (AsylG), (RV 270 BlgNr 18. GP; AB 328 BlgNR 18. GP)

leading cases: UBAS 28.09.1998, 203.430/0-IX/26/98; UBAS 27.01.1999, 203.912/0-VIII/24/98

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.

According to ORQOA in some cases the asylum seekers are in connection with an accredited LGBT Organisation. After social and political agitations like in the Iran 2009 elections we have sometimes asylum seekers with a combination of political and LGBT issues. We don't have examples of sexual orientation as a political opinion in Austria.

subsidiary protection? On which basis?

In some cases the Bundesasylamt (the first instance) says the person does not belong to a particular social group, but will be in danger because of sexual orientation when he or she returns to the home country. Therefore, subsidiary protection is given, but not asylum. These decisions are usually 'corrected' to the status as a refugee by the Asylgerichtshof when the applicant files an appeal.

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 sexual orientation itself is not a reason for a humanitarian permit (see §§ 43, 44 NAG)

b) other grounds (discretionary leave)?

No

Yes. Please quantify and explain.

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.

In Austria the age of consent in general is 14 (§ 206 StGB). The age of criminal responsibility is also 14. So if the persons are at the same age this is no problem in fact. Children of 13 usually don't seek for asylum as unaccompanied minors for LGBTI-reasons.

In special cases, when a person takes sexual advantage of a person under 16 who is "for certain reasons not able to understand the meaning of the sexual activities" and the person uses this lack of maturity to have sex, the age of consent is 16 (§ 207b StGB).

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.

The LGBTI asylum seekers are usually supported by the refugee NGOs, but the HOSI Vienna also took care of some cases.

There is one Organisation: ORQOA- Oriental Queer Organisation-Austria, <http://www.orqoa.at>

This organisation was founded in 2010, aiming to bring the oriental migrants closer to the LGBT-community. The Organisation offers help for persons who are persecuted and discriminated against in a migrant-oriental culture.

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

At the moment the ORQOA earns a strong mutual support from the non-LGBT and LGBT community in Austria. However, they are missing financial support for the clients.

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

only volunteers

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

No Yes. Which organisation(s)?

ORQOA only gets support from smaller organisations, who also deal with LGBTI or Asylum, but not from the bigger LGBTI / refugee umbrella organisations

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

No Yes. In what form?

ORQOA works with Asyl in Not, Amnesty International and an Independent Iranian Woman Organisation who provide them legal support as asylum lawyer and minimal financial support for their projects.

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

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.)

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

Materials to Austrian Asylum Law 1991 (AsylG), (RV 270 BlgNr 18. GP; AB 328 BlgNR 18. GP)

These materials say explicitly that sexual orientation can be the basis for belonging to a social group.

RL 2004/83/EG, Art 10/1/d: sexual orientation can be the basis for belonging to a social group

The Ministry of Interior asks to be appreciative that it is not possible to communicate intern directives.

- 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.

We have general gender guidelines. These do not explicitly refer to LGBTI people

- 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 Ministry of Interior asks to be appreciative that it is not possible to communicate intern directives. There might be written policy, but this is not publicly available.

Practice shows that in general LGBTIs from Afghanistan and Iran receive the status as a refugee if they are able to convince the officer in charge at the Bundesasylamt or the judges at the Asylgerichtshof that they are homosexual or transsexual. For bisexuals it is harder, because "they could live in a heterosexual partnership as well".

For persons from Russian Federation, Ukraine and Georgia in practice something must have happened, there must have been an actual persecution.

For persons from Nigeria it is the most important thing to convince the authorities about what happened. All the decisions I saw were decided negative because the asylum seekers were not assumed to be credible.

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.

UBAS 28.09.1998, 203.430/0-IX/26/98

This was the first LGBTI case which was judicature in Austria, since Austria got an independent court (in 1998). (Before 1998 the ministry of interior was the second instance (the police the first instance) which decided everything negative, one could only appeal at the court of administration against these decisions.)

The asylum seeker was a homosexual man from Iran. He came to Austria in 1992. He had been divorced since 1985 and had two children. In 1985 he was arrested for the first time because of his homosexuality. First he claimed he was arrested two more times, but in 1998 he said he lived in Turkey between 1985 and 1992.

The Bundesasylamt (the first instance) refused his application and argued that he would be safe in Turkey or "another neighbour state of Iran he must have crossed." The Ministry of Interior (in 1992 the second instance in asylum procedures) decided negatively in 1995. He appealed against this decision to the Administrative Court. The Administrative Court followed the appeal in 1998 and recommitted the case to the second instance - which was the Unabhängiger Bundesasylsenat (UBAS) at this time. The UBAS gave him the status as a refugee in 1998 because he belonged to a social group and has to fear persecution and prosecution.

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.

Qualification Directive³, Council Directive 2004/83/EC

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?

The officer in charge usually questions a person in order to find out whether his or her claim is credible. These questions are mostly about his or her experiences, i.e. the major motives for leaving his/her country. Additional questions concern knowledge about the homosexual scene of his or her home country and sometimes about the homosexual scene in Austria. In some cases there are also questions about the sex life.

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?

see below

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

AsylGH 15.11.2010, A12 405.717-3/2009:

This was a man from Nigeria whose statements concerning his sexual orientation showed numerous contradictions. Initially he stated "I am homosexual, this is not accepted in Nigeria." Later on he said: "I was not homosexual. It was the first time [that I had sex with a man]." After asking him if he was homosexual or heterosexual he said, at the Asylgerichtshof, that he could not say whether he is homosexual or heterosexual, whether he prefers having a relationship with a man or a woman.

AsylGH 11.06.2010, A12 311.341-1/2008:

Also a Nigerian man who claimed to be homosexual. However, his statements about homosexuality and his claims about homosexual practices in Nigeria were not plausible.

"Im Weiteren wurde der Beschwerdeführer hinsichtlich der von ihm selbst ins Treffen geführten homophilen Ereignisse befragt und sagte er im Rahmen der Einvernahme vor dem Asylgerichtshof aus: " Wir waren im öffentlichen Schulpark. Es war abends. Wir machten Liebe und wurden dabei beobachtet..." Die diesbezügliche Aussage des Beschwerdeführers, dass er in aller Öffentlichkeit in

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

concreto in einem öffentlichen (Schul)Park seiner homophilen Neigung nachgegangen wäre, stellt sich angesichts der strengen Sitten und Moralregeln im streng-moslemisch dominierten Norden Nigerias per se als gänzlich lebensfremd und unplausibel dar."

The general argumentation in Nigerian cases is very similar, as the cases themselves are. In cases from Iran and Afghanistan the asylum seekers are more often believed to be credible, since their explanations of the events in their home countries contain less contradictions and they also describe their homosexuality more credibly (see AsylGH 10.03.2010, C10 257.854-0/2008; 20.07.2009, C5 257.855-0/2008; 17.02.2009, E2 255.708-2/2008)

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

I have not found any positive decision for an asylum seeker from Nigeria. They are usually not credible. Persons from Gambia have better chances, but they also have a problem with credibility. Asylum seekers from former Yugoslavia also have difficulties to be credible.

For persons from Iran and Afghanistan it is easier; maybe because there are less persons who claim to be homosexual and the situation in these countries is much harder.

For persons from former USSR (especially Ukraine, Georgia and Russian Federation) it mostly depends on a - from my point of view - objective credibility.

This pattern is in principle the same as it is in non-LGBTI asylum procedures.

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)?

It is not required, but it helps, especially witnesses and special activities in Austria, e.g. in an LGBTI organisation or psychological evidence.

Caritas reports that without proof, especially witnesses, the sexual orientation is often doubted.

Visiting special locations (e.g. bars, LGBTI-NGOs, cultural centres ...) is also an important criterium. Caritas does not know of any cases where the authorities asked for special proof.

HOSI reports, that different kinds of proof, especially photos of LGBTI-happenings (gay pride etc), knowledge of locations, ... are very important.

I also was asked for proof of a claimed membership in a Russian LGBTI-organisation (flyers, ...).

There are also cases where the asylum seeker was found credible without proof.

Decisions and/or case law. Good/bad practices

AsylGH 17.02.2009, E2 255.708-2/2008: The first instance did not believe that the asylum seeker was homosexual because he brought wrong proof from an Iranian court and he was married. His social worker, however, confirmed that he is homosexual and already had problems with other asylum seekers in his accommodation, but the first instance decided that they do not believe her either, because she has "no medical education." The second instance asked the witnesses he proposed (the social worker of his accommodation and a man he had sexual contact with) and finally they believed that he was homosexual. The reason why he finally received the status as a refugee was that the situation for homosexuals in Iran is so serious, that every homosexual has to fear prosecution and so he received the status as a refugee.

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?

In AsylGH 20.07.2009, C5 257.855-0/2008 I found the expert was a sexual therapist and sexual scientist. In UBAS 05.08.2005, 238.353/5-VIII/22/03 too, but this expert was a psychiatrist as well and worked for the NGO Courage.

In UBAS 24.10.2002, 215.214/0-VIII/22/02 there was an expert, but it was not further defined which kind of expert it was.

b) What does the examination include?

The examination and following decision in the case of an Afghan homosexual man contain parts of the expertise. Most questions were asked about the emotional side of his relationship, the inner side of his coming out and his life as a homosexual in Afghanistan, but there were also questions about the erotic part of the relationship and his sexual fantasies. The expert tried to find out whether the homosexual conduct is a result of a "lack of women available", as it is sometimes the case in prisons or the military.

Full citation of the text (from AsylGH 20.07.2009):

"Die Befundung basiert auf den heutigen Erkenntnissen der Human- und Sexualwissenschaften, auf den wissenschaftlichen Erkenntnissen über den Coming-Out-Prozess gleichgeschlechtlich sowie bisexuell empfindender Menschen (Coleman, 1982 u. Cass, 1984), auf den neuesten Studien zum Sexualverhalten von Männern und Frauen (z.B. Kinsey-Skala), auf den Erkenntnissen zum Raster der sexuellen Orientierungen (Klein et al., 1985), auf dem Konzept und der Technik der

sexualtherapeutischen Einzelexploration nach dem Hamburger-Modell (Hauch, Universitätsklinikum Hamburg-Eppendorf, 2006) sowie jahrelanger psycho- und sexualtherapeutischer Erfahrung vor allem in den Schwerpunktbereichen sexuelle Orientierungen und geschlechtliche Identitäten. [...]

Gleichgeschlechtlich empfindende Frauen und Männer durchlaufen in ihrer psychosexuellen Entwicklung das, was wir in der Sexualwissenschaft Coming-out-Prozess nennen. Der Entwicklungsprozess des Coming-out (siehe Colemann, Cass, Rauchfleisch u.a.) umfasst auf der einen Seite einen innerpsychischen Vorgang, nämlich das Gewahrwerden und schließlich die Gewissheit, lesbisch, schwul oder bisexuell und nicht heterosexuell zu sein, und auf der anderen Seite eine soziale Dimension, bei der es um den Weg geht, sich entsprechend der sexuellen Orientierung zunehmend auch in der Öffentlichkeit zu präsentieren und einen eigenen Lebensstil zu finden.

Die Exploration zeigt deutlich, dass [der Beschwerdeführer] eine ca. dreijährige sexuelle Beziehung mit seinem männlichen Freund [N] hatte. In der Exploration geht weiterhin klar hervor, dass es sich dabei sehr wohl um eine emotionale Beziehung mit einer emotionalen Verbindlichkeit handelte. Weiters zeigt die Exploration, dass die sexuelle Beziehung mehrere Praktiken schwuler Sexualität beinhaltete, die von Beiden nicht aus Notlage oder Zwang, sondern aus gegenseitigem Begehren und gegenseitiger emotionaler und sexueller Befriedigung vollzogen wurden. Beide Männer fühlten sich gegenseitig zueinander sowohl emotional als auch sexuell hingezogen und begehrt. [Der Beschwerdeführer] gibt glaubhaft an, dass er in seinem Heimatland Afghanistan nie eine erotisch-sexuelle Beziehung zu einer Frau hatte und dies auch in seinen Gefühlen, sexuellen Fantasien und Wünschen nicht begehrte.

Aus sexualtherapeutischer und sexualwissenschaftlicher Sicht ist daher mit sehr hoher Wahrscheinlichkeit anzunehmen, dass [der Beschwerdeführer] eine homosexuelle Orientierung aufweist. In der Sexualexploration wurde dem Begutachter klar und deutlich, dass es sich in der Beziehung von [dem Beschwerdeführer] und seinem Freund [N] nicht nur um ein funktionales Sexualverhalten handelte, sondern tatsächlich auch um eine emotionale Beziehung zwischen zwei Männern. In diesem Sinn ist von einer homosexuellen Lebensweise zu sprechen, die jedoch in Afghanistan aufgrund eines fundamentalistisch praktizierten Islams und einer streng patriarchalen Kultur absolut verborgen werden musste, da - wie er sagt - 'Homosexuelle ohne Gerichtsverfahren eliminiert werden'. Dass es sich um eine Liebesbeziehung zwischen den beiden Männern handelte, zeigt auch die tiefe Trauer [des Beschwerdeführers] um seinen getöteten Freund, die er jedoch in seinem öffentlichen Auftreten massiv abspaltet, einerseits da die Trauer sein homosexuelles

Empfinden verraten würde, und andererseits aufgrund seiner schweren Traumatisierung durch das ohnmächtige Erleben der Ermordung seines Freundes.

Zusammenfassung bezüglich der Befundung, ob es denkbar ist, dass [der Beschwerdeführer] eine sexuelle Beziehung zu einem Mann gehabt hat:

Für den Begutachter stellte sich klar dar, dass [der Beschwerdeführer] eine emotionale und erotisch-sexuelle Liebesbeziehung zu seinem Freund [N] gehabt hat. Aufgrund der massiv bedrohlichen Situation Homosexueller in Afghanistan musste diese Beziehung jedoch absolut versteckt gelebt werden und war von der permanenten Angst begleitet, entdeckt und damit stigmatisiert, geächtet und mit dem Tod bedroht zu sein. Dass beide Männer dennoch diese Beziehung sowohl emotional auch als sexuell lebten, zeigt doch deutlich, dass sie füreinander Liebesgefühle entwickelten, was normalerweise bei homosexuellen Handlungen in Folge eines sexuellen 'Notstandes' (z.B. Militäreinsätze, Gefängnisse etc.) laut unzähligen Studien nicht der Fall ist. Da beide Männer jedoch auch in ihrer Gesellschaft aufgewachsen sind und sozialisiert wurden, weist [der Beschwerdeführer] klare Symptome einer verinnerlichten Homophobie auf, die zu einer deutlichen Abspaltung seiner wahren Gefühle und Bedürfnisse führten und führen und somit zu einem Verleugnen seiner Identität. [...]

All dies ist in der umfassenden Exploration mit [dem Beschwerdeführer] deutlich zur Sprache gekommen. Es ist daher für den Begutachter nur allzu verständlich, dass [der Beschwerdeführer] seine homosexuellen Gefühle, Fantasien, Wünsche und Handlungen selbst ablehnt und unter deutlichen Scham- und Schuldgefühlen, vor allem seiner Familie gegenüber, leidet.

Von daher ist es [dem Beschwerdeführer] innerpsychisch, vor allem von seiner religiösen und kulturellen Sozialisation und seiner Familientradition her, bis zum heutigen Tag nicht möglich, zu seinen homosexuellen Gefühlen und Handlungen zu stehen, geschweige denn dazu, dass dies seine sexuelle Orientierung sei. In seinem ihm vermittelten Weltbild ist Homosexualität 'schmutzig', 'widergöttlich', 'pervers', 'abartig' etc. [Der Beschwerdeführer] lebt derzeit in der Hoffnung, dass er seine homoerotischen Gefühle, Fantasien und Wünsche verdrängen und ein heteronormiertes Leben führen kann. Aus sexualtherapeutischer Erfahrung und Sicht, ist eine derartige Abspaltung der eigenen Gefühle und Bedürfnisse auf Dauer nicht möglich. Die Folgen sind oft Angstzustände, Panikattacken, Depressionen bis hin zu psychosomatischen Störungen.

Zusammenfassung bezüglich der Befundung, zur Frage der sexuellen Orientierung [des Beschwerdeführers]:

[Der Beschwerdeführer] hat über einen Zeitraum von drei Jahren eine erotisch-sexuelle und emotionale Beziehung mit einem Mann gelebt und erfahren, die er als sehr befriedigend erlebte. In der Sexualexploration wurde deutlich, dass er bereits vor dieser Beziehung sich in seinen Fantasien,

Wünschen und Begehren zum gleichen Geschlecht hingezogen fühlte. Für den Begutachter ist es daher in einem sehr hohen Maß anzunehmen, dass [der Beschwerdeführer] eine gleichgeschlechtliche Entwicklung und Orientierung aufweist.

Aufgrund der deutlich lebensbedrohenden Situation Homosexueller in Afghanistan und der erlebten Ermordung seines Freundes und Beziehungspartners [N] ist es bei [dem Beschwerdeführer] zu einer deutlichen Traumatisierung gekommen, weshalb die psychosexuelle Entwicklung [des Beschwerdeführers] derzeit massiv belastet und blockiert ist. [...] Aus heutiger Sicht ist dem Begutachter deutlich, dass [der Beschwerdeführer] homoerotische Fantasien, Wünsche und Empfindungen aufweist."

UBAS 05.08.2005, 238.353/5-VIII/22/03 shows about the same:

"Die Begutachtung bezüglich der sexuellen Orientierung von Frau X und der daraus resultierenden derzeitigen Zwangslage dauerte zwei Stunden und wurde in Anwesenheit ihrer Vertreterin, Frau Mag a S. W. und der Dolmetscherin durchgeführt. In der Begutachtung ging es in erster Linie um die psychosexuelle Entwicklung und der daraus resultierenden sexuellen Veranlagung von Frau X [...]

Die Begutachtung zeigt klar, dass Frau X den Entwicklungsprozess des Coming-Out erlebt hat und derzeit auch noch mitten darin steht, vor allem, was die soziale Dimension des Coming-out-Prozesses angeht. [...]

Zusammenfassend zum Prä-coming-out ist zu sagen, dass Frau X bereits in ihrer Kindheit und Jugendzeit eine "starke Ahnung" entwickelte, "anders als die anderen Mädchen zu sein". Zur klaren Gewissheit, lesbisch zu sein, kam sie mit ca. 24 Jahren, nämlich als sie nach Jahren der Verunsicherung, Einschränkung und Verdrängung auf die Universität kam.

Affektiv deutlich erhellt, spricht Frau X über ihr Kennenlernen lesbischer Freundinnen auf der Universität und ihrer Liebesbeziehung mit einer Frau, die ca. 5-6 Jahre andauerte und die sie innerlich als "Liebespartnerschaft" erlebte. Wörtlich: "Im Alter von 24 Jahren habe ich erstmals jemanden so geliebt, dass ich am ganzen Körper gezittert habe". Erstmals als Frau entwickelte sie Gefühle der Erotik und Leidenschaft, erlebte gefühlvolle und für sie nährende und befriedigende Sexualität. Zitat: "Ein Gefühl, als fahre ich in den Himmel hinauf". Es ist also klar davon auszugehen, dass die psychosexuelle Entwicklung von Frau X auf Grund ihrer Verunsicherung durch das Wahrnehmen "anders zu sein als die anderen", des vorherrschenden Totalverbots der Homosexualität im Iran und den damit verbundenen Zerrbildern und strafrechtlichen Folgen (Peitschenhiebe, Folter und Misshandlungen während der Haft, Hinrichtung) und ihrer Zwangsehe durch die Eltern bis zum 24. Lebensjahr massiv blockiert war. Die Folge dieser psychosexuellen

Blockade war eine Abspaltung von den eigenen Gefühlen und Bedürfnissen (vgl. Gruen A. Der Verrat am Selbst). Zum Durchbruch ihrer eigenen Gefühle und Bedürfnisse und somit zur Gewissheit über die eigene sexuelle Orientierung kam es erst im Alter von ca. 24 Jahren, also in der konkreten Begegnung mit anderen gleichgeschlechtlich empfindenden und l(i)ebenden Frauen an der Universität. Die Lebensgeschichte von Frau X wird klar durch die international Coming-out Studien und meine langjährige Beratungstätigkeit bestätigt: Viele homosexuell veranlagte Frauen und Männer erleben in ihrem Coming-out-Prozess auf Grund der Verinnerlichung negativer Fremdbilder, der Angst vor Diskriminierung und Ächtung oft lange Jahre der Unterdrückung, Geheimhaltung und Verdrängung ihrer sexuellen Orientierung. Dies zeigt auch eine österreichische Studie des vergangenen Jahres (Plöderl M. Universität Salzburg), die aufzeigt, dass die Selbstmordversuchsrate bei Homosexuellen noch siebenmal höher ist als bei Heterosexuellen; 96% der Selbstmordversuche geschehen im Alter von 15-27 Jahren, also während des Coming-out-Prozesses. Die Studien zeigen deutlich, in welcher psychisch massiv erlebter Zwangslage gleichgeschlechtlich empfindende Jugendliche/Frauen/Männer heute noch auf Grund gesellschaftlicher Rahmenbedingungen stehen. In diesem Sinn wird der Coming-out-Prozess von namhaften PsychiaterInnen, PsychotherapeutInnen und der Sexualwissenschaft als deutlicher Ausnahmezustand in der psychosexuellen Entwicklung und als enorme psychische Leistung bezeichnet.

Zusammenfassend zum Coming-out-Prozess ist zu sagen, dass es nur zutiefst verständlich ist, dass Frau X ihre deutliche Ahnung bezüglich ihrer gleichgeschlechtlichen sexuellen Orientierung geheim gehalten hat und sich daher als lesbische Frau öffentlich auch nicht zu erkennen gab. Dies war erst in der konkreten Begegnung mit ebenfalls gleichgeschlechtlich empfindenden Frauen an der Universität möglich, was auch den Durchbruch ihrer sexuellen Entwicklung und somit ihrer psychosexuellen Identität ermöglichte. Für den Begutachter liegt kein Zweifel vor, dass Frau X eindeutig eine homosexuelle Veranlagung aufweist."

Concerning UBAS 24.10.2002, 215.214/0-VIII/22/02 I can't give any details - they are not included in the decision - but the result was that the asylum seeker actually was recognized as a transsexual. In UBAS 19.03.2003, 288.027/0-VI/17/02 his sexual orientation was confirmed as well as his psychiatric problems: "Auch derzeit ist sein Affekt labil mit massiven ("schwulen") Manierismen, seine Befindlichkeit ist eher negativ getönt, die Psychomotorik unruhig, er leidet unter markanten Durchschlafstörungen und massiven Albträumen mit Gewaltinhalten; es besteht beim Berufungswerber eine deutliche paranoide Interpretationsneigung, die sich mit soziophoben

Ängsten kombiniert; er leidet an einer Borderline Persönlichkeitsstörung und wird medikamentös behandelt."

UBAS 10.05.2004, 240.479/0-VIII/22/03: "Da es sich bei Herrn D. einen Transsexuellen handle, der sich in Georgien einer geschlechtsumwandelnden Operation unterzogen habe, seien weiters die notwendigen Mindeststandards beim medizinisch / therapeutischen Umgang mit Transsexuellen in der Heimat des Patienten mit Sicherheit nicht gewährleistet und die rechtlichen Rahmenbedingungen würden völlig fehlen. Als Diagnose wurde Transsexualismus sowie eine ausgeprägte Angst gemischt mit einer depressiven Störung festgestellt."

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

As far as I can see it from this expertise it did not include inhuman or degrading treatment

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

In AsylGH 20.07.2009, C5 257.855-0/2008 and UBAS 05.08.2005, 238.353/5-VIII/22/03 the experts' opinion was highly valued and finally led to the status as a refugee.

In UBAS 24.10.2002, 215.214/0-VIII/22/02 the expertise was also a very important element of the positive decision, together with the very detailed COI-research organised by the UBAS.

Decisions and/or case law. Good/bad practices

AsylGH 20.07.2009, C5 257.855-0/2008: This expertise seems to be very helpful in this case and describes mostly the psychological side of his homosexuality and takes special regards to the cultural context.

UBAS 24.10.2002, 215.214/0-VIII/22/02: also very helpful to prove his gender identity.

In UBAS 19.03.2003, 288.027/0-VI/17/02 the psychologist confirmed that he had serious psychiatric problems but confirmed his homosexuality too. This man from Ukraine was recognised as a refugee.

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

No

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

There was only one transsexual case, where it was obvious that former he, now she is transsexual because she already had an operation to change the sex. She still had the problem that it was a Dublin case with Germany and so there was never a procedure in merits.

According to the practice in homosexual cases (see question 20) a psychological or sexological evidence will be accepted as well.

22) Are explicit questions asked about sexual activities?

No

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

In some cases, yes.

In a case reported by Caritas the asylum seeker was questioned about the sexual habits in a very degrading way at the Asylgerichtshof.

Asyl in Not reports that there are questions, but no details to the sexual habits; a female homosexual client was once asked, if she ever had sex with a man; sexual positions (just abstract, not which positions the person practices) are asked sometimes as a kind of "exam".

Deserteursberatung reports that a young girl was asked about sexual practices between women. A young man from Somalia was asked in his interrogation at the Bundesasylamt Graz when he had a homosexual encounter for the first time in a very inappropriate diction ("Bubensex").

ORQOA reported questions about the type of sexual activities and the number of partners.

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

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.

AsylGH 17.02.2009, B10 404.424.1/2009:

This decision was on a man from Serbia who claimed to be homosexual and an ethnic Roma. He stated that he was harrassed and maltreated by the Serbian public due to his sexual orientation. His family does not want to have contact with him any more because he refused to marry and they knew about his sexual preference. His father threatened to kill him in case he would not leave his house. The Asylgerichtshof, however, did not believe him. He applied for asylum two years after he entered Austria. He claimed he was a Roma but he did not speak Romanes. His depictions of the traditions he had to live with and of the events that had occurred in Serbia also contained a number of contradictions. He was therefore assumed to be unreliable. He was asked about the homosexual scene in Austria and could not provide satisfactory answers.

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

If a person is or was married and has children this is generally no problem if the person comes from a society, where homosexuality is forbidden by law or the person fears persecution for another serious reason.

AsylGH 17.02.2009, E2 255.708-2/2008:

This man applied for asylum in 2003 for the first time, but said that he was homosexual for the first time in an interrogation five months later. He had had a sexual relationship with a man for years, about which his neighbours informed the police. The police finally caught them having sex in 2000 and he was consequently arrested, beat and suffered a broken nose. After one week his father paid a bribe to release him. As he was a minor at the time he was not stoned to death. When he was 19 his father took him to a psychiatrist, who told his father he should get his son married - so he was married in 2002. His wife's father heard that they did not have sex and accused him of being against the islamic revolution so he escaped from his father in law's house. Finally in 2003 he was caught having sex with his boyfriend after drinking alcohol and the police took a photo as evidence. He then left Iran and received refugee status in Austria.

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

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.

The Ministry of Interior answered this question: "The Bundesasylamt has it's own Country of Origin Reports which provide and prepare information in a scientific way. This information also includes information about LGBTI-background. There is general information as well as special information for special cases. This information is available on www.staatendokumentation.at"

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?

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

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

A combination of different reports from NGOs and governmental organisations are available to the Bundesasylamt, which has to be objective. For instance there are reports from Auswärtiges Amt,

Germany; Office for Foreigners, Poland; IOM; Amnesty International; Freedom House; US Department of State; Human Rights Watch; UNHCR; UK Home Office, ...) and additional ACCORD requests.

The Asylgerichtshof in principle uses the same sources but sometimes applies different paragraphs from the same reports, so the results sometimes deviate slightly.

At the Bundesasylamt and the Asylgerichtshof the COI is - besides the interrogations - the most important element of the decision and is used to evaluate whether what the asylum seeker reports is plausible or not.

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.

No cases known.

In several cases of homosexual asylum seekers from Gambia there was a grave lack of information concerning homosexuality. The Bundesasylamt decided negatively because of that lack of information, but the Asylgerichtshof cancelled these decisions and ordered the Bundesasylamt to make detailed research about the situation of homosexuals in Gambia (AsylGH 09.06.2010, A2 405.597-2/2010; 22.10.2009, A2 409.086-1/2009; 14.09.2009, A2 408.439-1/2009).

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.

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

I found only one case which is still open (AsylGH 10.02.2010, E1 217.905-4/2010):

This case was about a man from Iran. He came to Austria in 2001 as a minor together with his parents. Though the application was finally refused in 2009 he was not expelled because he had been in Austria since 2001. A few months later he applied for asylum once more because he had not mentioned before that he is homosexual, which is prosecuted in Iran. He has been homosexual for two years.

The Bundesasylamt rejected the application as a res judicata and denied a procedure in merits. The Asylgerichtshof cancelled this decision and said there has to be a detailed procedure in merits regarding situation in Iran because the newly developed homosexuality is a new circumstance in his case. The relevant happening is not the inner discovery that a person is homosexual, but the moment he or she declares this to others.

citation:

"Hervorzuheben ist dabei, dass das Bundesasylamt zu den Feststellungen gelangte, der Beschwerdeführer habe im neuerlichen Asylverfahren keine weiteren asylrelevanten Gründe vorgebracht. Auch habe sich kein neuer objektiver Sachverhalt ergeben. Bezug nehmend auf das vom Beschwerdeführer als neuen Fluchtgrund erstattete Vorbringen, wonach er homosexuell sei und ihn deshalb im Iran die Todesstrafe erwarte, er sich seiner Homosexualität erst vor ungefähr zwei Jahren bewusst geworden sei, dies im Vorverfahren jedoch deshalb nicht erwähnt habe, da er es nicht für notwendig erachtet habe, führte das Bundesasylamt im Rahmen der Beweiswürdigung aus, der Umstand, dass der Beschwerdeführer den nun behaupteten Sachverhalt im Erstverfahren allenfalls nicht oder nicht der Wirklichkeit entsprechend vorgebracht habe, sei nicht von Relevanz, da sich dadurch der objektiv vorliegende Sachverhalt nicht geändert habe." [...]

"Damit verkennt das Bundesasylamt jedoch, dass es für die Beantwortung der Frage, ob im gegenständlichen Fall ein neuer Sachverhalt vorliegt oder nicht, nicht allein darauf ankommt, dass sich der Beschwerdeführer seiner homosexuellen Orientierung seinen Angaben zufolge bereits zu einem Zeitpunkt bewusst geworden ist, an dem das vorangegangene Verfahren noch nicht rechtskräftig abgeschlossen war, sondern wäre für die vorzunehmende Beurteilung vielmehr entscheidungswesentlich gewesen, zu klären, wann sich der Beschwerdeführer erstmals Dritten gegenüber zu seiner Homosexualität bekannt hat, ob und zu welchem Zeitpunkt der Beschwerdeführer erstmals homosexuell aktiv geworden ist, bzw. wann die sexuelle Neigung des

Beschwerdeführers auf sonstige Weise erstmals in außenwirksamer Weise bekannt geworden ist, was jedoch vom Bundesasylamt weder erfragt noch sonst ermittelt wurde."

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

Many persons do not speak about their homosexuality until later in their case. Some of them are recognised as refugees when they are credible, others are not considered credible by the authorities and the application is thus rejected in cases of a repeat procedure or in the first application.

It depends on the circumstances. In successful cases speaking about it later on is seen as a phase of the coming out process. In general 'up to a certain degree' especially the judges from Asylgerichtshof are more understanding and see that in an asylum procedure the asylum seeker often doesn't know what he or she can tell the officer, that it takes time for the asylum seeker to adjust to the new situation.

Usually, persons from Nigeria and Gambia have worse chances than persons from Iran.

These persons face stricter tests of credibility. In these cases the assertion was seen as a heightened assertion - which is negative.

There are special problems in cases in which an asylum seeker tells about his sexual orientation in a consecutive application. In these cases the asylum seeker can be deported while he is still in an open procedure (§ 12a AsylG).

There was a case of a Nigerian man who gained prominence through the Austrian media in 2010. He was represented by Asyl in Not and was known as "case Cletus". His case led to demonstrations against his deportation (AsylGH 31.05.2010, A8 255.343-4/2010). He first talked about his homosexuality in his second application, which was rejected. In his third application he stated that he was also a homosexual activist, which the Nigerian community was allegedly aware of. The second application was rejected for the reason of res iudicata. Finally, in his third asylum procedure the Bundesasylamt also rejected the application for the same reason. After he appealed against this decision he was deported without a final decision by the Asylgerichtshof which is legal in case of so-called "consecutive applications".

There are several comparable cases, for instance: AsylGH 08.07.2010, A2 405.524-2/2010/4E (Gambia); 02.03.2010, A9 300.500-3/2010; 05.05.2010, A12 255.319-2/2010 (Nigeria).

In another case (AsylGH 17.02.2009, E2 255.708-2/2008) a homosexual man from Iran told the asylum authorities about his sexual orientation in a later interrogation, about five months after he initially applied for asylum. He was recognised as a refugee.

In another case - this procedure is still open - the Ukrainian asylum seeker applied for asylum a second time after he was back in Ukraine for some time (AsylGH 30.10.2009, D12 230.429-2/2009/8E).

In his second application for asylum in 2009 (the first one was in 2001) he claimed that after his return to Ukraine he was beat up by a group called "Ukrainian Patriots" (who often assault homosexuals) when he met with three other homosexuals, losing three teeth in the conflict. He was also openly harassed by graffiti directly addressed at him. When he left his home town and lived in a hotel he asked the waiter for the homosexual scene in this town. Two days later he was attacked by four persons in his hotel room. He was raped, threatened and warned not to call the police. He did not tell about his homosexuality during his first asylum procedure because he was ashamed. He also brought medical expertise which confirmed that he was a victim of serious anal rape. This case went to the Constitutional Court too. After the Constitutional Court cancelled the Asylgerichtshof's decision, the Asylgerichtshof cancelled the original Bundesasylamt's decision, which rejected the application because of res iudicata too.

Until now there is no final decision.

AsylGH 19.11.2008, A1 305.094-1/2008:

This asylum seeker from Morocco declared his homosexuality very late in his procedure, in his appeal against the Bundesasylamt's negative decision. He claimed he would be killed by the Muslim Brotherhood were he to return to Morocco. The Asylgerichtshof decided negatively this case without further interrogation because there is a prohibition of bringing new assertions after the procedure at the Bundesasylamt, except for cases in which the procedure was incomplete, if there is new proof or if the asylum seeker was not able to talk about it earlier. All these legal positions were ignored.

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.

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

This is especially important for cases from Iran, Afghanistan and Gambia. It is enough that the law itself exists. It is not necessary that the person has already been prosecuted.

UBAS 28.09.1998, 203.430/0-IX/26/98:

"Das iranische Gesetz über die islamischen Strafen vom 08.05.1370 (30.07.1991), dem Präsidenten am 03.10.1370 (24.12.1991) zur Verkündung zugeleitet, umfaßt vier Bücher. Das erste Buch entspricht in der Regelungsmaterie in etwa dem Allgemeinen Teil eines westlichen Strafgesetzbuches. Darin findet sich auch die Vorschrift, daß Iraner, die im Ausland eine Straftat begangen haben und im Iran angetroffen werden, gemäß den Strafgesetzen der Islamischen Republik Iran bestraft werden (Art. 7). In Buch II (Artikel 63 bis 303) sind die sogenannten religiösen Strafen vorgesehen, die von der Sharia festgelegt und bestimmt sind. In diesem Teil sind neun Hauptvergehen erörtert, wie z.B. illegale sexuelle Beziehung, männliche Homosexualität bzw. Sodomie, Anstiftung zur Unzucht oder Konsum alkoholischer Getränke. Die dafür vorgesehenen Strafen sind z.B. Auspeitschung, Steinigung, Hängen, Kreuzigung, Amputation, Verbannung, Todesstrafe (Themenpapier "Iran: Strafrecht, Buch V: Ta'zirat vom 22.05.1996" des Eidgenössischen Justiz- und Polizeidepartements, Bundesamt für Flüchtlinge, 27.11.1996; Sammlung außerdeutscher Strafgesetzbücher in deutscher Übersetzung, herausgegeben vom Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg im Breisgau, 1996, Strafgesetze der Islamischen Republik Iran, übersetzt und eingeleitet von Dr. Silvia Tellenbach)." [...]

Aufgrund der unbestrittenen homosexuellen Veranlagung erscheint es auch glaubwürdig, daß der Asylwerber bereits im Iran eine sexuelle Beziehung zu einem anderen Mann hatte. Vor dem Hintergrund der einflußreichen leitenden Position des Freundes des Asylwerbers bei den Basij in Isfahan erscheint es in der Folge auch glaubwürdig, daß der Asylwerber vorerst mit einer Ermahnung des Revolutionskomitees in Verbindung mit einer abgegebenen Garantieerklärung davonkam. Für diesen Zeitpunkt hat der Asylwerber auch nicht behauptet, daß gegen ihn ein gerichtliches Verfahren wegen homosexueller Betätigung eingeleitet worden wäre. Eine Ermahnung durch das Revolutionskomitee scheint vor allem auch durch den Umstand, daß der Partner des Asylwerbers den Basij, also den Pasdaran unterstellten Einheiten und damit den Sicherheitskräften angehört, glaubwürdig, da es menschlich nachvollziehbar ist, interne Schwierigkeiten (hier: der Sicherheitskräfte) nicht zu sehr hochzuspielen. Es ist daher schlüssig, daß der Partner des

Asylwerbers eher in Schutz genommen wurde und sogar durch seinen Einfluß für den Asylwerber einen bloßen Verweis erreichen konnte. [...]

Der Asylwerber gab an, aus Furcht vor einer ihm aufgrund seiner homosexuellen Veranlagung drohenden Verfolgung durch die iranischen Behörden aus seinem Heimatland geflüchtet zu sein. Aus den Feststellungen zum iranischen Strafrecht erhellt, daß für homosexuelle Handlungen die Strafe der Auspeitschung oder sogar die Todesstrafe, damit jedenfalls ein schwerer Eingriff in die körperliche Integrität, verhängt werden kann. Dieser in seiner Intensität zweifellos im Sinne der obigen Definition von Verfolgungsgefahr erhebliche Eingriff ist nur dann asylrelevant, wenn er an einen in Artikel 1 Abschnitt A Ziffer 2 festgelegten Grund, nämlich die Rasse, Religion, Nationalität, Zugehörigkeit zu einer bestimmten sozialen Gruppe oder politische Gesinnung anknüpft. [...]

Nun ist zwar Homosexualität ein Zugehörigkeitsmerkmal zu einer sozialen Gruppe, doch wird Homosexualität als solche im Iran noch nicht verfolgt, sondern erst die aufgrund der Homosexualität in Erscheinung getretenen Handlungen. Begründete Furcht vor Verfolgung wegen der aufgrund der Homosexualität gegebenen Zugehörigkeit zu einer sozialen Gruppe ist daher nur dann zu bejahen, wenn der Asylwerber in objektiv nachvollziehbarer Weise nach seiner speziellen Situation Grund hat, eine Verfolgung wegen gleichgeschlechtlicher, aus seiner homosexuellen Veranlagung resultierender Handlungen zu fürchten hat. Die homosexuelle Veranlagung des Asylwerbers ist zweifellos vorhanden, und dieser hatte deswegen bereits im Iran Probleme mit den Behörden, weshalb er in die Türkei und dann nach Österreich flüchtete, wo er seine homosexuelle Veranlagung sanktionslos über dreizehn Jahre hinweg ausleben konnte. Es ist undenkbar, daß der im Iran bereits aufgrund seiner Neigung auffällig gewordene Asylwerber im Fall seiner Rückkehr in den Iran keiner Verfolgung aufgrund seiner homosexuellen Neigung ausgesetzt wäre, da es ihm in seiner Situation, insbesondere auch aufgrund des dreizehnjährigen Auslandsaufenthaltes nach der allgemeinen Lebenserfahrung unmöglich wäre, sich gleichgeschlechtlicher sexueller Handlungen zu enthalten. Mit seiner Neigung zur Homosexualität ist daher zwangsläufig die Umsetzung in homosexuelle Handlungen verbunden, aufgrund derer ihm Verfolgung droht. Mit der Asylrelevanz von nach dem iranischen Strafrecht schwer bestraften sexuellen Handlungen hat sich der VwGH im Erkenntnis vom 18.12.1996, Zahl 96/20/0793, auseinandergesetzt. Dabei hat er ausgesprochen, daß die Beschwerdeführerin, welche aufgrund eines begangenen Ehebruchs im Iran zur Steinigung verurteilt worden war, die befürchtete Verfolgung nicht wegen eines Zugehörigkeitsmerkmals zu einer sozialen Gruppe, sondern wegen einer begangenen Straftat gemäß den Rechtsvorschriften ihres Heimatstaates zu befürchten hatte. Ehebruch begründet demnach kein Zugehörigkeitsmerkmal zu einer sozialen Gruppe. Im Unterschied zu einem Homosexuellen könnte die Ehebrecherin aber

einer strafbaren Handlung entrinnen, indem sie entweder mit ihrem Ehegatten verkehrt oder sich von diesem scheiden läßt und eine neue Ehe eingeht. Demgegenüber hat ein Homosexueller keine Alternativen, denn egal, mit welchem Mann er gleichgeschlechtliche Handlungen vollzieht, ist dies strafbar. Insofern ist die Furcht des Asylwerbers, aufgrund seiner Homosexualität im Iran einer Verfolgung ausgesetzt zu sein, objektiv nachvollziehbar.

Weitere Voraussetzung für die Asylgewährung ist, daß die Verfolgungsgefahr im Verfolgerstaat mit maßgeblicher Wahrscheinlichkeit droht. Der Asylwerber wurde bereits einmal wegen gleichgeschlechtlicher Handlungen verhaftet und erhielt deswegen vom Revolutionskomitee aufgrund der einflußreichen Position seines damaligen Freundes vorerst nur eine Ermahnung. Tatsache ist daher, daß der Asylwerber den iranischen Behörden aufgrund seiner homosexuellen Kontakte bereits bekannt ist und deshalb zu befürchten ist, daß er, da homosexuelles Verhalten im Iran schlechthin mit den islamischen Ordnungs- und Moralvorstellungen unvereinbar ist, von den iranischen Behörden besonders beobachtet wird. Vor dem Hintergrund der Bedeutung, die der Geschlechtstheorie im Iran zukommt - was sich an der ausführlichen Regelung der Sexualdelikte im iranischen Strafrecht zeigt - und welche aufgrund des Stellenwertes, der der Religion zukommt, auch von der Bevölkerung getragen wird, muß außerdem davon ausgegangen werden, daß Homosexuelle gesellschaftlich geächtet und vor allem auch von der Bevölkerung besonders beobachtet werden und daher erhöht Gefahr laufen, an die Behörden verraten zu werden. In der besonderen Situation des Asylwerbers kommt noch hinzu, daß dieser sich seit 1985 nicht mehr im Iran aufgehalten hat und ab diesem Zeitpunkt seine Homosexualität frei ausleben konnte. Es ist aufgrund dieses Umstandes daher anzunehmen, daß es ihm, falls er in den Iran zurückkehren würde, keinesfalls gelingen könnte, seine homosexuelle Veranlagung auch nur kurze Zeit zu verbergen. Hinzu tritt noch die Wahrscheinlichkeit, daß der in Wien lebende Asylwerber aufgrund seiner homosexuellen Neigung den dort ansässigen iranischen Behörden längst aufgefallen ist und Informationen über den Asylwerber an die Behörden im Iran weitergeleitet wurden. In diesem Zusammenhang ist auch zu würdigen, daß gem. Art. 7 des iranischen Strafgesetzes jeder Iraner, der im Ausland eine Straftat begangen hat und im Iran angetroffen wird, gemäß den iranischen Strafgesetzen bestraft wird. Es besteht daher auch die Gefahr, daß der Asylwerber aufgrund in Österreich gesetzter gleichgeschlechtlicher Handlungen, welche dem Heimatstaat im Wege der in Österreich eingerichteten iranischen Behörden bekannt werden, im Iran verfolgt wird. Aus all diesen Gründen muß im speziellen Fall des Asylwerbers das Vorliegen einer maßgeblichen Wahrscheinlichkeit von Verfolgung bejaht werden.

Im Zusammenhang mit der maßgeblichen Wahrscheinlichkeit von Verfolgung muß auch darauf abgestellt werden, ob einer Person in der Situation des Betroffenen eine Rückkehr in den

Heimatstaat überhaupt zugemutet werden kann, was nicht zuletzt von der Intensität des drohenden Eingriffs abhängt. Je schwerer der drohende Eingriff, desto geringer ist die erforderliche Gefahrenneigung. Bei schwersten Eingriffen, etwa bei drohenden Eingriffen in Leben, Gesundheit oder Freiheit, ist darauf abzustellen, ob die Verfolgungsgefahr mit erforderlicher Sicherheit ausgeschlossen werden kann (vgl. UBAS vom 27.02.1998, Zahl 200.386/0-I/03/98).

Für den vorliegenden Fall bedeutet dies, daß bei den für homosexuelles Verhalten im Iran drohenden drakonischen Strafmaßnahmen der Maßstab der erforderlichen Gefahrenneigung sogar geringer anzusetzen wäre als er - wie oben dargestellt - tatsächlich gegeben ist. Es wäre deshalb nach Ansicht der Berufungsbehörde beispielsweise schon alleine wegen der Tatsache des langen sexuell uneingeschränkten Auslandsaufenthaltes in Verbindung mit der Wahrscheinlichkeit des Bekanntwerdens über die iranischen Vertretungsbehörden die Unzumutbarkeit der Rückkehr zu bejahen.

An der maßgeblichen Wahrscheinlichkeit von Verfolgung und der Unzumutbarkeit der Rückkehr ändern auch die vom Bundesasylamt ins Treffen geführten Beweisregeln des iranischen Strafgesetzbuches nichts. Nach Artikel 114 ff. ist zwar als Beweis grundsätzlich entweder ein Geständnis oder die Aussage von vier männlichen Zeugen erforderlich, doch besteht auch die Möglichkeit, daß der religiöse Richter gemäß Art. 120 nach seinem Wissen, das er auf allgemein üblichen Weg erlangt hat, ein Urteil fällt. Die Auslegung dieser Bestimmung ist sowohl nach Auskunft des Max-Planck-Institutes für ausländisches und internationales Strafrecht in Freiburg im Breisgau als auch nach Auskunft des Hochkommissärs der Vereinten Nationen für die Flüchtlinge, Regionalbüro Wien, unklar. Es ist nach beiden Auskünften nicht eindeutig, ob der Richter tatsächlich eine Entscheidung erlassen kann, die ausschließlich auf eigenen Kenntnissen beruht, oder ob für eine Verurteilung zusätzlich ein Geständnis oder die Aussagen der Zeugen benötigt werden. Aus diesen Aussagen kann die Berufungsbehörde nicht den vom Bundesasylamt gezogenen Schluß, daß "die eher theoretische Möglichkeit gemäß Art. 120 als nicht wahrscheinlich anzunehmen ist", ziehen. Im vorliegenden Fall ist aber auch die Auslegung der Beweisregeln nicht entscheidungsrelevant, weil nach dem festgestellten Sachverhalt davon auszugehen ist, daß derzeit gegen den Asylwerber kein Verfahren wegen Homosexualität eingeleitet ist und die Berufungsbehörde für die Zukunft eine Prognose über das Bestehen oder Nichtbestehen einer Verfolgungsgefahr abzugeben hat.

Die Erfüllung der Beweisregeln hat daher, da kein konkreter Anlaßfall zu beurteilen ist, außer Betracht zu bleiben. Tatsache ist jedoch, daß homosexuelle Handlungen mit drakonischen Strafen bedroht sind und daß der Asylwerber im Fall der Rückkehr in seinen Heimatstaat mit maßgeblicher Wahrscheinlichkeit einer Verfolgung wegen homosexueller Handlungen ausgesetzt wäre. UNHCR

hat zwar in seiner Auskunft vom 31.08.1998 mitgeteilt, daß UNHCR kein Fall bekannt ist, in dem es zu einer Hinrichtung einer Person aufgrund ihrer homosexuellen Beziehung gekommen ist, doch läßt diese Auskunft keine Rückschlüsse über die Gründe, weshalb es zu keiner Hinrichtung gekommen ist, zu. Diese könnten einerseits sein, daß es kein Verfahren wegen Homosexualität gegeben hat oder aber, daß homosexuelle Personen aus dem Iran geflüchtet sind und in einem anderen Land Asyl gewährt erhielten, oder daß die entsprechenden Beweise nicht erbracht worden sind. Nicht kann daraus daher abgeleitet werden, daß es zwar gesetzliche Straftatbestände für homosexuelle Handlungen gibt, diese aber in der Praxis nicht vollzogen werden."

According to this there were also other decisions: AsylGH 10.03.2010, C10 257.854-0/2008; 20.07.2009, C5 257.855-0/2008 (Afghanistan); 03.08.2009, A2 402.885-1/2008 (Gambia); 17.02.2009, E2 255.708-2/2008; 31.03.2009, E3 314.390-1/2008; UBAS 27.01.1999, 203.912/0-VIII/24/98; 11.11.2010, E17 411.562-1/2010 (Iran).

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.

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?

Whether an asylum seeker gets protection depends on the credibility and on his country of origin.

Cases in which protection was guaranteed:

AsylGH 10.03.2010, C10 257.854-0/2008: The man from Afghanistan lived in a homosexual relationship in his home town. The neighbours found out, killed his boyfriend, he was injured himself, he came to Austria. The Asylgerichtshof gave him the status as a refugee because he was credible and homosexuality is neither accepted by Afghan society, nor by the state's law.

AsylGH 20.09.2009, C5 257.855-0/2008: First he said he left Afghanistan because the Americans came to Afghanistan and his father is a Talib. The Talibs also wanted him to fight for them, but he refused. In his third interrogation he added his problems concerning his homosexuality: His

boyfriend was shot to death when the people in Afghanistan found out. He fears to be killed by his father when he returns because homosexuality is a shame for a muslim. He received the status as a refugee because his sexual orientation was credible. In Afghanistan there is a serious danger of persecution for homosexuals.

In both cases there was a persecution by non-state actors, but homosexuality is also forbidden by the law.

Deserteursberatung reports that most of their clients come from Somalia, the perception is mostly from non-state actors and the state is not able to protect them. These persons often receive asylum from the Bundesasylamt.

Cases where no protection was guaranteed:

AsylGH 13.10.2010, A4 253.668-0/2008: This Nigerian asylum seeker is homosexual, his father wanted him to marry, his father is a muslim and does not accept that he is homosexual. His father took him to a group of persons who prayed, they threatened to kill him because of his sexual identity. He received no status because there were many contradictions, internal relocation is possible in Nigeria and he was not credible because he made vague statements about what happened.

AsylGH 25.06.2010, A12 401.644-1/2008: This was an asylum seeker from Nigeria. His father is Imam. Once one of the pupils of his father's koran school saw him having sex with his boyfriend, so his father got to know about it. And in Nigeria the Sharia also wants death penalty for that. He received no status because there were many contradictions, internal relocation is possible in Nigeria and he was not credible because he made vague statements to what happened.

The same contention made another Nigerian asylum seeker, he was decided negative for the same reasons (AsylGH 25.06.2010, A12 401.644-1/2008)

AsylGH 11.06.2010, A12 407.330-1/2009: A Nigerian asylum seeker said he was caught having sex with his boyfriend, who was killed afterwards. The Sharia wants death penalty for homosexual activities, so he fled. He received no status because there were many contradictions, internal relocation is possible in Nigeria and he was not credible because he made vague statements about what happened.

AsylGH 16.11.2009, B1 310.343-/2008: The asylum seeker from Serbia said he is a Roma and homosexual. He has problems as a Roma as well. Because of these two reasons he cannot live in Serbia, he cannot find work etc. He opened his own business, but this was taken away by the Mafia. He was threatened to be killed by his neighbour before he left Serbia. He cannot live his sexual orientation freely. The Asylgerichtshof refused his appeal because he was not credible. He had all together eight convictions for drug abuse and assault. He applied for asylum from prison when he

was threatened to be deported because his residential permission was not prolonged because of his convictions. He lived since 1974-1994 in Austria, then until 2004 in Serbia, then in Germany and came 2005 to Austria. That was the main reason why he was not credible. The sanctions against homosexuals in Serbia are not that drastic, that it is a persecution due to GFK.

AsylGH 17.02.2009, B10 404.424.1/2009: Because of his sexual orientation he was harrassed and maltreated by Serbia's society. His family does not want to have contact to him any more because he refused to marry and they knew about his sexual orientation. Hsi father threatened to kill him in case he would not leave his house. The AsylGH assumed him as not credible.

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

In most cases there is a combination of persecution by non-state actors and state actors. They are comparable in lesbian and gay cases.

Concerning transgender and intersex claims there are not enough cases to give a well funded opinion about this.

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.

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.

As described above, this is mostly relevant for persons from Iran, Afghanistan and Gambia.

See decisions described in 36A:

Afghanistan: AsylGH 10.03.2010, C10 257.854-0/2008; 20.07.2009, C5 257.855-0/2008

Gambia: 03.08.2009, A2 402.885-1/2008

Iran: 17.02.2009, E2 255.708-2/2008; 31.03.2009, E3 314.390-1/2008; UBAS 27.01.1999, 203.912/0-VIII/24/98; 11.11.2010, E17 411.562-1/2010; UBAS 28.09.1998, 203.430/0-IX/26/98

In these decisions the Court argues that the persecution in these cases comes both from non-state and state actors, independently from the question whether there actually was a problem with the state or not.

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.

In some cases yes, in others no. It depends on the particular circumstances of each case.

AsylGH 21.07.2008, C2 312.450-1/2008: This asylum seeker came from Turkey. He originally came to Austria on a student's visa. In Turkey he had had problems because of his homosexuality for years: he was sexually abused for years by a person he knows, he was raped four times, also by police officers and he is afraid of serving in the military because of his sexual orientation. Because of that he has psychological problems and sees a doctor on a regular basis. He received a refugee status.

AsylGH 30.10.2009, D12 230.429-2/2009/8E: The Ukrainian homosexual asylum seeker said that after his return to Ukraine he was assaulted by a group called "Ukrainian Patriots" (who often beats up homosexuals) when he met other homosexuals and lost three teeth in the row. He was also openly harassed with graffiti on the wall directly addressed at him as a person. When he left his home town and lived in a hotel he asked the waiter for the homosexual scene of the town. Two days later four men attacked him in his hotel room. One of them raped him and he was threatened and warned not to call the police. This case is still open, but there are positive signs as the Constitutional Court cancelled the Asylgerichtshof's negative decision. This means even though he did not go to the police this is seen as relevant.

AsylGH 12.08.2010, A2 414.747-1/2010: This man is aware of his homosexuality since his time at school. People in Zimbabwe are against homosexuality and he was frequently beat by strangers and he has been discriminated against. Sometimes persons paid him or gave him presents when he had sex with them. After the community found out, he was assaulted even more often. There is still no final decision, but the Bundesasylamt's decision was cancelled once, which is a positive sign.

Nigeria: Caritas reports that in these cases there is a very strict analysis if the state is willing to protect a person. For instance, there are nationwide criminal laws against homosexuality in Nigeria and the state is not willing to protect LGBTI-persons. However, internal relocation to a Christian part of the country is often suggested.

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

see answers in 38A and 38B

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?

In the decisions it is argued that homosexuality leads to problems with the state as well as with the community. Therefore the criminal sanctions and the homophobic atmosphere go hand in hand.

Afghanistan: AsylGH 10.03.2010, C10 257.854-0/2008; 20.07.2009, C5 257.855-0/2008

Gambia: 03.08.2009, A2 402.885-1/2008

Iran: 17.02.2009, E2 255.708-2/2008; 31.03.2009, E3 314.390-1/2008; UBAS 27.01.1999, 203.912/0-VIII/24/98; 11.11.2010, E17 411.562-1/2010; UBAS 28.09.1998, 203.430/0-IX/26/98

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?

Nigeria: Caritas reports that in these cases there is a very strict analysis if the state is willing to protect a person. For instance, there are nationwide criminal laws against homosexuality in Nigeria and the state is not willing to protect LGBTI-persons. However, internal relocation to a Christian part of the country is often suggested.

AsylGH 19.08.2009, C9 248.748-0/2008: This woman from Mongolia came to Austria in 2002, the final negative decision was made in 2009. She has two kids who live in Mongolia with her mother. She was harassed by her former spouse and her colleagues at work and was physically maltreated by them because they knew about her sexual orientation. Concerning the violence she had to suffer from her former spouse and colleagues, the Asylgerichtshof argued that there is the alternative of an

internal relocation. Concerning her sexual orientation she is "not more in danger of being persecuted" than other persons in her situation. Since 2002 homosexual practices are no longer punished in Mongolia. "Homosexuals are not more in danger than other minorities"

AsylGH 01.07.2009, A13 407.007-1/2009: This woman said she is a lesbian and had a girlfriend. Her father wanted her to marry one of his friends, but she refused . Being homosexual is against Nigerian culture and law. Her father, who is also part of a secret cult, threatened to kill her in case she would not marry his friend. She and her girlfriend decided to run away, but her girlfriend died during their escape, though she does not know exactly how. Until she finally left Nigeria she lived in her father's house. The Asylgerichtshof argued that she could also be relocated within Nigeria and that lesbians are not as harshly discriminated against as gay men are (according to country reports).

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

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...)?

Caritas reports fear of criminal persecution, fear of attacks by relatives and / or others (neighbours); there is a special problem with the so called "dancing boys" (Tanzknaben) in Afghanistan, which is a sexual exploitation of minors. The authorities treat these cases in the same way as LGBTI-cases: the most important problems are credibility and internal relocation - men are usually assumed to be more credible.

Deserteursberatung reports mainly physical maltreatment and violence, death threats - their clients are mostly from Somalia.

Research in ris (www.ris.bka.gv.at/judikatur) for 2009 and 2010:

physical violence, blackmail, harassment, threats, psychological violence and intimidation in all countries, by family members as well as by neighbours, homophobic gangs, ...;
sexual violence especially against men in Russia, Ukraine, Georgia and Turkey;
detention and special punishment due to Sharia in Iran, Gambia, Nigeria;
execution especially in Iran;
forced marriages in Iran and Afghanistan, in one lesbian case also in Nigeria
no access to employment mainly in Mongolia, Cuba, Turkmenistan
no access to judiciary in Georgia, Russia, Turkey
honour killings mostly in Afghanistan, Gambia, Nigeria, sometimes Iran

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?

That depends on the country of origin, the intensity of the acts of persecution, the state's willingness or ability to protect a person and the internal relocation alternative.

Persecution by the state in cases where the physical integrity or freedom is violated systematically or several times, or in cases in which the state is not willing or able to protect a person from these acts is seen as relevant. I.e. the lack of access to judiciary was relevant in these cases.

Criminal penalties of all kinds are always relevant when they apply to the client's sexual orientation. Harassment, threats, blackmail, intimidation and psychological violence without physical violation does usually not lead to protection.

Forced marriage without any other elements of persecution did not lead to protection in the case of a lesbian Nigerian woman - it was argued that the danger comes from the family and she could move to another part of the country. In the other cases of forced marriage (Iran and Afghanistan) this was only one element of the persecution, which was not the main part of the assertion.

Not having access to employment did not lead to protection.

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).

I can only give a well-founded opinion about lesbian and gay cases.

In most cases men have more serious problems than women. They are more often victim of physical violence, including sexual violence (especially Georgia, Russ. Federation, Ukraine, Serbia, Turkey); in strict muslim countries which use the Sharia they are more likely to be prosecuted (Iran, Afghanistan, Gambia, parts of Nigeria).

Women more often report general discrimination, different kinds of psychological violence, problems with finding and / or keeping a job, but also physical violence. In strict muslim countries where they use Sharia women have in general the same problems as men.

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.

I found no such case.

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.

Most cases which are refused are because of lack of credibility of the asylum seeker in general - concerning the sexual orientation as well as concerning the persecution he or she had to suffer.

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.

There was one case of a bisexual man from Iran (AsylGH 14.07.2009, E2 405.216-1/2009) who did not get any form of protection. In this case the court believed he had homosexual encounters, but decided that these were not so deeply encraved in his sexual orientation, that it would be impossible for him to live in a heterosexual relationship.

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?

In principle it depends mostly on the actual consequences the asylum seeker has to fear in case of his or her return. So there are no general differences between L, G and B applicants, they are only based on the special circumstances of the case and the country of origin.

Concerning bisexual asylum seekers take special regard to AsylGH 14.07.2009, E2 405.216-1/2009 (described in 44)

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?

They are part of a social group as L, G and B asylum seekers.

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

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

If there is a group which has a certain sexual orientation in common they automatically have a distinct identity in case they are persecuted - otherwise they would not be persecuted, because nobody would find out. So in practice this is not a problem.

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

The Austrian asylum law says: A person is recognised as a refugee under the conditions of the Geneva Convention of the Protection of Refugees.

§ 3. (1) Einem Fremden, der in Österreich einen Antrag auf internationalen Schutz gestellt hat, ist, soweit dieser Antrag nicht wegen Drittstaatsicherheit oder Zuständigkeit eines anderen Staates zurückzuweisen ist, der Status des Asylberechtigten zuzuerkennen, wenn glaubhaft ist, dass ihm im Herkunftsstaat Verfolgung im Sinne des Art. 1 Abschnitt A Z 2 Genfer Flüchtlingskonvention droht.

The rest is from judicature, and the materials to asylum law which refer to EG-law. These sources say that LGBTIs are a social group.

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?

No such cases found, no NGO reported a case like this.

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?

No such cases found, no NGO reported a case like this.

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.

No such cases found, no NGO reported a case like this.

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

Procedures Directive⁴, 2005/85

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

Only in case of a violation of the sexual integrity the asylum seeker has the right to have an interpreter and an interviewer of the same gender, except in cases where he or she explicitly requests anything else:

§ 20. (1) Gründet ein Asylwerber seine Furcht vor Verfolgung (Art. 1 Abschnitt A Z 2 der Genfer Flüchtlingskonvention) auf Eingriffe in seine sexuelle Selbstbestimmung, ist er von einem Organwalter desselben Geschlechts einzuvernehmen, es sei denn, dass er anderes verlangt. Von dem Bestehen dieser Möglichkeit ist der Asylwerber nachweislich in Kenntnis zu setzen.

(2) Für Verfahren vor dem Asylgerichtshof gilt Abs. 1 nur, wenn der Asylwerber den Eingriff in seine sexuelle Selbstbestimmung bereits vor dem Bundesasylamt oder in der Beschwerde behauptet hat. Diesfalls ist eine Verhandlung von einem Einzelrichter desselben Geschlechts oder einem aus Richtern desselben Geschlechts bestehenden Senat durchzuführen. Ein Verlangen nach Abs. 1 ist spätestens gleichzeitig mit der Beschwerde zu stellen.

(3) Abs. 1 gilt nicht für Verfahren vor dem Kammersenat.

(4) Wenn der betroffene Asylwerber dies wünscht, ist die Öffentlichkeit von der Verhandlung eines Senates oder Kammersenates auszuschließen. Von dieser Möglichkeit ist er nachweislich in Kenntnis zu setzen. Im Übrigen gilt § 67e AVG.

Nevertheless, there are numerous cases at the Asylgerichtshof - even without a violation of the sexual integrity - where asylum seekers are in a special senate where cases about sexual violations usually have their hearing. In one case (AsylGH 03.08.2009, A2 402.885-1/2008) a homosexual man from Gambia without a violation of his sexual integrity was explicitly asked if it is ok if the interpreter and the writing personnel were female.

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

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

In general one has the right to refuse an expert (the interpreter is considered an expert according to Austrian law) if claims are made that the expert is prejudiced (§ 53 AVG). Valid reasons have to be provided why the expert is supposedly prejudiced. One does not have the right to refuse an interpreter just because of his or her ethnicity, as long as this does not imply that he or she is prejudiced and will translate incorrectly.

According to Deserteursberatung this is a problem within the Somali community.

§ 53. (1) Auf Amtssachverständige ist § 7 anzuwenden. Andere Sachverständige sind ausgeschlossen, wenn einer der Gründe des § 7 Abs. 1 Z 1, 2 und 4 zutrifft; außerdem können sie von einer Partei abgelehnt werden, wenn diese Umstände glaubhaft macht, die die Unbefangenheit oder Fachkunde des Sachverständigen in Zweifel stellen. Die Ablehnung kann vor der Vernehmung des Sachverständigen, später aber nur dann erfolgen, wenn die Partei glaubhaft macht, daß sie den Ablehnungsgrund vorher nicht erfahren oder wegen eines für sie unüberwindbaren Hindernisses nicht rechtzeitig geltend machen konnte.

(2) Über den Ablehnungsantrag entscheidet die Behörde endgültig.

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?

It is part of the general training.

55B) Is the training:

- Obligatory No Yes. For whom?

Answer from Ministry of Interior:

"The Bundesasylamt offers various programmes for further education every year for it's workers, which are in accordance with the special needs of the BAA. According to this, the officer's education is improved in the fields of interrogating and defining of a refugee. In these programmes the legal and interrogative techniques of the sexual orientation are treated as well."

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

55C) Who has access to this training?

The officers of the Bundesasylamt.

55D) Are judges included in these trainings?

No Yes

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

see 55B

55F) Who does the training?

see 55B

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.

These accelerated procedures are for Dublin-cases and consecutive applications. In general each of these applications is an accelerated procedure.

Dublin-cases usually pass through all instances within a few months. After the appeal against the Bundesasylamt's decision the Asylgerichtshof has one week to give the appeal suspensive effect. If the Asylgerichtshof does not do so, the person can be deported.

In cases of a consecutive application (see § 12a AsylG) he or she can be deported even before the first negative decision.

§ 12a. (1) Hat der Fremde einen Folgeantrag (§ 2 Abs. 1 Z 23) nach einer zurückweisenden Entscheidung gemäß § 5 oder nach jeder weiteren, einer zurückweisenden Entscheidung gemäß § 5 folgenden, zurückweisenden Entscheidung gemäß § 68 Abs. 1 AVG gestellt, kommt ihm ein faktischer Abschiebeschutz nicht zu, wenn

1. gegen ihn eine aufrechte Ausweisung besteht,
2. kein Fall des § 39 Abs. 2 vorliegt und

3. eine Zuständigkeit des anderen Staates weiterhin besteht oder dieser die Zuständigkeit weiterhin oder neuerlich anerkennt.

(2) Hat der Fremde einen Folgeantrag (§ 2 Abs. 1 Z 23) gestellt und liegt kein Fall des Abs. 1 vor, kann das Bundesasylamt den faktischen Abschiebeschutz des Fremden aufheben, wenn

1. gegen ihn eine aufrechte Ausweisung besteht,

2. der Antrag voraussichtlich zurückzuweisen ist, weil keine entscheidungswesentliche Änderung des maßgeblichen Sachverhalts eingetreten ist, und

3. die Zurückweisung, Zurückschiebung oder Abschiebung keine reale Gefahr einer Verletzung von Art. 2, 3 oder 8 EMRK oder der Protokolle Nr. 6 oder Nr. 13 zur Konvention bedeuten und für ihn als Zivilperson keine ernsthafte Bedrohung des Lebens oder der Unversehrtheit infolge willkürlicher Gewalt im Rahmen eines internationalen oder innerstaatlichen Konfliktes mit sich bringen würde.

(3) Hat der Fremde einen Folgeantrag (§ 2 Abs. 1 Z 23) gemäß Abs. 2 binnen achtzehn Tagen vor einem bereits festgelegten Abschiebetermin gestellt, kommt ihm ein faktischer Abschiebeschutz nicht zu, wenn zum Antragszeitpunkt

1. gegen ihn eine aufrechte Ausweisung besteht,

2. der Fremde über den Abschiebetermin zuvor nachweislich informiert worden ist (§ 67 Abs. 4 FPG) und

3. darüber hinaus

a) sich der Fremde in Schubhaft befindet;

b) gegen den Fremden ein gelinderes Mittel (§ 77 FPG) angewandt wird, oder

c) der Fremde nach einer Festnahme gemäß § 74 Abs. 2 Z 1 oder 3 FPG iVm § 39 Abs. 2 Z 1 FPG angehalten wird.

Liegt eine der Voraussetzungen der Z 1 bis 3 nicht vor, ist gemäß Abs. 2 vorzugehen. Für die Berechnung der achtzehntägigen Frist gilt § 33 Abs. 2 AVG nicht.

(4) In den Fällen des Abs. 3 hat das Bundesasylamt dem Fremden den faktischen Abschiebeschutz in Ausnahmefällen zuzuerkennen, wenn der Folgeantrag nicht zur ungerechtfertigten Verhinderung oder Verzögerung der Abschiebung gestellt wurde. Dies ist dann der Fall, wenn

1. der Fremde anlässlich der Befragung oder Einvernahme (§ 19) glaubhaft macht, dass er den Folgeantrag zu keinem früheren Zeitpunkt stellen konnte oder

2. sich seit der letzten Entscheidung die objektive Situation im Herkunftsstaat entscheidungsrelevant geändert hat.

Über das Vorliegen der Voraussetzungen der Z 1 und 2 ist mit Mandatsbescheid (§ 57 AVG) zu entscheiden. Wurde der Folgeantrag binnen zwei Tagen vor dem bereits festgelegten

Abschiebetermin gestellt, hat sich die Prüfung des faktischen Abschiebeschutzes auf das Vorliegen der Voraussetzung der Z 2 zu beschränken. Für die Berechnung der zweitägigen Frist gilt § 33 Abs. 2 AVG nicht. Die Zuerkennung des faktischen Abschiebeschutzes steht einer weiteren Verfahrensführung gemäß Abs. 2 nicht entgegen.

(5) Abweichend von §§ 17 Abs. 4 und 29 Abs. 1 beginnt das Zulassungsverfahren in den Fällen des Abs. 1 und 3 bereits mit der Stellung des Antrags auf internationalen Schutz.

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

No Yes. Please explain.

General LGBTI asylum procedures are not prioritised. They are only prioritised like all the others, as described in 57.

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.

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.

Family Reunification Directive⁵, Council Directive 2003/86/EC

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.

Due to § 2/1/22 AsylG under the same circumstances as a heterosexual family: the family must already have existed in the country of origin (or another country they lived in before the refugee relocated to Austria and applied for asylum). The partner simply has to apply for a family reunification.

§ 2/1/22 AsylG: Familienangehöriger: wer Elternteil eines minderjährigen Kindes, Ehegatte oder zum Zeitpunkt der Antragstellung minderjähriges lediges Kind eines Asylwerbers oder eines Fremden ist, dem der Status des subsidiär Schutzberechtigten oder des Asylberechtigten zuerkannt wurde, sofern die Ehe bei Ehegatten bereits im Herkunftsstaat bestanden hat; dies gilt weiters auch für eingetragene Partner, sofern die eingetragene Partnerschaft bereits im Herkunftsstaat bestanden hat.

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.

⁵ Family Reunification Directive:

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

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

62A) By whom are these problems caused?

According to ORQOA some of them must reside in small towns and villages during the asylum procedure, where the tolerance of local people is usually lowest for LGBTIs. Problems are most commonly caused by local people, the personnel of the accommodation or other asylum seekers living in the same accommodation.

In the case of a lesbian Iranian couple who lived on the countryside in Tyrol, the accommodation's leader always warned them about taking men home; she completely ignored the obvious homosexual orientation of two women from Iran and they were afraid of what would happen if she was to find out about their orientation.

In another case (AsylGH 17.02.2009, E2 255.708-2/2008) a homosexual man from Iran had serious issues with people from his community who lived in his accommodation. He was therefore initially given a single room, but as problems continued to occur he was allowed to live separately in his own apartment.

62B) Are the authorities aware of these problems?

No Yes. How do they react?

partly, see 62A

62C) Does a complaints mechanism exist?

No
 Yes. Is it effective? No Yes

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

No
 Yes. Please explain

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

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

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

a) during the asylum procedure

No Yes

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.

When still in the procedure, they cannot change it, when they are granted refugee status, they can

Any other issues

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

Caritas reports that for women it is more difficult than for men to prove their sexual orientation. There was a case where the (female) judge said informally that she does not want to deal with cases of the lesbian asylum seeker, "because there are already too many lesbians". This case was passed on to the HOSI. Persons who have a coming out after leaving their home country are often afraid of the reactions of their community.

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.

In general, the situation and chance to be granted refugee status seems to be very good for persons who come from Iran, Afghanistan and Irak, but very difficult, almost impossible, for persons who come from Nigeria, and very hard for persons who come from Gambia.

Partly, the reason for that might be the behaviour of the asylum seekers in front of the authorities.

Most of the applications were decided negatively because the asylum seekers and what they stated

about experiences in their respective countries of origin were assumed not to be credible. Many Nigerians who claimed to be homosexual actually are not homosexual, but somebody told them that they should say so. That is why their asylum claims and their behaviour in the procedure is often problematic. Their stories commonly contain contradictions while lacking detailed and valid reasons for leaving their country and sometimes they even re-use the exact same claims from other asylum seekers. The results of these problems are that

- a. the asylum-quotes for Nigerians who claim to be homosexual are very low
 - b. the judges are disproportionately strict with Nigerian asylum seekers,
- which makes it very hard for actual homosexuals from Nigeria to appear believable to the judge.

I also see some shortcomings in the protection of asylum seekers from Ukraine and the Russian Federation. These persons often had to suffer from mostly non-state persecution, but in a very harsh way. This high amount of discrimination, which also leads to physical and / or sexual violence is a problem in the whole country. However, asylum seekers do not receive appropriate protection.

Concerning the asylum procedure itself most of it seems adequate. Unfortunately though, some of the questions asked in the inquiries go much too deep into the private and sexual life of the asylum seekers, but this is not a general pattern which we can find in every asylum procedure.

Concerning the credibility of the asylum seekers' sexual orientation I found that psychological expertise is often very helpful and that no forms of degrading treatment in these examinations has occurred - mostly because they are brought by the asylum seekers themselves.

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.