

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

Name: Dr. Neil Falzon

Telephone number: +356 99892191

E-mail address: neilfalzon@aditus.org.mt / neil.falzon@um.edu.mt

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

I headed the UNHCR Office in Malta for four years and have also worked closely with the Malta Gay Rights Movement. I also provide information and legal assistance to asylum-seekers, together with advocacy efforts.

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

Government representatives, NGOs, administrative and court decisions.

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.

For the period 2002 to 2011 (present) the number of LGBTI asylum cases has been 5 (of which 1 did not make this information available to the asylum authorities). This information was obtained from consulting the national asylum authority and relevant NGOs.

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

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

1 (this is the case that did not inform the asylum authorities of her sexual orientation).

What are the main issues in these cases?

Unknown, since sexual orientation was not mentioned in her asylum claim.

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

3

What are the main issues in these cases?

Fear of persecution from family members and of social exclusion; lack of protection from state authorities either due to criminalisation of homosexual activity or strong negative attitudes towards homosexuals; negative asylum decisions; credibility and deportation.

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?

Fear of persecution from family members and of social exclusion; lack of protection from state authorities; negative asylum decisions; credibility and deportation. In these cases problems were also reported with accommodation in the reception centre. It was a case of male-to-female.

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.

- 1 Libya (1)
- 2 Turkey (1)
- 3 Nigeria (1)
- 4 Gambia (1)
- 5 Ethiopia (1)
- 6
- 7
- 8
- 9
- 10

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.

On the one hand, it may be said that almost all persons entering Malta irregularly (boat arrivals from Libya) apply for asylum irrespective of sexual orientation. Whether LGBTI persons who enter illegally do not apply is unknown since no information is available on this.

There is however information showing that, although almost all persons entering illegally seek asylum, some LGBTI persons did not present sexual orientation either as a basis for their claims or even as part of their general facts/profile. It ought to be reiterated that the majority of asylum-seekers in Malta are of African origin, and having discussed LGBTI issues with members of the refugee population it is clear that the taboo and fear of social exclusion within an already excluded group of persons is extremely strong.

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)

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

subsidiary protection? On which basis?

None of the 4 cases were granted protection or asylum, so it is not possible to answer this question. However, the asylum authorities confirmed that from their perspective all of the three options could be envisaged.

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.

LGBTI asylum-seekers are not eligible for the New Temporary Humanitarian Protection status as LGBTI persons. I would identify this as a bad practice since it looks like a blanket exclusion that fails to consider ab initio the specific circumstances of possible cases.

b) other grounds (discretionary leave)?

No

Yes. Please quantify and explain.

In one particular case, the failed asylum-seeker sought Maltese protection under ECHR 3 and 8 when challenging his pending deportation. Article 8 was also invoked since he was then in a relationship with a Maltese man. Since Maltese law does not acknowledge same-sex relationships, these are not afforded any kind of legal protection.

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

No

Yes. Please quantify and explain.

Expertise, Support

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

No

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

Jesuit Refugee Service is a general NGO (asylum) that provides legal and social assistance to all asylum-seekers and other migrants, including LGBTI persons. For LGBTI cases JRS would provide general legal service (explanation of the asylum procedure, interview counselling, dossier preparation if necessary, case follow-up if necessary, appeal) together with social support in terms of referral to counselling if needed, looking to accommodation arrangements in the reception centres. JRS would also offer legal representation in court if required and if possible, together with advocacy with the competent authorities.

The Malta Gay Rights Movement does not really provide services to asylum-seekers but if faced with an LGBTI claim they would definitely conduct necessary referrals (to JRS and other services), as well as advocacy if required (to challenge deportation, etc.).

Any other NGO encountering LGBTI asylum-seekers would refer the case to JRS and MGRM.

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

Persons not willing to divulge information; persons not willing to seek redress in the appropriate channels.

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

JRS works with both staff and volunteers whilst MGRM is wholly volunteer-based.

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

No Yes. Which organisation(s)?

JRS is a member of JRS International, whilst MGRM is a member of ILGA.

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

No Yes. In what form?

JRS provides its legal services through lawyers or law students, and also works closely with UNHCR. For legal issues, MGRM would refer the case to JRS, and possibly also UNHCR.

e) Do they have contact with the government?

No Yes. In what form?

Since both organisations are heavily involved in advocacy for their respective groups of concern, they do have regular contact with various government agencies and departments, ranging from high-level officials for discussions on policy to the more operational governmental representatives.

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

A comment for the answer to question 10(a). Although no specific training is offered as part of the general training, a number of JRS lawyers have attended specialised training sessions that also covered LGBTI issues.

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.)

Persons are only informed of this possibility if either their lawyers or the asylum authorities suspect that it could be relevant. It is however not mentioned in the general information package/DVD provided to all asylum-seekers.

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.

Although asylum cases and documentation are not publicly available, one such case (rejected Libyan homosexual) made it to the courts since the applicant attempted to challenge his deportation.

Case summary: a Libyan national was in a steady relationship with a Maltese man and once his family in Libya discovered his homosexuality he was threatened and ordered to leave Libya. He entered a marriage of convenience with a Maltese woman, viewed as the only legal way of remaining in Malta, since he was unaware that homosexuality could be a ground for international protection. His Maltese wife eventually filed a police report admitting to the marriage of convenience, on the basis of which the police initiated deportation proceedings.

At this point, the applicant was advised to apply for refugee status, which he did but - due to the expiry of the required deadline - his case was deemed to be invalid. In a last attempt to challenge his deportation, the applicant initiated court proceedings challenging his pending deportation under Articles 3 and 8 of the ECHR, which proceedings were never finalised since the applicant was deported prior to any court hearing. Regrettably, no court case was filed claiming the deportation breached Articles 3 and 8.

Since no court hearing was held, no court decision is available. Of interest, however, are the submissions presented by the Attorney General in support of the applicant's deportation. The submissions wholly dismissed the applicant's claims regarding his homosexuality on the basis that the applicant's credibility was irreparably damaged by the marriage of convenience.

The case citation is: Walid Ahmed Mohammed El-Haddad vs Principal Immigration Officer (First Hall, Civil Court), initiated on 29th July 2008.

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.

Although references were not found in the decisions, the asylum authorities confirmed that they are referred to although not necessarily quoted in every case.

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?

The applicant's own declaration is deemed to be sufficient in situations of sexual orientation. This is the information provided by the national asylum authorities. For gender identity, information is not available yet in view of the current situation in Malta with regards to legal status of transgender persons and the recognition of their affirmed gender, it is doubtful that the asylum authorities would rely on the applicant's declaration.

It can be concluded that the practice with regard to sexual orientation is in fact a good one.

In the light of the above comments regarding the deported Libyan national, it cannot be said how the Malta Police would have dealt with the applicant's claims re. his sexual orientation had he not 'irreparably damaged' his credibility through the marriage of convenience.

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>

Yet despite the above answer by the national asylum authorities, whether the practice does in fact reflect an acceptance of the applicant's declaration can be questioned.

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?

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

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

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 strictly required, yet it will be accepted. Any form of evidence is acceptable, and once provided such evidence will be used to assess the applicant's credibility.

Decisions and/or case law. Good/bad practices

In one particular case, since the applicant's credibility was tarnished by his marriage of convenience to a Maltese woman, the applicant was not given the opportunity to bring evidence of his homosexuality. Such evidence included a witness statement from his Maltese male partner.

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?

As above, medical/psychological/etc. evidence is not required, yet it will be accepted. Any form of evidence is acceptable, and once provided such evidence will be used to assess the applicant's credibility.

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?

As with supporting evidence, the expert's opinion will be used to assess the applicant's credibility. Although this approach has never been used in LGBTI cases, when doctors provide evidence in other kinds of cases (e.g. torture, sexual violence), this evidence is generally accepted yet in most cases it is also verified by doctors appointed by the asylum authorities.

Decisions and/or case law. Good/bad practices

N/A

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?

Same as above for sexual orientation for all questions in 21.

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

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

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.

The questions asked could relate to the visiting of clubs, membership with organisations, etc.

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

This was however not in the context of the asylum interview but in the course of deportation proceedings, as highlighted above.

In one case a claim of homosexuality was not believed because the applicant stated that he engaged in homosexual activity due to the absence of women accepting to engage in heterosexual activity with him.

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

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

No Yes

27) Does your country have national COI researchers?

No. Please go to question 29

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

Please give details.

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?

This is allowed by the asylum authorities, and also by courts and tribunals yet has never been used. If used, it would be the applicant or the applicant's representatives who would pay the expert.

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

If the report is unbiased and from a reliable source, it will be considered together with the other COI available to the asylum authorities.

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

This would really depend on the kind of information available, and whether it is from unbiased and reliable sources. COI is used at all stages of the asylum procedure and is used to verify claims by the applicant and to understand the scenario in the country of origin.

However, since asylum-seekers, lawyers and NGOs are not generally full granted access to the detailed decisions of the asylum authorities, it remains difficult to assess the role played the COI in the decision-making process. It is also difficult to know what COI is used since this is also not easily accessible.

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

No

Yes. Please give examples.

No information is available on this point. It should be reiterated that since the number of LGBTI cases examined by the asylum authorities so far is rather small, it is difficult for them, and for lawyers and NGOs to establish what is policy and practice.

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.

The comment included for 31 above is also valid here.

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

This has never actually happened, but the asylum authorities would consider the possibility of a sur place claim.

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

This has never happened, but in terms of the Maltese asylum procedure their case could be reopened and reevaluated, if they present sufficient information on why the relevant information was not mentioned earlier.

In practice, as examined from cases, asylum-seekers who miss the 2-month deadline (from arrival) within which to present their asylum claim face difficulties in providing sufficient justifications for this delay. Fear, shame and lack of information do not seem to constitute sufficient justifications. In the context of LGBTI claims, I would define this as a bad practice and a wider tolerance for 'late' claims should be adopted.

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

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?

Availability of an internal flight alternative, lack of credibility.

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

No information was provided for this question, since it seems that the current personnel of the asylum authorities were not aware of the transgender claim as this was processed quite some time ago.

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.

This answer was given by the national asylum authorities. Nevertheless, in one of the analysed cases the applicant was asked why he did not to seek protection from the police, despite the criminalisation of homosexual acts in the country of origin.

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.

Answer given by the national asylum authorities.

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

Answer given by national asylum authorities. In one of the analysed cases, the applicant was asked why he did NOT attempt to seek protection from the police, despite the criminalisation of homosexual acts in the country of origin.

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?

The answer provided by the national asylum authorities is YES, insofar as this question is interpreted as referring to their opinion, view or thought. Insofar as this question refers to a written policy or decision, the answer would be NO.

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?

The asylum authorities would assess whether it would be unduly harsh for the applicant to relocate, whether the applicant would have access to work and to have a decent living, and in such cases whether the applicant would have access to effective legal remedies. The authorities also state that they would make use of UNHCR's relevant guidelines.

Case analysis, however, reveals that in at least one of the rejected cases the internal flight alternative was adopted in a situation where homosexual acts face criminal sanctions. I propose this as a bad practice, since it indirectly coerces the applicant to live his sexuality in secret (also mentioned below).

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

Despite a negative reaction from the asylum authorities, as mentioned above at least one examined rejection was based upon the internal flight alternative in a country where homosexual acts face criminal sanctions.

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...)?

Threats to life and safety, blackmail, intimidation, exclusion from the family.

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?

The above acts were deemed to be not serious enough to constitute persecution.

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).

N/A, due to lack of sufficient cases.

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.

N/A, due to lack of sufficient cases.

Article 9 Qualification Directive: Discrimination /persecution

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

No

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

The asylum authorities are not satisfied with discriminatory treatment, and require a higher level of harm or fear of harm. Nonetheless it is conceded that discrimination may amount to persecution.

In practice, it is observed that criminalisation of homosexual acts is not sufficiently serious to qualify as persecution.

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

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

No

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

Although this reasoning is not directly adopted, the application of the internal flight alternative for countries of origin that criminalise homosexuality or homosexual behaviour seems to embrace this approach on a very practical level.

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?

There are no differences between L, G and B applicants.

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?

There is no specific mentioning of gender identity in Maltese asylum legislation, although it cannot be excluded that transgender asylum-seekers could qualify for protection as belonging to a particular social group.

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

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

Legal Notice 243 of 2008, Procedural Standards in Examining Applications for Refugee Status Regulations (regulations adopted under the main asylum legislation, the Refugees Act) wholly incorporated the wording of the QD in Regulation 18(d)(iii), stating that "gender related aspects might be considered without by themselves alone creating a presumption for the applicability of this subparagraph". The Regulations are the main legislative instrument transposing the QD and the PD. Notably, the other QD references to the applicant's gender are omitted from the Maltese transposition.

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

They are not automatically treated as vulnerable, yet there could be ancillary circumstances giving rise to this classification (e.g. victims of trauma, torture, etc.).

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

This is generally not allowed. It is also a problem with female asylum-seekers who are not always offered a **female** interpreter or female interviewer. This is definitely a bad practice, especially since the asylum-seekers reaching Malta are generally Africans and therefore heavily relying on a communal support that could easily be cut-off if homosexuality was revealed to the community.

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

It is possible, although such a request has never been made.

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

No. Please go to question 56.

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

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.

No exception is made for LGBTI applicants, yet the asylum authorities adopt a policy of granting an individual interview to all applicants.

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

No Yes. Please explain.

LGBTI issues do not automatically give rise to prioritisation, unless other ancillary elements require such a procedure as, for example, serious accommodation issues, torture, trauma, sexual violence, etc.

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 is found in an Annex to the Refugees Act. Included countries having criminal provisions against same-sex conduct (as at time of writing) are: Botswana (illegality of same-sex acts, no discrimination protection, no official recognition of LGBTI rights organisations), Jamaica (illegality of male same-sex acts, rampant homophobic violence, no official recognition of LGBTI rights organisations, no discrimination protection), Ghana (illegality of male same-sex acts, no discrimination protection), Benin (no discrimination protection), Chile (no discrimination protection), Costa Rica (no discrimination protection), Gabon (no discrimination protection), Senegal (illegality of same-sex acts, rampant discrimination, no discrimination protection).

What is further of concern is that the asylum authorities were not aware of the inclusion of these countries in the list, as evidenced from their responses to the questionnaire.

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

- No Yes. Please explain.

Article 27, 36 Procedures Directive: Dublin Regulation

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

- No

Yes. Please give details.

Family Reunification Directive⁵, Council Directive 2003/86/EC

Article 10 Family Reunification Directive: Family members

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

No. Please go to question 62.

Yes. Please answer question 61A.

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

No Yes. Please explain under which circumstances.

Legal issues: Maltese legislation on family reunification, and generally Maltese asylum legislation does not limit the definition of 'family' to heterosexual relations but merely states 'spouse'. In this light, it could be possible to envisage a situation of a same-sex spouse, yet of course the requirement of marriage is inescapable.

Policy issues: Despite the legal considerations, Maltese policy on family and same-sex matters clearly and unequivocally is not to recognise family-units other than those composed of a marriage between a man and a woman. This policy is also fully adopted by the law courts. On this basis, any interpretation of the term 'spouse' or 'family' will definitely not include same-sex relationships.

Furthermore, as also evidenced from case-law, same-sex relationships in Malta do not enjoy any protection under Article 8 ECHR.

Reception Directive⁶

Article 17 Reception Directive: Reception

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>

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?

By other residents/detained persons and also by policy-makers that are generally unable to accommodate such requirements.

62B) Are the authorities aware of these problems?

- No Yes. How do they react?

From an examination of cases it appears major problems were faced due to reception centre regulations on gender issues, preventing a transgender person from being accommodated with and treated as a member of her same gender. Transgender issues are still not fully recognised by the authorities, and this is reflected in policies and approaches.

Regarding sexual orientation, since the number of known cases has been low, there is in fact little awareness as to the actual problems faced.

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

This depends on a number of factors. Asylum-seekers entering Malta irregularly (the vast majority) or entering regularly but over-staying their visas are detained for a large part of the asylum-procedure. Unless released on grounds of vulnerability, there is little possibility of private accommodation.

Following release, all persons are offered accommodation in large reception centres, from where asylum-seekers are free to seek and move into private accommodation at their own expense.

Asylum-seekers entering Malta regularly and remaining in a regular situation are not detained and may freely reside in any part of the island at their own expense. If state accommodation is required, this will be provided in the form of space at the reception centres.

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?

1. A major obstacle is the closely-knit African communities in Malta, where information regarding any LGBTI element could have very serious impact in terms of social exclusion, discrimination within the community and also possibly violence, even of a sexual nature. There are reports of LGBTI persons refusing to mention the issue in their asylum interview due to the presence of an interpreter, and even refusing to come out following release from detention and termination of

asylum proceedings. It is not uncommon for such persons to seek a way to leave the country and live a more fulfilling life elsewhere.

2. This is exacerbated by Malta's detention policy whereby all persons entering irregularly are immediately detained for a period that could last up to 18 months. In the confined spaces of detention, it is expected that LGBTI persons are not in a position to disclose such information to anyone, including the management for purposes of relocation, specific health care if necessary and counselling.

3. As evidenced also from this report, the general lack of effective access to detailed case documentation (also for the applicants) results in limited possibilities to file effective appeals or to present additional information regarding one's claim. Since the asylum authorities do not provide information on, for example, the kind of COI used and on the criteria adopted to decide on the possibility of the internal flight alternative, it is close to impossible for applicants to seek redress and challenge their negative decisions. Furthermore, on a broader scale, this prevents NGOs and lawyers from compiling strong submissions since they are unaware of the relevant/irrelevant criteria to present.

4. The narrow definition of 'family' in Maltese policy is an obstacle for any possible application for family reunification, within an asylum context but also within the context of challenging deportation proceedings on the basis of the existence of a stable same-sex relationship.

5. In addition to the answer to question 66, it ought to be pointed out that Malta does not offer specialised public health support to transgender or intersex persons, irrespective of nationality or legal status. This is because such support is not available on the island. All asylum-seekers are however granted full access to available public health services. Recognised refugees continue to enjoy this level of access, whilst beneficiaries of subsidiary protection enjoy limited access in terms of the law but in terms of practice are generally offered equal treatment.

6. Given the very difficult living conditions faced by asylum-seekers in Malta (these conditions have been widely reported by, for example, the CPT, Amnesty, HRW, CoE HR Commissioner), it appears that asylum-seekers tend to place their LGBTI concerns at a low level of prioritisation, below issues such as basic employment, clothing, food/water, etc. The potentially emotionally and socially distressful coming out, especially for Africans, would in this light be seen as an unnecessary extra burden... potentially having a negative impact on their asylum procedure (if they choose to ignore or hide it) and on their possibility of self-empowerment.

7. As outlined in the report, most of the cases were rejected on the basis of internal flight alternative or on credibility grounds, even in countries of origin having criminal sanctions for same-

sex behaviour or very strong homophobic attitudes. I would consider this a bad practice, also since the case transcripts do not reveal any discussion with the applicants about this possibility.

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.

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.