

FLEEING HOMOPHOBIA

QUESTIONNAIRE

European Research Project

FLEEING HOMOPHOBIA, SEEKING SAFETY IN EUROPE,

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

Introduction

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

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

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

Guidance to the questionnaire

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

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

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

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

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

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

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

Thank you very much!

Best regards,

Sabine Jansen, COC Netherlands

Thomas Spijkerboer, VU University Amsterdam

General

Glossary:

- **AS** Asylum (international protection) seeker/s.
- **D.Lgs. 251/2007** D.Lgs. 19.11.2007 n. 251, the law which implemented in Italy the QD.
- **D.Lgs. 25/2008** D.Lgs. 28.1.2008 n. 25, the law which implemented in Italy the PD.
- **NC** "*Commissione Nazionale per il diritto di asilo*" ("National Committee for the right of asylum"), the national committee competent to direct, coordinate and training the TCs and which is also authorised to revoke the refugee status and subsidiary protection.
- **TC** "*Commissioni territoriali per il riconoscimento della protezione internazionale*" ("Regional committees for the recognition of international protection"), local bodies competent, on a geographical basis, to examine asylum claims and to take decisions at first instance. At the time of writing of this report (February 2011), the number of TC are 11 (in the cities of Turin, Milan, Gorizia, Bologna, Rome, Caserta, Foggia, Bari, Crotone, Trapani, Siracusa). Each committee is composed by four members, taken one from the governmental staff, one from the police staff, one designed by the local administration and one designed by the UNHCR. Decisions are taken by a majority of three votes. The interview is very often done by only one member.
- **Trib.** "*Tribunale*". The court which is competent, on a geographical basis, for appeal against the TC's decisions. The case is dealt with and decided by one judge.

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

Simone Rossi: Professional - experience as an Italian lawyer

Giorgio Dell'Amico: Professional - experience as a civil servant at an immigration / asylum bureau, and as coordinator of the project "IO Immigrazione e Omosessualità" (Immigration and Homosexuality) for Arcigay Italy

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

- Our cases:

Total: 26

L: 2

G: 22

T: 2

- Court decisions collected before and during the research. Before the research only one court case was published (Trib. Trieste 17.8.2009 sent. n. 304/2009 - **attached 10** - published in the law review "Diritto, Immigrazione e Cittadinanza" n. 3/2010); through a network of lawyers and TC we found eight unpublished cases. Unfortunately, we found a scarce number of court decisions compared to the number of LGBTI claims brought to the TCs. As a consequence, the results of this analysis might not be completely representative of the position of case law.

- Decisions of TC. About fifteen decisions have been collected. Positive decisions are given without explanation except for one decision which briefly stated that the AS (a gay from Morocco) suffered violence due to his SO and that in the country of origin a law criminalizing LGBTI was in force: the claimant was granted refugee status. In contrast, the negative decisions have such a brief reasoning that they are not very useful for analysis. When the negative decision is based on credibility, the reasoning is usually reported as follows: "*the story of the claimant is not credible and/or is contradictory to other declarations / or the story concerning how the AS fled the country is not credible*". When the decision is not based on credibility but lack of any other requirements, reasoning can be reported as follows: "*there are no sufficient elements to fulfil the requirements of the Geneva Convention, nor of art. 7 and 8 of D.Lgs. 251/2007 (for granting refugee status) or of art. 14 of D.Lgs. 251/2007 (for granting subsidiary protection)*".

- Information received from ONG (LGBTI and non LGBTI) and a network of lawyers dealing with immigration and asylum law (such as ASGI).

- Information obtained from 9 out of 11 TCs via a questionnaire (basically an abstract of this questionnaire using the relevant questions for the TCs) given to them. The UNHCR representative at the TC answered the questionnaire that was subsequently approved by the President of each TC. The research carried out using the questionnaire has been previously approved by NC.

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.

Approximately 400 claims were brought forward in the years 2008, 2009 and 2010 (the Qualification Directive was implemented at the end of year 2007 with D.Lgs. dated 19.11.2007 no. 251; the Procedure Directive at the beginning of year 2008 with D.Lgs. dated 28.1.2008 no. 25). The number of LGBTI claims increased significantly (as a percentage of the total asylum claims) from 2008 to 2009 and from 2009 to 2010.

Our answer is based on information obtained from TC. The data we analysed are not collected by official statistics or records, because neither TC nor NC keep records of LGBTI claims. The data are an estimate of TC members although we believe they are a good approximation of the real number of claims.

On 104 TC decisions (our cases; other TC decisions collected; statistics by Turin TC and Crotone TC) the results were:

Refugee status: 39

Subsidiary protection: 7

Humanitarian ground: 9

Negative: 49

On nine Tribunal judgements collected, the results were:

Refugee status: 5

Subsidiary protection: 2

Negative: 2

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

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

20-25

What are the main issues in these cases?

Credibility of sexual orientation. Credibility of persecution / discrimination. Discrimination and threats resulting from relatives and isolation within the family.

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

290-300

What are the main issues in these cases?

Credibility of sexual orientation. Credibility of persecution / discrimination.

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?

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?

M to F: 70-75

F to M: a TC referred to a few cases, about 5-10% of the total transgender asylum cases.

Main issues:

- transgender asylum seekers experience far more physical violence, sexual violence, detention, criminal penalties, isolation and other forms of serious persecution, either from non state actors or from state actors (police), compared to L and G;
- the situation of the country of origin and the persecutions suffered by the asylum seekers, as many transgender asylum seekers come from countries where LGBTI are not criminalized (such as Brazil and Colombia)

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

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

Nigeria, Morocco, Senegal, Ghana, Colombia, Tunisia. It is not possible to rank and quantify them.

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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.

ONG/groups advising potential LGBTI asylum seekers have not reported any LGBTI who, after having received information on asylum and asylum procedures, decided not to submit the asylum claim because of fear of the consequences (we have not consider fear of being sent back to the country of origin or fear of losing the possibility to travel to the country of origin, which are general issues of asylum).

We are aware that for LGBTI migrants, the public declaration of their status is a serious problem with respect to their ethnic/national community. LGBTI migrants face a 'twofold discrimination': as an immigrant and an LGBTI. Risk of isolation within their community and within LGBTI group is an issue for them.

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)

Homosexuals: gay man in (e.g.) Morocco; lesbian women in (e.g.) Senegal

Trib. Caltanissetta, 10.2.2010 (**att. 1**)(gay, Ghana): “... homosexual condition – persecuted in Ghana also by law – implies membership of a particular social group whose members *‘share an innate characteristic or a common background that cannot be changed or they share a characteristic or faith so fundamental for their identity or conscience that they should not be forced to renounce it’* (the judges quoted the definition of a particular social group provided by art. 8, c. 1, D.Lgs. 251/2007).

Trib. Torino, 5.11.2010 n. 426/10 (**att. 2**)(lesbian, Senegal): “...*taking into consideration the situation of the country of origin, the particular social group discriminated can be identified on the basis of a common characteristic of sexual orientation, as that of female homosexuality...*”.

In the decision of TC Turin, 2009 refugee status was granted with no reference to the particular social group: TC Turin, 2009 (gay, Morocco): “*the asylum seeker clearly reported the reason why he presented the asylum claim and the reported facts show how – because of his sexual orientation – the asylum seeker has been strongly restrained, also through psychological and physical abuse, in his area of origin and then in other areas of his country of origin; considered that after abuse within the family the asylum seeker suffered serious abuse and restriction of his personal freedom that he couldn’t avoid because his sexual orientation is criminally sanctioned; considered that the risk that the applicant would face in his country of origin is such to fulfil the requirements for the refugee status*” .

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.

Some of the TC reported that in a few cases the status was based on membership of a particular social group together with religious issues. The asylum seekers were coming from countries where a different sexual orientation or gender identity is criminalised and persecuted also because of religious convictions.

subsidiary protection? On which basis?

Claims by asylum seekers coming from countries where homosexuality is criminalized (such as Morocco, Ghana, Benin, Tunisia) were decided granting subsidiary protection on the basis that it did not exist (or it was not proved) a direct and personal persecution accordingly to art. 1 of the Geneva Convention. However, it was recognised that there was the risk of serious harm if they were to be sent back to their own country.

We found this reasoning both in decisions of TCs and in one court decision (Trib. Catania, 4.3.2010, **att. 3**, involving a gay from Ghana. The judge, indeed with a very incoherent reasoning, rejected the claim of refugee status because the claimant did not have sufficient proof of personal persecution but then they granted him/her the subsidiary protection, implying that the claimant had proved personal persecution (!) on the grounds of sexual orientation, as he/she was at risk of suffering serious harm due to sodomy laws).

Unfortunately, we could not access the entire documentation supporting the above cases. Only brief TC descriptions and court decisions have been found and analysed (see above, page 2).

This is the reasoning behind two TC decisions:

1) TC Milan, 2010 (gay; Morocco): “*considered that what was reported by the asylum seeker was vague, confused, contradictory and didn’t result in any element that fulfils the requirement of direct and personal persecution under art.1 lett. A 2) of Geneva Convention and art. 7 and 8 of D.Lgs. 251/2007 [Italian law that transposed the QD] to grant the refugee status; held, anyway, that the case fulfils the requirements of art. 14 D.Lgs. 251/2007 to grant the subsidiary protection, because there were substantiated reasons to consider that if the asylum seeker returned to his country of origin he would face a real risk of suffering serious harm.*”

2) TC Milan, 2009 (gay; Morocco): “*considered that what was reported by the applicant is coherent and credible but does not fulfil the requirement of direct and personal persecution under art.1 lett. A 2) of Geneva Convention and art. 7 and 8 of D.Lgs. 251/2007 to grant the refugee status; held, anyway, that the case fulfils the requirements of art. 14 D.Lgs. 251/2007 to grant the subsidiary protection, because there were substantiated reasons to consider that if the applicant returned to his country of origin he would face a real risk of suffering serious harm.*”. In this case, the name and the picture of the AS were published on a Moroccan newspaper in an article against homosexuals.

Our impression is that those decisions are bad practice, because they do not correctly apply D.Lgs. 25/2007: indeed if an AS is at risk of suffering serious harm on the grounds of SO or GI and he/she is unable or unwilling to avail to the protection of his/her country of origin, this means that his/her condition should be brought forward under the refugee status rules.

Trib. Caltanissetta 7.6.2010 (**att. 4**), granted subsidiary protection to a gay from Tunisia that suffered persecution on grounds of SO, after having rejected the claim of refugee status on the basis that being homosexual does not mean, as such, that the person belongs to a “particular social group”. The reasoning is unclear, but probably the judge meant that the claimant should have proved his membership to a specific group: this would be a misinterpretation of art. 10, lett. d) of QD, as implemented by art. 8, lett. d) of D.Lgs. 25/2007. In this case, subsidiary protection was granted

with the following reasoning: “the claimant reported to the Commission and to the judge, of being homosexual; he also reported that in his country that his condition caused him insults and mockery and that for such reason he was beaten, without having received any help from the local police, that on the contrary ‘burst out laughing’; he reported as well the risk of being convicted because in Tunisia homosexuality is a crime. ... the above circumstances, the truth of them being without doubt, ... lead to granting subsidiary protection..... being insulted, beaten or imprisoned on grounds of sexual orientation represent a serious risk, which means a violation of fundamental human rights; it is clear, furthermore, that the applicant in his country, where homosexuality is a crime, would not be able to ask for protection or support from the police, given the reaction of the police in the episode reported by the claimant, and would be denied of any protection.”

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.

Under Italian law, a permit of stay can be issued on humanitarian grounds “when there are serious grounds, particularly of humanitarian kind or due to constitutional or international obligations” (art. 5, c. 6, D.Lgs. 25.7.1998 n. 286) or, again when the person cannot be repatriated “because of the risk of being persecuted for his/her race, sex, language, nationality, religion, political orientations, personal or social conditions” (art. 19, c. 1, D.Lgs. 25.7.1998 n. 286).

Art. 32 of D.Lgs. 25/2008 states that, within the asylum procedure, when TC rejects a claim for international protection, but it considers that a serious humanitarian issue exists, it has to ask the “Questura” (the local police office) to issue a permit of stay for humanitarian reasons.

We found humanitarian protection granted in some LGBTI asylum cases: (a) when discriminations were not considered to amount to persecution (and when there are special circumstances, such as a particular vulnerability of the AS) or when other requirements for refugee status or subsidiary protection were not satisfied; (b) when the AS was particularly vulnerable or he/she had serious health problems; (c) when international protection was rejected, because of exclusion reasons accordingly to art. 12 of QD (only one case); (d) for lack of information on LGBTI’s COI (one case, of a gay from Sierra Leone – see Question 31).

b) other grounds (discretionary leave)?

No

Yes. Please quantify and explain.

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

No

Yes. Please quantify and explain.

Two cases of gays under the age of 18 have been reported by a TC. According to articles 19 and 26 of D.Lgs. 25/2008 the minors at the interview were assisted by a tutor. Interview was held following SCEP's (Separated Children in Europe Programme) guidelines.

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.

Arcigay Nazionale - migra@arcigay.it - www.migrantlgbt.arcigay.it
Devoted for many years to LGBTI asylum seekers.
Main activities: through the national coordinator or local sections they advise LGBT migrants on the possibility of international protection, on asylum procedures and on the consequences of submitting a claim. They assist the AS with drafting the claim (listening to the story; pointing out important things to stress or helping them to remember facts, asking about possible evidence of prosecution). They help the AS with supporting evidence on SO/GI (declarations of the group / declarations of LGBT associations) and on LGBTI COI. When it is not possible to work directly, Arcigay puts the AS in touch with other groups, experts that might give advice or assistance. They offer training for groups/staff/volunteers on LGBTI asylum issues. They also support the campaign on LGBTI asylum issues.

Sportello Migranti GLBT of Milan (*GLBT migrants service office of Milan*) / **Sportello Migranti GLBT of Verona** (*GLBT migrants service office of Verona*)
<http://sportellomigrantlgbtverona.wordpress.com>): they carry out the same activities as Arcigay on a local basis (Milan, from 2009, and Verona, from 2010).

Circolo di cultura omosessuale Mario Mieli Roma - <http://www.mariomieli.org/> - info@mariomieli.org: A free legal service for LGBTIs that also deals with LGBTI asylum claims.

Circolo Maurice Torino - <http://www.mauriceglbt.org> - info@mauriceglbt.org: a LGBTI NGO with particular expertise on transgender issues.

Other NGOs / groups who support or supported LGBTI asylum seekers are:

CIR Consiglio Italiano per i Rifugiati - www.cir-onlus.org, contacts cir@cir-onlus.org or legale@cir-onlus.org

The Italian Council for Refugees is an independent, humanitarian and non profit-making organisation, founded in 1990 under the patronage of the United Nations High Commissioner for Refugees (UNHCR). CIR works with the aim of empowering and co-ordinating actions in defence of refugees and asylum seekers' rights in Italy, in particular, in favour of vulnerable groups of people such as women, victims of gender violence and persecution, unaccompanied minors and victims of torture. Among its members CIR accounts for important humanitarian associations and organisations, the three main Italian trade unions and national and international research institutes. CIR is a member of the European Council on Refugees and Exiles (ECRE), as well as the Euro-Mediterranean Human Rights Network (EMHRN). CIR has been carrying out an extensive lobbying activity with Parliament and the Government to pass a national comprehensive law on asylum. CIR provides social protection and legal assistance to refugees and asylum seekers at its main office in Rome and through its offices all over Italy, particularly at nevralgic entrance borders.

Numero Verde ARCI 800 905 570 (toll-free number) – a toll-free phone service that gives AS information on asylum and asylum procedure and on services for AS and refugees.

Centro antidiscriminazioni di Pistoia (antidiscrimination centre of Pistoia) centroantidiscriminazione@provincia.pistoia.it

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

They cannot offer the AS logistic support (such as accommodation): reception system does not offer specific accommodation/integration projects for LGBTI AS and LGBTI refugees.

Lack of knowledge on asylum law and asylum law procedure make it difficult to give advice to the AS and to support them during the procedure. Sometimes it is difficult to find LGBTI COI information (apart from sodomy laws), to support the claim due to lack of information on some countries and because of the language barrier as the majority of information is in English.

Often the AS only gets in touch with these groups when the procedure is ongoing and this makes it more difficult to help them.

Volunteers do not have specific expertise to deal with the AS who has suffered serious physical/psychological violence, which makes it difficult to work on the information collected by the AS.

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

CIR, Centro Antidiscriminazioni Pistoia, and “Numero Verde Arcy” free tool number, employ staff.
The other NGO/groups referred to in letter a) work only with volunteers.

- c) Are they supported by bigger LGBTI and/or refugee umbrella organisations?
 No Yes. Which organisation(s)?

Arcigay is a partner of **Sportello Migranti GLBT of Milan / Sportello Migranti GLBT of Verona** (*GLBT migrants service of Milan / GLBT migrants service of Verona*)

- d) Do they work with lawyers or with UNHCR on LGBTI issues?
 No Yes. In what form?

With lawyers only.

- e) Do they have contact with the government?
 No Yes. In what form?

Not on a regular basis.

For example: Arcigay project IO (see answer 12) was partly funded by the government. Sportello Migranti GLBT of Verona (*GLBT migrants service of Verona*) met with the “Questura” (the local police office which can receive international protection claims) to present the work of the group, inviting the police to advise any potential AS of the service and to distribute their leaflets. When they support a claim they submit a declaration of the activities carried out with the AS.

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

ASGI – Associazione per gli studi giuridici sull’immigrazione (www.asgi.it; info@asgi.it);
Rete Lenford – Avvocatura per i diritti LGBT (www.retelenford.it - sos@retelenford.it)

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.)

Many asylum seekers reported that they submitted the claim after having lived in Italy for a long time, simply because they were not aware of the possibility.

Nevertheless, awareness among LGBT of the possibility of receiving asylum has increased significantly within the last few years.

Arcigay project “IO – Immigrazione e Omosessualità” (Immigration ad Omosexuality) published and distributed an informative booklet, translated in several languages, in ‘LGBTI places’ like bars, discos, saunas etc. and through e-mails and the internet at the following web site:

www.migrantilgbt.arcigay.it (please note that a copy of English and French versions of the booklet are attached: **att. 5**).

Sportello Migranti GLBT of Verona (*GLBT migrants service of Milan / GLBT migrants service of Verona*) distributed a leaflet in several languages (a copy in English is attached: **att. 6**) and information through a web site (<http://sportellomigrantiglbtverona.wordpress.com>).

We believe there is a lack of (effective) information at the immigration reception/detention centres, where illegal immigrants are hosted/detained. Probably this is a problem common to all asylum seekers, if we consider that 70% of asylum claims are submitted shortly after the illegal arrival by boat through the Mediterranean Sea (*source: UNHCR “Protezione dei rifugiati e migrazioni internazionali: una valutazione del ruolo operativo dell’UNHCR in Italia meridionale”, 2009*).

Policy, legislation, case law

13) Specific law and/or policy

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

No

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

There are no specific laws or policy concerning LGBT asylum seeker. “*Guidelines for evaluation of asylum claims*”, issued in 2005 by NC, contain reference to the fact that under the QD, LGBTI can

be treated as a member of a particular social group under the condition of the QD (complete text of NC Guidelines and translation of relevant pages – 21 and 22 - are attached hereto: **att. 7, 8**)

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

No Yes

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

“Guidelines for evaluation of asylum claims”, issued in 2005 by NC (see lett. a), contain a section on women related issues (p. 41 to p. 49).

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.

Under Italian law court decisions are not binding.

The Supreme Court judgement of the Civil Section of 25 July 2007 (Cass. Civ. 16147/2007) and the Supreme Court judgment of the Criminal Section of 18 January 2008 (Cass. Pen. 2907/2007), have been frequently quoted as leading asylum cases in national and international reports (e.g. European Union Agency for Fundamental Rights - "*Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*" - Update 2010).

The principle stated by those decisions, although not very clear, can be summarized as follows: "*only criminal laws that punish homosexuality should be considered persecutory, whilst laws prohibiting homosexual conduct against 'public morality' shouldn't be deemed as persecutory.*"

However, the above judgments are not asylum leading cases.

First of all the judgments are not considering international protection but an injunction to leave the country under immigration law (precisely under art. 19 of D.lgs. 286/1998 which avoids expulsion when the person, if he returns to his own country, can be persecuted for reasons (inter alia) of sex or for personal and/or social condition). Secondly, because the judgements were issued before the QD

was transposed by D.Lgs. 251/2007, that accordingly to art. 9 of QD, states that acts of persecution can take the form of discriminatory laws.

We didn't find any TC or court decision on international protection, before or after the transposition of QD, which followed the principle stated above or even mentioned the Supreme Court judgements.

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.

TCs reported that these principles and above all the UNHCR Guidance Note, although they are not quoted in the decisions, they are commonly used for assessing a LGBTI asylum claim. We didn't find any reference either in decisions or case law.

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?

SO / GI is generally established through an evaluation of the declaration of the asylum seeker and of supporting evidence (if existing).

TCs and courts usually consider if the asylum seeker is credible with respect to his/her story of awareness of SO/GI, sentimental experiences, relationships, persecution or discrimination suffered, circumstances for leaving the country of origin.

Art. 3, c. 4 of D.Lgs. 25/2010 transposed exactly art. 4, c. 5 of QD. TCs and tribunals apply those principles in all asylum cases, including LGBT asylum cases, often quoting the leading case of the supreme court, Cass. S.U. 27310/2008, remarking on the principle and stating that the judge or the TC has to cooperate with the claimant in finding evidence and carrying out independent enquiries.

Accordingly to these rules, the following court decisions considered the SO credible on the basis of the declaration of the claimant, without any other evidence: Trib. Caltanissetta 7.6.2010 (att. 4) (gay,

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>

Tunisia), Trib. Catania 4.3.2010 n. 1081/10 (att. 3) (gay, Ghana), Trib. Caltanissetta 10.2.2010 (att. 1) (gay Ghana).

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?

SO: the AS was not believed due to a number of elements such as: AS referred to only one single episode of sex with a person of the same sex; AS cannot describe the partner of a sentimental relationship he was talking about; AS was not able to tell how and when he became aware of SO and to describe his emotions regarding SO; AS does not know the situation of LGBTI people in the country of origin; AS explains that was homosexual in the country of origin but he is not homosexual anymore in Italy.

GI: we didn't find any case or reference to the fact that an asylum claim on the grounds of GI was rejected because the gender identity was not believed.

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

Trib. Trieste 11.11.2009 n. 508/2009 (att. 9), did not believe the SO of the claimant (gay, Senegal), because he declared that he discovered his SO at the age of forty, when he was married and had a child, and that he only had one homosexual experience which was never repeated, and that he didn't frequent LGBTI groups/places although he had been in Italy for a long time before applying.

We consider it good practice that the TC try to collect a list of elements to assess the credibility of the asylum seeker (such as life experience; emotional background; relationship; etc.) and that in many cases credibility of SO is positively established when there was not any other element but the story of the asylum seeker.

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

We do not perceive any pattern, but many TCs reported claims that have been rejected on the grounds of credibility, due to stories being too similar: AS had only one homosexual experience, during which AS was discovered by family members/other people and that was the reason AS fled the country, AS has no information on LGBTI situation in the country of origin and does not frequent LGBTI in Italy.

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)?

Supporting evidence is not required to prove SO or GI. Any supporting evidence is accepted because the rule on proof for this matter (see answer 17) allows any kind of evidence. TC decisions and court cases show the following supporting evidence: witnesses and witness statements; declarations of LGBT organization; membership of LGBT organization.

Decisions and/or case law. Good/bad practices

Court cases:

Trib. Torino, 5.11.2010 n. 426/10 (att. 2), considered the SO credible of a lesbian from Senegal on the basis of her declaration supported by one witness.

Trib. Trieste 17.8.2009 n. 304/09 (**att. 10**), considered the SO credible of a gay from Benin on the basis of his declaration supported by one witness (his partner).

Trib. Roma 5.5.2010, considered the SO credible of the claimant on the basis of his declaration supported by significant evidence (including witnesses; membership of LGBT association in Italy).

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

Not requested, but accepted (see answer 19).

Yes

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

n/a

b) What does the examination include?

n/a

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

n/a

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

n/a

Decisions and/or case law. Good/bad practices

One TC reported that sometimes they receive or ask for medical documentation of an AS hosted in asylum seekers centres and that, seldom, this documentation contains reference to the SO of the person (not as a 'diagnosis' but as an anamnesis information associated to other enquires; e.g. in one case a psychological statement reported 'depression due to SO'): this information can be important for a positive decision when credibility is in doubt, after the personal interview. We consider it good practice for TCs to look at existing medical documentation (not to ask for the opinion of an 'expert') if at the personal interview it arises that the AS has suffered psychological illness and when credibility is in doubt.

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

No Not requested, but accepted (see answer 19). No case was reported where the TC or Court doubted on GI affirmed by the AS

Yes

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

n/a

b) What does the examination include?

n/a

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

n/a

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

n/a

Decisions and/or case law. Good/bad practices

n/a

22) Are explicit questions asked about sexual activities?

No (but see explanation)

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

One TC reported that, although detailed questions had never been asked, some cases were asked the question concerning the age and the circumstances of the first sexual experience.

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

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

No

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

TC reported that negative answers are not decisive for rejecting the claim.

Trib. Torino, 5.11.2010 n. 426/10 (att. 10): in a case regarding a lesbian from Senegal, the fact that the police broke into a private house where a group of lesbians were gathering, was crucial in her story, because she declared that it was the reason she fled from Senegal.

Trib. Trieste 11.11.2009 n. 508/09 (att. 9): in this case of a gay from Senegal, one of the reasons for rejecting the claim was the fact that he didn't frequent LGBTI groups/places/people in his country of origin or in Italy.

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

Trib. Trieste 11.11.2009 n. 508/09 (att. 9)(gay; Senegal): the fact that the claimant was married and has a child was mentioned in the reasoning, but we do not believe it was the reason for a negative outcome, because he was not granted international protection.

TC Milan, 2010, granted refugee status to a gay from Morocco. He fled the country with his partner and went to Spain to some relatives of the partner that could help them find work. The relatives discovered their relationship and beat them. After this the AS fled to Italy. He said he couldn't go back to Morocco because their relative denounced him for 'unnatural acts'. He was married in Morocco and had a child within the marriage. He said that he got married at the age of 28 (he was 40 at the time of claim) because he was forced to do so by the family. He was asked by TC about his fatherhood of the child and he declared that he was not sure he was the father, but that he feels obliged to help them economically. He said his wife would not accept divorce for social reasons. The lawyer that stood for the AS was present at the personal interview. She told us that her presence was important to explain to the TC that being married and having children is not that strange for a LGB and that in Italy there are many LGBs in the same situation (she is a lawyer with LGBTI expertise).

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

TC: yes (and they also carry out specific enquiries about the relevant country of each case: this research would be largely carried out via the internet; e.g. www.refworld.org ; www.ecoi.net)

Courts: No, although the judge should look for relevant COI – the claimant should always submit COI.

Good practice: Trib. Torino, 5.11.2010 n. 426/10 (att. 10): in this case the judge carried out an autonomous enquiry of COI in Senegal using a browser (google) and he found relevant information on the persecution of LGBTIs.

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.

Official COI data bases are being developed but at the moment they are not very useful; TC use international COI data bases (www.refworld.org; www.ecoi.net)

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

No

Yes. Could you describe this information?

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

No

Yes

a) Can the expert draft a report? No Yes

b) How is the expert paid for?

The expert should be paid by the claimant.

In all the court cases we examined the legal charges have been compensated among the parties, except for one case, where the government covered the legal expenses of the claimant. This is quite

a common procedure in Italy when a public body is involved in the proceeding, despite the general rule that the legal expenses should be paid by the counterpart when the claim is admitted.

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

No cases were found where a COI expert had been consulted.

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

The situation of LGBTI people emerging from COI is examined; they always look for laws criminalizing or discriminating LGBTI; ONG and LGBTI group information are taken into account without any restriction.

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.

TCs report that they are aware of the fact that in some countries, due to fear of persecution, information couldn't be available; TCs report that they never faced a serious lack of information. We found one case of a gay from Sierra Leone: TC Milan, July 2007, where the claim for international protection was rejected, but the protection on humanitarian grounds was granted, with the following reasoning: "*the circumstances reported by the AS are of discrimination on grounds of homosexuality. These circumstances for the TC don't amount to persecution also because there is a lack of information on homosexuality in Sierra Leone. Nevertheless there is the need to grant humanitarian protection, because of the vulnerability of the AS and of the possible consequences when repatriated*".

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

No Yes. Please describe the examples.

33) Sometimes general COI which is not relevant for the situation of the LGBTI concerned is used as a basis for a decision (e.g. information on gay men used wrongly to assess the risk for

lesbians or trans people; information on heterosexual women's status used for lesbians). Did you find examples of this?

No Yes. Please describe the examples.

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

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

No

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

TC Turin (2008). A lesbian from Morocco, who left the country when she was nine and then lived in Spain and Italy and never went back to Morocco. She understood her SO when in Italy and she lived openly with her condition. She submitted the asylum claim when she was nineteen and was granted the refugee status.

The largest majority of LGBTI AS hide the SO in their country of origin; many of them fled the country after their SO have been discovered and they suffered violence, threats or discrimination as a consequence. Some of them fled the country because they couldn't live with their SO that they completely hid in their country, because of fear of persecution.

International protection has been granted also to LGBTI who hide their condition in the country of origin and that didn't experience episodes of violence, threats or discrimination. Or to LGBTI who live very discreetly with their SO in their country (revealing it only to a few people) and that didn't experience episodes of violence, threats or discrimination (see Q36).

Coming out in Italy seems to be more frequent among transgender.

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

We found a case of a gay AS which presented a first claim in 2007 based on other grounds. The claim was rejected. In 2009 he presented a new claim based on SO: at the personal interview he declared that he didn't mention his SO, because of fear that people in the reception camp would find out and he was afraid of suffering from violence. He was granted refugee status.

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.

When the country of origin criminalises homosexual acts or sexual orientation, the international protection can be granted also if the person didn’t suffered other acts of persecution by state or non state actors. When other acts of persecution are alleged and the evaluation of these acts amount to persecution or not, does not seem to be the crucial point of the decision.

Decisions/case law:

1) Gay, Egypt. He lived in Egypt hiding his SO. He had some gay relationships, one lasting for many years. The only act of violence he reported was that he met a man in a public toilet and hid with him in a toilet; the guardian of the toilet discovered them and beat him. He alleged he had problems with his mother: she didn’t know he was gay but she suspected and so she was very insistent. He declared that he left the country because he wanted to live freely with his SO and that he feared going back because in Egypt homosexuals are persecuted and there is a law against prostitution often used to sanction homosexuals. TC Gorizia (2011) granted the refugee status.

2) Gay, Iran. He didn’t suffer physical violence (he said that this was due to the fact that he belongs to a rich family). He was blamed by the people for his demeanour. He lived for many years with his partner, often moving house to avoid inquisitiveness from the neighbours. A woman threatened him saying that she would denounce him to the police if he didn’t have sex with her (he refused). He told the TC of Milan that he didn’t ask for protection from the police because the Iranian regime does not admit the existence of homosexuality. He was granted the refugee status (TC Milan, 2011).

3) Gay, Ghana. His claim was rejected by TC of Siracusa on the grounds of credibility (2009).

Trib.

Caltanissetta 10.2.2010 (attached 1) granted the refugee status. We do not know if he alleged acts of persecution/discrimination. But the judge wrote that “*he fled his country because he is homosexual*” and made no reference to acts of persecution/discrimination.

4) Gay, Tunisia. He lived with his partner (an Italian man) in Tunisia hiding his SO. He was insulted by the people who knew or suspected about their relationship. When suspicion concerning their relation arose, they were forced by the owners of their flats to move three times in a short period. He was imprisoned for three days, then released after being asked by the judge about his

relationship with the Italian man (he said they were just friends). TC Gorizia (2011) granted refugee status.

(see also case law under Q36A)

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 existence of criminal law provisions is generally sufficient, without the need to ensure that those rules are actually enforced, as criminal provisions are considered an obstacle to express a fundamental right. One TC reports that in some cases an enquiry on the actual enforcement of such laws was carried out to check the credibility of claimants that stated that they had suffered some periods of detention because of SO/GI.

Case law:

1) **Trib. Trieste 304/1999** (attached 10) granted the refugee status to a gay from Benin: *“the acts... of which has been given evidence can be qualified as serious violations of fundamental human rights, being a fundamental human right the choice of sexual orientation; the claimant suffered physical and psychological violence and, finally, Benin’s law provides ... imprisonment for homosexuals”*. The judge didn’t take into consideration whether the laws were actually enforced.

2) **Trib. Caltanissetta 7.6.2010** (attached 4) granted subsidiary protection to a gay from Tunisia: *“the claimant reported, to the Commission and to the judge, of being homosexual; he also reported that in his country that condition caused him insults and mockery and that for such reason he was beaten, without having received any help from the local police, that on the contrary ‘burst out laughing’; he reported as well the risk of being convicted because in Tunisia homosexuality is a crime. ... the above circumstances, the truth of them being without doubt, ... lead to granting the subsidiary protection..... being insulted, beaten or imprisoned on grounds of sexual orientation represent a serious risk, which means a violation of fundamental human rights; it is clear, furthermore, that the applicant in his country, where homosexuality is a crime, would not be able to ask for protection or support from the police given the reaction of the police in the episode reported by the claimant.”* The judge didn’t take into consideration whether the laws were actually enforced.

3) **Trib. Caltanissetta 10.2.2010** (attached 1) granted refugee status to a gay from Ghana: *“Indeed, in Ghana homosexuality is illegal: quite a number of articles of penal code regard crimes against the family and morality and can be used to punish homosexuals. Article 105, chapter 6 of Criminal Code provides that “[the judge translate the article]”. Furthermore, Ghanaian government –*

according to a report on International gay and lesbian human rights commission – first of all prohibited a gay conference, and instructed the Ministry of Interior to identify and arrest the organizers, and secondly the Ministry of Information stressed the fact that ‘unnatural carnal knowledge’ is illegal under the laws of the country and ‘homosexuality, lesbianism and bestiality are offences under the laws of Ghana’. In this case, the judge didn’t explicitly take into consideration whether the laws were actually enforced. But the reference he made to the position of the government might be an implicit evaluation of the probable enforcement of the laws.

4) **Trib. Torino 5.11.2010 n. 426** (attached 2), granted refugee status to a lesbian from Senegal). She escaped a police raid during a private meeting of a lesbian group. The father wanted to force her into marriage. She then fled the country. TC Turin (2010) rejected the claim on grounds of credibility. The Tribunal granted the refugee status. The judge considered that the criminal law in Senegal was enforced: “*The Commission did not challenge the truth of the claimant story about the real risk of serious criminal sanctions in the country of origin, of Muslim inspiration and rejected the claim only because the claimant wasn’t credible regarding her personal story*”.

5) **Trib. Trieste 11.11.2009 n. 508/09** (gay; Senegal), reasoned that although in Senegal a sodomy law exists, there was not evidence of any fear of persecution among the citizens: however, we don’t believe that that was the main reason to reject the claim as we argue that the main reason was credibility of SO.

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?

Yes. Decisions / case law:

1) Gay, Benin. He was discriminated by the family; fired twice because of SO; assaulted by strangers when getting off a taxi; he didn’t go to the police because in Benin homosexuality is a crime. TC of Gorizia granted subsidiary protection, then Trib. Trieste 304/2009 (attached 10) granted refugee status with this reasoning: “*the acts... of which has been given evidence can be*

qualified as serious violations of fundamental human rights, being a fundamental human right the choice of sexual orientation; the claimant suffered physical and psychological violence and, finally, Benin's law provides ... imprisonment for homosexuals".

2) Gay (we are not authorized to reveal the country of origin). He was discovered with his boyfriend in an intimate relationship and because of that he was raped, beaten and exposed naked on the street; after these facts, the family segregated him for a long time; after he suffered threats and insults. The asylum authority (at the time the NC was responsible) rejected the claim, whilst **Trib. Roma, 5.5.2010** granted refugee status.

3) Gay, Tunisia. He was insulted, suffered mockery and he was beaten by non-state actors. The TC of Siracusa (2009) rejected the claim on grounds of credibility. **Trib. Caltanissetta 7.6.2010** (attached 4) granted the subsidiary protection.

4) Gay, Morocco. He was seriously beaten. He was granted refugee status by Milan TC (2009).

No.

1) Lesbian, Nigeria. She stated that she was afraid of being killed by her husband who had discovered her in an intimate relationship with a friend (a woman). TC Rome (2009) rejected the claim on grounds of credibility *"doubts on the truth of the facts alleged, particularly concerning the circumstances where the husband discovered her condition, because the AS referred to being constantly under the control of her husband's body guards"*. **Trib. Roma 19.10.2010** rejected the appeal with this reasoning: *"the alleged facts of fear of being killed by her husband who discovered her in an intimate relationship with a friend are reported in vague, contradictory and hardly plausible terms (to the judge she declared she refused the forced marriage and for that she was threatened and beaten by the betrothed; whilst to the TC she declared that she agreed to the marriage to appease her parents). Furthermore, these facts can't be considered as acts of persecution under art. 7 and 8 of D.Lgs 251/2007 [Italian law that transposed QD] or of serious harm under art. 14 D.Lgs 251/2007, but as facts related to private relationships"*.

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 lesbian claims we founded more persecution by the family and relatives than in gay claims.

In transgender claims we founded far more physical violence and severe abuse, both from non state actors and the police, than in gay claims.

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.

For those countries this is not an issue (see answer to Q36 and Q36A)

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.

No when AS came from countries that threaten homosexuality / homosexual acts with criminal laws. For countries where there are not such criminal laws, we didn't find decisions/case law.

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

No when AS came from countries that threaten homosexuality / homosexual acts with criminal laws. For countries where there are not such criminal laws, we didn't find decisions/case law; some TC answered yes to this question, and we think this is the practice.

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?

We didn't find decisions or case laws that specifically deal with the creation of an "homophobic atmosphere".

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.

We found a court decision (Trib. Trieste 11.11.2009 n. 508/09, gay, Senegal) where the judge affirmed that the claimant could have avoided the (eventual) threat of his father moving to another town in his country.

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...)?

Physical violence, (“corrective”) rape and other sexual violence, detention, other criminal penalties, execution, honour killings, medical abuse (as a “cure”), harassment, threats, intimidation, forced marriages, other psychological violence, isolation.

The most frequent acts of persecution are physical violence, harassment, threats, psychological violence, isolation.

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?

All of them have been recognized as persecution or serious harm.

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).

See above questions 3 and 37B

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.

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.

TCs report that some cases were granted protection on humanitarian grounds when discriminations were not considered to amount to persecution, when there are special circumstances (such as a particular vulnerability of the AS). We didn't have access to the dossiers of these cases so we can't say if the AS experienced a persecution labelled as discrimination.

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.

One TC reported that in one case the AS declared that he had always lived his SO very discreetly and that he didn't he didn't believe that being discreet was a sacrifice: for this reason the TC decided

that there was not a reasonable fear of persecution.

None of the other TCs reported to have used this argument, which was not used in any of the court decisions examined

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?

No differences.

Art. 8, c. 1, D.Lgs. 251/2007: “a particular social group is that which is composed of members who share an innate characteristic or a common background that cannot be changed or share a characteristic or a faith that is so fundamental to identity or conscience that a person should not be forced to renounce it, or has distinct identity in the country of origin, because it is perceived to be different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might be identified on the basis of the common characteristic of sexual orientation, excluded when sexual orientation includes acts considered to be criminal under Italian law’.

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

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

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

Reference to GI provided in art. 10, par. 1, lett. d) of QD has not been translated and there isn't any other law or policy provision.

Despite this, practice recognizes that transgender AS belong to a particular social group.

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

One is sufficient (art. 8, c. 1, lett. d) D.Lgs. 251/2007, see question 45).

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

There is not any reference to this aspect (see question 46).

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.

n/a

Article 20-3 Qualification Directive: Vulnerable persons

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

- No
 Yes. Please give details

They are not considered part of a ‘vulnerable group’ or a ‘group having special needs’ under law or policy.

Some TCs reported that LGBTI asylum seekers are considered people having special needs and therefore particular attention is given at the personal interview to the interviewer/interpreter (TCs ask if the AS feels comfortable with the sex of the interviewer/interpreter) and with confidentiality.

Procedures Directive⁴, 2005/85

Article 13 Procedures Directive: The interview

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

- No
 Yes. Is such a preference usually recognised? No Yes

Art. 12, c. 1, D.Lgs. 25/2007 states that “upon justified request of the claimant, it can decide to do the interview ... with an interviewer of the same sex of the claimant”. The rule does not state that the claimant can ask for an interviewer of the opposite sex. There isn’t any rule of law about sex of the interpreter.

In practice, the answer is yes for the gender.

With respect to SO/GI TCs report that such a request has never been asked for and it would have been very difficult to satisfy, as for privacy reasons the members/interpreters of the TCs are not asked their SO/GI.

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

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

The interviewer is always a member of TC and all of them are Italian citizens and we have no information of any of them being (or having been) a citizen of any of the country of origins of the LGBTI asylum seekers that came out in this survey.

Concerning the interpreters, the answer from all TCs to this question was yes, except one TC that answered that such a request was never asked for and one TC that answered that the preference is recognized according to the availability of interpreters who are not of the same ethnic community.

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.

There is no training on LGBTI issues. Recently, during an optional training session on international protection held by CN for TC members, a workshop on LGBT in Iran was held.

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.

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

No Yes. Please explain.

Articles 29-31 Procedures Directive: Safe countries

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

No. Please go to question 60.

Yes. Please answer questions 59A and B.

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

No

Yes. Please give the names of these countries.

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

No Yes. Please explain.

Article 27, 36 Procedures Directive: Dublin Regulation

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

No

Yes. Please give details.

As far as we know the only European country whose courts have considered their country unsafe for the purpose of the Dublin Regulation is Greece, but that was in relation to a general asylum matter.

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.

Reception Directive⁶

Article 17 Reception Directive: Reception

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

No. Please go to question 63.

Yes. Please answer questions 62A, B and C.

62A) By whom are these problems caused?

We didn't have information about specific cases, but it is well known that the LGBTI in reception/detention centres fear revealing their SO/GI, because of the risk of facing harassment / violence from other migrants (see about this fear, answer 35).

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>

62B) Are the authorities aware of these problems?

No Yes. How do they react?

We don't have any information of any specific program. In reception / detention centres there are several problems and we don't think LGBTI condition is on the priority list.

62C) Does a complaints mechanism exist?

No

Yes. Is it effective? No Yes

We don't think so.

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

No

Yes. Please explain

AS are hosted in reception centres for asylum seekers ("*CARA: centro di accoglienza richiedenti asilo*" – reception centre for asylum seekers) when: (i) it is necessary to verify AS identity or AS does not have a passport or ID or presented a fake one; (ii) AS submitted his/her claim after being detained because AS eluded or tried to elude border controls; (iii) AS submitted his/her claim after being halted because of irregular staying.

AS are hosted in immigration detention centres ("*CIE – Centro di identificazione ed espulsione*" centre for identification and repatriation) when: (i) art. 1 par. F of Geneva Convention applies; (ii) AS has been condemned for certain crimes; (iii) AS received a repatriation or refoulement decision.

Accommodation in CARA and detention in CIE is granted for a certain period, depending on specific conditions under immigration or asylum law.

AS which are not in any of the above circumstances can stay at their home or can be hosted by friends/partner etc. if any.

Accommodation facilities for AS and refugees are provided by "The Central Service and System of Protection for Asylum Seekers and Refugees (SPRAR)" (in 2009-2010 the capacity was 3000 people).

The Central Service was established by the Ministry of Interior – Department of Immigration and Civil Liberties - entrusting ANCI (National Association of Italian Municipalities) of its management. The Central Service is in charge of:

Monitoring the presence in the area of international protection seekers and holders;

Creating, maintaining and periodically updating a database of activities implemented at the local level in favour of international protection seekers and holders;

Disseminating information on activities performed;

Providing technical assistance to local bodies, also in setting up the reception activities;

Providing support to information and guidance services implemented at the governmental centres for asylum seekers;

Providing support to ANCI in performing the tasks arising from its status as delegate authority for the European Refugee Fund (Erf).

The Central Service also coordinates and gives advice for special reception services, within the SPRAR, by addressing people belonging to the so-called vulnerable categories such as unaccompanied minors, persons with disability (even temporary), persons requiring in-house personal or health specialist and long-term care, the elderly and victims of torture or violence.

Moreover, the Central Service supervises the professional training for operators and – in a vision of ongoing sharing between central and peripheral levels – it tries to make local experiences as a common heritage granting the highest quality standards of service available.

The *System of Protection for Asylum Seekers and Refugees* (SPRAR) is comprised of local bodies that have granted access, within the availability of its resources, to the *National Fund for asylum policies and services*, for the performance of projects related to integrated reception.

At a local level, the local bodies, with the support of actors from the service industry, ensure “integrated reception” activities going beyond the mere supply of accommodation and meals, and provide for complementary activities as information, assistance, support and guidance through the definition of customised pathways to socio-economic integration.

<http://www.serviziocentrale.it/> - info@serviziocentrale.it

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

In Milan’s CIE (“Centro di identificazione ed espulsione” centre of detention for migrants who wait to be repatriated) there is a specific section for transgender.

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

a) during the asylum procedure

No Yes

Under certain circumstances, AS that do not have a permit of stay when they apply for asylum, can receive a permit of stay until the decision has been made. Permit of stay gives access to the health care system equal to that of Italian citizens.

b) after they are granted asylum?

No Yes

When international protection is granted the person has access to the health care system as do Italian citizens.

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?

Our experience with LGBTI AS shows that the reconstruction of their story is a very long and difficult process that always requires several meetings with the person. Often LGBTI AS are not aware and prepared on what could be important to remember and to declare and at the first meeting their story can be brief in detail. Experience of supporting groups shows that some of them are surprised when asked to explain certain facts of their life (youth, family relationships, friends, how they discover their SO, etc.) which are the main objectives of the personal interview.

Therefore, it is possible that LGBT AS may have not been properly supported or advised, have difficulties in drafting/fulfilling a coherent and detailed claim and answering correctly at the interview. In this respect, it is important to consider that most of the asylum claims are submitted shortly after the illegal arrival by boat through the Mediterranean Sea (70%, *source: UNHCR "Protezione dei rifugiati e migrazioni internazionali: una valutazione del ruolo operativo dell'UNHCR in Italia meridionale"*, 2009) and also that for the largest majority of cases TCs hold only one personal interview.

AS should have more time to prepare their story and should have the possibility of a second interview when their credibility is doubted.

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

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

Some TCs reported a specific training on LGBTI issues for TC members and interpreter would be useful to help them to conduct the interview and to decide the claim. We agree.

Attachments:

- 1 Trib. Caltanissetta, 10.2.2010
- 2 Trib. Torino, 5.11.2010 n. 426/10
- 3 Trib. Catania, 4.3.2010
- 4 Trib. Caltanissetta 7.6.2010
- 5 Booklet of Arcigay project “Immigrazione e Omosessualità”
- 6 Leaflet of “*GLBT migrants service of Verona*”
- 7 NC Guidelines (Italian text)
- 8 NC Guidelines (English translation of pages 21-22)
- 9 Trib. Trieste 11.11.2009 n. 508/2009
- 10 Trib. Trieste 17.8.2009 n. 304/09

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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.