

# FLEEING HOMOPHOBIA

## General

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

During five years I have worked at the Refugee Department of Amnesty Netherlands, from where I started to do research on the policy and legal practice concerning homosexual asylum seekers in the Netherlands. The findings of this research are incorporated in the article: "Fleeing Homophobia, on discrimination and discretion" ("Op de vlucht voor homohaar, over discriminatie en discretie", Nieuwsbrief Asiel- en Vluchtelingenrecht, 2006 nr. 3) <http://www.publiek.coc.nl/dossiers/politieke-lobby/Homoseksuele%20asielzoekers%20artikel%20NAV2006nr03.pdf>;

see also my case comments: Nieuwsbrief Asiel- en Vluchtelingenrecht, NAV 2007/9; Nieuwsbrief Asiel- en Vluchtelingenrecht, NAV 2007/39; Jurisprudentie Vreemdelingenrecht JV 2010/20.

In 2006 I got involved in COC Netherlands as a member of their political working group, and as such, and together with COC Netherlands, I engaged in advocacy and formulated recommendations for the Dutch government to improve the legal position of LGBTI asylum seekers.

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

I mainly studied the published case law on LGBT asylum, from 1 January 2006 until 1 May 2011, found on:

[www.VluchtWeb.nl](http://www.VluchtWeb.nl) (the database of the Dutch Refugee Council);

[www.Rechtspraak.nl](http://www.Rechtspraak.nl);

[www.MigratieWeb.nl](http://www.MigratieWeb.nl);

[www.raadvanstate.nl](http://www.raadvanstate.nl) (site of the Council of State, this case law goes back until medio 2007; Caco Verhees and Louis Middelkoop provided invaluable assistance in unlocking these cases).

The published case law before 2006 is incorporated in my previous article (see above).

I want to stress that I have no idea how many LGBTI asylum seekers receive a positive decision directly after their application, without the need to appeal in court. Apart from a few unpublished cases and files I saw accidentally, I only studied judicial cases, i.e. judgements after an initial negative decision. Therefore it is possible that Dutch legal practice is actually more friendly towards LGBTI asylum seekers than it is presented here. Because statistics are lacking, the actual recognition rates are unknown.

Questions 1a, 1b, 49 - 51 and 53 - 56 have been answered by the Dutch Immigration and Naturalisation Service, IND.

### ***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.

The total number of LGBT asylum cases at [www.vluchtweb.nl](http://www.vluchtweb.nl), [www.rechtspraak.nl](http://www.rechtspraak.nl) and [www.migratieweb.nl](http://www.migratieweb.nl) together from 1 January 2006 until 1 May 2011 was 64 cases.

The total number of LGBT asylum case law at [www.raadvanstate.nl](http://www.raadvanstate.nl) (Council of State, which covers its case law since mid 2007) - assessed 1 May 2011 - was 97 cases, and 3 regular (non-asylum) trans cases, total 100 cases (see also question 15).

The overlap with the other three sites is 15 cases (= appeals at the Council of State). Hence, the total number of published cases I studied is 149.

I also incorporated a few unpublished cases and a few cases from before 2006 in this report.

The Report "Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland" (Evaluation of Gender-related Aliens Policy in the Netherlands), issued by INDIAC (IND Center for Information and Analysis, IND Informatie- en Analysecentrum), The Hague, Ministry of Justice, 2008 ([www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek\\_indiac.asp](http://www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp)) searched for LGBTI cases in the first quarter of 2007, taken into account only eight countries for which a specific Dutch policy for LGBTs exists (Afghanistan, Colombia, Eritrea, Iran, Iraq, Nepal, Nigeria and Turkey). 18 cases were found (6 women and 12 men). 9 of these cases were decided positively (7 based on LGBTI aspects, 2 on other grounds), 7 were rejected and 2 were still in procedure. One of the women was an intersex individual; bisexuals were not mentioned and transgenders were not found.

However, the report notes that between January 2003 and May 2008 there were 30 transgender-cases in which the doctors from the BMA (Bureau Medische Advisering, medical bureau which advises the IND) were asked to give a medical advice, concerning the question as to whether the transgenders were in a 'medical emergency situation'. In 15 of these cases (50%) the BMA assessed that there was indeed a medical emergency situation. In most cases this assessment was not based on the transgender identity, but on psychiatric problems, like suicidality, or on other serious medical problems.

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

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

In published case law since 1 January 2006 I found only seven lesbian women (= 5 or 6%) who all lost their appeal:

Sierra Leone, Court Dordrecht, 9 November 2010, 09/4135, Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State), 201011782/1/V1, MigratieWeb ve11001135, JV 2011/307.

(In this report I will further refer to the Administrative Jurisdiction Division of the Council of State, the highest Administrative Court in the Netherlands, as "Council of State").

Armenia, Court Dordrecht, 15 June 2010, nr. 09/23430, Council of State, 16 September 2010, 201006745/1/V1

Cameroon, Court Middelburg, 18 February 2010, nr. 09/23583, Council of State, 31 May 2010, 201002470/1A/1.

Mongolia, Court Dordrecht, 17 November 2009, nr. 09/27672.

China, Court Assen, 29 April 2008, nr. 08/13222

Mongolia, Court Zwolle, 12 October 2007, nr. 07/36115, Council of State, 21 February 2008, 200707341/1

Belarus, Court Arnhem, 21 December 2006, nr. 06/21595, Council of State, 8 June 2007, 200700569/1

What are the main issues in these cases?

A woman from Sierra Leone had a hidden lesbian relationship in her country of origin. She came out in the Netherlands and did not want to conceal her sexual orientation again. The Council of State accepted the argument that “the fact that in the Netherlands the applicant used the possibilities and rights of Dutch society does not imply that she will be unable to accommodate upon return, even if that would require a certain restraint towards society,” adding: “although sexual orientation is a crucial element of one's personality, this does not imply that it cannot be expected that she lives her private life in Sierra Leone in the same way as before she left for the Netherlands, just because she cannot live her sexual orientation in Sierra Leone publicly. It is also not contrary to Article 8 ECHR to expect this from her, for the mere reason that she has not adduced facts or circumstances indicating that in Sierra Leone she has not been able or will not be able to give a meaningful interpretation to her homosexual orientation.” (Court Dordrecht, 9 november 2010, 09/4135, appeal allowed; IND's appeal from this judgement at the Council of State was allowed, 201011782/1/V1, MigratieWeb ve11001135, JV 2011/307).

Two women experienced persecution by non-state actors: the woman from Belarus (rape and physical abuse, she was fired and she had to leave her house as a result of harassment by the neighbours) and the woman from Mongolia (2007) (harassed, fired, excluded, people threw water and stones at her). In both cases a major argument for dismissing their claim was that homosexuality is not a crime in their country of origin and they did not experience problems from the authorities. In both cases the COI submitted by their lawyers was not found to be sufficient, their appeals were dismissed (Mongolia, Court Zwolle, 12 October 2007, nr. 07/36115, appeal dismissed, confirmed without reasons by Council of State, 21 February 2008, 200707341/1; Belarus, Court Arnhem, 21 December 2006, nr. 06/21595, appeal dismissed, confirmed without reasons by Council of State, 8 June 2007, 200700569/1).

Two other women (Cameroon and Mongolia (2009)) did not experience acts of persecution yet. Both women did not tell about their sexual orientation right away. The woman from Cameroon only

applied for asylum, when she was arrested, after an illegal stay of two years in the Netherlands. The Mongolian woman told about her lesbian orientation some time after the start of her procedure (but before the first decision). This woman also submitted COI on Mongolia: The Court held that the COI did establish that the position of gays and lesbians leaves much to be desired and that they may face discrimination and physical violence. However, it does not show that lesbians in Mongolia as a group are systematically persecuted, nor that every lesbian in Mongolia runs a real risk of a treatment prohibited by Article 3 ECHR (Cameroon, Court Middelburg, 18 February 2010, nr. 09/23583, appeal dismissed, confirmed without reasons by Council of State, 31 May 2010, 201002470/1A/1; Mongolia, Court Dordrecht, 17 November 2009, nr. 09/27672, appeal dismissed).

The woman from Armenia stated she had been arrested, but, because the Dutch Country Report Armenia shows that homosexuality is not criminalised, this was not found to be credible. She did not want to give the real name of her lesbian partner. Because she gave a false name, the court decided she was a liar and did not think it necessary to go into the credibility of the other parts of her account (Court Dordrecht, 15 June 2010, nr. 09/23430, Council of State, 16 September 2010, 201006745/1/V1).

The Chinese woman said she feared to be arrested, because of her relationship with a woman, but this fear was not found to be credible (Court Assen, 29 April 2008, nr. 08/13222).

In three older cases lesbian women all experienced severe persecution by non-state actors (rape, sexual abuse, battery, kidnapping, burglary, their house was set on fire etc.). In all three cases the courts decided positively. (Ukraine, Court Breda, 29 August 2005, nr. 05/5440; Mongolia, Court Zwolle, 9 July 2003, nr. 01/57514; Armenia, Court Groningen, 18 March 2003, nr. 02/43135, unpublished).

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

The vast majority, 85%

What are the main issues in these cases?

see this report

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?

I found 7 cases, all males.

An applicant from Iraq stated in a previous procedure that he was homosexual, and submitted as one of the "new facts" in the repeat procedure that he was in fact bisexual. However, the Court considered this fact did not change the evaluation of the claim, that he had no well-founded fear of persecution in Iraq due to his homosexual orientation. Appeal dismissed (Court Dordrecht, 9 March 2010, nr. 10/542, confirmed without reasons by Council of State, 31 May 2010, 201003422/1/V1).

Another Iraqi declared about his sexual orientation later in the procedure, but this was not found credible. During the interview he said it was no problem to do the interview with a female interviewer and a female translator, but later he declared he was ashamed in front of the female IND officer. He won the initial court case on other grounds, but lost in appeal at the Council of State (Court Groningen, 30 November 2009, nr. 09/11769, Council of State, 21 June 2010, 201000147/1/V1).

A bisexual Ugandan man and his partner were attacked by non-state actors in a night-club because of their bisexuality. They thought the police would protect them, but they were arrested instead. The IND refused his claim, because he was released, he did not have the constant negative attention of the authorities upon him and he was not an LGBT activist. He submitted a letter from the Dutch Refugee Council stating that in Uganda not only activists are harassed and that arbitrary arrests and persecution of LGBTs occur. He won the appeal because his arrest for reasons of his bisexuality was found credible, thus the authorities knew about his sexual orientation and he had well-founded reasons to fear the authorities upon return (Uganda, Court Haarlem, 22 September 2009, nr. 09/31503). He later was granted refugee status.

Another Iraqi applicant submitted a repeat application. Because he had sexual contacts with men already years ago, his homosexual orientation was not considered a "new fact" by the Court, but his bisexuality was, because he became aware of it only after the first procedure. Because he did not have previous problems in the country of origin and therefore failed the continuity, necessary to qualify for refugee sur place, and because he failed to show a real risk within the meaning of article 3 ECHR, the appeal was dismissed (Court Roermond, 6 August 2009, nr. 08/41419, confirmed without reasons by Council of State, 10 June 2010, 200906705/1/V2).

A Turkish bisexual feared a treatment contrary to Article 3 ECHR because of his sexual orientation while serving in the Turkish military. The Court considered that the military service was an uncertain future event, because he first had to go through a medical examination. Appeal dismissed

(Court Amsterdam, 26 September 2008, nr. 08/32307, confirmed without reasons by Council of State, 3 November 2008, 200807377/1).

The bisexual orientation of a Jamaican applicant was not believed, inter alia because he had declared his homosexuality was "not in his genes" and because he had no knowledge of Jamaican organisations to support homosexuals, nor clubs or discotheques, gay meeting places, gay magazines or internet-sites, nor was he familiar with Jamaican legislation concerning homosexuals. His declaration that he kept a low profile and did not move in homosexual circles, did not help him. His appeal was dismissed. (Court Haarlem, 18 December 2007, nr. 07/26891; confirmed without reasons by Council of State, 18 April 2008, 200800353/1).

A Moldovan bisexual had been in hospital several times because he had been beaten up by boys from the neighbourhood, because of his bisexuality. When he was sixteen years old, he reported the abuse to the police, who arrested the perpetrators, but released them a week later. His mother sent him to Italy, but after he got beaten up there by Moldovans also, he left for the Netherlands. The IND, however, found his situation not unbearable, and considered the beatings as juvenile banditism, against which he could have sought protection from the higher authorities. The Court dismissed the appeal. (Moldova, Court Zutphen, 17 March 2006, nr. 06/9846)..

d) Did you find transgender asylum cases?

No

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

What are the main issues in these cases?

In published case law since 2006 there were only three trans asylum cases, and four non-asylum (medical treatment) cases. I also found three older asylum cases. From the total amount of 10 cases, nine were male-to-female and only one female-to-male.

- An Iraqi applicant claimed in an earlier application to have experienced problems with respect to his sexual orientation. In this fresh claim the applicant submits as a new fact not the gender identity as such, but the fact that her female gender identity is much more visible now. Through the gradual mental and physical process the applicant has so much developed towards being a woman, that returning to Iraq would lead to a real risk of a treatment contrary to article 3 ECHR. The IND was of the opinion that s/he should have told about the transgender aspects in the first procedure. The Court considered that the development that the applicant has been and still is experiencing in the expression of her transsexuality and the physical changes resulting from the hormone treatment

provided by the VU Medical Centre have to be regarded as new facts. According to the policy rules homosexuals from Iraq are a group at risk. Although the Country Report Iraq states that no information was found concerning transgenders, the Court finds it plausible that the risks of discrimination, humiliation and violence, which according to the report exist towards homosexuals in Iraq, would apply even more for transgenders in the stage of development in which the applicant finds herself. She could end up in a vulnerable position against which - as it is established - no protection is available. Appeal allowed. (Court Haarlem, 18 April 2011, nr. 10/36310).

- A transwoman from Guatemala was beaten, sexually abused, kidnapped, locked in, cigarettes were extinguished on her body, and she was harassed at work and in public transportation, she could not rent housing and she lived in constant fear. The IND thought this discrimination was not severe enough to amount to persecution, because she did not turn to the police for protection. She said the Guatemalan police does not want to help trans people, and the police was involved in the murder of two trans persons in 2005. However, the Court was of the opinion that this does not mean that it is useless to seek police protection. Her problems were not serious enough to consider the discrimination systematic. The BMA medical report shows that, apart from a 'gender identity problem' and taking hormones, she is HIV-positive and she has Hepatitis A, but this is not considered life threatening, appeal dismissed. (Guatemala, Court Arnhem, 3 December 2009, nr. 09/16380; confirmed without reasons by Council of State, 15 March 2010, 200909972/1/V1)

- In an Iraqi case the Court agrees with the IND that the applicant did not show with minor indications that the problems resulting from the applicant's sexual orientation lead to a well-founded fear of persecution. Also considering that the stated rapes were found not credible. However, considering the Human Rights Watch Report on Iraq (August 2009) and UNHCR's Guidelines on Iraq (April 2009) the Court does not follow the IND's point of view that the applicant does not run a real risk of a treatment contrary to Article 3 ECHR upon return. The applicant stated that s/he cannot hide her/his sexual orientation and feminine conduct. In the initial interview he stated that the problems were caused by his homosexual orientation as well as by his feminine conduct. In the corrections to this interview she said that she was transgender. This is supported by the letter from the VU Medical Center that states that she has "serious gender identity problems of a male to female transsexual." Appeal allowed. She received a status based on Article 3 ECHR. (Art. 29(1)(b) Aliens Act) (Iraq, Court Den Bosch, 30 December 2009, nr. 09/7231)

three older trans asylum cases:



In Azerbaijan she was a (gay male) singer. After an article was published in Azerbaijan, his sexual orientation became widely known and he was even more discriminated than before. Apart from threats, blackmailing and beatings, he was fired. Only in the Netherlands he realised to be a transwoman. The IND did not consider this a new fact, but the Court did, also based on information of the VU Gender Team. The Court considers it is significant that the Dutch Country Report 2003 on Azerbaijan states that, because of the taboo on transsexuality in Azerbaijan, it was not possible to find information on the position of transsexuals there, and that this is a weightier qualification than the statement of the IND that there is no information available. The position of transsexuals in this country could also be derived from the position of homosexuals, which is very weak. The Court finds it plausible that upon return she will again be the victim of such discrimination that her life will be unbearable. Furthermore, in Azerbaijan she is registered as a man, while nowadays she has the physical appearance of a woman and this could reasonably lead to a situation in which the authorities will not provide effective protection. The IND did not pay attention to this aspect. Considering all aspects of the case, the Court concludes that upon return she runs a real risk of detention. As the Dutch Country Report on Azerbaijan 2004 states that homosexuals have a vulnerable position in prison, and could meet intimidation and violence there, the Court finds that she - as a former gay man who is presently a transwoman - has a real risk of a treatment contrary to article 3 ECHR (Court Roermond, 4 November 2005, nr. 02/20771).

[In this case the applicant started the gender reassignment treatment during the asylum procedure. Today this is no longer possible.]

A Romanian transwoman had a lot of problems, caused by police, medical people as well as by her family. Her father called her a monster. Police officers regularly stopped her in the street and when they found out about her gender identity, she was tormented and ridiculed. She was raped by three policemen. Other policemen threatened her not to report this. She worked as a prostitute and she suffered from serious depression. The Court considered that several serious discriminatory incidents happened, on a regular and systematic basis, and the IND did not motivate why these events did not amount to discrimination for reasons of belonging to a particular social group. With respect to the events experienced by the applicant, the IND concluded that, since nothing is recorded on the position of trans people in Romania, it must be assumed that this group does not experience any problems. However, the Court did not agree with this assumption. The Human Rights Watch Report 2002 showed that police officers in Romania often used violence and that lesbians and gay men were harassed by the police. According to the Court it was not clear why the position of transsexuals would be more favourable. In addition, the Court considered that, in order

to live a decent life, a transsexual person should have access to medicines and medical support, while there is serious doubt concerning the question whether this kind of access existed in Romania at the moment she left this country. Her appeal was allowed (Court Amsterdam, 22 January 2004, nr. 02/94109).

An Estonian transwoman was brought to the police station regularly where she had to undress in order to establish her gender identity. They put her in a men's cell, where she was sexually abused, watched by police camera's. The Court considered that, although she might have been discriminated at occasionally, there was no serious restraint of her means of existence. Concerning her statements about discrimination and sexual abuse by the police and being put in a situation where sexual abuse by others could occur, she could have called for the protection of the (higher) authorities. It was not stated that the (higher) authorities could not or would not have offered her protection. However, she won the case because of miscommunications during the interview, because the interview was done in Russian instead of Estonian or Finnish and it took too long, while she was exhausted (Court Groningen, 17 October 2003, nr. 03/46993).

Trans people often apply for a residence permit on medical (regular/ non-asylum) grounds. In these cases it should be assessed whether the Netherlands is the most obvious country for a medical treatment (like for instance a gender reassignment operation). Also the applicant is required to firstly apply for a visa in the country of origin (mvv) and procedures deal with the question whether the applicant should be granted an exception to this requirement, based on the difficult circumstances for transgenders in the country of origin. In these cases the strict division between asylum and regular cases is a problem.

A Thai transwoman had a gender reassignment operation in Thailand and she applied for a regular (non-asylum) permit on humanitarian grounds. She was expelled before the Court could answer this question ('no'). Therefore the Council of State decided that the case was inadmissible. (Court Amsterdam, 17 July 2009, nr. 09/12023, Council of State, 7 September 2009, 200906140/1/V1).

The appeal of a transwoman from Serbia was also dismissed on this visa requirement. Although she suffered from PTSS, she was considered to be capable of travelling, and the hormone treatment could be continued in Serbia, according to the Court (Court Rotterdam, 3 June 2010, nr. 09/27601, Council of State, 3 December 2010, 201006732/1 /V2, appeal dismissed without reasons).

A transwoman from Ecuador also suffered from severe PTSS. However, the Court considered that she did not qualify for a waiver of the visa requirement. She could travel to Ecuador to apply for a visa, and in Ecuador it would be possible for her to obtain hormones and even a gender reassignment treatment. Her appeal was dismissed (Court Amsterdam, 1 October 2008, nr. 08/11878, Council of State, 24 August 2009, 200807916/1/V1, appeal allowed, but legal outcome (i.e. negative decision) remained unchanged).

The regular (i.e. non-asylum) residence permit of a transman from Turkey was withdrawn on account of criminal offences. He was born in Turkey as a woman and has undergone a gender reassignment operation while in the Netherlands. When applying the Article 8 ECHR case law of the ECtHR, according to the Court Roermond, the IND has not taken into account that the applicant was a woman when living in Turkey, and to what extent the applicant's sex change has influenced the applicant's social and cultural ties with Turkey. The applicant stayed legally in the Netherlands for almost ten years, based on a marriage. After a divorce, a gender reassignment operation and the committing of some serious crimes, he appealed against his deportation. The IND's motivation was considered to be not in line with Article 8 ECHR (private life), and the criterion social, cultural and family-ties from the ECtHR-judgment Üner against the Netherlands. His family lived in the Turkish countryside, where the general atmosphere is not tolerant towards transsexuals, and according to COI, in bigger cities he could also meet several problems. Appeal allowed (Court Roermond, 20 November 2008, nr. 08/21601).

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

I did not find intersex cases in the published case law. However, the INDIAC report mentions an 'intersexual woman' from Ethiopia who received a refugee status in 2009. I have no further details. In addition, a few years ago I heard of an intersex applicant from Northern Iraq. I have no further details.

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

- |   |         |
|---|---------|
| 1 | Iraq    |
| 2 | Nigeria |
| 3 | Iran    |

4 Sierra Leone

5 LGBTI applicants also came from Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Bosnia-Herzegovina, Burundi, Cameroon, China, Cuba, Ecuador, Egypt, Estonia, Ethiopia, Gambia, Georgia, Guatemala, Guinea-Conakry, India, Jamaica, Kosovo, Lebanon, Libya, Mali, Moldova, Mongolia, Morocco, Niger, Pakistan, Romania, Senegal, Serbia, Somalia, Sudan, Syria, Tanzania, Thailand, Togo, Tunisia, Turkey, Uganda, Ukraine, United States, Uzbekistan, Venezuela and Zimbabwe.

6 This answer is based on published case law. I have no idea of the numbers of LGBTI applicants who did not make it to published case law.

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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.

LGBT people sometimes apply for asylum on different grounds (true or false), out of fear or shame, or because they are not aware of the possibility of asylum based on sexual orientation or gender identity.

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)

Generally it is just 'member of the particular social group' of homosexuals/ lesbians/ bisexuals/ transsexuals

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

I have never seen that sexual orientation or gender identity was considered a political opinion or other Convention ground.

subsidiary protection? On which basis?

Article 3 ECHR, inhuman or degrading treatment. (Article 29-1 b Vw, Aliens Act)

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.

There is the possibility of receiving protection based on humanitarian grounds (and trauma, on limited grounds (Article 29-1 c Vw, Aliens Circular C2/4). LGBTIs are sometimes granted this kind of protection, for instance a gay man from Afghanistan. In his second procedure he told for the first time about his sexual orientation and the sexual abuse he experienced in Afghanistan. He was given the benefit of the doubt, because he was only sixteen years old when he fled from Afghanistan.

(motivation of the positive decision (minuut), 25 June 2008, available at VluchtWeb)

The special policy for LGBTs from Iran is also based on Article 29-1 c Vw, humanitarian grounds other than trauma (WBV 2006/38). See for more information about this policy: question 14.

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.

I have never heard this is an issue.

### ***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.

Secret Garden is an NGO which focuses on reaching LGBT Muslims and the Muslim community in general. They organise community activities, support and bring together LGBT Muslims and sometimes provide emergency assistance to LGBTI asylum seekers, varying from advice on procedures to alternative housing.

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

Lack of knowledge on legal issues and asylum procedures, which sometimes leads to harmful advice. Lack of financing and thus depending on volunteers, low quality assurance.

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

Volunteers only.

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

No  Yes. Which organisation(s)?

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

No  Yes. In what form?

They have contacts with lawyers.

e) Do they have contact with the government?

No  Yes. In what form?

Secret Garden wrote a brochure on problems of LGBTI asylum seekers in reception centres, presented it to parliament and were then invited to meet the Minister, together with COC Netherlands. (see also question 62)

#### 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

An Amsterdam lawyer is specialised in transgender asylum cases.

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.)

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### Policy, legislation, case law

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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

Aliens Circular 2000 C2/2.10.2: "Persecution of homosexuals

If an asylum seeker invokes problems for reasons of his or her sexual orientation this could lead to the conclusion that this person is a refugee within the meaning of the Convention. It is standing policy and standing case law that persecution for reasons of membership of a particular social group within the meaning of Article 1A-2 of the Refugee Convention includes persecution for reasons of sexual orientation.

An asylum application relying on problems caused by the (stated) sexual orientation of an asylum seeker must be judged with special attention regarding the position of homosexuals in the country of origin. The influence of the authorities on society will vary per country of origin.

Punishment on the basis of a penal provision that only affects homosexuals, is considered to be an act of persecution. This will be the case, for instance, when being homosexual or expressing specific homosexual feelings is criminalised. In order to conclude that the person concerned will be recognised as a refugee, the criminal sanction must attain a certain gravity. A mere fine will in most cases not be sufficient to reach this conclusion.

However, the mere criminalisation of homosexuality or homosexual acts in a certain country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum seeker must show (if possible with documents) that he personally has a well-founded fear of persecution.

People with a homosexual preference are not required to hide this preference upon return.

In case the asylum seeker is in fact not homosexual, but it is credible that the authorities consider him or her as such and it is plausible that persecution has occurred or will occur, the asylum seeker can be considered a refugee within the meaning of the Convention.

In case homosexuality or homosexual acts are criminalised in the country of origin, the asylum seeker will not be required to invoke the protection of the authorities there.

#### Discrimination

Whenever an asylum seeker invokes discrimination inflicted upon him by the authorities or by third parties, see Aliens Circular 2000, C1/2.5:

Discrimination by the authorities and/or non-state actors could in specific circumstances be labelled as an act of persecution. This is the case when the discrimination suffered leads to such serious restrictions of the means of existence that it is impossible to function socially.

An asylum seeker is considered a refugee, if he makes it plausible that the discrimination for him personally has led to serious restrictions of his means of existence and it is plausible that the authorities were unable or unwilling to protect him from this type of discrimination.

Whenever the authorities have not been asked for protection, attention is being paid to the question why this has not happened. If it has happened, but the alien has, after one attempt, not tried another part of the authorities, special attention is being paid to the question why there was only one attempt."

The IND has an internal instruction for interviewing LGBTs from Iran. I was not allowed to see it.

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.

Aliens Circular 2000, C1/2.11: Gender cannot be the sole criterion for establishing a social group. Women in general do not form a social group, because as a social group they are too diverse. In asylum policy, the individualisation requirement is the starting point. Prosecution on account of a prescription which is specific for women constitutes persecution in the sense of the Refugee Convention if it has been established that

- the punishment is discriminatory and related to one of the persecution grounds
- besides normal punishment there is discriminatory punishment on account of one of these grounds.



If an asylum seeker invokes that discrimination is directed specifically against women, applicability of one of the persecution grounds remains a condition for refugee status. Of course, when discrimination is invoked as persecution the individualisation requirement still applies. For example, the mere existence of a dress code is not a form of discrimination which goes in the direction of persecution.

For assessing the political activities of women, see Aliens Circular 2000 C2/2.8 (concerning gender and political opinion). For a gender inclusive approach, see Aliens Circular 2000, C14/3.3 (on how activities in the private sphere may be politically relevant).

(Political) resistance against female genital mutilation can under certain circumstances lead to the conclusion of refugee status. If there is a real risk of genital mutilation, without this leading to the conclusion of refugee status, Aliens Circular 2000 C2/3.2 (concerning Article 3 ECHR) applies. For the preparation of the interview, see C13/3.1 (no specific references to women).

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.

A special policy for lesbian, gays, bisexuals and transgenders from Iran is established, since 17 November 2006:

"Because homosexuals from Iran run a higher risk of human rights violations, they are considered a specific group, which qualifies for an asylum status for humanitarian reasons other than trauma. Homosexuals, bisexuals and transsexuals from Iran who do not qualify for a status based on Article 29, subsection 1, under a or b, will qualify for Article 29, subsection 1, under c (i.e. a domestic law based humanitarian status), except for contraindications." (WBV 2006/38)

Notwithstanding this policy, case law shows that Iranian LGBT asylum cases are being denied. Sometimes their sexual orientation is not regarded as credible, and there was at least one Iranian Dublin-case (see question 60). Apart from these situations there are several Iranians who told about their sexual orientation too late in the procedure, and were refused by the IND, because the homosexuality was not regarded a "new fact", for instance:

Court Assen, 12 September 2008, nr. 08/30179, Council of State, 10 December 2008, 200807075/1; Court Arnhem, 27 November 2009, nr. 09/40762, Council of State, 23 December 2009, 200909367/1/V2; Court Haarlem, 8 December 2009, nr. 08/40650, appeal allowed, but the IND

appealed at Council of State, still pending; Court Zwolle, 17 June 2010, nr. 10/18620, Council of State, 8 July 2010, 201006033/1/V2. However, the applicant in Court Haarlem, 10 December 2009, nr. 09/36705 was granted protection based on 3 ECHR, after his appeal was allowed.

Then there are cases of Iranian gay men who committed criminal offences, which is a contraindication. In these cases removal may only be prevented by reliance on Article 3 and possibly Article 8 ECHR, for instance:

Court Utrecht, 8 May 2009, nr. 08/31993, appeal allowed, but quashed by Council of State, 12 July 2010, 200904231/1/V3; Court 's-Hertogenbosch, 21 December 2009, nr. 09/18790, appeal allowed, the not-allowed part confirmed by Council of State, 17 March 2010, 201000475/1/V2; Court Haarlem, 6 July 2009, nr. 08/41885, appeal allowed, followed by Court Haarlem, 12 July 2010, nr. 09/38194, appeal allowed, followed by IND's appeal at the Council of State, still pending; Court Amsterdam, 28 September 2010, nr. 09/34305, appeal allowed, IND appealed at the Council of state, still pending.

Since the end of 2008 the Dutch policy for homosexual applicants from Afghanistan and Iraq is as follows: "Homosexuals from Afghanistan/Iraq are regarded as a "group at risk", which means lesser demands are placed on them regarding the plausibility of the weightiness of the events they experienced. This means that when they invoke problems based on their homosexuality caused by the present (central) authorities, or third parties, or fellow-citizens, and the story is credible and individualisable, it can be made plausible with minor indications ('geringe indicaties') that these problems lead to a well-founded fear of persecution." (Afghanistan: WBV 2008/25, 27 October 2008; Iraq: WBV 2008/28, 20 November 2008). If these requirements are met, the applicant qualifies for refugee status.

However, I am afraid that in legal practice this special policy does not provide a special protection. Despite the 'minor indications', the applicants still have to prove a personal risk. The standard consideration on this point is: "A member of a group at risk has to show that he especially runs an extra great risk (more than other members of the group) to a treatment which is forbidden by Article 3 ECHR, if he is to qualify for protection based on this provision." Although I did not find any case law on Afghan LGBTIs, I found several examples of LGBTIs from Iraq who lost their case. In these cases I do not see signs of a 'minor indications'-test.

For instance: A bisexual Iraqi lost his appeal because he did not fulfil the 'requirement of continuity' (which in Dutch legal practice until recently was necessary for a sur place-claim) and he failed to show a real risk within the meaning of article 3 ECHR (Court Roermond, 6 August 2009, nr. 08/41419, Council of State, 10 June 2010, 200906705/1/V2). See also Court Assen, 21 January 2010, nr. 09/3574, Council of State, 14 June 2010, 201001708/1/V1; Court 's-Hertogenbosch, 23 February 2010, nr. 09/27829, Council of State, 17 June 2010, 201002902/1/V2; Court Assen, 25 August 2009, nr. 08/45188, Council of State, 14 October 2009, 200906818/1/V2.

In these cases it was considered credible that the applicant was a gay man from Iraq, but the individual problems were not found credible.

Sometimes the courts quash IND's decisions:

The Court Almelo decided that a gay man from Iraq who started a second procedure because of his homosexuality, had an "arguable claim" with respect to a real risk of violation of Article 3 of the ECHR. The main argument for this decision was the submitted country of origin information (COI) stating that homosexuals in Iraq are systematically murdered. (Court Almelo, 6 November 2009, nr. 09/38377) However, after this judgment the IND rejected his claim again and he appealed again, still pending.

The horrible situation for gays in Iraq, illustrated by COI (including the 2009 Human Rights Watch Report "They want us exterminated. Murder, Torture, Sexual Orientation and Gender in Iraq") also led to the positive judgement of the Court Haarlem. The IND was of the opinion that although the applicant, as a homosexual from Iraq, belonged to a "group at risk", the COI did not lead to the conclusion that he had to fear persecution just because of his sexual orientation, nor would he have a real risk to a treatment forbidden by Article 3 ECHR. His account of the events was not credible and therefore he did not succeed in submitting "additional individual features". In appeal the Court Haarlem considered that the only way the applicant could return to Iraq safely, was by hiding his sexual orientation. However, this cannot be expected from anyone, and it is contrary to Dutch policy rules as well. Furthermore, the Court considered, referring to case law of the European Court of Human Rights (Salah Sheekh v. the Netherlands, Saadi v. Italy and NA v. the UK), the COI shows that homosexuals in Iraq are in such a vulnerable position that, just because of their sexual orientation, they are target of serious human rights violations, against which no protection is available. Appeal allowed (Court Haarlem, 31 December 2010, nr. 10/24828; IND appealed at the Council of state, still pending).

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.

1. In 1981 in the case of a gay man from Poland the Judicial Department of the Council of State (Afdeling Rechtspraak van de Raad van State) ruled that "a reasonable interpretation of persecution for reasons of membership in a particular social group can include persecution for reason(s) of sexual nature". Although the applicant's appeal was dismissed, this was, as far as I know on a global scale, the first time that a High Court acknowledged that persecution for reasons of sexual orientation could be a ground for refugee status (ARRvS 13 August 1981, no. A-2.1113, RV 1981/5).

2. A Somalian boy fled to the Netherlands together with his family. Later he discovered his homosexual feelings and when he came of (legal adult) age he filed an independent asylum application. The Court 's-Hertogenbosch thought his homosexuality was not a new fact, but the Council of State decided that his fear for problems in Somalia because of his sexual orientation was specified enough, very personal and not decided upon earlier. Therefore it was considered a "new fact" (Council of State, 3 October 2003, 200305027/1, NAV 2003/310, JV 2004/3).

This is one of the very exceptional cases in which an LGBT asylum seeker won an appeal at the Council of State. I saw 100 LGBT cases on the website of the Council of State, which covers its case law since 2007. All of these applicants (=100%) lost their case.

16) Did you find any references to the Yogyakarta Principles<sup>1</sup> and/or to UNHCR's Guidance Note on Refugee Claims Related to Sexual Orientation and Gender Identity<sup>2</sup> in decisions or case law?

No

Yes. Please specify where you found these references.

Although in some cases lawyers referred to the UNHCR Guidance Note.

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### **Qualification Directive<sup>3</sup>, Council Directive 2004/83/EC**

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

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

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

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

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

Generally it is established by the declaration of the asylum seeker, thus by self-identification.

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?

- coming out too late in the procedure
- the applicant initially denied to be homosexual
- the stated behaviour was considered too risky to be true
- the applicant was not familiar with gay scenes in the country of origin or in the Netherlands
- no explicit answers to sexually explicit questions
- not enough psychological problems regarding the own sexual orientation
- not familiar with (exact) criminal sanction or exact wording of the criminal provision in Penal Code of the country of origin

It should be noted that in general in Dutch asylum law people who do not provide enough documents (concerning identity, travel etc.), are supposed to have a narrative without any gaps, vaguenesses, incongruous developments or contradictions, that shows a "positive power to convince". Whenever this requirement is not met, the credibility is "harmed beforehand".

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

In one case the homosexuality of the applicant was considered not to have been established, according to the IND, because his partner was a (male to female) transgender, hence a female. The Court considered that the IND should investigate whether a non-heterosexual relationship, i.c. a relationship with a transsexual, is considered as a homosexual relationship in Morocco and/or whether these type of relationships are subject of persecution and/or to what extent it is possible to express such a non-heterosexual relationship in Morocco. Appeal allowed. (Morocco, Court 's-Gravenhage, 4 November 2009, nr. 09/32210, followed by Court Arnhem, 30 December 2010, nr. 10/14637, appeal allowed again).

In an Iranian case the IND stated that the fact that the applicant is homosexual does not lead to a violation of Article 3 ECHR, because only homosexual acts are punishable, and not the mere homosexual orientation, and because his sexual orientation was not known in Iran. According to the Court the latter statement was irrelevant, considering IND's policy not to expect people to hide their sexual orientation upon return. (Court Haarlem 6 July 2009, nr. 08/41885, followed by Court Haarlem, 12 July 2010, nr. 09/38194, followed by IND's appeal at the Council of State, still pending).

In another Iranian case the IND argued likewise that the applicant has incorrectly stated that in Iran homosexuality is punished by the death penalty, as homosexuality in itself is not punishable in Iran. However, the Court Haarlem did not think the statement of the applicant was strange. Appeal allowed. (Court Haarlem, 8 December 2009, nr. 08/40650, IND appealed at the Council of State, still pending).

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

1. I think that the phenomenon described by Jenni Millbank ("From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom", 2009, 13 (2/3) International Journal of Human Rights) also occurs in the Netherlands. When I did research in 2006, examples of non-credibility of sexual orientation were very scarce. Nowadays these examples are not so hard to find. There might be a relation with the cancelling of the discretion requirement in 2007 (see below, question 44).

2. Louis Middelkoop describes an authorised interview he held with an IND decision maker. ("Geloofwaardigheidskwesties rond homoseksuelen in de Nederlandse asielprocedure", Assessing credibility of sexuality in Dutch asylum cases, A&MR, 2010 nr. 10, Netherlands Journal on Asylum and Migration Law). The decision maker pointed out that a homosexual within the meaning of the Convention is someone who is sexually or romantically attracted to people of the same gender. Crucial are the feelings of the person concerned, how s/he experiences her/his sexuality and how s/he became aware of his/her sexual orientation. For the Convention aims to protect people for who they are, and not for what they do. Only engaging in homosexual activities is in this reasoning not sufficient to establish membership of a particular social group. The IND-decision maker also stated that people who engage in same-sex sexual acts without the feelings that, according to the IND, are appropriate for LGBs, do not belong to a social group of homosexuals, although they could be granted protection based on Article 3 ECHR. This would also apply to perceived LGBs.

It should be noted that this distinction between convention ground and protection based on Article 3 ECHR is contrary to Dutch policy in the Aliens Circular 2000 (see question 13). It also seems to reflect the IND's confusion with respect to the handling of these cases.

Examples of this approach can be found in some cases, in which applicants were rejected, because they did not declare to have suffered from an internal struggle or a thorough quest into their sexuality.

A Pakistani boy declared that he liked to have sex with his boy-friend and, although he knew homosexuality was considered a sin, he did not feel ashamed. The IND did not believe he was gay, because "he has never lived out his homosexuality in any other way than having sexual contact, nor has he fully explored what it means to be homosexual, nor has he had any inner struggle or gone through a phase of coming-out of the closet." The IND also did not find it plausible that he had sex with his boy-friend in his room while other (muslim) family-members were present in the same home, nor that they did not lock the door properly, knowing the risks involved. The Court considered that the basis for the IND's statement, that homosexuals in a society like Pakistan are expected to go through a phase of inner struggle, was unclear. Appeal allowed. (Pakistan, Court Haarlem, 29 September 2009, nr. 09/32801, *Jurisprudentie Vreemdelingenrecht* 2010/20, *MigratieWeb* ve09001493). Comp. also another case from Pakistan, Court Haarlem, 9 March 2010, nr. 10/6920.

A man from Burundi said he was not interested in women, but he did not realise he was gay until the moment he got into a relationship with a man. Although the interviewer did not ask him any further questions, his claim was rejected because "he did not declare sufficiently on the process of discovery of his sexual orientation." (decision IND, 28 January 2011, nr. 0607-27-04150, on file with the author).

3. I found more examples of IND decisions based of stereotypes concerning (non-western) LGBT life-style. An Iraqi applicant stated that, although he had a sexual relationship with a man for five years, he was not sure whether he was in fact homosexual, because he never had experienced feelings towards other men than his lover. The IND believed the relationship, but was of the opinion that the policy for homosexuals from Iraq did not apply to him, because he was not a homosexual, like he himself had stated. In addition, the IND noted that "In Arabic countries young men often turn to men for sexual satisfaction, because they cannot satisfy their sexual needs with a woman."

The Court Groningen saw no reason why this speculation was applicable. Appeal allowed. (Court Groningen, 3 September 2010, nr. 10/6506).

I did not find any cases in which a stated gender identity was not believed.

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

No.

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

Witness statements, membership of COC.

Decisions and/or case law. Good/bad practices

Membership of COC Netherlands and pictures of the applicant and his partner were not sufficient proof. (Iran, Court Assen, 12 September 2008, nr. 08/30179, Council of State, 10 December 2008, 200807075/1).

In an Iranian case where the applicant had been sentenced in the Netherlands to a 22 month prison term for abduction with a view to extortion, and then argued he should be granted asylum because he was gay, the applicant offered to undergo a physical examination in order to establish his homosexual orientation (without, however, specifying how such an examination might result in such proof). The IND declined this offer and denied asylum on account of lack of credibility. The Court upholds the decision, holding that in any case the applicant's sexual orientation is not a new fact justifying examination of a new asylum application, because the applicant could have disclosed it before. The appeal lodged by the applicant was dismissed by the Council of State without reasons (Council of State, 25 March 2008, nr. 200706155/1, upholding Court 's-Gravenhage, 26 July 2007, nr. 07/2687)

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?



b) What does the examination include?

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

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

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

Medical evidence is not requested in this respect, but in some cases it can support a claim. In particular, medical evidence is relied on by applicants for arguing that statements about their sexual orientation should be taken into account when assessing their claim, even though they have been submitted later (see for case law on coming-out later in the procedure question 35). In some Court decisions, statements by psychologists or psychiatrists about the applicant's trauma (Iraq, Court Groningen, 17 November 2006, nr. 06/52447) or internalised homophobia (Iran, Court Haarlem, 8 December 2009, nr. 08/40650) are considered decisive by courts.

See for the formalistic approach in Dutch asylum practice on the moment at which statements and evidence have to be adduced: Joukje van Rooij, *Asylum Procedure versus Human Rights*, April 2004, [www.rechten.vu.nl/documenten](http://www.rechten.vu.nl/documenten).

In a case from Sierra Leone, the applicant argues he was initially unable to make statements about what happened to him on account of trauma (he had allegedly been subjected to rituals to drive out evil spirits, and had been raped and beaten during detention). The Court dismissed the statements testifying to the applicant's trauma because they had been drafted by a nurse and not by a doctor. Appeal by applicant dismissed without reasons (Council of State, 20 December 2010, nr. 201010028/1, upholding Court Assen, 21 September 2010, nr. 09/32381).

Another case in which the central issue was whether the applicant could be excused for declaring about sexual orientation only in a subsequent application: during the interview in his second application, the applicant in so many words denied being homosexual. He only stated this in the letter submitted by his lawyer after the intended rejection of his second asylum claim has been communicated to him. IND and Court acknowledged serious psychic problems - the applicant displayed suicidal tendencies - but both held that the psychiatric evidence did not establish that he was entirely unable to give statements about his sexual orientation, i.e. he could have given indications about it, even if being unable to give full details. Appeal submitted by applicant

dismissed without reasons (Sudan, Council of State, 30 November 2009, nr. 200907946/1/V2, upholding Court Groningen, 15 September 2009, nr. 08/15227).

Comp. the Iranian case referred to under Question 19 (Council of State, 25 March 2008, nr. 200706155/1, upholding Court 's-Gravenhage, 26 July 2007, nr. 07/2687) and the Iranian case, Court Haarlem, 8 december 2009, nr. 08/40650.

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?

The gender team of the Medical Center of VU University; the BMA (Medical Bureau advising the IND)

b) What does the examination include?

Psychological and physical examination.

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

No

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

I did not see any cases in which a stated gender identity was doubted. The reason for this might be that transgender applicants often submit medical reports which could serve as evidence.

Decisions and/or case law. Good/bad practices

"The medical evidence submitted by the Medical Bureau of the IND (BMA) shows among other things that she has gender identity problems and that she is treated with hormones, but this is not a life-threatening condition." Appeal dismissed (Guatemala, Court Haarlem, 3 December 2010, nr. 09/16380).

"The applicant's transsexuality is supported by the letter of the VU University Medical Centre, from which it appears that the applicant has serious gender identity problems of a male to female transsexual." Appeal allowed (Iraq, Court 's-Hertogenbosch, 30 December 2009, nr. 09/7231).

"The transsexuality of the applicant is a fact which came about after the decision. This is supported by statements of a general practitioner and of the VU University Gender team. The applicant could

not be expected to have made statements about this at an earlier moment." Appeal allowed (Azerbaijan, Court Roermond, 4 November 2005, nr. 02/20771).

22) Are explicit questions asked about sexual activities?

No

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

In an Iranian case the IND rejected the claim, stating: The applicant has not given convincing statements about his sexual orientation and has given evasive answers to all questions concerning actual homosexual contacts, or actual homosexual interests. However the Court considered: "The applicant has stated that he and his friend found themselves naked in the bed of his friend, that they were sitting, that they touched each other on erotic body parts, and that they were having sex." The Court did not agree that it can be required of the applicant to give further details on the position in which he was caught with his friend in order to be found credible on the point of his homosexuality. (Court Haarlem, 8 December 2009, nr. 08/40650, the IND appealed at the Council of State, still pending).

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

Although decisions do sometimes contain stereotypes (see for example question 18B), I did not see stereotypical questions. Although it must be noted that I did not see many transcripts of interviews.

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.

While he was open about his sexual orientation, his knowledge of the situation of homosexuals in his country was mediocre. He could not declare about other homosexuals, organisations or gay meeting places in Port Harcourt of Lagos. Appeal dismissed (Nigeria, Court Arnhem, 9 February 2007, nr. 07/2866).

The bisexual orientation of a Jamaican applicant was not believed, inter alia because he had declared his homosexuality was "not in his genes" and because he had no knowledge of Jamaican organisations to support homosexuals, nor clubs or discotheques, gay meeting places, gay

magazines or internet-sites, nor did he know Jamaican legislation concerning homosexuals. His declaration that he kept a low profile and did not move in homosexual circles, does not change this. His appeal was dismissed. (Court Haarlem, 18 December 2007, nr. 07/26891; confirmed without reasons by Council of State, 18 April 2008, 200800353/1).

The applicant should have known some facts on matters that concern homosexuals in Nigeria. He failed to show knowledge of organisations that support gays in Nigeria. And it is also strange that he cannot tell anything about the gay community in the Netherlands. Despite this he won the appeal against deportation, because of a provisional medical report, which stated that he was in need of psychiatric care, and because the final medical report might explain his contradictory declarations. Some time later he was granted refugee status (Court Haarlem, 3 November 2008, nr. 08/37511).

In another Nigerian case, the applicant was deemed not credible because, among other reasons, he could not tell anything about meeting places for gays in his town, and did not know the names of gay rights activists. Appeal dismissed (Court 's-Gravenhage, 12 January 2010, nr. 09/48023, appeal lodged by applicant dismissed without reasons by Council of State, 1 February 2010, 201000538/1/V2).

The applicant did not know any names of gay organisations inside or outside Iran, nor gay meeting places in Teheran, nor well-known Iranian homosexuals, and he neither tried to find information on the internet on the position of homosexuals in Iran. However, the Court Haarlem thought it not reasonable to conclude from this argument that he is not homosexual. It is also clear that he does not feel comfortable to speak openly about his sexual orientation and he is not interested in promiscuity. It is therefore not surprising that he is neither interested in lobby groups nor in gay meeting places. (Iran, Court Haarlem, 8 December 2009, nr. 08/40650).

The applicant did not have enough knowledge of homosexuality in his country of origin. This harms his claim that he is homosexual. He did not mention names of people who fight for the rights of homosexuals in Pakistan, he does not know meeting places or names of international organisations that stand up for the rights of homosexuals, nor names of books, films or magazines with a homosexual theme. He does not know well-known homosexuals in Pakistan and he does not know the opinion of the Koran on homosexuality. (Pakistan, Court Haarlem, 9 March 2010, nr. 10/6920).

In the case of a man from Burundi it was stated that "It can reasonably be assumed that when a person finds himself in such a difficult position, in light of the taboo on homosexuality in the culture and religion, he will inquire into underground homosexual interest groups or movements" (intention to reject (voornemen) IND, 25 January 2011). "It is surprising that he cannot name underground gay organisations in Burundi, while he stated he had a homosexual relationship in Burundi for four years" (decision IND (beschikking), 28 January 2011, nr. 0607-27-04150).

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

In the same Burundese case the IND stated: "It is strange that a man who previously had a homosexual relationship for four years, marries a woman without objections". (decision IND 28 January 2011, Burundi, nr. 0607-27-04150)

A Nigerian applicant married a lesbian woman (in the U.S.A.), because he liked to have children. He states he is more interested in men than in women, and he can only have sex with a woman after consuming lots of alcohol. These statements had increased the incredibility of his statements on his homosexuality. (Court Haarlem, 12 January 2010, nr. 09/48023, unpublished).

***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

Although it is improving, the COI on the situation of LGBTIs that is available is still not at all sufficient or effective. See also next question and question 30.

27) Does your country have national COI researchers?

No. Please go to question 29

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

Please give details.

The Ministry of Foreign Affairs regularly drafts general Country Reports on the political and human rights situation in the most important countries from which people who seek asylum in the Netherlands originate. At this moment there are 36 of these reports. Since a few years each report

contains a paragraph on the situation of 'homosexuals' (and sometimes also 'transsexuals') in this country. The amount of information varies strongly per country, sometimes it only describes the criminal sanction against homosexual acts, sometimes it gives information on the attitude of the authorities and society in general towards homosexuals (and sometimes transsexuals). Information on transgenders is scarce, information on lesbians is very scarce. Information on bisexuals and intersexuals is non-existent. I do not have the impression that the people who draft the reports are trained in LGBTI issues.

In 2002 a thematic Country Report on the situation of homosexuals in Lebanon was issued, seven years later followed by a thematic Country Report on the situation of christians and homosexuals in Iran (in May 2009). COC Netherlands proposed to issue more thematic Country Reports on the situation of LGBTs, especially for countries where there is no General Country Report (see Letter from COC Netherlands to Secretary of State Albayrak and Minister Verhagen, 31 July 2007, available on Vluchtweb).

The Ministry of Foreign Affairs invited COC Netherlands to give input to general country reports. However, as COC Netherlands does not have the resources to thoroughly investigate the situation of LGBTIs in countries of origin, COC is not able to provide such input.

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

No

Yes. Could you describe this information?

In 2006 the Minister, answering parliamentary questions, stated that: "the Minister of Foreign Affairs shall try to investigate to what extent the authorities offer protection to homosexual people against persecution by third parties in countries that criminalise homosexuality or where in practice grave discrimination or punishment takes place." (Antwoord van minister Verdonk van 28 november 2006 op de Kamervragen van Lambrechts van 3 oktober 2006, nr. 394)

But to date in Dutch Country Reports information on the availability of state protection for LGBTs is scarce. None of the reports gives information like "the state authorities are in general willing and/or able to protect LGBTs." The information that is reported is usually about the difficulties in obtaining protection.

Some examples: General Country Report Armenia, August 2010: "If homosexuals ask for help and protection from the police, there is no guarantee that they will get it in an adequate way and

therefore they seldom turn to the police for help. Homosexuals could find themselves in a vulnerable position, if they come into contact with the police, because of the risk that police-officers will take (financial) advantage of the situation by threatening to publicly "out" them. In the past there were reports on police-officers who visited gay meeting places, in order to blackmail men."

General Country Report Georgia, December 2009: "A transsexual person who turns to the police for protection, does not run the risk to be prosecuted for the sole fact that he or she is a transsexual." No information is given on whether he or she could obtain protection.

General Country Report Turkey, September 2010: "The Turkish law and the Turkish authorities do not offer sufficient protection to LGBTs. In general LGBTs do not dare to ask for protection. Many LGBTs do not trust the police due to existing prejudices. Insofar LGBTs report cases of discrimination and/or threats to the Turkish authorities, their reports are generally not taken into consideration."

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 representative can try to find an independent expert. However, there are no schemes for funding these experts.

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

The lawyer can ask an expert to give his/her opinion, but the weight is very low. For instance in a Cameroonian case several experts wrote a report on the situation of gay men in Cameroon, among them a well-known Cameroonian lawyer and human rights activist. The IND was of the opinion that she was probably hired by the applicant or his lawyer and therefore she was not objective. For that reason the part of her letter concerning the applicant is not a decisive factor. The part of the letter that is about the situation of gay men in Cameroon in general, was not taken into account, because it was not about the applicant specifically (intention to reject (voornemen), 15 September 2008, IND nr. 0312-18-0218, on file with the author).

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

In general the Country Reports from the Dutch Minister of Foreign Affairs are considered to be the most important source of information in asylum cases. In cases where there are no such reports available, the decision is taken on the basis of other available information from objective sources, for instance reports from other countries and reports from international organisations and NGO's.

Concerning LGBs the Aliens Circular states: An asylum application relying on problems caused by the (stated) sexual orientation of an asylum seeker, must be judged with special attention regarding the position of homosexuals in the country of origin. The influence of the authorities on society will vary per country of origin. (Aliens Circular 2000 C2.10.2)

But this policy is not always implemented, for instance: The Court Almelo concluded that the IND did not comply with his own policy in the sense that the application was not assessed with special attention regarding the position of homosexuals in Ukraine. But the Court did not think it is necessary to cancel the decision for this reason. The appeal was dismissed (Ukraine, Court Almelo, 28 May 2010, 10/16953, appeal dismissed without reasons by Council of State, 31 August 2010, 201005517/1/V2.)

Two Iraqi cases were won because of COI on the horrible situation for gays (see question 14)

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.

Courts sometimes do, see question 32.

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.

Yes, this happens sometimes in transgender cases:

- "The most recent Country Report on Romania, dated 1999, states that homosexuals have an increased risk of ill-treatment upon arrest and while in preventive custody, but regarding the position of transsexuals the Minister of Foreign Affairs does not have information that would indicate that this group experiences specific problems in Romanian society. Regarding the incidents



experienced by the applicant, the IND's conclusion that, since nothing is recorded on the position of transsexuals in Romania, it must be assumed that this group does not experience any problems, cannot be maintained. The Human Rights Watch Report 2002 also shows that police officers in Romania often use violence and that lesbians and gays are being harassed by the police. It is not clear why the position of transsexuals would be more favourable." Appeal allowed (Romania, Court Amsterdam, 22 January 2004, nr. 02/94109).

- "The Country Report on Azerbaijan 2004 states that "Transsexuality is a taboo subject in Azerbaijan society. Therefore it was not possible to find information on the position of transsexuals in Azerbaijan." According to the Court this information leads to a different conclusion than the one reached by the IND, being that there is no recorded information on transsexuality in Azerbaijan. According to the Court, considering the wording of the Country Report, their position could be judged as alarming. Appeal allowed (Court Roermond, 4 November 2005, nr. 02/20771).

- In the case of an Iraqi transwoman the Court considered - contrary to the decision of the IND - that although the Country Report Iraq states that no information was found concerning transgenders, it is plausible that the risks of discrimination, humiliation and violence, which according to the report exist towards homosexuals in Iraq, would apply even more for transgenders in the stage of development in which the applicant finds herself. She could end up in a vulnerable position against which - as it is established - no protection is available. Appeal allowed (Court Haarlem, 18 April 2011, nr. 10/36310).

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 Court Groningen considered that the sole fact that, according to the General Country Report Armenia 2001, there are gay meeting places in Jerevan, does not show that the applicants (two lesbian women) can relocate in Jerevan without experiencing problems because of their sexual orientation, as the IND had argued (Armenia, Court Groningen, 18 march 2003, nr. 02/43135; 02/43145).

***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

A Somali boy fled to the Netherlands together with his family. Later he discovered his homosexual feelings and when he came of (legal adult) age he filed an independent asylum application. The Court 's-Hertogenbosch thought his homosexuality was not a new fact, but the Council of State decided that his fear for problems in Somalia, because of his sexual orientation was specified enough, very personal and not decided upon earlier. Therefore it was considered a "new fact". (Court 's-Hertogenbosch, 24 July 2003, nr. 03/36870, Council of State, 3 October 2003, 200305027/1, NAV 2003/310, JV 2004/3)

However, this case was an example of an applicant who was deemed too young to realise his sexual orientation upon his initial arrival in the Netherlands.

The same applies for the Iranian (Court Haarlem, 10 December 2009, nr. 09/36705) who came to the Netherlands at age 11. At age 19 he applied for asylum based on his homosexual orientation, which was considered a new fact. He was granted a status based on Article 3 ECHR (Art. 29, 1-b Aliens Act).

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

The rejection of LGBTs who came out later is a major problem in the Netherlands. Standard practice is that later statements are not taken into account. This may be changing, as the Aliens Act since 1 July 2010 provides that information submitted during the initial appeal shall be taken into account (see for instance Cameroon, Court Haarlem 27 July 2010, nr. 10/24966). However, for information submitted after the first court decision, the older standard practice is bound to remain unchanged.

The lower courts have acknowledged that coming-out is a complex process which can take a long time with various stages of awareness (aware, but not fully, still searching, insecure and scared, not able to talk about it, still in the phase of acceptance, slumbering homosexuality, fearing the consequences, struggling etc.) and that people are sometimes not able to talk about their sexual

orientation immediately upon arrival (Afghanistan, Court Zwolle, 26 September 2007, nr. 06/55693; Angola, Court Haarlem, 7 December 2007, nr. 07/44180; Iraq, Court Groningen, 17 November 2006, nr. 06/52447).

The Council of State, however, applies a stricter criterion: someone who is (albeit slightly) aware of homosexual feelings should mention this immediately upon arrival, also when he or she has never expressed these feelings ever before.

A Somali man always realised he was different and only looked at men, but he expressed his sexual orientation for the first time some years after he came to the Netherlands. The Court Assen ruled that because only after his first application he became fully aware of his homosexuality and acted accordingly, this was a new fact (Court Assen, 2 February 2006, nr. 06/54668). In appeal the Council of State overruled this judgement: "because he declared he had always been aware of his sexual orientation, he could and should have told about it at the time of his first application. The fact that he engaged in a homosexual relationship only after some years of staying in the Netherlands does not change this." (Council of State (MK), 14 April 2006, 200601113/1).  
Comp. Iran, Council of State, 10 december 2008, 200807075/1 (JV 2009/85): "In as far as the applicant argued that he could not tell about his homosexuality earlier on account of feelings of shame, this argument is not convincing."

In a Togolese case, the applicant argued that he did not declare about his homosexual acts in Togo because (1) he was 15 when he submitted his first application for asylum, and could not be expected to declare about acts which are criminalised in Togo (2) he was traumatised by the beatings of his village peers (3) on account of his young age he was not yet fully conscious of his sexual orientation. The Court dismissed these arguments and concluded he could and should have declared about his sexual orientation in the first procedure, hence this is not a new fact. The Court found it contradictory that the applicant was not yet fully conscious of his sexual orientation, and at the same time was ashamed of it. Another contradiction, in the eyes of the court, was that he had sex with another boy three times, yet he was not fully conscious of his homosexuality. Appeal of applicant dismissed without reasons, Council of State, 23 August 2010, nr. 201003043/1/V2, upholding Court 's-Gravenhage, 3 March 2010, nr. 09/14203.

In a case concerning a first application, the applicant did not declare about his sexual orientation during the interview, but he did so when submitting corrections and additions, so before even the intention to reject his claim has been communicated to him. The Court found that he should have

referred to his homosexuality during the interview, even if only summarily, for example by indicating that there is something he does not dare to declare about. He had been informed of the fact that he could speak freely and should not withhold information. In the appeal, the applicant argued that the corrections and additions are also meant as an opportunity to give substantial information, and not only textual corrections. Appeal denied without reasons (Iraq, Council of State, 15 September 2009, nr. 200905386/1/V2, Court 's-Gravenhage, 24 June 2009, nr. 09/5070; see also Iraq, Court Almelo, 6 November 2009, nr. 09/38377; 09/38375).

Concerning a subsequent application in a Sierra Leonean case, the applicant stated he was unable to declare about his homosexuality during the first asylum procedure on account of psychological force majeure, caused by the taboo on homosexuality in Sierra Leone. The IND as well as the Court found this force majeure had not been established, because no psychological expert opinion to this effect had been submitted. The appeal lodged by the applicant was dismissed without reasons, Council of State, 4 February 2010, nr. 200909364/1/V2, Court Rotterdam, 30 October 2009, nr. 09/11045. Comp. for the ruling that the existence of a taboo does not justify disclosure only in a second asylum procedure a Chinese case (Court Zwolle, 15 May 2008, nr. 08/13416, appeal dismissed without reasons by Council of State, 4 June 2008, 2090803565/1.

Comp. in an Iranian case - official Dutch policy holds that Iranian gays are to be granted asylum, the only reason why this was not considered in this case was that the applicant's purported homosexuality was raised only in the second asylum procedure (Council of State, 8 July 2010, nr. 201006033/1/V2, appeal dismissed without reasons, against Court Zwolle, 17 June 2010, nr. 10/18620; 10/18619; Also comp. Iran Council of State, 23 December 2009, 200909367/1/V2, appeal dismissed without reasons, against Court Arnhem, 27 November 2009, 09/41874; 09/41872).

An Iraqi case illustrates the problems that may come up in lengthy asylum procedures. The applicant had a temporary residence permit on account of the general situation in Iraq in 1997-1998, After this permit was withdrawn, years of litigation follow. In 2007 he applied for asylum for the second time. He argued that there were new facts justifying a fresh examination: the situation of gays in Iraq has deteriorated, and he has had homosexual relations in the Netherlands for years, whereas in Iraq he knew he was gay, but did not have sex and therefore had not run into trouble. His homosexuality was not considered to be a new fact by both IND and the Court, because the situation of gays in Iraq had not deteriorated, and because he should have declared about his homosexuality in 1997 since he was aware of it. (Court Groningen, 17 March 2010, nr. 08/42096,

appeal filed by the applicant dismissed without reasons, Council of State 14 October 2010, nr. 201003573/1/V1. Comp. Iraq, Court Almelo, 6 November 2009, nr. 09/38377 and Iraq, Court Haarlem, 31 December 2010, nr. 10/24828, see question 14

Some courts are willing to be inventive about this. Interesting is the case of an Iraqi whose homosexuality was not considered a new fact, but his bisexuality was, because - other than his homosexual orientation - he discovered his bisexual orientation after the former procedure. He lost the case, because in the opinion of the IND and the Court he didn't fulfil the 'requirement of continuity' (he did not have previous problems in the country of origin and he therefore failed the continuity that was until recently necessary to qualify for refugee sur place) and he failed to show a real risk within the meaning of article 3 ECHR (Court Roermond, 6 August 2009, nr. 08/41419; Council of State, 10 June 2010, 200906705/1/V1).

However, in another Iraqi case the applicant stated in a previous procedure that he was homosexual, and submitted as one of the "new facts" in the repeat procedure that he was in fact bisexual. The Court considered this fact did not change the evaluation of the claim, that he had no well-founded fear of persecution in Iraq due to his homosexual orientation. Appeal dismissed (Court Dordrecht, 9 March 2010, nr. 10/542, confirmed without reasons by Council of State, 31 May 2010, 201003422/1/V1).

In an Iraqi trans case the Court considered that the development that the applicant has been and still is experiencing in the expression of his transsexuality and the physical changes resulting from the hormone treatment provided by the VU Medical Centre are to be regarded as new facts (Court Haarlem, 18 April 2011, nr. 10/36310).

A remarkable negative judgement is the following: A Nigerian did not tell about his sexual orientation at his first application, because at the time this was not the reason for leaving Nigeria. Furthermore he did not practice his homosexuality until recently. The Court considers that the circumstance that he has become more aware of his sexual orientation now and has openly engaged in a homosexual relationship is so much interwoven with his sexual orientation itself, that it cannot be said that this development must be considered a new fact. His awareness vis-à-vis his sexuality has its origins in his previous homosexual feelings which he already experienced before leaving Nigeria (Court Amsterdam 6 November 2009, nr. 09/37284, appeal dismissed without reasons Council of State 8 December 2009, 200908695/1/V2).

In a Senegalese case, the applicant argued that he had become aware of being gay only in the Netherlands, therefore he could not have raised this during his first asylum procedure. He was aware he had a problem with sexuality, but considered it as an illness. IND and the Court held that he should have informed the asylum authorities about his problems, even if he thought they were medical ones. Appeal by applicant dismissed without reasons, Council of State, 10 August 2010, 201006375/1/V2, Court Haarlem, 22 June 2010, nr. 10/18687.

In a Ugandan case the sexual orientation of the applicant was not considered a new fact, but his appeal was allowed because of a possible risk to a treatment contrary to article 3 ECHR (Uganda, Court Amsterdam, 22 April 2011, nr. 11/10642).

**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

36: Aliens Circular C2/2.10.2: "Punishment on the basis of a penal provision that only affects homosexuals, is considered an act of persecution. This will be the case, for instance, when being homosexual or expressing specific homosexual feelings is criminalised. In order to conclude that the person concerned will be recognised as a refugee, the criminal sanction must attain a certain gravity. A sole fine will in most cases not be sufficient to reach this conclusion.\* However, the sole criminalisation of homosexuality or homosexual acts in a certain country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum seeker must (if possible with documents) show that he personally has a well-founded fear of persecution."

\* In my opinion this remark is superfluous, since - at least to my knowledge - there are no countries in which the penalty for homosexuality (and/or acts) is 'a sole fine'. The common sanction is

imprisonment or worse. Hence, the requested gravity is 'guaranteed' in country which criminalise homosexuality.

36A: Yes, the IND often rejects claims, stating that although homosexual acts are criminalised, the authorities in the country of origin do not have a policy of active prosecution of homosexuals. For example:

A Tunisian man feared his family and especially his brother who threatened to kill him. But the IND was of the opinion that the Tunisian authorities did not know and would not find out about his sexual orientation upon return. Furthermore, data from public sources do not show that the Tunisian authorities have an active policy of criminal investigation and prosecution against people whom they suspect of homosexuality or homosexual acts. His appeal was allowed, but the IND appealed and the Council of State did not consider it necessary to do more research on the availability of protection against homophobic persecution by non-State actors in Tunisia, because the applicant did not establish a well-founded fear. Appeal by IND allowed (Court Groningen, 30 November 2009, nr. 09/41408; Council of State, 4 February 2010, 200909560/1/V2)

However, in the case of a man from India the Court 's-Gravenhage considered that the US State Department Report proves that section 377 of the Indian Penal Code is not a dead letter. On a regular basis this provision is used for police raids against homosexuals and for threatening gay people with arrest when they come to report acts of violence. Appeal dismissed because of an internal relocation alternative, see question 40 (Court 's-Gravenhage, 11 November 2009, nr. 09/13455).

Although homosexuality is a crime in Tanzania, according to the IND there is no country of origin information which shows that the authorities in Tanzania have a policy of active prosecution. The US Department of State Country Reports 2007-2009 show that no person has been prosecuted because of homosexuality. However, the applicant submitted COI that stated several homosexuals have been arrested recently, the general climate towards homosexuals has deteriorated, and not only with respect to gay activists. The Court concluded that the risks this worsened situation could have for the applicant were not properly investigated. His appeal was allowed (Court Haarlem, 2 March 2010, nr.10/5782).

In a case from Cameroon the IND accepted that the applicant is a member of a prohibited political party and that he is gay, but denied asylum because homosexuality, although a criminal offence, is only prosecuted rarely and if so in combination with other offences. The Court agreed with the IND, and dismissed the appeal (Court 's-Hertogenbosch 1 October 2009, nr. 08/36980, appeal applicant denied without reasons, Council of State, 25 January 2010, 200908271/1/V1).

In an Algerian case, the IND rejected an asylum claim because there is no systematic prosecution of gays in Algeria, and the applicant had not established that he will be targeted specifically. Decision upheld by Court, appeal applicant denied without reasons (Council of State, 27 January 2010, 201000184/1A/2, Court 's-Gravenhage, 9 December 2009, nr. 09/23841).

In a Moroccan case the Court considered that the IND could not contradict the country of origin information submitted by the applicant, showing an active prosecution of homosexuals or people who are perceived to be of homosexual orientation, and allowed the appeal (Court Arnhem, 30 December 2010, nr. 10/14637).

**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?

LGBTI people can and do get protection based on persecution by non-state actors. One of the issues in case the perpetrators are non-state actors is that the IND often interprets this situation as 'discrimination'. Aliens Circular C2/2.5.1: "Discrimination is considered to constitute persecution if the experienced discrimination leads to such serious restrictions of the means of existence that it is impossible to function socially."

In case law the test to measure whether the discrimination is serious enough to label it persecution within the meaning of the Convention is whether the applicant has access to employment, housing,



education and health care. This sometimes results in applicants who had encountered serious forms of persecution being withheld protection, because they still had a job, a house, etc.

A man from Sierra Leone had been kidnapped and raped by rebels. As a result of this he was considered to be gay, his surroundings did not accept him anymore, he was physically abused and robbed several times. When he sought protection from the police, they sent him away and threatened to detain him, because of his perceived homosexuality. The Court Haarlem applied the test and considered that the discrimination did not amount to persecution because he still had access to work, an income, housing and medical care. However, the appeal was allowed because of the lack of motivation concerning the availability of state protection (Sierra Leone, Court Haarlem, 5 September 2006, nr. 06/40350, NAV 2007/9; Comp. Bosnia-Herzegovina, Court Groningen, 12 January 2010, nr. 10/48386).

However in an Indian case it was held that: The applicant's coming out has led to deprivation of liberty, having to end his academic studies, serious ill-treatment, an attempt on his life, as well as preparations to have him locked up in a mental hospital. The court cannot reach an other conclusion than that the applicant has undergone acts of persecution from his relatives and co-villagers, which he fears to be subjected to again upon his return, and which will be so serious that they constitute discrimination in the above mentioned sense. In principle, the applicant qualifies for refugee status on this ground (India, Court 's-Gravenhage, 11 November 2009, nr. 09/13455). He still lost the appeal, because an internal flight alternative was held against him, see question 40.

Comp. two lesbian Armenians (Court Groningen, 18 March 2003, nr. 02/43135). They were granted refugee status after the court decision. Comp. also a lesbian from Mongolia, (Court Zwolle, 9 July 2003, nr. 01/57514). See also question 43.

Another issue is that sometimes persecutory acts by non-state actors are labelled as "common crimes", which have no relevance with respect to the Refugee Convention. For instance in the following Ukrainian case:

When the police saw him kissing his boy-friend, he was arrested and searched, during which they put cannabis in his pocket. He was brought to the police office where he was threatened, severely abused and raped by other detainees, who were incited to do this by the police. Later he was arrested again, falsely accused of theft, detained for two days, severely physically abused and he received death threats. A chief of police told him he would pass his name and whereabouts to an

extremist organisation. Since then he has been followed by this organisation. His car was set on fire, while he was sleeping in it. He was kidnapped by this organisation, brought into the woods and battered. He was fired by his employer because of his sexual orientation and he had to hide in different places. The IND labelled the actions of the organisation as "ordinary crimes", against which he should have sought police protection.

The Court considered that in case of discrimination there must be such serious restrictions of the means of existence that it is impossible to function socially. According to the Court the applicant did not show that he is restricted in such a way. Although it can be considered serious what he has experienced, it does not qualify as persecution in the sense of the Convention. (Ukraine, Court Almelo, 28 May 2010, nr. 10/16953, appeal dismissed, confirmed without reasons by Council of State, 31 August 2010, 201005517/1/V2).

In a Georgian case the applicant regularly received public insults and beatings, twice men tried to drag him into a car, once these were in military uniforms. These events were not considered serious restrictions of his means of existence. Decision upheld by Court Haarlem, 21 September 2010, nr. 10/31038, appeal by applicant dismissed without reasons Council of State, 9 November 2010, 201009360/1/V3.

However, in an older Ukrainian case the Court "does not exclude the possibility of common crimes committed by ordinary criminals leading to refugee status, in cases where the criminal activities (partly) find their cause in a persecution ground and the authorities are unable or unwilling to provide protection." (Ukraine, Court Breda, 29 August 2005, nr. 05/5440).

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

I did not find clear differences here. I found that persecution by non-state actors is very common in all LGBTI claims. See also question 3

***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.

Before July 2009 there were cases in which it was held against LGBT asylum seekers originating from criminalising countries, that they did not seek police protection, sometimes even after they were raped by the police. Since July 2009, however, this requirement is cancelled. The Aliens Circular now explicitly states that: "Whenever homosexual acts are criminalised in the country of origin, the applicant is not required to have invoked the protection of the authorities there" (Aliens Circular C2/2.10.2). In addition, this policy is incorporated in some policy guidelines concerning specific countries. "Homosexuals in [country name] are not expected to turn to the police for protection." On this basis, homosexuals from the following countries are not required to seek national protection in case of problems related to their sexual orientation: Afghanistan, Democratic Republic Congo, Guinea, Iraq, Ivory Coast, Nepal (referring to homosexuals, transvestites and transgenders), Nigeria, Sierra Leone, Sri Lanka, and Syria. In case of criminalising countries that do not appear in these country specific guidelines, LGBs can invoke the exemption from the requirement to seek national protection on the basis of the general policy rule, the application of which is not restricted to particular countries. It applies to all countries where same sex sexual acts are criminalised. This amendment was made in response to a suggestion of COC Netherlands and I consider this a good practice (Letter of COC Netherlands to the Secretary of State of the Ministry of Justice and to the Minister of Foreign Affairs, 31 July 2007; Letter of the Secretary of State Albayrak to COC Netherlands, 12 February 2009, available at Vluchtweb).

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.

Asylum seekers in general should first turn to the authorities of the country of origin for protection, unless the applicant shows that this clearly would have been dangerous or pointless.

The case law of the Council of State holds that first it has to be established whether, generally speaking, the authorities provide protection in the country concerned. This assessment is based primarily on COI of the Ministry of Foreign Affairs, supplemented with other sources. Only if that

question has been answered affirmatively, the question is addressed whether the applicant has established that seeking protection would have been clearly dangerous or pointless. If that has not been established, the conclusion that the authorities are unable and unwilling to grant protection can only be drawn if the applicant has invoked protection in vain. (e.g. Council of State 12 February 2010, LJN: BL4567).

Examples: In a Chinese case, the wife of a man the applicant had a relationship with had him beaten up, after which he went in hiding. Application denied because these were problems in the private sphere, the applicant could have sought police protection. The argument that this would have been meaningless because of the taboo on homosexuality in China (decriminalised only in 1997, not considered a disease since 2001) was dismissed by Court Groningen, 3 November 2008, nr. 08/12467, appeal by applicant dismissed without reasons by Council of State, 6 April 2009, 200808661/1/V1.

A Georgian gay man was filmed while he was having sex with a friend. Boys from the neighbourhood beat him up, his father threw him out of the house, his sister was sexually assaulted on account of his sexual orientation. Although the IND acknowledges that gays do not have an easy life in Georgia, he should have sought protection because it was not obvious beforehand that this would have been meaningless. Upheld by Court 's-Hertogenbosch, 16 February 2010, nr. 09/16343, applicant's appeal dismissed without reasons by Council of State, 11 June 2010, 201002793/1A/2.

See also: Ukraine, Court Almelo, 28 May 2010, nr. 01/16953, Council of State, 31 August 2010, 201005517/1/V2 (appeal dismissed); Belarus, Court Arnhem, 21 December 2006, nr. 06/21595, Council of State, 8 June 2007, 200700569/1 (appeal dismissed); Moldova, Court Zutphen, 17 March 2006, nr. 06/9846 (appeal dismissed); Armenia, Court Zutphen, 10 October 2007, nr. 07/17458 (appeal dismissed); Kosovo (Dublin-case see question 60), Court Zwolle, 15 december 2008, nr. 08/27847, appeal allowed, but quashed by Council of State, 7 September 2009, 200809455/1/V3.

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

That is how it should be, in my opinion, but such COI does not exist. With the exception of countries that criminalise homosexual acts, people are supposed to have sought protection, also

when the COI says that LGBTI people generally do not dare to do so. See for examples the answer to question 28.

In a letter to the Secretary of State of the Ministry of Justice and the Minister of Foreign Affairs COC Netherlands stated that the requirement to seek protection from the authorities against non-state actors could only be demanded from homosexuals in case it is firstly established through publicly available COI that the authorities are generally able and willing to offer protection to homosexuals (Letter from COC Netherlands to Secretary of State Albayrak and Minister Verhagen, 31 July 2007; Letter of the Secretary of State Albayrak to COC Netherlands, 12 February 2009, available at Vluchtweb).

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?

However, it is no longer required to seek state protection against non-state actors in these countries.

***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?

- In 2003 the Court Groningen did not agree with the Secretary of State that the circumstance that Jerevan in Armenia has meeting places for homosexuals made Jerevan a good relocation alternative for two lesbian women (Court Groningen, 18 March 2003, nr. 02/43135).

- In a judgement from 2005 based on a country report in an individual case it was ruled that the tourist coastal area of Gambia was a good relocation alternative. Because of the loose sexual moral a homosexual could live there in some anonymity (Court Amsterdam, 6 October 2005, nr. 05/42699).

- Bigger cities in Nigeria were considered a good relocation alternative, because an October 2005 report from the British Home Office stated that homosexuals do not have fear of persecution there, as long as they do not openly express their sexual orientation. (Court 's-Hertogenbosch, 31 May 2007, nr. 06/51632)
  
- With reference to the Dutch Country Report on Algeria (June 2005) the problems of an Algerian applicant with his family were considered problems in the private sphere, and therefore he was supposed to relocate in bigger cities in Algeria, "where homosexuality is being tolerated, as long as it is not explicitly propagated." (Court Assen, 17 April 2009, nr. 09/11179, Council of State, 25 May 2009, nr. 200902993/1/V2)
  
- New Delhi (India) was considered a good relocation alternative, because on the 2nd of July 2009 the Delhi High Court ruled that section 377 of the Indian Penal Code is contrary to the Indian Constitution and therefore homosexuality is no longer punishable in New Delhi. The Court also considered that other Country of Origin Information shows that in the large cities of India, among which New Delhi and Mumbai, since some time there is a climate in which homosexuals feel free to organise and manifest themselves, for instance by means of gaypride-parades. (Court 's-Gravenhage, 11 November 2009, nr. 09/13455)
  
- More tolerant regions of Ukraine (Court Almelo, 28 May 2010, nr. 10/16955, Council of State, 31 August 2010, 201005517/1/V2).

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

Yes, in the Nigerian example the discretion reasoning from the British Home Office was followed. And in the Algerian example discretion reasoning was also involved, based on the Dutch Country Report Algeria.

***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...)?

All of the above, and also peculiar types of persecution, like the case in which the village people decided in a meeting to have the gay man ride on a donkey through the village with his face painted black, and then send him to a mental hospital to cure him of his "sick habits". After this verdict was proclaimed, he fled.

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?

See question 37 and question 43.

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).

No differences noticed in type of persecution concerning lesbians and gays. Transwomen were often persecuted severely, but no comparison with transmen possible, because we found only one. The bisexuals were all male.

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.

Aliens Circular C2/2.5.1: "Discrimination is considered to constitute persecution if the experienced discrimination leads to such serious restrictions of the means of existence that it is impossible to function socially."

In jurisprudence the test applied in cases of discrimination/persecution is whether the applicant has access to employment, housing, education and health care (see above, question 37A).

Another consideration used in jurisprudence is that the discrimination should be systematic and far-reaching and causing the applicant's life to be unbearable.

In the case of a gay man from Uzbekistan the Court held that the IND has relied on a too restrictive notion of discrimination. The IND has ignored that the applicant has undergone acts of persecution on account of his sexual orientation, and should have examined whether this made him a refugee. Instead, the IND has examined whether the acts the applicant has experienced amount to discrimination, which involve a different, stricter criterion, i.e. whether his experiences make it impossible for him to function socially. He won the appeal and later he received refugee status. (Uzbekistan, Court Groningen, 26 October 2010, nr. 10/16405)

I agree with the way one lawyer puts it in his appeal at the Council of State: "It is incomprehensible to consider that following a training, having a house at one's disposal and earning a living by means of which one can pay the necessary medical care, would be relevant circumstances that could prevent blackmail, death threats and severe physical abuse from state actors." He lost the case in both instances. (Armenia, Court Zutphen, 10 October 2007, nr. 07/17458, Council of State, 18 February 2008, 200707743/1).

An Estonian transwoman was brought up to the police station regularly where she had to undress in order to verify her gender identity. They put her in a men's cell, where she was sexually abused, watched by police camera's. The IND was of the opinion that she could have asked protection from the (higher) authorities. Discrimination for reasons of transsexuality can only lead to a refugee status, if there is a systematic, far-reaching discriminatory treatment, that results in serious restrictions of the means of existence and against which the authorities do not provide protection. Although she might have been discriminated occasionally, there is no proof of serious restrictions regarding her means of existence (Court Groningen, 17 October 2003, nr. 03/46993).

A transwoman from Guatemala was beaten, sexually abused, kidnapped, locked in, cigarettes were extinguished on her body, she was harassed at work and in public transportation, she could not rent a house and she lived in constant fear. The IND thought this discrimination was not severe enough to amount to persecution, because she did not turn to the police for protection. The Court went along in this reasoning, finding that her problems were insufficient for the conclusion that she was



systematically being discriminated against on account of her transsexuality (Court Arnhem, 3 December 2009, nr. 09/16380, Council of State, 15 March 2010, 200909972/1/V1).

Comp. a Nigerian case, Court Amsterdam, 31 March 2010, nr. 08/42552, Council of State, 9 June 2010, 201004197/1/V1. Comp. also Pakistan, Court Zutphen, 25 January 2007; Nigeria, Court 's-Hertogenbosch, 31 May 2007; Tanzania, Court Haarlem, 2 March 2010; Egypte, Court Assen, 28 September 2010.

***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.

Since 1 May 2007 the Aliens Circular states: 'People with a homosexual preference are not required to hide this preference upon return in the country of origin' (Vc C2/2.10.2). In a letter to COC Netherlands the Secretary of State added that this means that in the assessment of an asylum claim the possibility to conceal one's sexual orientation should play no role (Letter of the Secretary of State Albayrak to COC Netherlands, 12 February 2009).

However, in some cases this policy rule is not implemented correctly by the IND and thus examples of discretion reasoning still occur, for instance in the following cases:

A woman from Sierra Leone had a hidden lesbian relationship in her country of origin. The IND rejected her application stating: "She can reasonably be expected to continue her private life in the same way as before her departure. The fact that she will have to hide her sexual orientation in the future, does not change this, since she has managed to do so before without problems." (IND decision, 15 October 2009, nr. 0807-15-1291, on file with the author)

In appeal the Court considered that it cannot reasonably be asked from her to suppress or hide her sexual orientation upon return in Sierra Leone, because sexual orientation is a crucial element of one's personality. The IND's argument that she did not face problems caused by her sexual orientation prior to her departure from Sierra Leone is not convincing, because it surpasses her claim that she has been hiding her sexual orientation there out of necessity. However, in the

Netherlands she dared to come out and she does not want to hide her sexual orientation again.

Appeal allowed (Court Dordrecht, 9 November 2010, nr. 09/41353).

The IND appealed from this Court decision. The Council of State accepted the argument that “the fact that in the Netherlands the applicant used the possibilities and rights of Dutch society does not imply that she will be unable to accommodate upon return, even if that would require a certain restraint towards society,” adding: “although sexual orientation is a crucial element of one's personality, this does not imply that it cannot be expected that she lives her private life in Sierra Leone in the same way as before she left for the Netherlands, just because she cannot live her sexual orientation in Sierra Leone publicly. It is also not contrary to Article 8 ECHR to expect this from her, for the mere reason that she has not adduced facts or circumstances indicating that in Sierra Leone she has not been able or will not be able to give a meaningful interpretation to her homosexual orientation.” (Council of State, 11 May 2011, 201011782/1/V1, *MigratieWeb* ve11001135, *Jurisprudentie Vreemdelingenrecht* 2011/307, annulling Court Dordrecht, 9 November 2010, 09/4135).

In another Sierra Leonean case the IND held, among other arguments, "that homosexual acts in public are prohibited, but this does not imply that it is entirely impossible for the applicant to act on his homosexuality in the private sphere." This point of view was based on the Dutch Country Report Sierra Leone. Appeal dismissed by Court Rotterdam, 3 October 2009, nr. 09/11045, appeal dismissed without reasons by Council of State, 4 February 2010, 200909364/1/V2.

In an Iranian case the Court considered: "The circumstance that the authorities are unaware of the applicant's orientation and that this orientation in itself is not punishable is not decisive, because in the Aliens Circular C2/2.10.2 Vc is stated that homosexuals are not expected to hide their sexual orientation upon return." (...) "The mere consideration that the interference with the applicant's private life is justified by his criminal record does not provide evidence of a proper assessment. Private life in the sense of Article 8 ECHR includes the right to autonomy over one's own life. In a new decision, the IND should include in the assessment that the applicant is active in homosexual circles and will be unable to continue his way of life upon return to the country of origin." Appeal allowed (Court Haarlem, 6 July 2009, nr. 08/41885, followed by Court Haarlem, 12 July 2010, nr. 09/38194, appeal allowed again, appealed by the IND at the Council of State, still pending).

A positive judgment was found in another Iranian gay case: "That the authorities are unaware of the applicant's orientation and that this orientation in itself is not punishable is not decisive. It cannot be

required that someone hides his sexual orientation, which is a crucial aspect of one's identity. This has also been incorporated in the Aliens Circular 2000, C 2/ 2.10.2." Appeal allowed (Court Haarlem, 10 December 2009, nr. 09/36705). The IND granted the applicant a subsidiary (b-)status (based on Article 3 ECHR).

An Egyptian case was assessed by the IND in light of what the applicant had already experienced, even though he had not come out in Egypt. However, according to the Court: "for a proper examination it is of primary importance what treatment the applicant could expect from the population and the authorities when he does come out." Appeal allowed (Court Haarlem, 26 February 2008, nr. 08/04691). He was granted refugee status after this judgement.

In another Egyptian case the Court Assen ruled "that the applicant could not be expected to adopt a different lifestyle. Furthermore, the IND has not factored into its assessment of the extent of discrimination which the applicant will face from the authorities and fellow citizens upon return to Egypt, that the applicant stated that until now he has not dared to come out in that country. The crucial point is whether the applicant, living openly as a homosexual in Egypt, will face such restrictions on his means of existence that for him (as a homosexual) it will be impossible to function socially. In this respect, the court takes into account that in principle, according to the IND's policy, it is not required that persons with a homosexual orientation conceal this preference, or that they should exercise constraint when expressing their sexual orientation upon return to the country of origin." (Egypte, Court Assen, 28 September 2010, nr. 09/31329, appeal allowed, but annulled by the Council of State, because "systematic persecution of gay people in Egypt was not established," stating also that "the Minister did not expect the applicant to adopt a lifestyle which is in conflict with his sexual orientation" (Council of State, 1 June 2011, 201010332/1/V1).

***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?

Aliens circular C2/2.10.2: Social group is defined as persons invoking problems experienced on account of his or her sexual orientation, which makes clear that lesbian as well as gay asylum seekers can be protected. Bisexuals are not mentioned explicitly.

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?

Although it is not explicitly recognised in the law, in practice transgenders can (and do sometimes) obtain refugee status based on membership of 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

Article 3.37 par 1, d Aliens Ordinance 2000 is a cut and paste of Art 10(1)(d) Qualification Directive. However, because of the existence of specific policy rules - C2/2.10.2 Aliens Circular 2000 (see above, Q 13a) - this issue is not raised in LGBT cases.

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

This is not addressed in legislation. There are passages in the Aliens Circular 2000 (respectively C2.11 and C14/3.3, see above, question 13b) addressing gender related aspects, but these concern women and no relation is made with LGBTI applications.

***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?

This answer was given by the IND.

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?

This answer was given by the IND.

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.

This answer was given by the IND.

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

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### **Procedures Directive<sup>4</sup>, 2005/85**

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#### ***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

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

The IND says: The question concerning the gender of the interviewer/interpreter is a standard question during the introduction of the interview.

However, practice shows that the applicant's request is not always granted.

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

IND: The asylum seeker should bring this request forward. Sometimes it is recognised.

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

No. Please go to question 56.

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

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

IND: There is no specific notice for this target group in training or courses. More in general there is attention for vulnerable people or persons who will be persecuted. In June 2011 we will introduce the module Interviewing Vulnerable People from the European Asylum Curriculum for all caseworkers. This training is optional. The focus of this module is on feelings of shame and intercultural aspects, such as family honour and criminalisation of sexual orientation.

55B) Is the training:

- Obligatory  No  Yes. For whom?

IND: the general part of the training is obligatory for all the decisionmakers and interviewers

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

55C) Who has access to this training?

decisionmakers and interviewers

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.

Two gay men from Kosovo firstly applied for asylum in Slovenia, but fled to the Netherlands after they were reportedly battered by Slovenian police officers and by guards of the asylum seekers centre. The Court Zwolle was of the opinion that the Dutch authorities could not expect them to stay in Slovenia to wait for the outcome of their complaint against these civil servants. But the Council of State overruled this judgement and concluded that they should go back to Slovenia. They had reported the abuse to the Slovenian authorities and they did not show that protection from the Slovenian (higher) authorities was not available. The Court Zwolle also wondered whether they could be treated in Slovenia for their PTSS, but the Council of State was of the opinion that they did not show that they could not get an adequate medical treatment in Slovenia. The circumstance that Slovenia never granted asylum based on homosexual orientation to date, does not mean that they fear indirect refoulement, because there is no information that shows Slovenia expels homosexual asylum seekers without consideration regarding the prohibition of refoulement. (Court Zwolle, 15 December 2008, 08/27847; Council of State, 7 September 2009, 200809455/1/V3)

There was also the (famous) case of the Iranian who came to the Netherlands after his asylum claim was rejected in The United Kingdom. The Netherlands did not assume responsibility to take his claim into account. After a lot of protests and a resolution of the European Parliament (<http://www.unhcr.org/refworld/docid/47da75002.html>) he was granted asylum in the United Kingdom after a subsequent re-examination. (Court Zwolle, 14 December 2007, 07/38475, Council of State, 11 March 2008, 200800250/4).

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### **Family Reunification Directive<sup>5</sup>, Council Directive 2003/86/EC**

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#### ***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.

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<sup>5</sup> Family Reunification Directive:

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



Yes. Please answer question 61A.

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

No  Yes. Please explain under which circumstances.

The Netherlands were the first country in the world where same sex marriage was acknowledged (as of 1 April 2001). Presently, no distinction is made on the basis of the same or other sex nature of the relationship involved. However, our current government plans to cancel all family reunification rights based on non-legal relationships. This will make family reunification for non-married couples (again: regardless of the same or other sex nature of the relationship - equality, no?) impossible.

In the case of a gay man from Libya an 'open relationship' did not provide sufficient ground for a violation of Article 8 ECHR (Court Amsterdam, 16 April 2009, nr. 08/8265, Council of State, 18 September 2009, 200903246/1A/1).

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## Reception Directive<sup>6</sup>

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### *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?

By other asylum seekers. We heard about incidents of harassment and sexual abuse. Secret Garden in 2010 issued a brochure "Onzichtbaar in Niemandsland, zichtbaar in Nederland" (Invisible in Nowhereland, visible in the Netherlands) in which aggression and discrimination against LGBTs in AZC's is reported.

62B) Are the authorities aware of these problems?

No  Yes. How do they react?

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

The COA (Central Organ for Reception of Asylum Seekers, Centraal Orgaan Opvang Asielzoekers) informed COC Netherlands they are not aware of these problems. There is a huge discrepancy between the individual stories Secret Garden reported and the position of the COA with respect to this issue ("there are no problems"). COC Netherlands assumes the threshold for LGBTI asylum seekers to file a complaint is too high. Recently, the Minister of Immigration and Asylum assigned the COA to carry out a research based on interviews with LGBTI asylum seekers, regarding their reception conditions in the Netherlands.

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

Possibly at a later stage asylum seekers could try to rent their own lodging, but in practice this is almost impossible, both for financial reasons and because housing permits are only granted to persons with a residence permit.

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

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**Any other issues**

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

Not specifically on asylum seekers, but on the lives of trans people in general, see the recent Human Rights Watch Report "Controlling Bodies, Denying Identities, Human Rights Violations against Trans People in the Netherlands," September 2011, on the impact of Article 28 of the Dutch Civil Code, which requires transgender people to take hormones and undergo surgery to alter their bodies and be permanently and irreversibly sterilised, before they can have their gender legally recognised on official documents.

<http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf>

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!