

Protecting the rights of LGBTI asylum seekers and refugees in the reform of the Common European Asylum System

A significant number of people applying for asylum in the EU are lesbian, gay, bisexual, trans or intersex (LGBTI). Some of them flee persecution unrelated to their sexual orientation or gender identity, while others are at risk of persecution precisely because they are LGBTI. In both cases, their sexual orientation, gender identity, gender expression or sex characteristics can be a ground for protection under the Refugee Convention and under EU asylum law, depending on the situation in their home country and on their case.

LGBTI asylum seekers are often at risk of additional danger during their journey and upon arrival in the country where they seek asylum, such as harassment, exclusion, sexual violence, or other forms of violence. Often but not always, they qualify as persons with special needs in terms of legal assistance, reception conditions, healthcare, etc.

Since 2004, EU asylum legislation¹ stipulates that persons persecuted because of their sexual orientation can lodge a claim for asylum in the EU. Since 2011, gender identity also has to be given due consideration when determining whether a person belongs to a particular social group under persecution. Apart from this provision of the Qualification Directive, current EU asylum legislation does not address LGBTI asylum seekers explicitly. Some Member States have already gone beyond EU legislation and provide better legal protection for LGBTI asylum seekers.

In 2016, the EC presented a number of proposals to reform the European asylum system:

1. new Qualification Regulation (COM(2016)466 final)
2. recast Reception Conditions Directive (COM(2016)465 final)
3. new Asylum Procedures Regulation (COM(2016) 467 final)
4. new Regulation on the EU Agency for Asylum (COM(2016) 271 final)
5. recast Dublin Regulation (Dublin IV) (COM(2016) 270 final)
6. new Regulation establishing a Union Resettlement Framework (COM(2016) 468 final)

With this briefing, ILGA Europe sets out how to ensure that the proposed directives and regulations will protect the rights of LGBTI asylum seekers, and respect their specific needs in terms of reception conditions, procedures and protection status.

ILGA-Europe's key demands:

- *The new Qualification Regulation, the Reception Conditions Directive and the Procedure Regulation should enhance protection, reception and procedural standards offered to people persecuted on the ground of their sexual orientation, gender identity, gender expression and sex characteristics.*

¹ First introduced by Council directive 2004/83/EC and later upheld by the new Directive 2011/95/EU in 2011.

- *Outdated or inappropriate language excluding trans and intersex people or linking LGBTI people to criminal practices should be removed.*
- *The definition of the asylum seeker's family members should be improved to clearly include same-sex partners and their families.*
- *People belonging to persecuted minorities, including LGBTI people, should not be subject to accelerated procedures, like lists of safe countries of origin, safe third countries, etc.*

Including the grounds of gender expression and sex characteristics in all proposals put forward

Currently, the Qualification and Asylum Procedures Directives mention sexual orientation and gender identity as grounds for seeking asylum or as vulnerability factors. Subsequently, many Member States adopted specific national legislation and policies covering LGBTI asylum seekers.

In order to make sure all LGBTI people are covered and protected, **ILGA-Europe calls for the inclusion of gender expression and sex characteristics as additional grounds in the relevant provisions.**

Gender expression refers to a person's ways of communicating culturally-defined traits of masculinity or femininity (or both or neither) externally through physical appearance (including clothing, accessories, hair styles, and the use of cosmetics), mannerisms, ways of speaking, and behavioural patterns in interactions with others², e.g. men dressing in female attire or women dressing in male attire (cross-dressing), who are regarded as being not sufficiently 'masculine' or 'feminine' respectively. Cross-dressers, which a numerically a large part of the trans community, are not sufficiently covered by "gender identity".

Sex characteristics refers to intersex people. Intersex persons are born with physical sex characteristics that don't fit medical or social norms for female or male bodies. The variations in sex characteristics may manifest themselves in primary characteristics such as the inner and outer genitalia, the chromosomal and hormonal structure and/or secondary characteristics such as muscle mass, hair distribution and stature. Intersex people face persecution, and are even at risk of infanticide in some countries around the world, and therefore need protection.

Several EU institutions and agencies, Member States and international organisations already broadened the scope of their work on LGBTI people's rights, in order to fully protect the fundamental rights of trans and intersex people. The most notable national law in the EU is the

² Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme. 2015. Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities. Washington, DC: Futures Group, Health Policy Project.

Gender Identity, Gender Expression and Sex Characteristics Act adopted by the Maltese Parliament on 1 April 2015.³

When it comes to asylum law, the EEAS LGBT Guidelines address the criminalisation of transgender people by legal measures, such as anti-prostitution laws, nuisance laws, and prohibition of so-called ‘cross-dressing’. Such laws may also target gender variant and transgender persons, and be used by law enforcement personnel to prosecute transgender persons on the basis of their gender identity or gender expression.⁴ The UNHCR’s LGBT Guidelines consequently and explicitly include trans and intersex people in their guidance document addressed at governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff.⁵ EASO also took up the issue of gender expression in its recent Training Module on Gender, Gender Identity and Sexual Orientation.⁶

1. The Qualification Regulation (COM (2016) 466 final)

The Qualification Directive defines minimum standards for the qualification of asylum seekers as persons in needs of international protection (refugees or beneficiaries of subsidiary international protection). The directive is legally binding in all EU Member States, except Denmark.

Since 2004, the Qualification directive explicitly includes sexual orientation, and since 2011 also gender identity, in the possible reasons for persecution.⁷

On 13 July 2016, the European Commission published a proposal that would replace the Qualification by a Regulation, directly applicable across the EU. ILGA-Europe has identified the following important issues to be raised during the legislative process.

³ See <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>.

⁴ Council of the EU, Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, Foreign Affairs Council Meeting Luxembourg, 24 June 2013, Para 16.

⁵ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/09, 23 October 2012, available at: <http://www.unhcr.org/50ae466f9.pdf>. See in particular paragraphs 9-10 and 57 and footnote 1.

⁶ See EASO’s 2015 Annual Training Report, page 48-49:

<https://www.easo.europa.eu/sites/default/files/public/EASO%20Training%20Report%202015%20FINAL.pdf>

⁷ Following the adoption of the recast Qualification Directive in 2011, ILGA-Europe published [guidelines](#) to monitor the transposition and to assess if national legislation met the European standards. The Commission itself commissioned two implementation studies in 2015, but these have still not been published at the time of writing. The information ILGA-Europe receives from LGBTI organisations working on asylum on the national level indicates that the level of implementation between Member States is very diverse, and that there exist great gaps.

Article 10 - Add gender expression and sex characteristics as reasons for persecution and delete outdated link to criminal acts

Article 10 - Reasons for persecution

“The following elements shall be taken into account when assessing the reasons for persecution:

[...]

depending on the circumstances in the country of origin, the concept ~~might~~ **shall** include a group based on a common characteristic of sexual orientation (~~a term which cannot be understood to include acts considered to be criminal in accordance with national law of the Member States~~); gender related aspects, including gender identity, **gender expression and sex characteristics**, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

ILGA-Europe calls for Article 10 to be amended in order to include the grounds of gender expression and sex characteristics to ensure full protection of all LGBTI people.

Secondly, the phrase **linking sexual orientation to acts considered criminal is out of place** as it recalls the offensive assimilations made between persons attracted to persons of the same sex on the one hand and paedophiles on the other hand, and should therefore be removed. Sexual orientation in legislation can never mean acts considered to be criminal. Moreover, the phrase has no legal added-value since the concept of sexual orientation is clearly defined in European treaties and EU law, and thus also recognised in national law. The Treaty of Maastricht for the first time enshrined an EU-wide protection against discrimination on the basis of sexual orientation in the Treaty on the Functioning of the EU in 1997. Since then, no link was ever made between sexual orientation and criminal acts neither in any of the subsequent EU Treaties nor in the numerous legislative acts based on them.

Recital 16 - Definition of family members

Recital 16

The notion of family members should take into account **family diversity**, the different particular circumstances of dependency and the special attention to be paid to the best interests of the child. It should also reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit. The notion should therefore include families formed outside the country of origin, but before their arrival on the territory of the Member State. **The notion of spouse and unmarried partner shall not discriminate based on the gender of the partners.**

Contrary to the previous directives, ‘family members’ will now only be defined in the Qualifications Regulation, with the other proposals referring to this definition in Article 2. It is important that this definition does not discriminate between different types of families, including families comprised of same-sex couples, as all EU legislation should not discriminate against any children and spouses, including those in Rainbow families.

Recital 29 - Respecting late disclosure

Recital 29

In accordance with relevant case law of the Court of Justice of the European Union, when assessing applications for international protection, the competent authorities of the Member States should use methods for the assessment of the applicant's credibility in a manner that respects the individual's rights as guaranteed by the Charter, in particular the right to human dignity and the respect for private and family life. Specifically as regards ~~homosexuality~~ **sexual orientation and gender identity**, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning ~~homosexuals and~~ **sexual orientation and gender identity**, the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices, **and the competent national authorities cannot find that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on their sexual orientation, gender identity, gender expression or sex characteristics on the first occasion given to set out the ground for persecution.**

A positive change in comparison with the former Qualification Directive is the new recital 29. This recital lists three of the four main takeaways of the recent judgment of the Court of Justice of the EU in the case of *A, B and C v Staatssecretaris van Veiligheid en Justitie*, of 2 December 2014 (prohibition of assessments based on stereotypes and prohibition of tests and questions regarding sexual practices).

However, ILGA-Europe calls for three important changes to the wording of this recital:

- a. To **replace homosexuality by sexual orientation**, as was consequently used by the Court of Justice in its own assessment of the law in that case (despite the applicants bringing up “homosexuality”). As set out above, sexual orientation is the correct legal term in EU law, starting with article 10 and article 19 of the Treaty on the Functioning of the European Union.
- b. To **add gender identity, gender expression and sex characteristics** to this paragraph. Indeed, trans and intersex people are at least as much at risk of persecution, stigma and shame as lesbian, gay and bisexual asylum seekers, and the same principles should therefore apply to them. This is demonstrated by the UNHCR’s LGBT Guidelines, which consequently and explicitly include trans and intersex people in this guidance document addressed at governments, legal

practitioners, decision makers and the judiciary, as well as UNHCR staff.⁸ EASO also took up the issue of gender identity in its recent Training Module on Gender, Gender Identity and Sexual Orientation.⁹

c. The **fourth main takeaway of the ABC judgment**, the aspect of **late disclosure**, was forgotten and should be added to this recital. For LGBTI asylum seekers, fear and stigma often lead to late disclosure of their sexual orientation, gender identity, gender expression or sex characteristics. We recommend adopting the wording of the Court of Justice to be consistent with the judgement, but also applying this principle to gender identity, gender expression and sex characteristics.¹⁰

2. The recast Reception Conditions Directive (COM (2016 465))

Reception conditions providing safety and human dignity to asylum seekers are a key aspect of a well-functioning asylum system. LGBTI asylum seekers run additional risks and have specific needs in terms of legal assistance and reception conditions.¹¹ Currently, in most Member States, they have very limited access to such services. Therefore, ILGA-Europe calls on the European Parliament and Member States to ensure that the recast of the Reception Conditions Directive ensures an improvement of the situation of asylum seekers with special reception needs, in particular LGBTI asylum seekers.

In addition to the specific points below, ILGA-Europe supports the European Council on Refugees and Exiles' (ECRE) comments on this Directive.¹² In particular their criticism of the detention of persons with special reception needs and of the procedure to identify vulnerability are of great concern to ILGA-Europe.

⁸ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/09, 23 October 2012, available at: <http://www.unhcr.org/50ae466f9.pdf>. See in particular paragraphs 9-10 and 57 and footnote 1.

⁹ See EASO's 2015 Annual Training Report, page 48-49:

<https://www.easo.europa.eu/sites/default/files/public/EASO%20Training%20Report%202015%20FINAL.pdf>

¹⁰ See the wording in *A, B and C v Staatssecretaris van Veiligheid en Justitie*, of 2 December 2014, paragraph 73: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=143957>.

¹¹ These needs are clearly demonstrated in the "Fleeing Homophobia" and the "No Safe Refuge" reports. See VU University Amsterdam, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, available at: <http://www.refworld.org/docid/4ebba7852.html> and Chaka L. Bachmann, *No Safe Refuge - Experiences of LGBT asylum seekers in detention*, Stonewall, London, October 2016, available at http://www.stonewall.org.uk/sites/default/files/no_safe_refuge.pdf.

¹² See <http://www.ecre.org/ecre-comments-on-commission-proposals-for-reform-of-the-common-european-asylum-system/>, in particular pages 14 and 19-21.

Article 2 - Including LGBTI people in definition of applicants with special reception needs

Article 2 (13)

‘applicant with special reception needs’: means ~~⊗~~ an applicant ~~⊗~~ ~~a vulnerable person, in accordance with Article 21,~~ who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive ~~⇒~~, such as applicants who are minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders, **lesbian, gay, bisexual, trans and intersex persons**, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation ~~⇐~~.

In order to ensure the full protection of LGBTI asylum seekers, they need to be added to the list of persons in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive. Indeed, due to the nature of the acts of persecution suffered by many LGBT asylum seekers, and to the level of discrimination they may face during the time their application is examined, LGBTI asylum seekers have special needs.

Article 5 - Access to information and modalities of reception conditions

Article 5 – Information

2. Member States shall ensure that the information referred to in paragraph 1 is in writing ~~⇒~~ using a standard template which shall be developed by the European Union Agency for Asylum **and shall visibly display relevant information in relation to the personal circumstances that may result in special reception needs or needs of special procedural guarantees as listed in [this Directive and the Procedure Regulation]** ~~⇐~~ and ~~z~~ in a language that the applicant understands or is reasonably supposed to understand. Where ~~⇒~~ necessary ~~⇐~~ appropriate, this information ~~may~~ ~~⇒~~ shall ~~⇐~~ also be supplied orally ~~⇒~~ and adapted to the needs of minors ~~⇐~~.

In order to make sure that LGBTI asylum seekers receive specific and relevant information regarding their special needs, this should be more clearly be foreseen in article 5 of the proposed recast Directive.

Article 17 (3) - Guaranteeing access to gender identity related healthcare needs

Article ~~18~~ 17 – Modalities for material reception conditions

[...]

3. Member States shall take into consideration gender and age-specific concerns and the situation of ~~vulnerable persons in relation to~~ applicants ~~⇒~~ with special reception needs when

providing material reception conditions. ***In this regard, Member States shall also take into consideration an applicant's gender identity. Member States shall guarantee access to sexual and reproductive health services and to trans-related healthcare needs*** ~~within the premises and accommodation centres referred to in paragraph 1(a) and (b).~~

Thanks to the increased attention in recent years for the situation of trans asylum seekers,¹³ their special needs in terms of reception conditions are more and more respected. It is equally important to include provisions that will ensure that trans applicants do not end up in accommodation centres based on mistaken assumptions regarding their gender identity. False placement, e.g. of trans women in male accommodation, accelerates the severe risk of physical, sexual and mental harassment and violence.

Secondly, reception in the context of the directive also covers health. For many trans asylum seekers access to hormone replacement treatment and mental health support is paramount to maintaining their physical well-being and emotional stability, which is crucial for the asylum procedures, interviews, etc. However, gender reassignment surgery would usually only be accessed after an asylum procedure, unless the process can be expected to last several years and the person is in a safe and stable condition

Article 17 (4) - Addressing hate crime in reception centres

Article ~~18~~ 17 – Modalities for material reception conditions

[...]

4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment ~~when providing accommodation~~ ***as well as all forms of violence committed with a bias and discriminatory motive related to the victims' personal characteristics in the sense of [the Victims' Rights Directive, article 22 (3)]*** ~~within the premises and accommodation centres referred to in paragraph 1(a) and (b).~~

Homophobia and transphobia, as all other forms of hate crimes, can arise in the context of asylum accommodation (e.g. among applicants with different ethnic, religious or political backgrounds coming from the same country where ethnic, religious or political violence is taking place). The list of characteristics in the Victims' Rights Directive is the most inclusive one, and in order to ensure consistency between EU legislation, it should also be applied here.

New Recital 32bis - Defining gender-based violence

¹³ See for instance the recent publication by TGEU, "Welcome to Stay – Building Trans Communities Inclusive of Trans Asylum Seekers and Refugees", October 2016, available at: http://tgeu.org/wp-content/uploads/2016/10/TGEU_TransAsylumBrochure_WEB.pdf.

ILGA-Europe calls for the inclusion of a new recital setting out a clear and unequivocal definition of gender-based violence from the Victims' Rights Directive¹⁴ in this Directive, since the term is mentioned in the proposal without being defined. To ensure consistency in the EU legal framework, the following should be added to the proposal:

Recital 32bis (new)

Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.

Recital 33 - Definition of family members

In order to be consistent with the proposed changes for the Qualification Regulation, the following phrase should be added to recital 33:

Recital 33

The scope of the definition of family member should reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit. The definition should therefore include families formed outside the country of origin, but before their arrival on the territory of the Member States. ***Regarding unmarried couples, the notion shall not discriminate based on the gender of the partners.***

¹⁴ Recital Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

3. The new Asylum Procedures Regulation (COM(2016) 467 final)

Article 12 - Competence of persons conducting interviews and of interpreters

Article 12 Requirements for personal interviews

[...]

6. The person conducting the interview shall be competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, age, gender, sexual orientation, gender identity, **gender expression, sex characteristics** and vulnerability. Personnel interviewing applicants shall also have acquired general knowledge of problems which could adversely affect the applicant's ability to be interviewed, such as indications that the person may have been tortured in the past.

[...]

8. An interpreter who is able to ensure appropriate communication between the applicant and the person conducting the interview shall be provided for the personal interview. **Interpreters shall be competent to adequately translate statements related to personal and general circumstances surrounding the application, including the applicant's cultural origin, age, gender, sexual orientation, gender identity, gender expression, sex characteristics and vulnerability, avoiding incorrect, stereotypical and derogatory expressions.** The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. [...]

ILGA-Europe welcomes that article 12 reiterates the Asylum Procedures Directive's provision on competence of interviewers regarding sexual orientation and gender identity. However, as in other provisions of the proposed regulation, gender expression and sex characteristics need to be added to this list.

Secondly, adequate interpretation in cases involving LGBTI people is key. Numerous LGBTI organisations working with asylum seekers report the severe problem of prejudiced, stereotypical, or even outright homophobic behaviour by interpreters, which can intimidate asylum applicants and which can have extremely negative consequences for the issue of their procedure.

Art 27, 29 and Recital 18 - Full protection of the needs of trans asylum seekers

Article 27 – Registering applications for international protection

1. The authorities responsible for receiving and registering applications for international protection shall register an application promptly, and not later than three working days from when it is made. They shall register also the following information:

- (a) the name, date of birth, gender, nationality and other personal details of the applicant, **including, where relevant, the gender identity of the applicant;**
- (b) the type and number of any identity or travel document of the applicant;
the date of the application, place where the application is made and the authority with which the application is made.
- Where the data referred to in points (a) and (b) has already been obtained by the Member States before the application is made, it shall not to be requested again.[...]

Article 29 - Documents for the applicant

[...]

2. The authorities of the Member State where the application is lodged shall, within three working days of the lodging of the application, provide the applicant with a document in his or her own name:

[...]

(g) Where the data referred to in 27(1)(a) includes an applicant's gender identity that differs from their legal gender, the document shall mention the name, gender marker and other gendered data corresponding to the gender identity of the applicant.[...]

For trans asylum seekers to be treated in a way which respects their identity, it is imperative that their gender identity, where it differs from their legal gender, is recognised during the procedure and especially during the interview. This enables interviewers, interpreters as well as other personnel to address the person correctly and thus eliminates a common source of forced outing, harassment and discrimination. Recognising the gender identity in the documents of a trans asylum seeker does not imply automatic recognition of the asylum claim. However, it contributes considerably to their safety and protects their right to privacy.

Moreover, in order to avoid situations where trans applicants end up in accommodation centres based on mistaken assumptions regarding their gender identity, the registration procedure for applications should equally be gender-sensitive.

Finally, ILGA-Europe calls for the corresponding recital about gender-sensitive applications, i.e. recital 18, to be modified in the same way:

Recital 18

With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. For this purpose, women should be given an effective opportunity to be interviewed separately from their spouse, partner or other family members. Where possible, women and girls should be provided with female interpreters and interviewers. Medical examinations on women and girls should be carried out by female

medical practitioners, in particular having regard to the fact that the applicant may have been a victim of gender-based violence. ***Where an applicant's gender identity differs from their legal gender, Member States ensure in examination and interviews respect for the gender identity of the applicant by using the corresponding name, title and gender marker. The complexity of gender-related claims, including claims related to sexual orientation, gender identity, gender expression, and sex characteristics,*** should be properly taken into account in procedures based on the concept of first country of asylum, the concept of safe third country, the concept of safe country of origin and in the notion of subsequent applications.

Article 35 - Including persecution of trans and intersex people under gender-sensitive decisions

Article 35

[...]

Decisions by the determining authority

3. In cases of applications on behalf of spouses, partners, minors or dependent adults without legal capacity, and whenever the application is based on the same grounds, the determining authority may take a single decision, covering all applicants, unless to do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity, **gender expression, sex characteristics** or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.

ILGA-Europe calls for the inclusion of gender expression and sex characteristics in the provision on gender-sensitive decisions in case of decisions about several persons from one same family.

Art 47 - Disproportionate high risk of accelerated procedures and especially safe country concepts for LGBTI people

The increasing use of accelerated and fast-track procedures (safe countries of origin, safe third countries, subsequent applications, etc.) as proposed by the European Commission and many Member States entails great risks for many asylum seekers, as cases are not assessed individually and situations of persecution might stay undetected. It entails the risk to undermine the essence of the system of international protection. This is particularly the case for asylum seekers with special needs related to their individual circumstances, such as their age, gender, disability, illness, mental disorders or consequence of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence.

Especially the controversial safe country mechanisms will have a disproportionate negative impact on LGBTI asylum seekers. Countries otherwise regarded as “safe”, such as Turkey, Russia

or states in North-Africa, might be systematically unsafe for LGBTI people.¹⁵ Such measures shift the burden of proof from the authorities to the asylum seeker and accelerate the procedure, and thus leave very little time for LGBTI asylum seekers to come forth with the real motive of their flight. This has proven very challenging to many, due to lived experiences of stigma and shame. Accelerated procedures thus entail the risk that people in need of protection are not identified, a particularly great risk in the case of asylum claims by LGBTI people.

Many LGBTI people do not dare to state their real flight motive from the outset of their procedure, because of lived stigma and shame, and because of not being aware that this can actually be a ground for protection. This is called the issue of “late disclosure”, and it is quite common for LGBTI asylum seekers.

Even though the proposed regulation provides for certain guarantees, LGBTI asylum seekers still face a high risk of falling through the cracks due to the burden of proof and the short timeframe.

In order to fully protect the asylum rights of people belonging to persecuted minorities, including LGBTI people, accelerated procedures, like lists of safe countries of origin, safe third countries, etc need to be rejected. However, if the co-legislators maintain the concept, all people belonging to persecuted minorities, including LGBTI people, should be excluded from its application.

As a very minimum, article 47 on safe countries of origin should be amended as following:

Article 47 – The concept of safe country of origin

[...]

3. In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

[...]

(c) the absence of expulsion, removal or extradition of own citizens to third countries where, inter alia, there is a serious risk that they would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where their lives or freedom would be threatened on account of their race, religion, nationality, sexual orientation, **gender identity, gender expression, sex characteristics**, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another third country;

¹⁵ See for example the list of countries criminalising consenting same-sex sexual acts in ILGA, *State-Sponsored Homophobia - A World Survey of Laws: criminalisation, protection and recognition of same-sex love*, May 2015, page 25 ff. http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf; or continuously high murder rates of trans people in Turkey: Transgender Europe, Trans Murder Monitoring Project, <http://transrespect.org/en/map/trans-murder-monitoring/>

Recital 15 Ensure a fully inclusive definition of special procedural guarantees

Recital 15

Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, **gender expression, sex characteristics, disability**, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence. It is necessary to systematically assess whether an individual applicant is in need of special procedural guarantees and identify those applicants as early as possible from the moment an application is made and before a decision is taken.

During the previous reform of the Asylum Procedures Directive, an open definition of “applicant in need of special procedural guarantees” was adopted, which is reiterated in the current proposal. In the recital corresponding to this definition, the previous directive referred to sexual orientation and gender identity. Since then, there have been several reports highlighting the human rights violations intersex people face. It is time to recognise this and ensure the full protection of LGBTI people in asylum legislation by including **gender expression and sex characteristics throughout the text**.

New Recital 18bis Defining gender-based violence

In order to ensure that the regulation is fully in line with other EU legislation, the definition of gender-based violence of the EU Victims’ Rights Directive¹⁶ should be added to the recitals of this regulation.

Recital 18bis new

Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called ‘honour crimes’. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.

¹⁶ See Recital 17 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

4. Relevant provisions in other proposals

Proposal for an EU Agency for Asylum (COM(2016) 271 final)

In the proposed regulation on the EU Asylum Agency, there are numerous references to “vulnerable groups” and “vulnerable persons”, but no definition of vulnerability is provided. Such a definition should be inserted in the proposal and should include vulnerability based on sexual orientation, gender identity, gender expression and sex characteristics.

Recast Dublin Regulation (Dublin IV) (COM(2016) 270 final)

ILGA-Europe is very concerned about the definition of family members in the proposed recast of the Dublin Regulation¹⁷. As also pointed out by ECRE in its comments on this proposal, this definition leaves too much margin of discretion to Member States in relation to unmarried partners in a stable relationship and same-sex partners. We fully support the analysis and the subsequent recommendations made by ECRE (emphasis added):

*“Such discretion may create legal tension with the case law of the ECtHR as there is no static and pre-determined family model for the purpose of family life under Article 8 ECHR or Article 7 of the Charter. The ECtHR supports an expansive interpretation of family based on actual ties rather than legal relationships. The existence of family links should be examined cautiously, as the CJEU jurisprudence indicates that Member States must consider each case on its merits. **Even where national legislation does not offer equal rights to unmarried couples in a stable relationship or to same sex partners, national authorities cannot apply a blanket exclusion and should, by way of an individualised assessment, take into account all relevant factors, in line with the right to dignity and to respect of private and family life guaranteed by Articles 1 and 7 of the Charter.**”*

Regulation establishing a Union Resettlement Framework (COM(2016) 468 final)

Since the summer of 2015, more and more reports have emerged of LGBTI asylum seekers and refugees trapped in countries where they are particularly at risk, such as Turkey, Lebanon, Jordan, etc. Countries like the U.S., the U.K. and Canada have thus decided to resettle LGBTI refugees from that region. However, little to none EU Member States have followed suit. Therefore, ILGA-Europe calls for LGBTI people to be added to the list of vulnerable persons in the proposed Regulation on an EU Resettlement Framework, under article 5 (b) (i).

¹⁷ Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, abbreviated as Dublin IV.