

FLEEING HOMOPHOBIA

QUESTIONNAIRE

European Research Project

FLEEING HOMOPHOBIA, SEEKING SAFETY IN EUROPE,

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

Introduction

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

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

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

Guidance to the questionnaire

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

It is clear that there are not only considerable differences in the handling of LGBTI asylum applications in each EU country, but in their numbers as well. The availability of these cases will

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

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

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

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

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

Thank you very much!

Best regards,

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General

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

I taught Refugee Law at the Faculty of Law of Masaryk University (Brno) and was co-responsible for the Refugee Law Clinic at the same university. Since 2007 I have clerked for Justice of the Supreme Administrative Court of the Czech Republic (currently on leave). I also co-authored the only available Commentary on the Czech Asylum Act (KOSAŘ, D., MOLEK, P., HONUSKOVÁ, V., JURMAN, M., LUPAČOVÁ, H.: *Zákon o azylu. Komentář*. Wolters Kluwer CZ, 2010, 736 pp.) and authored several reports on transposition of the EC Asylum Directives for the European Commission (under the auspices of the Odysseus Network).

This reflects the development in the Czech Republic until 31 March 2011. All opinions expressed in this questionnaire are strictly personal to the author and not to any of the abovementioned institutions.

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

I relied on the following sources: the case law of the Supreme Administrative Court of the Czech Republic and the available case law of lower courts, the decision-making practice of the Ministry of the Interior (my personal collection), replies to my own questionnaire (a condensed version of this questionnaire translated into Czech) sent to the Ministry of the Interior, to the Refugee Facilities Administration (RFA) and to the UNHCR, and on interviews with lawyers specialized in asylum law, members of NGOs and DAMP officials.

Throughout the questionnaire, I use the following abbreviations:

- ASA: Act No. 325/1999 Coll. on Asylum and on Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act)
- ALA: Act No. 326/1999 Coll. on Residence of Aliens on the Territory of the Czech Republic and Amendment to Some Acts; informally referred to as the Aliens' Act

- DAMP: Department for Asylum and Migration Policies (Odbor azylové a migrační politiky) of the Ministry of the Interior (this body decides on the application for international protection that encompasses refugee status claim, subsidiary protection claim, humanitarian asylum and family reunification claims)
- RFA: Refugee Facilities Administration (Správa Uprchlických Zařízení) = a budgetary organisation of the Ministry of the Interior of the Czech Republic that operates the reception and accommodation centres for asylum seekers, integration centres for recognised refugees and facilities for administrative detention of foreign national and, more generally, is responsible for delivering reception conditions to applicants for international protection.
- QD: Qualification Directive
- RCD: Reception Conditions Directive
- "DAMP Replies": Replies of the DAMP to my questionnaire from 12 January 2011 (on file with author).
- "UNHCR Replies": Replies of the UNHCR to my questionnaire from 4 March 2011 (on file with author).
- "RFA Replies": Replies of the RFA to my questionnaire from 16 March 2011 (on file with author)
- COI: country of origin information
- MPSG: membership of a particular social group
- "FRA Report of 2010": FRA: Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. 2010 Update, Luxembourg: Publications Office of the European Union, 2010.

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.

As there is no official statistics of the LGBTI claims and since the decisions of the DAMP and decisions of the lower courts are not published [This has changed in January 2011, when the SAC started to publish all decisions of the regional courts (the courts of the first instance in administrative law issues) on its new website. However, only decisions rendered after 1 January 2011 are uploaded automatically and the decisions from the previous years shall be added only later] it is very difficult to provide a reasonable estimate of the number of LGBTI claims. I will provide numbers from the case law of the Supreme Administrative Court (SAC), estimates of the DAMP and, finally, I will add my own assessment based on my intuition and interviews with my network of advocates and members of NGOs involved in asylum law litigation. However, it is important to stress here that all of these estimates are tentative and should be approached with caution.

As to the SAC, one must note two limits of conclusions drawn on the SAC's case law. First, the SAC was established only in 2003 and, hence, the following numbers cover only years 2003-2010 [Note that data prior 2003 are not available, because the case law of the high courts that decided on the asylum cases before the establishment of the SAC is not, with the exception of few cases published in law journals, publicly available]. Second, asylum seekers appeal the decision of the DAMP only if the DAMP's decision is negative. Hence, the case law of the SAC does not tell us anything about the number of asylum seekers who raised their LGBTI successfully before the DAMP (as there is no specific statistics on successful LGBTI asylum seekers it is impossible to learn how many LGBTI asylum seekers were granted asylum or other form of protection). The "good thing" is that the SAC publishes all decisions rendered by the SAC at its website (www.nssoud.cz).

The SAC decided 10.349 asylum cases since 1 January 2003 until 31 December 2010 (see www.nssoud.cz). The SAC referred to sexual orientation in hundreds of decisions, but most of these decisions just "copy and paste" the ratio decidendi of the leading cases on the membership in a

particular social group, where the SAC accepted in general that homosexuals may form a particular social group under the Art. 1(A) GC1951. Therefore, these cases do not necessarily deal with the LGBTI claims. When I went through these cases, I found 31 genuine LGBTI cases in the SAC's case law (within 8 years). This means that there are roughly 4-5 LGBTI cases per year that reach the SAC. Among these 35 cases, there are 20 gay cases (65%), 8 lesbian cases (26%), 2 bisexual cases (6%), 1 transsexual case (3%) and no intersex case.

According to the DAMP, LGBTI claims are often combined with gender and religious issues and thus it is difficult to separate the LGBTI aspect of the case. Despite this ambiguity the DAMP estimates (as stressed above, there are no official statistics) that there LGBTI cases are rather rare and that the number of these cases per year usually does not reach double digits. DAMP claims that gay cases are the most numerous among the LGBTI cases, lesbian and bisexual claims are less common, transsexual claims are extremely rare (DAMP remembers only 2 or 3 transsexual cases altogether) and intersex claims are non-existent (see DAMP Replies).

I discussed the "SAC numbers" and "DAMP numbers" with several lawyers involved in the asylum litigation and they confirm these estimates.

It is thus possible to pin down the following tentative conclusions. Given the huge numbers of asylum claims in the Czech Republic (especially before the accession of to the European Union, when the Czech Republic shared external border of EU with Germany), the number of LGBTI claims has been relatively low. LGBTI claims usually reach single digits or slightly above per year (note that not all cases are appealed to the SAC). The percentage of LGBTI claims among all asylum cases has increased sharply since 2004, because the overall number of asylum cases dropped significantly. Whether the actual number of LGBTI cases increased over time is hard to say, but none of the interviewed people observed a significant increase of these claims.

As to the outcome of 31 cases before the SAC, the numbers are as follows: 26 cassational complaints were rejected [18 on the merits, 8 in the so-called "inacceptability procedure" introduced in 2005 (this procedure roughly corresponds to the leave of appeal or the writ a certiorari)] and 5 cassational complaints were successful (hence, the SAC quashed the judgments of the regional court in these 5 cases; however, this does not necessarily mean that these applicants were granted the refugee status or another form of international protection).

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

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

Lesbian cases are the second most common among the LGBTI cases (after gay cases). They amount, roughly, to 25% of all LGBTI cases. But note that all estimates mentioned in this question are extremely crude (for reasons mentioned in Q. 2) and, hence, these estimates should be approached with caution.

What are the main issues in these cases?

Note that almost all lesbian cases based on the wording of ASA prior to transposition of QD (that is the cases that were decided by the DAMP before 31 August 2006) were rejected by the SAC because the SAC adopted the German restrictive position on agents of persecution. According to the SAC's "pre-QD interpretation" of Art. 12(b) ASA [that roughly corresponds to the GC1951 definition of a refugee], only persecution committed, condoned or tolerated by the State was considered persecution under Art. 1(A) GC1951. Many pre-accession lesbian cases involved persecution by non-stage agents and thus they were rejected on this ground (see e.g. Judgment of the SAC of 20 April 2005, No. 3 Azs 245/2004; or Judgment of the SAC of 30 October 2006, No. 4 Azs 13/2006). Other lesbian cases were dismissed on procedural grounds or for failure to raise the LGBTI issues before the regional court (see e.g. Judgment of the SAC of 21 March 2007, No. 3 Azs 74/2006). It is important to stress here that under the Code of Administrative Justice the SAC reviews the DAMP decisions according to the state of the law AT THE TIME the DAMP's decision is rendered [More specifically, Art. 75(1) of Act No. 150/2002 Coll., Code of Administrative Justice, stipulates: "In its review of the decision the court proceeds from the facts of the case and the legal situation existing at the time of decision-making by the administrative authority."]. Hence, the SAC adopted the QD-conforming interpretation only in cases decided by the DAMP after 1 September 2006 (I am aware of the fact that this position is problematic from the point of EU law and CJEU's case law on the direct and indirect effects of the EC Directives).

The main issues in the SAC's case law on lesbians are as follows:

- whether decriminalisation of lesbian relations (in Armenia) automatically means that the "failure of state protection" limb of persecution is not satisfied (Judgment of the SAC of 2 August 2006, No. 3 Azs 268/2005)
- whether lesbians can form a particular social group (Judgment of the SAC of 2 August 2006, No. 3 Azs 268/2005; Judgment of the SAC of 21 February 2007, No. 4 Azs 130/2006)
- requirement to seek protection from the State authorities (Judgment of the SAC of 2 August 2006, No. 3 Azs 268/2005)

- threshold of persecution and where to draw the line between discrimination and persecution (Judgment of the SAC of 21 February 2007, No. 4 Azs 130/2006; Decision of the SAC of 30 September 2009, No. 9 Azs 39/2009)

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

See above. Gay cases are the most numerous among LGBTI cases in the Czech Republic. They represent more than half of these asylum claims.

Note that in 2006 the Czech Republic adopted a "single procedure" that covers both the refugee status determination and subsidiary protection determination [and also specific national forms of protection such as humanitarian asylum and family reunification statuses; on the former see Q.7(a), on the latter see Q.61]. Hence, since 2006 one should speak about international protection procedure and applicants for international protection. However, I use terms "asylum seeker" and "applicants for international protection" interchangeably.

What are the main issues in these cases?

Similarly to the SAC's case law on lesbians, the restrictive interpretation of agents of persecution prior to transposition of QD permeates the early case law of the SAC on gays. Hence, majority of gays cases were rejected on the ground that persecution was not attributable to the state, but emanated from non-state agents (see e.g. Judgment of the SAC of 9 August 2006, No. 3 Azs 280/2005). Many gay cases were also dismissed on procedural grounds or for failure to raise the LGBTI issues before the regional court (see e.g. Judgment of the SAC of 28 August 2003, No. 2 Azs 3/2003). These two factors postponed adjudication of important substantive issues in LGBTI claims (most leading cases come from years 2006-2010).

The main issues in the SAC's case law on gays are as follows:

- role of decriminalisation of gay relations automatically (Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; Judgment of the SAC of 30 June 2005, No. 4 Azs 440/2004; Judgment of the SAC of 23 November 2007, No. 5 Azs 50/2007)

- whether the fact that homosexuality is a criminal act in the country of origin automatically satisfies the threshold of persecution or whether additional proof such as regular enforcement of this criminal provision is required (Judgment of the SAC of 23 November 2007, No. 5 Azs 50/2007)

- whether gays can form a particular social group (Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; Judgment of the SAC of 23 November 2007, No. 5 Azs 50/2007)
- requirement to seek protection from the State authorities (Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; Judgment of the SAC of 15 September 2005, No. 1 Azs 102/2005; Judgment of the SAC of 24 August 2005, No. 4 Azs 547/2004)
- standard and effectiveness of protection from persecution (Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; Judgment of the SAC of 20 October 2005, No. 2 Azs 463/2004)
- threshold of persecution and where to draw the line between discrimination and persecution (Judgment of the SAC of 26 July 2006, No. 5 Azs 75/2006; Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; Decision of the SAC of 16 July 2008, No. 1 Azs 34/2008; Judgment of the SAC of 13 November 2006, No. 2 Azs 270/2005; Judgment of the SAC of 23 November 2007, No. 5 Azs 50/2007)
- persecution on cumulative grounds (Judgment of the SAC of 13 November 2006, No. 2 Azs 270/2005)
- burden of proof and standard of proof (Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, §§ 23-25)
- whether the gay applicant for international protection whose "asylum story" was not found credible must be granted subsidiary protection (Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, §§ 29-34)
- imputed homosexuality (Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, § 35)
- harassment of gays in the army and draft evasion (Judgment of the SAC of 23 November 2007, No. 5 Azs 50/2007)
- "hidden homosexuality" (Judgment of the SAC of 28 May 2009, No. 6 Azs 26/2009)
- "quality & quantity" of the COI in gay cases (Judgment of the SAC of 28 May 2009, No. 6 Azs 26/2009)
- whether harsh treatment of gay criminals in prison facilities triggers extraterritorial effect of Art. 3 and/or Art. 8 ECHR (Judgment of the SAC of 29 May 2009, No. 6 Azs 41/2008)

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?

Bisexual cases are far less numerous than gay or lesbian cases. I found two bisexual cases in the SAC's case law. In the first case, the SAC did not address the LGBTI issues on the merits since the asylum seeker did not raise these issues before the regional court and thus these claims, due to the procedural principle of concentration, were found inadmissible (Decision of the SAC of 25 November 2008, No. 9 Azs 79/2008). This is highly unfortunate since this asylum claim (Nigerian asylum seeker claimed that he would face reprisals from religious groups for his bisexuality after his return) raised several interesting issues that have not been dealt with by the SAC so far.

The second case concerned a similar factual scenario - a Nigerian asylum seeker who alleged that he was persecuted by the state agents for his relationships with homosexuals. During the interview with the DAMP this asylum seeker confirmed that he had also sexual relationships with women and, hence, he was considered a bisexual. This case eventually reached the merits at the SAC, but the SAC touched upon key substantive issues (difference between homosexuals and bisexuals, imputed homosexuality etc.) only cursorily since it did not find applicant's testimony credible and for this reason it upheld the negative judgment of the regional court (Judgment of the SAC of 1 April 2009, No. 2 Azs 5/2009).

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?

In the only transgender case before the SAC (Decision of the SAC of 14 November 2007, No. 6 Azs 102/2007), the core issue was the difference between homosexuality and transsexuality. The SAC in the shortened procedure, the so-called "inacceptability" procedure (nepřijatelnost), arrived at the conclusion that there is no difference between homosexuality and transsexuality for the purposes of assessment of the claim of the asylum seeker from Ukraine. The SAC based its conclusion on the controversial ground that it is social perception that matters and when the society is tolerant towards homosexuality (according to the COI) it can be reasonably inferred that it is also tolerant towards transsexuality.

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

No, I have not found any intersex asylum claim. Neither the DAMP nor the advocates specialized in asylum law remember such a case. However, it does not mean that intersex asylum claim could not appear before the DAMP or before the lower courts.

The RFA also stated that their workers had not encountered any intersex claim (RFA Replies, p. 1).

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

1 It is impossible to infer valid conclusions on the most common countries of origin of LGBTI asylum seekers from a small sample of cases before the SAC. The LGBTI asylum seekers came from the following countries: Armenia, Belarus, Moldavia, Mongolia, Morocco, Nigeria, Russia, Somalia, Uganda and Ukraine. The most common country of origin of LGBTI asylum seekers is Ukraine, followed by Armenia..

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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.

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)

The only body that is authorized to grant the refugee status (that is to grant asylum under Art. 12 ASA) in the Czech Republic is the DAMP. According to Art. 68(4) of the Administrative Code

(Act No. 500/2004 Coll.), the administrative body that finds in favour of the applicant in full does NOT have to provide reasons for its conclusion. That means that if the DAMP grants refugee status to the asylum seeker, it does not have to elaborate in detail on the reasons WHY it granted the refugee status. The DAMP uses Art. 68(4) of the Administrative Code in all positive international protection cases as it does not want to provide impetus for fabricated asylum claims based on the "successful asylum story".

In sum, a positive decision of the DAMP will mention in the "verdict part" which type of international protection is granted and refer to the relevant provision of ASA. The reasoning will usually summarize relevant facts and, sometimes, also mention on which ground of persecution the refugee status was granted. Hence, there will be statement along the following lines: "For the abovementioned reasons the DAMP finds that applicant has well-founded fear of persecution for reasons of her membership in a particular social group". No further legal analysis is usually provided. That also means that the DAMP does not define particular social group more precisely.

Administrative courts also do not struggle with a precise definition of a particular social group in a given case. This has not been so far an important issue in the Czech asylum litigation (for further details, see Q. 45-47).

Apart from the MPSG ground, ASA stipulates also the sixth ground of persecution - "gender" [incorrectly translated in ASA as "sex"]. For further details on this ground, see Q.48.

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.

I am not aware of such case. However, it is worthy of mention that "gender" was added as a sixth ground of persecution to Art. 12(b) ASA in 2006. Therefore, gender is a separate ground of persecution and thus it can be reasonably argued that even though gender-related claim does not suffice under the MPSG ground, it can still succeed on the separate gender ground. But since the settled case law of the SAC accepts LGBTI groups as potential "particular social groups", LGBTI asylum seekers invoke the MPSG ground and do not try to argue the gender ground. See also Q. 48.

subsidiary protection? On which basis?

I am not aware of such case.

However, the SAC did not exclude granting subsidiary protection to gay applicants if they would face inhuman or degrading treatment in prison (Judgment of the SAC of 29 May 2009, No. 6 Azs 41/2008). Nevertheless, the threshold of "serious harm" is very high in these cases (see Art.14a ASA and Art. 15 QD).

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.

I am not aware of such case.

There is one case, where the SAC explicitly rejected arguments of the LGBTI applicant, who invoked humanitarian asylum under Art. 14 ASA. The SAC held that the DAMP enjoys wide discretion in granting humanitarian asylum and that this form of protection is reserved to cases of exceptionally serious hardship such and includes in particular disabled applicants, seriously ill applicants or victims of humanitarian catastrophe (Judgment of the SAC of 21 March 2007, No. 3 Azs 74/2006). In addition to the abovementioned groups, humanitarian asylum is also sometimes granted to pregnant women.

b) other grounds (discretionary leave)?

No

Yes. Please quantify and explain.

I am not aware of such case.

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.

I am not aware of such case.

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.

In the Czech Republic, there are NGOs supporting LGBTIs and NGOs supporting asylum seekers, but there has been no overlap between the two so far. Hence, there is no NGO specialised in supporting LGBTI asylum seekers. There are only specialized advocates who provide support to LGBTI asylum seekers on occasional basis (see Q.11 below).

But note that some NGOs [for instance SOZE (Sdružení občanů zabývajících se emigranty) and OPU (Organizace pro pomoc uprchlíkům, Organization for Aid to Refugees)] have been involved in various joint projects with the UNHCR that touched upon the issues relevant for LGBTI asylum seekers - for instance the project on "Sexual and Gender Based Violence". However, there was no such project aimed specifically at LGBTI asylum seekers. That is also reason why I ticked "no" in Q.10(a) - see below.

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

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

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

No Yes. Which organisation(s)?

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

No Yes. In what form?

e) Do they have contact with the government?

No Yes. In what form?

10) Special training for NGOs

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

No Yes

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

No Yes

- c) Do people working for LGBTI Asylum NGOs receive special training on refugee law?
 No Yes

11) Lawyers' expertise on LGBTI

- a) Are there lawyers with expertise in LGBTI asylum cases?
 No Yes
- b) Are there networks of lawyers with expertise in LGBTI asylum cases?
 No Yes. Please provide the web address of the network

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.)

The leaflet distributed to all applicants for international protection does not explicitly mention the fact that sexual orientation is a ground for asylum. No further details on what might fall within the ambit of "particular social group" or on the SAC's case law are provided to the applicants for international protection.

However, applicants have the access to ASA, where they can find out that "gender" is one of the grounds for granting the refugee status.

Policy, legislation, case law

13) Specific law and/or policy

- a) Does your country have specific law and/or policy concerning LGBTI asylum seekers? (primary or secondary legislation, guidelines, internal instructions and/or circulars, etc.)?
 No
 Yes. Please give English (French/German) translations **and** attach the text in the original language. Are these binding? No Yes

- 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.

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.

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.

The relevant cases on LGBTI asylum issued by the SAC are mentioned above in Q.2 (including full citations). I will provide summary of the leading cases upon further specification of the scope of these summaries.

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

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

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

As mentioned in Q.22-24, no specific questions are asked during interview about sexual activities, stereotypical conduct or about familiarity with gay scenes unless the importance of these issues arise in the course of the interview with the applicant. Applicant bears a burden of statement and,

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

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

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

hence, he must at least indirectly address the LGBTI in her testimony. Once the applicant raises the LGBTI issue, she is asked about sexual activities, stereotypical conduct, about familiarity with gay scenes and alike.

The later procedure depends on the general credibility of the applicant and her story. It is very difficult to generalise, but if the applicant is generally credible and her statements about sexual orientation are convincing (or if she can submit additional proof of her sexual orientation; see Q.19), the DAMP does not question applicant's sexual orientation and focuses on other elements of the refugee definition.

However, when the applicant is not generally credible or when her statements related to LGBTI issues are contradictory or unconvincing, the DAMP requires additional proof.

This additional proof meant a complex "sexodiagnostic examination". This "sexodiagnostic examination" was conducted in 2008 and 2009 (for sure) and included interview with sexologist and the so-called "phallometric testing" (on the latter see Q.20). The DAMP claims that it stopped using "phallometric testing" in 2009 and that since then no applicant for international protection has undergone this procedure. It is difficult to prove or disprove this assertion of the DAMP. However, I was not able to find any case in 2010 or 2011, where "phallometric testing" was used (nor anyone from my network of lawyers). The DAMP also claims that this procedure was used in less than 10 cases in total (DAMP Replies). Again, it is impossible to find out the precise number of applicants who underwent this procedure as there is no official statistics.

With significant degree of simplification, there were three possible results of "phallometry":

- (1) positive result in favour of the applicant ("phallometric testing" supported applicant's L or G orientation);
- (2) negative result to the detriment of the applicant ("phallometric testing" showed little or no signs of applicant's L or G orientation);
- (3) neutral result ("phallometric testing" neither supported nor excluded applicant's L or G orientation).

Despite the fact that "phallometric testing" was only one part of a complex "sexodiagnostic examination", it carried a decisive weight in DAMP's conclusions on the credibility of applicant's

assertion of his or her sexual identity. The DAMP proceeded in the abovementioned three scenarios as follows:

ad (1) if "phallometric testing" supported applicant's L or G orientation, the DAMP accepted applicant's claim of sexual identity;

ad (2) if "phallometric testing" showed little or no signs of applicant's L or G orientation, the DAMP rejected applicant's claim of sexual identity;

ad (3) if "phallometric testing" neither supported nor excluded applicant's L or G orientation, the DAMP usually rejected applicant's claim of sexual identity - this conclusion of the DAMP was challenged before administrative courts and the SAC eventually quashed the decision of the regional court that upheld the DAMP position (Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009); more specifically, the SAC held that the DAMP should have provided other evidence (psychological examination, detailed long-term observation etc.) and if it is not able to do so it must apply principle in dubio pro libertatis and accept applicant's testimony (Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, § 24-25). This judgment also clearly shows a limited reliability of "phallometric testing", since this method (apart from other deficiencies) does not produce unambiguous results.

On further details of medical aspects of "phallometry", see Q. 20.

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?

The most common reason in the SAC's case law concerns significant discrepancies in applicant's testimony. But such cases are relatively rare (or at least rarely appealed on this ground to the SAC); it is far more "easier" for the DAMP to reject the application for failure to seek protection from state authorities or for insufficient intensity of maltreatment (which does not meet the threshold of persecution).

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

There is one recent gay case decided by the SAC that is relevant here. In Case No. 2 Azs 47/2009, the applicant from Uganda asserted that he worked in the gay club in Kampala (which was supposed to be on the fourth floor of the building he referred to) and provided the concrete location where this gay club allegedly was. The Ministry of the Interior asked the members of the Czech Embassy in Nairobi to check this location in Kampala. The embassy staff did not find the gay club and, furthermore, found out that there is no building that has more than two floors in the area referred to by the applicant. This finding contributed to the lack of credibility of this particular assertion submitted by the applicant (see Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, § 30). However, the SAC rejected DAMP's conclusion that this automatically means that applicant is not gay (see also discussion of this case in Q.17).

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

See above Q. 17.

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)?

Article 51(1) of the Administrative Code (Act No. 500/2004 Coll.) does not prioritise any evidence and is framed very broadly. Hence, all of the abovementioned types of evidence is accepted. The more the applicant can submit, the better for him.

It is difficult to say what is REQUIRED. It very much depends on the country of origin, general credibility of the applicant, whether he filed an application for international protection immediately upon her arrival to the Czech Republic, whether she was issued an expulsion order and dozen other issues. There is no requirement stipulated in ASA or any other policy or guideline. Administrative courts also proceed on case-by-case basis. Hence, it is not possible to generalise on this point.

Decisions and/or case law. Good/bad practices

Good practice: The SAC has recently accepted the video from YOUTUBE submitted by the LGBTI applicant from Morocco as evidence and quashed the decision of the regional court for not taking this video into account in its assessment (Judgment of the SAC of 28 May 2009, No. 6 Azs

26/2009). The Moroccan applicant submitted this video as a proof of his allegation that situation of gays in Morocco has deteriorated recently [Note that the SAC did not discuss the relevance of the YOUTUBE video, but merely quashed the decision of the regional court and remanded the case back. The applicant's claim was eventually rejected on other grounds.].

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?

All forms of abovementioned evidence (that is medical, psychological, psychiatric and sexological evidence) are accepted in proving the sexual orientation. There is no hierarchy among various medical professions. It is up to the DAMP and administrative courts to assess all available evidence in the holistic manner.

Applicant can submit her own medical, psychological, psychiatric and/or sexological evidence. As mentioned in Q.17, if her story is considered convincing by the DAMP, no further evidence is required. However, when the applicant is not generally credible or when her statements related to LGBTI issues are contradictory or unconvincing, the DAMP requires additional proof. In 2008 and 2009 this additional proof meant a complex "sexodiagnostic examination".

The "sexodiagnostic examination" was performed by a professional sexologist and only with the person's written consent, and once that person has been informed about the technique of the examination [but note that the Czech NGO, Organization for Aid to Refugees (Organizace pro pomoc uprchlikům), questioned whether the asylum seeker is informed about the procedure itself in a way that is understandable for him; see FRA Report of 2010, p. 60]. This "sexodiagnostic examination", which was applied to applicants for international protection in 2008 and 2009, was similar to tests applied to sex offenders.

b) What does the examination include?

A complex "sexodiagnostic examination" consisted of interview with sexologist and of the so-called "phallometric testing". As "phallometric testing" was by far more important for the result of the procedure for international procedure, I will focus primarily on this part of "sexodiagnostic examination".

With a significant degree of simplification, "phallometric testing" as applied to the applicants for international protection in the Czech Republic in 2008 and 2009 tested their physical reaction to pornographic material. This pornographic material included heterosexual pornographic material, gay pornographic material, lesbian pornographic material, children pornography and adolescent pornography. According to reactions of the applicant to these types of pornographic materials, the sexologist arrived at his conclusion (see Q. 17). In medical terminology, "phallometric testing" of men is called penile plethysmography (also known as "PPG") and its counterpart for women is called vaginal photoplethysmography (also known as "VPG"),

ORAM defines penile plethysmography as "an attempt to scientifically quantify male sexual arousal by measuring physiological responses to visual stimuli through attachment of electrodes to the penis" (ORAM: Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings, San Francisco, December 2010, p. 1). Penile plethysmography (PPG) measures changes in the size of the penis. PPG examinations are conducted using one of two techniques: 1) the "volumetric method" and 2) the "circumferential method." For a more detailed description of these two methods, see ORAM: Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings, San Francisco, December 2010, pp. 3-4).

As to vaginal photoplethysmography (VPG), it detects changes in the volume of blood in the vagina by measuring light absorption by the walls of the vagina and the vaginal pulse. The method utilizes a small acrylic probe similar in size to a menstrual tampon, which is inserted into the vagina (for a more detailed description of this method, see ORAM: Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings, San Francisco, December 2010, p. 4)

The following features of "phallometric testing" as applied to the applicants for international protection in the Czech Republic in 2008 and 2009 are important:

1] BOTH penile plethysmography (for men) AND vaginal photoplethysmography (for women) were applied in the Czech Republic. This was explicitly confirmed by the DAMP (DAMP Replies) and by the UNHCR (UNHCR Replies). Unfortunately, neither the numbers of how often these techniques were used nor the ratio of these two methods are known. The UNHCR claims that it knows of at least 9 instances, when PPG was used (primarily to men from Nigeria), and of 1 case

when VPG was employed (a woman from Democratic Republic of Congo). The UNHCR also suggests that phallometric testing was for the first time used as far as in 2004 on two applicants, one from Sri Lanka and one from Armenia (UNHCR Replies).

2] Both penile plethysmography (for men) and vaginal photoplethysmography (for women) were performed by a professional sexologist.

3] Both penile plethysmography (for men) and vaginal photoplethysmography (for women) were performed only with the person's written consent, and once that person has been informed about the technique of the examination [note that The Czech NGO Organization for Aid to Refugees (Organizace pro pomoc uprchlíkům) questioned whether the asylum seeker was informed about the procedure itself in a way that was understandable for him or her; see FRA Report of 2010, p. 60].

4] According to some Czech sexologists, vaginal photoplethysmography (method used for women) is less reliable than penile plethysmography (method used for men); see e.g. statement of Petr Weis at <http://www.novinky.cz/zahranicni/evropa/219048-cesi-meri-homosexualnim-azylantum-prutok-krve-v-penisu-kritizuje-eu-urady.html> (retrieved on 31 January 2011).

5] According to some Czech sexologists, both vaginal photoplethysmography (method used for women) and penile plethysmography (method used for men) are just secondary methods for determination of sexual orientation and that both of these methods can be avoided; see e.g. statement of Petr Weis at <http://www.novinky.cz/zahranicni/evropa/219048-cesi-meri-homosexualnim-azylantum-prutok-krve-v-penisu-kritizuje-eu-urady.html> (retrieved on 31 January 2011).

For further reading on vaginal photoplethysmography and penile plethysmography see:

- ORAM: Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings, San Francisco, December 2010 (and literature cited therein)

The following background information might be also helpful for understanding the situation in the Czech Republic:

A] Phallometric testing was employed in the Czech Republic for the first time by an NGO lawyer (not the DAMP) who wanted to overcome conflicting testimony and a lack of credibility of her

client (asylum seeker) and thus she persuaded her client to voluntarily undergo phallometric testing. Phallometric testing was "positive" and her client was granted asylum. Then the rumour spread that this "story" works and the DAMP witnessed a significant increase in LGBTI claims. This increase led the DAMP to the decision to introduce complex "sexodiagnostic examination" that included phallometric testing.

B] One could see phallometric testing also in the context of the "Czechoslovak school of sexology" that is particularly invasive. In fact, phallometry was developed by Kurt Freund in 1950s in then-Czechoslovakia. Recently, there have been reported similar problems with other invasive medical methods such as forced sterilization of Roma women under dubious circumstances (that is, without prior informed consent), both in the Czech Republic and Slovakia. These cases are currently pending before the Czech courts and it is highly probable that these cases will end up before the European Court of Human Rights in the foreseeable future (the Slovak cases raising the issue of forced sterilization of Roma women should be discussed by the ECtHR soon - see e.g. Case V. C. v. Slovakia, no. 18968/07; I.G., M.K. and R.H. v. Slovakia, no. 15966/04; or N.B. v. Slovakia, no. 29518/10).

C] The DAMP did not explicitly ask sexologists to conduct phallometric testing. It asked them to provide a complex "sexodiagnostic examination" (that is commonly applied to sex offenders in criminal law) and sexologists used phallometric testing as one of the methods included in this complex "sexodiagnostic examination". In other words, phallometric testing was not invented nor revived just for the purposes of assessment of credibility of the applicants for international protection. This method has, unfortunately, a long tradition in the Czech sexology (see previous point).

D] It is disputed whether the applicants were properly informed about the content of "sexodiagnostic examination". Both the UNHCR and NGOs claim that the requirements of a prior informed consent were not met (see FRA Report of 2010, p. 60; and UNHCR Replies).

E] According to the UNHCR, the form that the applicant had to sign before "sexodiagnostic examination" contained information that if he or she refuses to do so, his or her application for international protection can be discontinued (UNHCR Replies). Hence, the applicants were in fact coerced to undergo this "sexodiagnostic examination".

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

Yes, the so-called "phallometry" (see previous paragraph that explains that "phallometry" is in fact sometimes used as a generic term that includes PPG and VPG) arguably violates Arts. 3 and 8 ECHR. For further details why it is so, see FRA Report of 2010 (pp. 59-60) and Judgment of the German Administrative Court in Schleswig Holstein of 7 September 2009 referred to in Q.60. I will not repeat arguments mentioned in these documents here.

But note that the ECtHR in *Toomey v. United Kingdom*, App. No. 37231/97 (1999), found that the use of penile plethysmography did not amount per se to degrading treatment under Article 3 ECHR (even though this case dealt with different factual scenario). For a more detailed analysis of this case, see also Freddy Gazan, *Penile Plethysmography Before the European Court of Human Rights*, 14 *SEXUAL ABUSE: J. RES. & TREATMENT* 89–93, 90 (2002); and ORAM: *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings*, San Francisco, December 2010, p. 16.

When the UNHCR criticized the use of "phallometric testing" (note that this criticism led to suspending this practice in 2009, see below), it relied on two grounds: (1) that it is a degrading treatment under Art. 3 ECHR (see discussion above); and (2) that it violates the right to private life under Art. 8 ECHR, because it is neither "in accordance with the law" nor "necessary in democratic society" (UNHCR Replies).

Note also that "phallometric testing" was according to all available sources stopped in 2009 and since then it has not been used. The UNHCR confirms this position (UNHCR Replies).

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

The weight of "expert's opinion in 2008 and 2009 (when the "sexodiagnostic examination" was used) was decisive. For further details, see Q.17.

Decisions and/or case law. Good/bad practices

"Phallometry" of LGBTI applicants for international protection was never challenged before the Czech courts as such. Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, referred to above in Q.18 dealt only with the RESULTS of phallometric testing and did not question this method as such.

It is second-guessing WHY "phallometry" was never challenged. Note that the DAMP implicitly suggested the following two explanations:

(1) maybe there were indeed so few cases (as suggested by the DAMP) when "phallometry" was applied (note that this is a mere speculation).

(2) phallometric testing was used only in "borderline cases" and as the "last check" for applicants who were not found credible and the potential risk the unrecognised LGBTI claimant faced in his country of origin was very high (the DAMP asserted that it wanted to be 100% sure when they were returning applicants from countries such as Azerbaijan, Cameroon, Egypt, Iran, Nigeria, Syria).

However, it is not possible to prove or falsify this claim (suggested by the DAMP) with verifiable data and thus it is again a speculation.

On the other hand, NGO lawyers suggested that no applicant wants to sever his or her relationship with the DAMP before the DAMP decides on his or her case. However, this does not explain why the applicants did not challenge "phallometry" once they received a negative decision from the DAMP.

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?

All forms of abovementioned evidence (that is medical, psychological, psychiatric and sexological evidence) are accepted in proving the gender identity. As mentioned in Q.2, gender identity claims are extremely rare in the Czech Republic. The DAMP claims that there were only 2 or 3 such claims and in all of these cases the applicants were credible and able to substantiate their transsexualism with their own medical and psychological reports (DAMP Replies).

As a result, the DAMP did not require additional evidence (DAMP Replies). That means that the DAMP has not resorted to any invasive method (similar to "phallometry") in gender identity cases.

b) What does the examination include?

There is no required examination. It is up to the applicant to do her best to substantiate her claim.

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

As mentioned above, no inhuman/degrading element has been reported in the gender identity claims.

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

The Administrative Code does not prioritize any type of evidence [See Art. 51(1) of Act No. 500/2004 Coll., the Administrative Code]. Each case must be assessed in "holistic manner".

Decisions and/or case law. Good/bad practices

There has been no case before the SAC, where the proof of gender identity was an issue. I am also not aware about such case before the lower courts or before the DAMP.

22) Are explicit questions asked about sexual activities?

No

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

There are no "compulsory" questions about sexual activities of the asylum seekers that would be posed in each interview. The relevance of sexual identity or sexual activities must arise in the course of the interview. If the sexual identity of an asylum seeker turns up to be relevant for his or her asylum claim, more specific questions follow.

However, in order to have a complete picture one would have to go through the transcripts of interviews with LGBTI asylum seekers (both genuine and alleged). Unfortunately, such study is impossible, because the DAMP's case files are not publicly accessible.

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

There are no "compulsory" questions about stereotypical LGBTI conduct that would be posed in each interview. The relevance of stereotypical LGBTI conduct must arise in the course of the interview.

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.

There are no "compulsory" questions about familiarity with gay scenes or membership of LGBTI groups (in the country of origin or in the country where asylum is claimed) that would be posed in each interview. The relevance of familiarity with gay scenes or membership of LGBTI groups must arise in the course of the interview.

There is one recent judgment of the SAC that seems to be relevant here. In Case No. 2 Azs 47/2009, the applicant from Uganda asserted that he worked in the gay club in Kampala (which was supposed to be on the fourth floor of the building he referred to) and provided the concrete location where this gay club allegedly was. The Ministry of the Interior asked the members of the Czech Embassy in Nairobi to check this location in Kampala. The embassy staff did not find the gay club and, furthermore, found out that there is no building that has more than two floors in the area referred to by the applicant. This finding contributed to the lack of credibility of this particular assertion of the applicant (see Judgment of the SAC of 28 August 2009, No. 2 Azs 47/2009, § 30).

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

The DAMP asserted that neither marriage nor children are conclusive for the assessment of the sexual orientation or gender identity and that it accepted such claims on several occasions (DAMP Replies).

But note the bisexual case No. 2 Azs 5/2009 referred to in Q.2. In this case, a Nigerian asylum seeker alleged that he was persecuted by the state agents for his relationships with homosexuals. During the interview with the DAMP this asylum seeker confirmed that he had also sexual relationships with women and, hence, he was considered a bisexual. This case eventually reached the merits at the SAC, but the SAC did not find applicant's testimony credible and for this reason it upheld the negative judgment of the regional court (Judgment of the SAC of 1 April 2009, No. 2 Azs 5/2009).

There are too few bisexual cases in the Czech Republic to generalise and thus far-reaching conclusions should be avoided. Nevertheless, it seems that in the abovementioned case No. 2 Azs 5/2009 a bisexual claim was treated with greater suspicion than a "pure" L, G or T claims (I am not aware of any intersex claim).

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

Decision-makers of the DAMP have the access to several databases of COI (such as Refworld etc.). The most important COI Reports (such as reports from the U.S. Department of State) are automatically translated into Czech; other reports are translated upon the individual requests of the decision-makers (these translations form an "internal COI database" of the DAMP). The DAMP decision-makers can also submit a more complex request to the specialized COI researchers deployed in Prague (see Q. 27).

Regional courts and the SAC have access to some of the COI databases mentioned above (Refworld, databases available online). However, neither regional courts nor the SAC have the access to the "internal COI database" of the DAMP (that contains Czech translations of major COI reports and additional COI information compiled by the DAMP's Department of Strategy and Foreign Affairs - on the latter see below in Q.27). Note that most Czech judges are NOT fluent in English and thus a lack of access to Czech translations of the COI reports significantly limits their ability to review the COI assesment by the DAMP. Some judges solve this problem by submitting COI requests to the UNHCR, which submits its own assessment of the COI in Czech language.

The SAC has also a specialized unit, the Department of Documentation and Analytics, which currently includes several COI researchers (including the trainer of ACCORD and member of the COI Trainer Pool) among its staff. Nevertheless, the Department of Documentation and Analytics is consulted by judges of the SAC rather sporadically, since the SAC (the top administrative court) deals primarily with questions of law and not with questions of fact.

As to practice, until 2008, regional courts were rather deferential towards the Ministry of the Interior in assessment of the COI. However, the SAC issued several judgments in 2008 and 2009 that require more stringent assessment of the use of the COI by the Ministry of the Interior (see e.g. Judgment of the SAC of 1 September 2008. No. 5 Azs 55/2008; and Judgment of the SAC of 28 May 2009. No. 6 Azs 26/2009) and since then the situation has gradually improved. For more details, see Q.30.

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 the Interior has 2-3 specialized COI researchers who are deployed in Prague (at the seat of the Ministry of the Interior). Every DAMP decision-maker can submit a specific COI request to these specialized COI researchers or ask for a complex COI analysis. In other words, "hard COI issues" are often relinquished to these COI researchers.

In addition to these memoranda related to individual cases, the DAMP's Department of Strategy and Foreign Affairs has recently started to compile more general COI reports that are not necessarily tied to a particular case pending before the DAMP (even though compilation of these general COI reports is usually triggered by a series of repetitive cases from one region that raise a similar issue). A typical example of such general COI report is the report on political parties in Turkey and the status of Turkey's Marxist DHKP-C (The Revolutionary People's Liberation Party-Front). However, these general COI reports compiled by the DAMP still tend to be more specific and narrower than general COI reports of UK Home Office or the U.S. Department of State.

I am not aware of any special training of these COI researchers on the LGBTI issues, but as they attend several seminars on the COI (mainly abroad) every year I cannot exclude the possibility that they were trained in these issues. The DAMP's researchers can also attend seminars within the EAC (European Asylum Curriculum).

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

No

Yes. Could you describe this information?

As mentioned above, the COI researchers do not compile general reports on the whole countries or regions or on specific concepts (such as internal flight alternative). Instead, they reply to individual requests of the DAMP decision-makers once the COI issues arise in the course of the international protection procedure. These memoranda of the COI researchers are not public - they become a part of the case file in a particular case and are used as evidence.

Until recently, when there was a recurring COI issue, these memoranda (or the relevant parts of them) were used in other cases as well (note that these memoranda did not have general validity since they were usually drafted in the "question-and-answer" format). However, as mentioned above in Q.27, the DAMP's Department of Strategy and Foreign Affairs has recently started to compile more general COI reports that are not necessarily tied to a particular case pending before the DAMP. These general COI reports do not follow the "question-and-answer" format and tend to be more general and more thorough. In other words, these reports of the DAMP's Department of Strategy and Foreign Affairs are something in between "individual memoranda" (which were predominant in the Czech Republic until recently) and general COI reports produced by the UK Home Office or of the U.S. Department of State.

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?

In theory, the legal representative of the applicant can consult and instruct an independent COI expert [no statute prohibits it and evidentiary materials are defined broadly in Art. 51 of the Administrative Code; the SAC has recently accepted even the video from YOUTUBE submitted by the LGBTI applicant as evidence and quashed the decision of the regional court for not taking this video into account in its assessment (Judgment of the SAC of 28 May 2009, No. 6 Azs 26/2009)]. The problem is that there are no independent COI experts in the Czech Republic - all COI experts work either with the Ministry of the Interior or with the SAC (BTW independent experts are available in Slovakia - e.g. "Liga za ludske prava").

In sum, independent advisors on the COI can be consulted and these advisors can draft a report. However, I am not aware of any case when this actually happened. Therefore, it is hard to determine how the expert would be paid. Most probably, the applicant would have to pay by herself, but there is no precedent on this issue.

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

As I am not aware of any case where the independent COI expert submitted the COI report, I cannot answer this question.

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

As mentioned above in Q.26, regional courts were rather deferential towards the Ministry of the Interior in assessment of the COI until 2008. The SAC was more willing to review the COI findings of the DAMP, but it proceeded on the case-by-case basis in this period.

In September 2008, the SAC issued the landmark judgment on the COI standards (Judgment of the SAC of 1 September 2008, No. 5 Azs 55/2008). The SAC relied on "Country Information in Asylum Procedures: Quality as a Legal Requirement in EU" (Gabor Gyulai, Hungarian Helsinki Committee, Budapest, 2007) and held that "[the COI] must be, to the maximum extent possible (1) relevant, (2) reliable and balanced, (3) accurate and up-to-date, and (4) transparently processed and retrievable" (Judgment of the SAC of 1 September 2008, No. 5 Azs 55/2008). Later on, this standard was adopted by other chambers of the SAC (see e.g. Judgment of the SAC of 4 February 2009, No. 1 Azs 105/2008, published in the printed Collection of SAC's Decisions in No. 5/2009; or Judgment of the SAC of 28 May 2009, No. 6 Azs 26/2009) and became a settled case-law.

This is the generally applicable standard that is applied also to the LGBTI cases (see e.g. Judgment of the SAC of 28 May 2009, No. 6 Azs 26/2009).

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.

I am not aware of any case before the SAC, where the SAC explicitly discussed the reasons why reports of persecution may be unavailable in some countries.

The SAC usually deals with contradictory reports, obsolete reports or nature of the reports (some COI reports are of political nature and, hence, should not be necessarily considered objective), or it merely observes that the applicant did not meet the required standard of proof.

With regards to standard of proof, the leading case is Judgment of the SAC of 30 September 2008, No. 5 Azs 66/2008 (not dealing with the LGBTI issues). In this judgment the SAC relied on foreign jurisprudence [R v. Secretary of State for the Home Department, ex p Sivakumaran [1988] Imm AR 147, Kaja [1995] Imm AR 1, Karanakaran v. Secretary of State for the Home Department [2000]

Imm AR 271 a Yildirim [2002] UKIAT 02813 (all UK); Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 a Rajalingam [1999] FCA 179 (Australia); and BVerwG 9 C 91/89 (Germany)] and held that the relevant standard of proof in the refugee definition is "reasonable probability". This standard applies, according to the SAC, both to overall assessment of well-founded fear and to assessment of individual factual statements of the applicant (Judgment of the SAC of 30 September 2008, No. 5 Azs 66/2008). The SAC also stressed the importance of Art. 4 QD, which was not transposed to ASA.

The "reasonable probability" test is of general application and, hence, it applies to the LGBTI claims as well.

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.

As suggested elsewhere in the questionnaire [see Q. 33, Q. 37(b) and Q. 45], the DAMP and Czech administrative courts do not distinguish between the subgroups of LGBTI claims. In other words, once any sexual minority (gays are usually the reference group) is considered a "particular social group" in a given country, it is considered per analogiam that other subgroups form a "particular social group" too.

I am not aware of any case, where the SAC used a lack of information or a lack of criminal sanctions against a specific subgroup (L, B, T or I) to the detriment of claimants of a particular subgroup of LGBTI asylum seekers (for instance as a proof of a lack of evidence of persecution).

Maybe the Czech asylum litigation just has not reached this stage yet. Until 2006, the main reason for rejecting LGBTI claims were non-state agents of persecution. After 2006, it has been the failure to seek the State protection, existence of effective protection in the country of origin and failure to meet the threshold of "serious harm" limb of persecution.

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.

In the only transgender case before the SAC (Decision of the SAC of 14 November 2007, No. 6 Azs 102/2007), the core issue was the difference between homosexuality and transsexuality. The SAC in the shortened procedure, the so-called "inacceptability" procedure (nepřijatelnost), arrived at the conclusion that there is no difference between homosexuality and transsexuality for the purposes of assessment of the claim of the asylum seeker from Ukraine. The SAC based its conclusion on the controversial ground that it is social perception that matters and since the Ukrainian society is tolerant towards homosexuality (according to COI) it can be reasonably inferred that it is also tolerant towards transsexuality. I consider this judgment highly problematic and, what is more, it seems to be a systemic and recurring problem in the SAC's case law (see the following paragraph).

In both bisexual cases, the SAC did not pay much attention to specific position of "bisexuals" and uses the terms "homosexual" and "bisexual" interchangeably (see Decision of the SAC of 25 November 2008, No. 9 Azs 79/2008; and Judgment of the SAC of 1 April 2009, No. 2 Azs 5/2009; for further details on these two cases see Q.2). Similar pattern exists in most lesbian cases as well (see Q.2). In these cases, the SAC tends to use the term "homosexual orientation" so as to encompass both gay and lesbian relations (see e.g. Judgment of the SAC of 2 August 2006, No. 3 Azs 268/2005 on lesbians in Armenia).

In conclusion, the Czech courts tend to use "gays" as the relevant reference group for all LGBTI cases and do not sufficiently distinguish between various groups covered by the term "LGBTI". However, one must add one caveat here - apart from the transgender case (No. 6 Azs 102/2007) the applicants did not argue before the SAC that lesbians or bisexuals are treated differently in the country of origin (and, hence, potential different treatment was not raised before the SAC). But despite this caveat, a lack of differentiation between subgroups of LGBTI applicants is a serious problem in the Czech asylum case law.

See also Q. 32, Q. 37(b) and Q. 45.

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

There is almost no case law on "refugees sur place" in the Czech Republic. The only post-QD case that addressed the concept of refugee sur place (Judgment of the SAC of 30 December 2008, No. 8 Azs 38/2008) did not deal with LGBTI issues.

The issues of "hidden homosexuality" and "coming out" in the Czech Republic were raised in Case No. 6 Azs 26/2009, but the SAC quashed the decision of the regional court for other reasons (Judgment of the SAC of 29 May 2009, No. 6 Azs 41/2008). Lesbian "coming out" could have been an issue in Case No. 9 Azs 11/2009, but the applicant unfortunately appealed only the negative decision on the subsidiary protection and thus neither the regional court nor the SAC could address the relevance of late "coming out" for the refugee status (Judgment of the SAC of 28 April 2009, No. 9 Azs 11/2009). This is a typical example of poor legal representation, which unfortunately plagues the Czech asylum litigation. These two cases did not elucidate the issue of late "coming out", but they at least suggest that the DAMP is reluctant to grant the refugee status to such LGBTI claimants.

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

I am not aware of such a case. However, this question is difficult to answer since only the DAMP can grant the refugee status and its decisions are not publicly available. I am also not aware of any judgment of an administrative court that would specifically address late "coming out". In general, both the DAMP and administrative courts are reluctant to find credible those applicants who significantly change their testimony (especially when they change the critical parts of their "asylum story") during the course of the procedure.

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

The case law of the SAC was restrictive on this issue. In Judgment of 23 November 2007, No. 5 Azs 50/2007, the SAC held that the fact that homosexuality is a criminal act in the country of origin (in Morocco) does not automatically mean that the threshold of persecution was met. The SAC relied on the pre-QD definition of the term "persecution" in ASA that required the existence of the "danger to life or freedom" and opined that the prison sentence within the range of 6 months up to 3 years, coupled with low enforcement of this penal sanction, does not meet the threshold of persecution. This is a highly problematic judgment, which not only sets extremely high threshold of persecution, but also mixes the "fear" element and the "serious harm" element of the refugee definition.

This judgment has never been explicitly overruled, but the amendment to ASA changed the definition of the term "persecution" (even though it still falls short of standards required by Art. 9 QD) and the more recent judgment of the SAC on Moroccan homosexuals (Judgment of 28 May 2009, No. 6 Azs 26/2009) seems to have overruled the abovementioned judgment No. 5 Azs 50/2007 implicitly (one may call it "under-the-table overruling"). In the 2009 judgment (No. 6 Azs 26/2009) the SAC eventually quashed the decision of the regional court for other reasons (insufficient COI and failure to take into account evidence submitted by the applicant), but it also touched upon the role of criminalization of homosexual activities in Morocco. It mentioned Judgment No. 5 Azs 50/2007 in passing, but it also explicitly stressed that the wording of definition of persecution changed after the transposition of QD and that the regional court must take into account also those provisions of QD that were not explicitly transposed into ASA [in particular Art. 9(2)(c) QD]. In other words, the SAC urged the regional court to look beyond the wording of ASA and adopt interpretation of the term "persecution" that is consistent with EU law (for further details, see Judgment of 28 May 2009, No. 6 Azs 26/2009). Given the fact that both cases dealt with homosexuals from the same country of origin (Morocco), such "advice" of the SAC means that the regional court should no longer consider Judgment No. 5 Azs 50/2007 as a binding precedent. Hence, "under-the-table overruling". Nevertheless, the SAC in Judgment of No. 6 Azs 26/2009 did not elaborate in detail on the role of low enforcement of the impugned penal provision which criminalizes homosexual conduct (this issue will become relevant only once the DAMP and/or the regional court reassess COI and rehear applicant's arguments on the matter).

The other LGBTI cases before the SAC, where asylum seekers came from countries of origins that criminalise homosexual acts (such as Nigeria or Uganda), were decided on other grounds.

The precise position of the DAMP on this issue is difficult to ascertain since it does not have to provide reasons for granting the refugee status. See Q.2.

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?

As suggested above, with regards to non-state agents of persecution one must distinguish two phases of the Czech asylum law and the Czech case law. During the first phase, that is prior to transposition of QD, most cases were rejected because the SAC adopted the German restrictive position on agents of persecution (this period covers all cases decided by the DAMP before 31 August 2006). According the SAC's "pre-QD interpretation" of Art. 12(b) ASA, only persecution committed or condoned by the State was considered persecution under Art. 1(A) GC1951. In other words, persecution by non-state agents of persecution was not accepted if state organs were not (at least indirectly) participating in persecution. The interpretation of element of "indirect participation" or "toleration" by the state agents varied from one judge to another. One chamber of the SAC held bluntly that Art. 1(A)2 GC1951 does not cover persecution by "non-state agents" (Judgment of 22 October 2003, No. 4 Azs 14/2003-4). Other chambers adopted less restrictive stance. However, one may conclude that all cases in which the SAC reviewed decisions of the DAMP issued before 31 August 2006, where applicants alleged only persecution by "non-state agents" and were unable to prove at least toleration of persecution by the state authorities, were rejected.

The SAC changed its position on non-state agents of persecution in Judgment of 16 September 2008, No. 3 Azs 48/2008 (this case did not touch upon the LGBTI issues) and the asylum jurisprudence on non-state agents entered the second phase. Unfortunately, there are only few

LGBTI cases decided by the SAC since September 2008 and, hence, no general conclusions can be inferred from them. In my opinion, the "well-founded fear" is less developed and thus less important in the Czech asylum case law than the "serious harm" element and the "failure of state protection" aspects of the refugee status definition. That means that most LGBTI cases boil down to the issue of intensity of negative treatment (threshold of the "serious harm" limb of persecution) and to the standard of state protection and requirement/failure to seek the State protection (the "failure of state protection" of persecution). For more details, see below.

In other words, the "pre-QD position" on agents persecution, roughly, excluded most applicants invoking persecution by non-state agents, whereas the "post-QD position" generally accepts that persecution by non-state agents fall within the ambit of Art- 12(b) ASA [which is an equivalent of Art. 1(A)2 GC1951]; even if the state authorities actively try to suppress the non-state persecutors but is not able to prevent persecution. Nevertheless, the "post-QD litigation" shifted to more nuanced issues of standard of protection and requirements to seek protection from state organs.

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 general, most LGBTI cases in the Czech Republic (in all categories) deal with persecution by non-state actors. I could not trace significant difference in ratio between the "state agents cases" and the "non-state agents cases" among the subgroups of LGBTI asylum seekers. The type of actor seems to depend rather on the country of origin. When the particular country criminalises or is hostile towards homosexuality, state agents are more involved in all LGBTI cases.

However, as mentioned in Q.2, transgender cases are rare, intersex cases non-existent and lesbian cases far less numerous than gay cases, and this fact may distort my findings.

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.

I am not aware of such case.

But see Q.36A above, where I discussed a high threshold of the "serious harm" element and the issue of actual enforcement of criminal laws.

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.

Yes, there are several pre-QD judgments that held that applicants for international protection failed to seek protection from the state authorities in the country of origin, even though the police had a reputation of being homophobic.

The following examples can be mentioned:

- applicant is required to seek the State protection (at higher echelons of the police hierarchy) even though the applicant was subject to ridicule, intimidation or sexual harassment by the police when he or she turned to the local police officers (see e.g. Judgment of the SAC of 20 April 2005, No. 3 Azs 245/2004; Judgment of the SAC of 30 October 2006, No. 4 Azs 13/2006; or Judgment of the SAC of 30 June 2006, No. 8 Azs 101/2005)
- applicant's claim was rejected because the applicant did not seek the State protection (when he or she was persecuted by non-state agents) even though the effectiveness of protection and/or availability of protection was questionable or not addressed by the DAMP at all (see e.g. Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; or Decision of the SAC of 27 February 2008, No. 6 Azs 4/2008)

But note that all the abovementioned judgments interpreted ASA in the wording before the transposition of QD. Since then, the SAC significantly changed its position on the requirement to seek protection from the state authorities in the country of origin. In a nutshell, the SAC now interprets this requirement in light of Art. 7(2) QD. The following judgments are the leading cases on this issue (I can provide summaries of these judgments, but they do not deal with the LGBTI issues):

- Judgment of 30 September 2008, No. 5 Azs 66/2008
- Judgment of 18 December 2008, No. 1 Azs 86/2008
- Judgment of 21 April 2009, No. 2 Azs 13/2009

For a detailed analysis of these lengthy judgments, see KOSAŘ, D., MOLEK, P., HONUSKOVÁ, V., JURMAN, M., LUPAČOVÁ, H.: *Zákon o azylu. Komentář*. Praha: Wolters Kluwer ČR, 2010, pp. 115-120, 125-126, 131-133 and 396-398.

Author's note: Since the DAMP can no longer reject an asylum claim merely on the ground that persecution emanates from "non-state agents", the failure to seek protection from state authorities has become the most common reason for rejecting refugee claims. In my opinion, this is the most contentious issue in the Czech refugee law jurisprudence nowadays.

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

As mentioned in Q.38(b), the pre-QD case law did not take this factor into account. Both the DAMP and administrative courts did not pay much attention to the issues whether there was effective protection generally available and/or whether LGBTI applicants had access to this protection.

This has changed recently [see post-QD judgments mentioned in Q.38(b)] and both conditions of Art. 7(2) QD (the effective protection element and the access element) are required. Judgment of 30 September 2008, No. 5 Azs 66/2008, also introduced a novel concept to the Czech refugee law - principle of "singling-out". However, these are very recent developments and there are no LGBTI cases that would discuss these issues in relation to the LGBTI issues.

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?

I have not found such argument in the two cases mentioned in Q.36A above.

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?

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...)?

LGBTI asylum seekers who fled to the Czech Republic experienced (or alleged that they had experienced) the following kinds of persecution or serious harm in their country of origin:

- (threat of) prison sentence
- administrative detention
- beating (both by state and non-state agents)
- harassment, beating and suppression of food supply during the service in the army
- impossibility of or difficulties in finding a job
- dismissal from a job
- intimidation
- derision and ridicule by neighbours and relatives
- expulsion from home by relatives
- disinheritance by relatives
- threats to take away applicant's child
- bullying by classmates at the university

- dismissal from university
- verbal attacks
- rape

There are also cases where not only the applicant himself, but also his or her family members were subject to persecution. Applicant's relatives faced, inter alia, dismissal from their job (mother of the Armenian LGBTI applicant) or beating (brother of the Armenian LGBTI applicant).

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?

As mentioned in Q.2, DAMP's decisions are not published and, furthermore, the positive decisions of the DAMP do not have to be reasoned. Hence, it is difficult to describe precisely what is considered sufficient according to the DAMP.

The following experiences were found sufficient by the SAC:

- prison sentence or a threat of prison sentence [but see Q. 36(A) !!!]
- administrative detention
- beating and other serious attacks on physical integrity (e.g. with knife or knuckles)
- dismissal from university

[rape is also considered as an act of persecution, but the case where the lesbian applicant alleged that she had been raped was dismissed on the ground that she had been raped by non-state agents]

The following experiences were found insufficient by the DAMP and by the SAC:

- harassment, beating and suppression of food supply during the service in the army
- impossibility of or difficulties in finding a job
- dismissal from a job
- intimidation
- derision and ridicule by neighbours and relatives
- expulsion from home by relatives
- disinheritance by relatives
- threats to take away applicant's child
- bullying by classmates at the university
- dismissal from the university
- verbal attacks

[note that many of these cases were dismissed rather for the lack of credibility of the applicant or because the applicant did not meet her standard of proof (e.g. in proving the link between his or her dismissal from the job and his or her sexual orientation); note that Czech judges, at least until 2006, tended to avoid substantive issues of the refugee definition and instead focused on the procedural and credibility issues]

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).

If one compares the Czech gay cases and the Czech lesbian cases, one has to keep in mind (1) that gay cases are far more numerous (thus more kinds of persecution can be found in gay cases) and (2) that there has been no lesbian case, where the lesbian came from the country of origin that criminalises homosexual activities, before the SAC so far (hence, types of persecution that are specific to the state agents, such as prison sentences and detention, are not present in lesbian cases). Third, what seems to be a more important factor is the country of origin from which the LGBTI applicant comes rather than his or her gender.

Leaving these three caveats aside, it is possible to reach the following TENTATIVE conclusions:

1] gay applicants are more often subject to harsh physical treatment (beating, food deprivation etc.), whereas allegedly "softer" or "more psychological" techniques are used to intimidate lesbian applicants (such as dismissal from job, intimidation on the work place, expulsion from home by relatives, disinheritance by relatives, harassment, derision and ridicule)

2] there are certain types of persecution that appear only in lesbian cases (threat of taking applicant's child away and rape)

3] family-related types of persecution are far more common in lesbian cases than in gay cases [note that in certain societies women (=lesbians) are more dependent on the family support than men (=gays) and, hence, the denial of this support can arguably have more serious consequences for lesbians than for gays; unfortunately, this factor has never been taken into account by the SAC]

There are only few bisexual and transsexual cases and hence it is not possible to provide any general conclusions.

I am not aware of any intersex case and thus I cannot report any differences with regard to this group.

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.

No, the SAC dismissed similar arguments in the leading case from 2006 - Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006 (for further details, see Q.43). More recently, these arguments were dismissed by Decision of the SAC of 30 September 2009, No. 9 Azs 39/2009.

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.

This used to be a common ground for rejecting LGBTI asylum claims.

The leading case is Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006, where the SAC discussed situation of gays in Armenia after decriminalisation of homosexual activities in 2003. The SAC held that homosexuals suffer from certain degree of discrimination also in Western Europe and that discrimination does not necessarily meet the threshold of persecution. More specifically, it found that disapproval of the applicant by his relatives is not sufficient, harassment during the service in the army was only temporary and that the applicant did not prove the link between his alleged impossibility to find a job and his sexual orientation. It is worthy to mention that the SAC did not discuss persecution on "cumulative grounds" in this judgment. The argument of persecution on "cumulative grounds" was dismissed in the gay case from Russia by the same chamber of the SAC just a month later (Judgment of the SAC of 13 November 2006, No. 2 Azs 270/2005). Note that both of these judgment applied the "pre-QD" wording of ASA and did not take Art. 9 QD into account.

After the transposition of QD, the SAC changed its position and accepts not only persecution on "cumulative" grounds but it also regularly invokes Art. 9(1)(b) QD even though this provision of QD was not explicitly transposed into ASA (see e.g. Judgment of the SAC of 19 September 2007, No. 1 Azs 40/2007; or Judgment of the SAC of 22 May 2009, No. 5 Azs 7/2009). Unfortunately,

there are no recent (= post-QD) LGBTI cases that address this issue in more detail in the LGBTI context.

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.

I am not aware of any case where the DAMP invoked (against the applicant) "stay-in-private" argument as a main ground for rejecting her application.

The DAMP touched upon this issue in Case No. 6 Azs 26/2009 (discussed in more detail in Q.36A), where the Moroccan applicant alleged that he was blackmailed (in Morocco) by a person who had his intimate pictures and who threatened to make them public. Nevertheless, the DAMP eventually rejected this application on other grounds (low enforcement of penal provision criminalising homosexual conduct, threshold of persecution was not met etc. - see Q.36A) and did not pursue the "stay-in-private" argument in the subsequent litigation before administrative courts. The SAC in its Judgment of 28 May 2009, No. 6 Azs 26/2009, made clear (albeit obiter dicta, because it quashed the judgment of the regional court on other grounds) that the "stay-in-private" argument is no longer relevant, because his sexual orientation has become public in the meantime.

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?

ASA does not explicitly mention sexual minorities as particular social groups. In fact, Art. 10(1)(d) was not explicitly transposed into ASA and thus ASA does not contain any specific definition of the MPSG ground. In other words, the task of defining the precise contours of the MPSG ground was left to administrative courts.

As to the practice, the case law of the SAC recognizes that people who flee their country of origin because of their sexual orientation can belong to a particular social group. The leading case is Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006, where the SAC held that homosexuals can form a particular social group (however, sexual minorities were mentioned as examples of a particular social group obiter dicta even in earlier judgments). Judgment of the SAC of 3 Azs 268/2005 affirmed lesbians as particular social group.

More generally, as suggested above [see Q. 32, Q. 33 and Q. 37(b)], the case law of the SAC does not distinguish among subgroups of LGBTI asylum seekers (several SAC's judgments on the MPSG mention "sexual minorities" as particular social groups; see e.g. the leading case - Judgment of the SAC of 19 May 2004, No. 5 Azs 63/2004) and thus it is generally accepted that G, B, T and I applicants can also belong to a particular social group.

The DAMP confirmed that it granted refugee status not only to gays, but also to lesbians and transsexuals (DAMP Replies). However, I am not aware of the successful bisexual applicant (this might result from a low number of these claims). There are too few bisexual cases in the Czech Republic to generalise, but it seems that bisexual claims are treated with greater suspicion (especially when the applicant changes his or her position from "gay" or "lesbian" to "bisexual" in the course of asylum procedure) than "pure" L, G or T claims (there are no intersex claims); see also Q.25.

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?

No, there is no specific policy or guideline on transgender applicants.

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

I must add one caveat here. Even though I ticked "no", there is a divergent case law on this issue. There are cases that opted for "immutable characteristic OR social perception" approach (see e.g. Judgment of the SAC of 19 May 2004, No. 5 Azs 63/2004; and Judgment of the SAC of 21 April 2009, No. 2 Azs 13/2009), there are cases that arguably opted for the "immutable characteristic AND social perception" approach (see e.g. Judgment of the SAC of 5 October 2006, No. 2 Azs 66/2006; and Judgment of the SAC of 21 April 2009, No. 2 Azs 13/2009), there are cases that invoke the "immutable characteristic" approach (see e.g. Judgment of the SAC of 19 May 2004, No. 5 Azs 63/2004) and, finally, there are also cases that tend to prefer the "social perception" approach (see e.g. Judgment of the SAC of 26 January 2010, No. 4 Azs 56/2009). Hence, one may conclude that the position of the SAC on this issue has not settled yet.

However, to be honest, the SAC does not realize the difference between various approaches to definition of MPSG and their consequences. Sometimes it copies the definition of the UNHCR (the "immutable characteristic OR social perception" approach), sometimes it copies the Czech translation of Art. 10(1)(d) first indent (the "immutable characteristic AND social perception" approach) and sometimes it focuses on just one of these two approaches. The fact that the SAC sometimes cites two conflicting positions in the same judgment confirms this conclusion (Judgment of the SAC of 21 April 2009, No. 2 Azs 13/2009).

The reason why my answer is "no" is that there is not a single case, where the SAC rejected a particular social group on the ground that it did not meet BOTH conditions.

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

"Gender" [incorrectly translated as "sex"] was added as a sixth ground of persecution to Art. 12(b) ASA in 2006 (next to five grounds enumerated in GC1951). Therefore, gender is a separate ground of persecution and it can be reasonably argued that even if a gender-related claim does not fall within the ambit of the MPSG ground, it can still succeed on the separate gender ground.

It is worthy of mention, how "gender" as a sixth separation ground found its way into ASA. As mentioned above, it was introduced into ASA in 2006, by the amendment (Act No 165/2006 Coll.) transposing, among other things, also the Qualification Directive. The explanatory memorandum to the 2006 amendment is extremely brief on why the gender ground was added to Art. 12(b) ASA. It

states in a single sentence that "[the amendment] stresses that alien's fear of persecution might also result from a membership to a gender group" (author's translation). There is no reference to the QD or to other instruments. No further interpretative guideline is provided. The only conclusion that might be inferred from this brief sentence is the fact that the legislature had in mind "gender groups" and not only "groups based on sex", since the explanatory memorandum explicitly refers to "gender" [in contrast to wording of Art. 12(b) ASA that uses the term "sex"]. There is one more factor, apart from QD, that might have contributed to the introduction of this ground to ASA. In 2005, SOZE (the NGO based in Brno that specializes on asylum issues) together with the UNHCR issued a comprehensive study on the "gender persecution" in 2005 [POŘÍZEK, P., SKALKOVÁ, M.: Pronásledování související s příslušností k určitému pohlaví: příručka k posuzování žádostí o azyl. Brno: SOZE, 2005; see also POŘÍZEK, P.: Sexuální a genderové násilí v kontextu kvalifikační směrnice. In JÍLEK, D., BUKVALDOVÁ, J., KLEČKOVÁ, R., KOSAŘ, D., TOMISOVÁ, M. (eds.): Společný evropský azylový systém: právní pojem pronásledování. Brno: Doplněk, 2005, pp. 201-226.], where they criticised the Czech practice.

All in all, the "gender" ground provides a promising avenue for many asylum seekers who had problems to fit in the five grounds enumerated in the GC1951 prior to introduction of this sixth ground. It might include "sex claims" (women persecuted for being a woman) as well as "gender claims" (e.g. transsexuals being persecuted for their gender identity). However, since the settled case law of the SAC accepts LGBTI groups as potential "particular social groups", LGBTI asylum seekers tend to invoke the MPSG ground only and do not try to argue the "gender" ground. There is almost no case law on the latter ground and the "gender" is thus a "dormant ground" of persecution in ASA.

Only recently the SAC addressed an issue whether a female asylum seeker (Kyrgyz national of Uzbek origin) who alleged that she was forced to live in bigamy as the second wife and suffered from domestic violence meets the criterion of being persecuted "for reasons of gender" (see Judgment of the SAC of 25 January 2011, No. 6 Azs 30/2010, § VI.2). The SAC eventually held that the regional court failed to address this issue and remanded the case back for reconsideration. However, I am not aware of any judgment of the Czech administrative court that discusses the application of the "gender ground" to the LGBTI claim.

The UNHCR's position is that the five Convention grounds should be applied preferentially to the LGBTI asylum seekers since the ground "sex", lacking the "Convention pedigree", can be easily

repealed by the legislature (UNHCR Replies). NGOs expressed the same concern. They fear that a widespread use of the "sex" ground invites the DAMP and administrative courts to adopt a narrow interpretation of the MPSG ground (due to an interpretative canon - the so-called "rational legislator" canon - that suggests that the scope of these two terms should not overlap).

In sum, it is arguable whether the addition of the sixth ground of persecution should be considered a good practice. On the one hand, all major actors - the DAMP, the UNHCR and NGOs - formally support explicit inclusion of the "sex" ground in ASA. On the other hand, all of these actors, each for its own reasons, are hesitant to invoke this ground. It is thus up to individual litigants to give life to this provision. It is difficult to predict, whether they will be eventually successful, but so far they have also showed a little activity in creative interpretation of this potentially very broad ground.

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

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

No

Yes. What was the reason?

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

No

Yes. What was the reason?

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

No

Yes. Please give examples.

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

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

No Yes. Please give details.

Article 20-3 Qualification Directive: Vulnerable persons

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

No

Yes. Please give details

Vulnerable persons are defined in Art. 81(2) ASA and in Art. 42(2) ASA. None of these two lists explicitly mentions LGBTI applicants for international protection. However, Art. 81(2) ASA includes a general "catch all" category that can be applied to LGBTI applicants (this category is defined as "other cases requiring special consideration").

A recent independent study on the "vulnerable persons" conducted under the contract with the UNHCR (by ASIM - Asociace pro právní otázky imigrace) confirms this position and mentions gays as one of the groups that fall within the ambit of phrase "other cases requiring special consideration" (see ASIM: Studie týkající se zacházení s osobami se zvláštními potřebami v rámci řízení o mezinárodní ochraně v České republice, November 2009, p. 11). More specifically, the RFA, in response to question raised by ASIM, stipulated that gays may ask for being accommodated separately from other men in order to prevent a conflict situation.

The RFA reiterated this position in the RFA Replies (p. 2). According to the RFA, LGBTI asylum seekers are considered as vulnerable persons within the meaning of Art. 81(2) ASA and Art. 42(2) ASA. More specifically, the RFA stated that it tries to accommodate all requests by asylum seekers, who claim that they are relatives or that they are in other close (even emotional) relationship. If the capacity of the reception/accommodation allows it, these persons are housed together.

The UNHCR also confirmed this position (UNHCR Replies).

Procedures Directive⁴, 2005/85

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

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

Art. 23(3) ASA stipulates that: "... upon the explicit request of the applicant for international protection, the Ministry [of the Interior] secures conducting an interview, and if possible also interpreting, by a person of the same sex." (author's translation).

That means that the DAMP must provide interviewer of the same sex upon the request of the applicant. If the request concerns the interpreter, applicant's preference is almost always recognised. The only exception would be the situation, when the applicant speaks a very special dialect and the DAMP is unable to find an interpreter of the preferred sex.

I am not aware of any case when the applicant asked for interviewer or interpreter of a particular sexual orientation or gender identity and, hence, I do not know how the DAMP and administrative courts would react to such request. However, in my opinion, Art. 23(3) ASA does not stipulate the right of asylum seekers to have an interviewer/interpreter of sexual orientation/gender identity of their own choice.

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 theory, the applicant may ask for recusal of an interviewer and/or interpreter who is a member of her own ethnic community, but I am not aware of such case.

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?

55B) Is the training:

- Obligatory No Yes. For whom?

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

55C) Who has access to this training?

55D) Are judges included in these trainings?

No Yes

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

55F) Who does the training?

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

No Yes

Article 23-3,4 Procedures Directive: Accelerated procedure

57) Does your country have accelerated asylum procedures?

No

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

No Yes. Please explain.

The reasons for triggering accelerated procedure are framed generally and no exceptions for a particular type of claims (in substantive terms) are carved out.

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

No Yes. Please explain.

The DAMP does not prioritize any group of applicants for international protection.

Articles 29-31 Procedures Directive: Safe countries

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

No. Please go to question 60.

Yes. Please answer questions 59A and B.

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

No

Yes. Please give the names of these countries.

The list of "safe countries of origin" is not public in the Czech Republic and it changes over time.

According to my knowledge (and based upon consultation with other lawyers), there is currently no country with obvious homophobic practice on the list. The only "safe country of origin" that can be in theory considered problematic from the LGBTI point of view is Mongolia (which was added to the Czech list of "safe countries of origin" only recently). However, I would not label this country OBVIOUSLY homophobic.

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

No Yes. Please explain.

The list of "safe countries of origin" does not provide any "substantive exceptions" for a particular group of applicants for international protection.

However, the DAMP may decide to not apply the "safe country of origin" concept on individual basis.

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.

However, there is Judgment of the Schleswig-Holsteinisches Verwaltungsgericht (German Administrative Court in Schleswig Holstein) of 7 September 2009 that granted an interim measure and ordered the stay of transfer under the Dublin II Regulation of an Iranian gay man because of the risk that the applicant would have to undergo phallometric testing in the Czech Republic. On fallometry, see Q. 19 and Q. 20.

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.

The ASA stipulates "asylum for the purpose of family reunification" (Art. 13 ASA) and "subsidiary protection for the purpose of family reunification" (Art. 14b ASA). The definition of family members is same in both provisions and includes "partners" of the asylee [Art. 13(2)(a) ASA] or the beneficiary of the subsidiary protection [Art. 14b(2)(a) ASA]. The term "partner" is defined in Art. 2(13) ASA as follows: "Partner, for the purposes of this Act is a person who proves that she entered officially recognized permanent relationship between two persons of the same sex..." (author's translation). Both the specific treatment of same-sex partnerships (that goes beyond requirements of the QD) and the definition of "partners" reflects the Czech Act on Registered Partnership (Act No. 115/2006).

Note that there is no case law on the precise boundaries of the definition of "partner". It is thus not entirely clear which types of "permanent relationships" fall within the ambit of definition of Art. 2(13) ASA. Same-sex marriage and registered partnerships (similar to the Czech one) are surely "in", the legal position of "civil unions" and "civil partnerships" is more difficult to ascertain, and "unregistered cohabitations" are most probably "out". For a more detailed analysis of this problem, see KOSAŘ, D., MOLEK, P., HONUSKOVÁ, V., JURMAN, M., LUPAČOVÁ, H.: *Zákon o azylu. Komentář*. Praha: Wolters Kluwer ČR, 2010, pp. 44-45.

Reception Directive⁶

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>

Article 17 Reception Directive: Reception

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

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

62A) By whom are these problems caused?

62B) Are the authorities aware of these problems?

- No Yes. How do they react?

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

After the conclusion of the admission procedures, the applicant for international protection is moved to one of the accommodation centres (sometimes also referred to as “residential centres”) or can exercise her right to stay in private housing. It is up to each applicant to decide individually whether she opts for housing in the accommodation centre or in private housing. However, if the applicant chooses to stay outside the accommodation centre, she must find private housing by herself and is entitled to the financial contribution only during the first three months. In other words, the Czech Republic indirectly prioritizes housing of applicants for international protection in the state accommodation centres run by the RFA.

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: Transgender/ 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

Any other issues

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

No.

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

No.

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

-

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.