

FLEEING HOMOPHOBIA

QUESTIONNAIRE

European Research Project

FLEEING HOMOPHOBIA, SEEKING SAFETY IN EUROPE,

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

Introduction

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

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

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

Guidance to the questionnaire

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

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

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

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

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

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

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

Thank you very much!

Best regards,

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General

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

Krzysztof Śmiszek: 9 years of experience of heading the legal team of the Polish nation-wide LGBTI organisation, Campaign Against Homophobia. President of the Polish Society of Anti-discrimination Law, which brings together lawyers and academics interested in equality issues.
Kazimierz Bem: Ph.D. in international refugee law from the Vrije Universiteit in Amsterdam in 2007; since then working with Wouters Kluwer Poland writing commentaries on asylum and refugee court decisions, as well as on the area of human rights, including the GLBTQ issues.

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

- Our own cases in which Mr. Śmiszek's organisation is/was involved .
- Cases from other Polish NGOs dealing with refugee issues.
- Responses provided by governmental agencies responsible for refugee and asylum matters in Poland.
- press information where it was appropriate.

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 answers that we were provided with by the Polish authorities responsible for asylum matters (Office for Aliens) suggest that the number of claims based on persecution on the ground of sexual orientation/gender identity is extremely low. In the period between 2006-2010 there were only 10 cases of this type officially registered by the Office for Aliens. It is worth mentioning that this figure comes from the Office for Aliens which does not gather specific and separate statistics for LGBTI claims. Their answer is based on the ad hoc review carried out especially for the purpose of the survey project of the claims, lodged to the Office within the last few years.

We would like to point out, that from the information provided by Polish NGOs which were contacted and interviewed for the purpose of this project, the number of claims in which LGBTI issues were raised by the asylum seekers themselves was a bit higher (albeit not significantly higher). The issue of persecution on the ground of sexual orientation or gender identity was not a main reason or the only reason of lodging the claim. That would explain why the aspect of sexual orientation or gender identity was not addressed by the official authorities in a few cases. It is the opinion of Polish NGOs dealing with refugees that Polish authorities do not treat these cases seriously claiming that the information about sexual orientation of the applicants is "made up" for the purpose of the asylum procedure being successful.

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

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

From the data provided by the Office for Aliens, there were no claims lodged by lesbians. However, as the project team was informed by one of the Polish NGOs dealing with refugees issues, there was one application submitted by a lesbian woman from Belarus. This discrepancy can be explained by the fact, that in some cases the persecution on the grounds of sexual orientation or gender identity was not the main ground for lodging the claim before Polish authorities and therefore, was not taken seriously into account by the Polish Office for Aliens.

What are the main issues in these cases?

- fear of persecution performed by state actors.

- fear of persecution performed by non-state actors as family, neighbours and society in general.
- discriminatory national laws.

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

From the data provided by the national authorities almost all officially submitted cases came from gay men. The same information was received from Polish NGOs with one exception of the claim lodged by the Belarusian woman (see case described above).

What are the main issues in these cases?

- fear of persecution performed by state actors.
- fear of persecution performed by non-state actors as family, neighbours and society in general
- discriminatory national laws

c) Did you find bisexual asylum cases within these asylum claims?

No

Yes. Indicate the number of male and female cases. What are the main issues in these cases?

d) Did you find transgender asylum cases?

No

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

What are the main issues in these cases?

From the statistics provided by the Office for Aliens, there was only one case of a transgender asylum seeker in Poland. The case was filed by a Belarusian transgender person (male-to-female). The main ground in this case was the well founded fear of being persecuted because of belonging to a specific social group of transgender people in the country of origin. However, we were informed by one of the Polish NGOs dealing with refugee issues, that there was another case of a transgender person (female-to-male) from The Republic of Ingushetia in Russia. The main ground in this claim was the well founded fear of being persecuted by both state and non-state agents. The applicant was not accepted in his home town, or by his family due to his gender identity. The applicant left the country for fear of losing his life. On January 3, 2007 he submitted an application for refugee status in Poland. Due to the complexity of the case, the proceedings took several months. On 01.10.2007 the President of the Office for Aliens issued a decision granting the applicant refugee status.

e) Did you find intersex asylum cases?

No

Yes. What are the main issues in these cases?

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

1 According to the information provided by the Office for Aliens:

1 Belarus - 2 cases of gay men, 1 case of a transgender person

2 Moldova - 1 case

3 Ukraine - 2 cases

4 Algeria - 1 case

5 Uganda - 1 case

6 Pakistan - 1 case

7 Camerun - 1 case

Additional information provided by Polish NGOs dealing with refugee or LGBT issues:

8 Nigeria - 2 cases

9 Egypt - 1 case

10 Russia - 1 case

11. Rwanda - 1 case

12. Vietnam - 1 case

5) Are you aware of L,G,B,T or I people who do not apply for asylum because of fear of the consequences?

No

Yes. Please explain.

6) When asylum/ protection is granted to LGBTI asylum seekers, is this generally:

refugee status based on membership of a particular social group? (If so, what is the description of the particular social group, e.g. lesbian women in Pakistan)

From the information provided by Polish authorities, in the case of a transgender Belarusian applicant the main ground for granting refugee status was his membership of "a specific social group of transgender people".

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

subsidiary protection? On which basis?

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.

From the data provided by the Office for Aliens, there were no decisions granting any other form of protection other than refugee status. However, the project team was informed by one of the Polish NGOs, that there had been in fact one case of granting subsidiary protection on the basis of the Act of 13 June 2003 on granting protection to Aliens within the territory of the Republic of Poland (Journal of Laws of 2003, No 128, item 1176). The decision involved an applicant from Nigeria.

This discrepancy can be explained by the fact, that in some cases persecution on the grounds of sexual orientation or gender identity was not the main ground for filing an application before Polish authorities and therefore had not been addressed by the Polish Office for Aliens.

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.

The Polish Office for Aliens as well as Polish NGOs informed us that there were no (and there are no) cases of LGBTI applicants who are under the age of consent.

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.

There are no specialised NGOs supporting LGBTI asylum seekers in Poland. All the information on the cases provided in the survey were provided by Polish NGOs dealing with asylum seekers in general, or by the organisations dealing with LGBTI issues. In some cases these different NGOs were collaborating with each other in order to provide the best support to the applicant possible (e.g. psychological support, housing or legal advice). In some cases LGBTI organisations were collaborating with private legal offices who contacted these organisations in order to receive some expert knowledge on LGBTI or in order to add this to the procedure pending before national authorities.

Nationwide LGBTI organisations (mainly Campaign Against Homophobia) provide general legal support for the LGBTI community in Poland. LGBTI asylum cases are quite rare so there is no specific unit within the Legal Team who work on these issues. However, some of the lawyers working for the Campaign Against Homophobia have experience in asylum law, therefore the support provided is quite effective.

The most active Polish NGOs dealing with asylum seekers in general are:

- Helsinki Foundation for Human Rights
- Association for Legal Intervention
- Polish Humanitarian Action
- The Halina Nieć Legal Aid Centre
- Caritas
- The Rule of Law Foundation

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

Bearing in mind that the LGBTI asylum cases are quite rare in Poland there is a great need for trainings and specialised literature for lawyers dealing with these issues. Also, there is a great lack of access to information about similar cases and decisions which were taken in others countries.

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

Most of Polish NGOs dealing with asylum in general or LGBTI issues employ legal staff serving legal support to their clients.

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

No Yes. Which organisation(s)?

- no information available

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

No Yes. In what form?

There is no collaboration between Polish LGBTI organisations and UNHCR. The NGOs working on asylum issues do cooperate with UNHCR quite closely.

e) Do they have contact with the government?

No Yes. In what form?

There is no collaboration between Polish LGBTI organisations and the government on LGBTI asylum issues. The reason for this lack of collaboration is the hostility of the Government towards LGBTI issues. However, there is some cooperation between Polish LGBTI organisations and the newly established Government Plenipotary for Equal Treatment (Pełnomocnik Rządu do spraw Równego Traktowania) but the issue of LGBTI asylum has not been raised yet. The NGOs working on asylum issues do cooperate with the government to some extent.

10) Special training for NGOs

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

No Yes

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

No Yes

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

No Yes

11) Lawyers' expertise on LGBTI

a) Are there lawyers with expertise in LGBTI asylum cases?

No Yes

b) Are there networks of lawyers with expertise in LGBTI asylum cases?

No Yes. Please provide the web address of the network

12) Sometimes potential asylum seekers are not aware of the fact that sexual orientation or gender identity is a ground for asylum. Are they informed about this?

No

Yes. Who gives the information and how is such information given? (If it is given through a booklet or leaflet, please attach.)

Policy, legislation, case law

13) Specific law and/or policy

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

No

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

Until 2008 the Law on Granting Protection to Aliens on the Territory of the Republic of Poland which provides the condition of granting refugee status did not explicitly protect people who were persecuted or harassed because of their sexual orientation or gender identity from the risk of being returned home. The law was significantly amended in March 2008 in order to implement the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. According to article 13 Section 1 “An alien is granted the refugee status if owing to well-founded fear of being persecuted in his/her country of origin for reasons of race, religion, nationality, political opinion or membership of a particular social group is unable or unwilling to avail himself/herself of the protection of that country”. Article 13 Section 2 stipulates that refugee status is granted also to a minor child of a person who was granted refugee status if a child was born on Polish territory. While considering rights of homosexuals, Article 14 is the crucial one. This article lists factors that should be taken into account while the reasons for persecution are being assessed. According to Article 14 Section 2 “Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation; sexual orientation cannot be however understood to include acts considered to be criminal in accordance with Polish law”. Article 14 Section 3 stipulates that well-founded fear of being persecuted in the country of origin may exist even if someone does not possess particular features but these features are attributed to him/her by entities who commit persecutions. The law does not make any reference to persecutions caused due to gender identity, but it seems that Article 14 Section 1 may be interpreted in such a way. It

stipulates that “a group shall be considered to form a particular social group where in particular that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society and its members share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.”. The Law on Granting Protection to Aliens on the Territory of the Republic of Poland offers three types of protection: refugee status, permission for tolerated residence (zgoda na pobyt tolerowany) and subsidiary protection (ochrona uzupełniająca). Subsidiary protection was introduced by the amendment of March 2008. It is granted if a person does not fulfil conditions prescribed for the refugee status but is under risk of death sentence, execution, tortures, inhuman or degrading treatment or his/her life would be in serious risk because of an armed conflict if such a person would be returned to his/her country of origin. (FRA, Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation, report on Poland)

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.

As the project team was informed by the Office for Aliens, there are no country gender guidelines for handling asylum claims. The Polish authorities rely on UNHCR's "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (7 May 2002)

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.

In the official response from the Polish authorities the Office for Aliens stated that due to the very limited number of LGBT asylum claims, there are (so far) no specific laws or policies on LGBTIs coming from specific countries of origin. All claims are handled individually. In practice, the Office for Aliens relies on UNHCR's "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (7 May 2002).

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.

16) Did you find any references to the Yogyakarta Principles¹ and/or to UNHCR's Guidance Note on Refugee Claims Related to Sexual Orientation and Gender Identity² in decisions or case law?

No

Yes. Please specify where you found these references.

Qualification Directive³, Council Directive 2004/83/EC

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

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

In general, the applicant must put forward his/her sexual orientation or gender identity as a basis of, or the main basis of seeking refugee status. From then on, the general principles of Polish administrative procedure apply. The applicant is free to submit any evidence that supports his/her claim, while if he/she is found to be implausible the burden is on the state, to refute the claim. The opinions of doctors and medical professionals is often used to determine the truthfulness of the claim.

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?

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

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

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

There were no cases found in which such reasoning was put forward. Rather, in most cases the Office for Aliens questioned the existence of persecution as presented by the applicant rather than questioning the stated sexual orientation or gender identity.

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

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

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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)?

According to the information received from the Office for Aliens, it is suggested/recommended to the applicant that additional evidence, e.g. results of psychological tests, medical opinion from the medical doctor (sexuologist) are provided by him/her.

Decisions and/or case law. Good/bad practices

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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?

Mainly sexuologist's opinions but as it was underlined by the Office all cases are handled individually. It is worth mentioning that according to the Polish law on administrative procedure (which governs the procedural aspects of asylum and immigration law) the Office for Aliens is free in terms of evaluating all evidence during the proceedings. This can result in admitting other evidence if the Office finds they are pertinent to the case and shed additional light on its merits.

b) What does the examination include?

psychological tests

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

no information available

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

Sexuologist's opinions are treated as additional evidence to the applicant's statement.

Decisions and/or case law. Good/bad practices

no information available

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?

Psychologists, psychiatrists, sexuologists. But as it was mentioned above, the list of medical professions is not exhaustive since other medical experts' opinions could be also presented by the applicant and could be taken into account by the Polish authorities.

b) What does the examination include?

no information available

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

no information available

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

Sexuologist's opinions are treated as additional evidence to the applicant's statement.

Decisions and/or case law. Good/bad practices

Psychologists, psychiatrists, sexuologists. But as it was mentioned above, the list of medical professions is not exhaustive since other medical experts' opinions could be also presented by the applicant and could be taken into account by the Polish authorities.

22) Are explicit questions asked about sexual activities?

No

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

All cases are treated in an individual manner so it is difficult to provide general and strict YES or NO information. In some cases there were some general questions about sexual activities asked (but

to the knowledge gathered by the project team they were not very intrusive). Source of the information: Polish NGOs dealing with refugee or LGBT issues.

23) Are questions asked about stereotypical LGBTI conduct?

No

Yes. Please describe them.

no information available

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.

General information provided by Polish NGOs dealing with refugee or LGBT issues.

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

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

As the Office for Aliens informed the project team, officers who are carrying out the case have a possibility to ask the so called "Department for Information on Country of Origin" about the general situation of the LGBT community in specific countries. The abovementioned Department has access to all available sources of information on this topic. The answer provided by the Department is one of the most crucial parts of the evidence concerning the individual case in question.

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.

Two things should be born in mind:

The Polish authorities hire independent experts from time to time on an ad hoc basis to prepare reports on specific situations in specific countries. But it is worth mentioning that this is not standard practice.

From the information provided by the Office for Aliens most of the information about the countries of origin are collected and processed by the internal Department for Information on Country of Origin within the Office for Aliens. It was clearly stated by the Office for Aliens that the Department employees have not been trained yet in investigating LGBTI issues.

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

No

Yes. Could you describe this information?

The Office for Aliens did not provide us with any such information.

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

No

Yes

a) Can the expert draft a report? No Yes

b) How is the expert paid for?

The Legal counsel may present independent analysis and reports. This is a general principle of the administrative procedure in Poland, wherein the applicant is allowed to present her/his own evidence. The state organ which adjudicates the case has discretion in assessing the value of such evidence. Thus, presenting independent reports doesn't give any certainty that they will be taken into account as reliable information. Nevertheless, the practice shows that in some cases this kind of initiative made the application stronger, especially when the information was provided by an LGBT organisation which possesses expertise on the specific situation of the LGBT community in specific countries.

If the applicant decides to hire an independent expert in order to commission an independent report, it is for the applicant to pay for such expert's opinion.

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

see text above

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

Such reports are taken into consideration when adjudicating the case. As it was mentioned before, the information provided by the internal Department of the Office for Aliens is one of the most crucial parts of the evidence concerning the individual case in question. But, as the project team was informed by the Office for Aliens, each case is treated individually, and it is not just the COI that is taken into account by Polish authorities but also all possible evidence put forward by the applicant.

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

No

Yes. Please give examples.

no information available

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

No Yes. Please describe the examples.

As far as we were informed by the Office for Aliens, the lack of information on LGBTI people or lack of criminal sanctions against same-sex conduct was never treated as a sufficient ground or the only one ground to deny granting of refugee status.

33) Sometimes general COI which is not relevant for the situation of the LGBTI concerned is used as a basis for a decision (e.g. information on gay men used wrongly to assess the risk for lesbians or trans people; information on heterosexual women's status used for lesbians). Did you find examples of this?

No Yes. Please describe the examples.

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

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

No

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

As far as we were informed by the Office for Aliens, there has been one case of this type where the applicant came out only after leaving the country of origin. We were informed that during the adjudication this circumstance was taken into account but unfortunately, the project team was not informed in what manner exactly.

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

no information available

Article 6 Qualification Directive: Persecution by the state

36) Are LGBTI applicants granted asylum if in their country of origin homosexual acts and/or identity is criminalised (by explicit ‘sodomy laws’ or by other criminal law provisions)?

No. Please go to question 37.

Yes. Proceed with question 36A.

36A) Is it required that those criminal law provisions are actually enforced, or is the existence of those criminal law provisions sufficient? Please provide further information. Decisions and/or case law. Good/bad practices

The Polish authorities responsible for asylum matters officially report that such a situation is not treated any differently than a situation in which the criminalization of homosexual acts and/or identity is enforced on the ground. Thus, the situation of a "de facto tolerance" is not viewed to be detrimental to the case.

However, in one case of a Pakistani applicant the Office for Aliens denying refugee status in its reasoning stated that although in Pakistani law homosexual acts are criminalized, yet in practice, there are almost no prosecutions filed in such matters. Therefore, the authorities claimed, the situation of LGBT people is not as dangerous as it was described by the applicant.

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?

no information available.

The only information which the project team was successful in obtaining was that the applicant who had suffered persecution from non-state agents was given protection from the state in his country of origin. The project team interprets this to mean that the Polish state refused to grant the applicants any kind of international protection. Also, based on the knowledge of the project team on other refugee status applicants, such an approach is not limited to GLBTI cases, but applies to other cases as well, and has been confirmed by the Polish administrative courts who exercise judicial review in refugee cases in Poland.

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

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.

No information available.

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.

Precise data is lacking. However, The Office for Aliens stressed the importance of reporting the case of homophobic persecution to the national authorities for the outcome of the refugee procedure in Poland. The Polish authorities have consistently claimed in its case law, not restricted to GLBTI cases, that the possibility of obtaining effective protection by the authorities in the country of origin is a ground for the denial of international protection in Poland. Such an interpretation was used in two cases of Ukrainian applicants.

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

The case law of the Office for Aliens (regarding the GLBT cases) as well as the court's case law is consistent in requiring that the applicants show the impossibility or ineffectiveness of state protection. Applicants are asked first to seek protection from national authorities. Thus, there is a presumption that the state will protect the applicants. However, the applicants may be asked to put forward evidence why such a protection would be ineffective or impossible to obtain, and thus rebut the assumption. In the case of the trans person from Ingushetia, the Office took notice that the local authorities were unwilling to offer protection.

39) Do your decision makers and courts acknowledge that the existence of criminal sanctions against LGBTIs, even if not enforced, contribute to a homophobic atmosphere in which persecution by state and/ or non-state actors can flourish?

No

Yes. Could you give examples?

The Office for Aliens reports that such a scenario is not treated any differently than situations in which the homophobic law is officially enforced. Thus, if not always strengthening the claim, it does not weaken the applicant's case.

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?

There was only one case - that of a gay man from Pakistan. The Office for Aliens claimed that the applicant was able to seek protection in other parts of his country of origin and therefore refused to grant him protection in Poland.

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

The Office for Aliens claimed, that the applicant in question was able to "escape" to other parts of his country and as a result of this, protection in Poland was not granted. The wording "escape" could suggest that the real reason to relocate was to hide or at least not to live openly as a gay person. The Office in its reasoning referred also to the British Home Office report on the situation of LGBT in Pakistan where it is stated that "if he lives as homosexual discreetly there should be no reason for him to experience harm from the rest of the society". The case is from 2010.

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...)?

- death threats from religious groups/ threats from religious leaders
- rapes (in one case of the Moldovan applicant, according to the facts provided, the rape was done by the Police officers, recorded and used to blackmail the victim. One of the officers wanted to compell him to go to Turkey to work as a prostitute.
- killings of family members (information provided by the applicant from Pakistan)
- detention by the Police
- blackmails
- intimidation

- threatening with a gun
- harrasment
- physical violence
- threats regarding the applicant's partner
- forcing to start collaboration with secret services of the country of origin
- denial of access to education (In 2009 a Vietnamese gay man applied for refugee status claiming that in his country of origin he was persecuted due to his sexual orientation. He substantiated his claim stating that due to his homosexuality he was unable to continue education and to find employment. He was also denied serving in the military after the authorities made inquiries concerning his sexual orientation in his school and surroundings.)

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?

It is difficult to provide precise information and to differentiate the various forms of homophobic acts since the amount of information provided by the Polish authorities is scarce. From the official information provided by the Office for Aliens it would seem that most examples of persecution alleged by the applicants are regarded more as discrimination and social exclusion rather than as forms of persecution.

The Office for Aliens stated in its few recently issued decisions, that the following acts are not perceived as persecution and should be treated as discrimination that is an insufficient in gravity to be grounds for granting refugee status:

- intimidation caused by family members and neighbours
- low level of tolerance for transgender people
- verbal slander

The following experiences were recognized by the Office as persecution:

- physical violence
- sexual violence

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 precise information is available. In the case of the Belarusian transgender women (male-to-female) the applicant was psychologically and physically abused not only by Police officers but also by family members. The applicant raised the issue of her physical appearance which was the cause of many acts of psychological violence (also from state actors). She was also humiliated by the health care services (she was obliged to undress publicly). She was stopped by the Police many times in order to check her identity, and was also raped by the Police officers.

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.

We have not come across any incident for that kind of reasoning in the administrative decisions.

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.

In one Belarusian case of two gay men we have found out that The Office for Aliens refused to grant protection in Poland arguing that they were victims of merely a low level of tolerance and acceptance for LGBTI people in Belarus. This phenomenon, the Office claimed, does not fall under the scope of "persecution." A similar qualification was made in many of the cases the project team had the chance to review e.g. denial of access to education, health care, insults from family members were all qualified as discrimination or social exclusion, not as persecution.

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

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

No

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

In its official response the Office for Aliens answered that they don't use this kind of reasoning when deciding a case. But this statement was directly contradicted in one of the cases handled by the Office. In the case of a Pakistani gay man, the Office referred to the British Home Office report

on the situation of LGBT in Pakistan, and argued that he could relocate to another part of the country and if he lives a "discreet" life, he will not be persecuted. The irony of the decision lays in the fact, that the office used the verb "to flee" to describe the suggested internal flight alternative and existing persecution on the ground.

Article 10-1-d Qualification Directive; Article 37-38 Procedure Directive: Implementation

45) Does your law or practice recognise explicitly that people who flee because of their sexual orientation can belong to a particular social group?

No

Yes. Are there any differences between L, G and B applicants, and if so, what differences?

No differences were detected by the project team.

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

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

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

This comes from the practice of law and not from any official policy.

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

As the Office for Aliens stated, they use so called literal interpretation of the abovementioned Article.

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

No reference to the concept of gender related aspects were found in Polish legislation. In the official response from the Office for Aliens it is stated that the Office takes into account all "relevant" gender aspects in handling cases.

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

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

No

Yes. What was the reason?

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

No

Yes. What was the reason?

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

No

Yes. Please give examples.

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

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

No Yes. Please give details.

Article 20-3 Qualification Directive: Vulnerable persons

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

No

Yes. Please give details

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

No information is available whether there were any questions of this type. The project team was informed by the Office for Aliens, that there is always such a possibility for the applicant available. The project team interprets this to mean a real possibility for the applicants. A potential denial of the request would constitute a ground for appeal.

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

See the answer above.

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?

Yes. The issue of LGBTI issues is a part of general trainings. The Office for Aliens stated in its answer, that because of a low number of LGBTI applicants filing claims before Polish authorities, there have not been any separate trainings on LGBTI issues.

55B) Is the training:

- Obligatory No Yes. For whom?

no information available

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

55C) Who has access to this training?

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

no information available

55D) Are judges included in these trainings?

No Yes

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

no information available

55F) Who does the training?

no information available

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.

There is no such procedure anymore in Polish refugee law. According to art. 35 sec. 1 cases considered to be "manifestly unfounded" are to be adjudicated "on first basis", but there is no accelerated procedure as such and the law does not provide any "faster" track for such cases.

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.

Family Reunification Directive⁵, Council Directive 2003/86/EC

Article 10 Family Reunification Directive: Family members

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

No. Please go to question 62.

Yes. Please answer question 61A.

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

No Yes. Please explain under which circumstances.

Reception Directive⁶

Article 17 Reception Directive: Reception

⁵ Family Reunification Directive:

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

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

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

No. Please go to question 63.

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

62A) By whom are these problems caused?

There were no reported cases of homophobic/transphobic violence while in detention/reception centers. However, in one case of a transgender person from Ingushetia because of the potential threat of psychological or physical violence, the reception center management (in close collaboration with NGOs) decided to grant this person separate accommodation to avoid any potential problems. This information was procured from a Polish NGO and not the Office for Aliens.

62B) Are the authorities aware of these problems?

No Yes. How do they react?

The authorities are aware of potential problems which may arise when the LGBTI applicant is accommodated in reception/detention centres.

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

According to the art. 71 point 2 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws of 2003, No 128, item 1176) the applicant can be granted so called "social support" in the form, among others, of financial subsidy in order to cover his/her accommodation needs.

64) Is it possible in reception/ accommodation centres or immigration detention to be placed in an accommodation separate from people from the same country and/or religious background?

No

Yes. Are asylum seekers informed about this possibility? No Yes

Articles 17 and 15 Reception Directive: Transgender/ intersex

65) Do transgender and intersex people have the possibility to choose whether they want to be housed in a women's or men's (section of) reception/ accommodation and detention centre?

No Yes

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

a) during the asylum procedure

No Yes

b) after they are granted asylum?

No Yes

67) If your country provides the possibility to legally change a person's name and sex, does this also apply to trans/ intersex asylum seekers and trans/ intersex refugees?

No Yes

Any other issues

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

Referring to Question 65 - if cases of transsexual applicants, the management of the reception centre may grant a separate room for this person in order to assure security and to avoid any conflicts.

Referring to Question 66 - trans / intersex applicants have access to the health care system at the general level. It has to be noted, that the Polish public health care system doesn't cover specific treatment for trans people (mainly gender reassignment and other specific treatments are not refunded by the state). Therefore, specific health services are not available for trans asylum seekers.

Referring to Question 67 - since the issue in question has not been tried yet before Polish courts (the procedure of changing someone's name takes place in civil courts) it is hard to answer. From the point of view of the project team it could be possible to launch the procedure of changing the name for the person who was granted the refugee status. The problem could arise when it comes to the applicant.

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

It is worth mentioning the effective collaboration between those different NGOs dealing with asylum in general and LGBT issues in particular. The cases of LGBTI applicants are not so frequent, but if there is such an application, the applicant has the possibility to turn for specific help to national organisations.

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

Thank you!

SHORT LGBTI GLOSSARY

Age of consent

The minimum age at which a person is considered to be legally competent of consenting to sexual acts.

Bisexual

An individual who is physically, romantically and/or emotionally attracted to both men and women. Bisexuals need not have had equal sexual experience with both men and women. In fact, they need not have had any sexual experience at all to identify as bisexual.

Coming out

A lifelong process of self-acceptance. People forge a lesbian, gay, bisexual or transgender identity first to themselves and then may reveal it to others. Publicly identifying one's sexual orientation may or may not be part of coming out.

Gay

Used to describe people whose enduring physical, romantic and/or emotional attractions are to people of the same sex (e.g., *gay man*, *gay people*). Often used to describe a man who is sexually attracted to other men, but may be used to describe lesbians as well.

Gender

Refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.

Gender Identity

Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. It includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Intersex

Refers to a condition of having sexual anatomy that is not considered standard for a male or female. Intersex can be used as an umbrella term covering differences of sexual development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical. The term *intersex* is not interchangeable or a synonym for *transgender*.

Lesbian

A woman whose enduring physical, romantic and/or emotional attraction is to other women.

Sexual Orientation

Refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.

Sodomy Laws

Laws that define certain sexual acts as crimes. The precise sexual acts meant by the term sodomy are rarely spelled out in the law, but are typically understood by courts to include any sexual act deemed unnatural. Consensual homosexual acts between adults are illegal in about 70 to 80 countries in the world; in 40 of these, only male-male sex is outlawed.

Transgender

An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Transgender people may or may not decide to alter their bodies hormonally and/or surgically.