

Papers

## Out & Proud? LGBTI asylum in Europe Conference

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### "Late disclosure" in Spain

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#### 1. INTRODUCTION

The object of this paper is to identify and analyse, as a means to change, the interpretation and application of current Spanish legislation in the area of International Protection, and specifically assessment of the testimony of asylum seekers in case of "late disclosure" of LGBTI reasons.

To do so, an examination of a number of "late disclosure" cases will be carried out focusing not only on the criteria of Spanish case officers in the administrative phase, but also the case law of the Spanish Tribunals. This will take us firstly, to the informal and subjective standards established by decision makers so as to determine the credibility and veracity of the testimony of "late disclosure" asylum seekers that allege LGBTI reasons for fleeing after the first asylum application; secondly, the reasons that can cause "late disclosure" and the consequences of this in our country, Spain; thirdly, we will share some conclusions of our study, noting some dynamics that concern us from a human rights and gender perspective, and several good practices and guidelines to be considered as legally guaranteed references.

#### 2. THEORETICAL FRAMEWORK

##### I) Concepts to consider:

##### DEFINITION OF REFUGEE

The 1951 Refugee Convention adopted (in Article 1.A.2) the following definition of "refugee" to apply to *any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or*

*political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

#### DEFINITION OF "late disclosure"

This refers to the cases when LGBTI asylum seekers reveal their sexual orientation or gender identity after the first interview. This can happen:

- a) In the reexamination of a rejected application at Border Control (after receiving a “non-admissibility” decision).
- b) In the investigation phase, through an additional written pleading.
- c) In the second interview convened by the Asylum Office of Spain for either territory or border applications in the administrative investigation phase.
- d) In a new application after denial of the first one by the Asylum Office of Spain or by the Spanish Courts.

#### LGBTI ASYLUM IN SPAIN

Under the Spanish Asylum Law 12/2009, asylum seekers can apply for International Protection for gender and sexual orientation, as Article 3 expressly establishes:

“Refugee status is recognized for any person who, due to well-founded fears of being persecuted for reasons of race, religion, nationality, political opinions, membership of a particular social group, gender or sexual orientation, is outside the country of his or her nationality and can not, or because of such fears, does not wish to avail himself of the protection of that country, or to the stateless person who, lacking nationality and being outside the country where he had his habitual residence for the same reasons, can not, or Because of these fears, does not want to return to it, and is not involved in any of the causes of exclusion of article 8 or causes of denial or revocation of article 9.”

Every case has to be assessed taking into account the objective “well-foundedness” element of the definition (the available information on the country of origin) and the subjective element of “fear” in the definition. This second discretionary criteria can generate inequality as we will present hereinafter: *The credibility analysis is particularly*

*necessary in the applications based on sexual orientation or related to questions of gender, given that the decision is made mainly based on the credibility of the applicant.*<sup>1</sup>

## **II) Regulations: International Law, EU regulation, Spanish domestic Law**

The 1951 Refugee Convention is the key legal document on International Protection. It establishes the definition of a refugee person in its article 1. The Convention has been subject to only one amendment in the form of a 1967 Protocol. Spain has ratified the Convention and its protocol.

The Spanish Constitution states that the terms under which citizens from other countries and stateless persons may enjoy the right to asylum in Spain will be determined by law. The Law 12/2009 Regulating the Right of Asylum and Subsidiary Protection (LRASP)<sup>2</sup> was adopted to provide the legal framework applicable to refugees and stateless persons who seek asylum in Spain. The Law applies to those who qualify as refugees under the definition provided by the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol.[4] The regulation of the LRASP is still pending congressional approval. Therefore, Royal Decree 203/1995 enacting the regulation implementing the previous legislation on refugees is still applicable in so far as it does not contradict the current LRASP.

As a totally novel and unprecedented aspect, in the framework of the Community countries, the former Spanish Asylum Law has been expanded in terms of persecution for reasons of belonging to a particular social group, considering for this purpose, persecution based on gender or sexual orientation, contained in the definition of refugee. All derived from the interpretation of the norms, both national and international, carried out by the Spanish Courts of Justice. This turned out to be a legal innovation in the field of European legislation.

Concerning European regulation on International Protection, the current Qualification Directive of 2011<sup>3</sup> amends 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.

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1 Study of ASYLUM IN SPAIN International Protection and Reception System Resources Madrid, June 2016. Spanish Ombudsman: [https://www.defensordelpueblo.es/wp-content/uploads/2016/07/Asylum\\_in\\_Spain.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2016/07/Asylum_in_Spain.pdf)

2 Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria.

3 Directive 2011/95 EU of the European Parliament and of the Council of 13 December 2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>

Moreover, the Asylum Procedures Directive (recast)<sup>4</sup> creates a coherent system that ensures that decisions on applications for international protection are taken more efficiently and more fairly. It repealed the Council Directive 2005/85/CE which established minimum standards on procedures in Member States for granting and withdrawing refugee status.

We should mention several relevant documents in terms of sexual orientation asylum claims:

- Yogyakarta principles, 2006.
- Fleeing homophobia report, 2011.
- Good practices: related to LGBTI Asylum Applicants in Europe, ILGA, 2011.
- Asylum Policy instruction: Sexual orientation in asylum claims, August 2016, UK Home Office.

### **III) International Protection procedure in Spain.**

Applications for international protection in Spain may be presented in person (or through a representative in the case of legal or physical incapacitation), either in the Spanish territory or at the border. The applicant may file the international protection claim in the following places:

- 1) On Spanish territory: at the Asylum Office of Spain, in any of the Foreign Offices of the autonomous communities, or at Police Stations.
- 2) Entry points at Border Control.

#### 1) Application Procedure on Spanish territory

The application must include all personal information and any documents or evidence supporting the case. Once the application is filed, the applicant must remain in Spain until the application is decided on. He/she will have access to legal aid and an interpreter in his or her language, will have his or her application notified to the UNHCR, will have any return or extradition process halted until a final decision is reached, has access to his or her file at any time, and has the right to receive health care and social services.

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<sup>4</sup> Directive 2013/ 32 EU of the European Parliament and of the Council of 26 June 2013, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

The applicant will be required to cooperate with the Spanish authorities, submit any information in support of his or her claim, submit his or her fingerprints, report his or her domicile in Spain and any change thereof, and appear before the competent authorities upon request.

The Asylum Office of Spain may reject any application for international protection if Spain does not have jurisdiction to process the petition in accordance with international agreements; when the application does not meet the legal requirements for its processing; when the applicant already has refugee status in another state; when the applicant has come from a safe third country; when the application is a resubmission of a previous one which was already denied; and when the applicant is a national of another EU country.

The applicant must be notified of a rejection of his or her application within a maximum of one month. If there is no response within this time, it is understood that the admission of the application petition has been accepted and the applicant may remain in Spain while a final decision is reached.

2) Accelerated Procedure at the Border, such as the applications submitted at international airports, Ceuta and Melilla hotspot, and detention centers for migrants.

If the application is submitted at the airport (other borders have longer deadlines), because the applicant does not meet the necessary requirements to enter Spain, the Ministry of the Interior has four days to decide on the application. If the application is admitted the applicant may remain in Spain. If the application is rejected, the decision may be subject to reexamination, which must be filed within two days of being informed of “non-admittance” and must be decided by the Ministry of Interior within two days of the review request. In this application procedure, the asylum seeker has legal advice provided by specialized NGOs or free legal aid: the lawyer will join the first interview and after that, the applicant will have the opportunity to talk to her/him.

The application could be rejected at the Border for these reasons:

-The application exclusively raises issues which are not relevant to the examination of the requirements for the recognition of refugee status or the granting of subsidiary protection;

-The applicant has provided inconsistent, contradictory, unreasonable, insufficient, or inconsistent information on his country of origin or habitual residence if he is stateless, in such a way as to make it clear that his request is unfounded because there is no well-founded fear of being persecuted or suffering serious harm.

The application Procedure in Spanish Embassies and Consulates does not apply due to the lack of rules for implementation.

### **3. METHODOLOGY**

We have used primary documentary sources that have not been analyzed nor studied until now: Asylum Office of Spain resolutions and case law of the Spanish Tribunals.

To do so, we have selected two cases, that will help us to study the "late disclosure" phenomenon in the administrative and judicial case. Those two cases are based on two asylum applications of two asylum-seekers from Senegal and Cameroon.

At the same time, we have included different examples of diverse procedures related to "late disclosure" and sexual orientation asylum-claims in order to gain a bigger picture of the Spanish administrative and judicial authorities' interpretation of this matter.

As we have not been able to access the judicial appeal (recurso contencioso-administrativo) presented by the asylum-seekers lawyer, we would like to note that our analysis lacks an important part of the judicial proceeding.

Finally, as fieldwork, we have held a meeting with sixteen asylum seekers and members of the LGBTI group of a migration NGO called "Merced Migraciones"<sup>5</sup>.

### **4. CASE STUDIES**

#### **CAMEROON CASE:**

##### **Administrative proceeding**

Philippe (fictitious name) arrived to Spain in May 2010 and applied for international protection in June 2010 at Spanish territory, as a citizen of Chad. That request was rejected in October 2010 because the application raised issues which were not relevant to the examination of the requirements for the recognition of refugee status or the granting of subsidiary protection, and because the description of the facts that made him flee from his country of origin was contradictory and gave inconsistent information on this country.

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<sup>5</sup> <http://www.lamercedmigraciones.org/>

Philippe reports a second application before the Asylum Office of Spain in November 2011, attaching a hand letter in which he describes the persecution he had suffered based on his sexual orientation, a circumstance which was not revealed before. He explains he kept his homosexuality secret until the age of 27, although friends and neighbors already suspected it because they saw many boys going to his room. His family found out in 2008, when he started dating a boy. They used to go to a hotel and one day they got caught by surprise by the receptionist, who called the Police. They got arrested and, after paying bail, they were released. Philippe's family threw him out of the house; he moved to the capital and then fled the country.

One year later, the Asylum Office of Spain issued a second denial, deciding it was not necessary to make a new interview and stated the lack of credibility of his application for the following reasons:

1) The two applications are radically different and they seem to be two asylum seekers instead of one. The fact that he does not explain the reason of the absence of identity accreditation is one of the causes.

2) The reasoning of the judgments of September 19, 2007 and July 3, 2007 of the National Court (Audiencia Nacional), indicate that "the strong discrimination suffered by certain social groups can not be considered a persecution of the entity sufficient to give rise to asylum", there has to be a persecution for that reason.

3) The case officer of the Asylum Office of Spain thinks that it is strange: "that a six year old boy can discover his homosexuality"; that the asylum seeker declared he had hidden his sexual orientation but at the same time "it was public and notorious because in the neighborhood they saw boys entering in his room"; and that he does not talk about his internal and external problems in his coming out process.

4) The administrative resolution highlights the "sexual orientation asylum seeker's clichés that come from sub-Saharan countries":

- The reduction of homosexuality to same sex sexual relations, ignoring feelings and affection.
- The way they all get caught by a receptionist or by a neighbour while they are having sex.
- The partner disappears from the story (he does not know where and how he is after he flees the country).

## **Judicial proceeding**

After the administrative study by the Asylum Office of Spain, which decided to deny asylum to the asylum-seeker, Philippe, the Spanish National High Court (Audiencia Nacional) studied the appeal of the administrative resolution. The asylum seeker brought an appeal to the National High Court (recurso contencioso-administrativo).

The court studies the scope of the evidence through relevant case-law and significant sentences by the Spanish Supreme Court (Tribunal Supremo).

What concerns the scope of the evidence; the court establishes the way in which the administration shall act according to the legal system. Among the case-law mentioned we need to highlight:

*“The examination and appreciation of the circumstances that determine the protection should not be made with restrictive criteria, under penalty of making the proof of the same difficult, if not impossible, reason why the rational conviction of the reality of such circumstances should be sufficient in order to obtain the intended declaration, which is included in the article 8 Law under the expression “sufficient evidence”.”*

Moreover, it mentions two sentences of the Spanish Supreme Court in terms of the scope of the evidence (STS de 19 de junio de 1989; STS, Sala Tercera de 16 de febrero de 2009)

As a consequence, the National Court, under its rational conviction, does not consider the demands of the appeal on the denial for the following reasons:

- The appellant's account does not state that he has been persecuted by authorities in his country. It only relates an incident and how he decided to leave his country once his he was socially rejected due to his “sexual orientation”.
- Applicant did not apply for protection in a third country: He passed by Cameroon, Nigeria, Benin, Burkina Faso, Mali, Algeria and Morocco.
- Delay in applying for asylum: following Philippe’s story, Philippe arrived to Spain six months before applying for International Protection.

- Asylum cannot be granted based on sexual orientation alone. The applicant must be facing certain persecution. As with other reasons for granting asylum, there must be a minimum of evidence.
- A “common story” of asylum applications: the high court reproduces arguments from the administrative study, claiming the reasons mentioned by the asylum seeker falls into a “common story” of asylum applications by Cameroon citizens which argue sexual orientation persecution.
- Serious doubts about his identity: inconsistency of the appellant report since there has been an expulsion procedure under Spanish Aliens Law with a different identity. This, together with the fact that he did not provide documentation, justifies the very serious doubts about his identity as well as the reality of his story and his statements.

### SENEGALESE CASE

#### **Administrative proceeding on admission to procedure**

Rogers arrives to Spain in January 2006 and applies for international protection on the 16<sup>th</sup> of November 2011 reporting that: he was attacked by his family when they found out that he had accepted money in exchange for having sex with a male tourist.

His first application is denied by the Asylum Office of Spain on the 3<sup>rd</sup> of May 2012.

The 2<sup>nd</sup> of July 2012 Rogers applies for asylum for the second time confirming the story of his first application and revealing his homosexuality. He explains that when he was 20, his parents wanted him to marry a woman but he refused to. He gives more information about the incident in which he prostitutes himself with a white tourist male from United States and gets caught by a neighbor. After that, his family hits him and he runs away. He has been told that his father committed suicide with a weapon because of the shame of having a son that had had sex with a same sex person and earned money for it.

In his 20<sup>th</sup> of July 2012 report, UNHCR proposes a new study of the case for the following reasons:

- Although it is a second application and the first was rejected, in the present application the asylum seeker refers to aspects that were not revealed in the previous one. Thus, the new allegations indicate that the applicant is homosexual

- and that his parents wanted to force him to marry. He adds that his father committed suicide after learning of his son's sexual orientation.
- It also refers to the reports provided by Rogers and the country of origin information that proves Senegal forbids and prosecutes homosexual acts.
  - Considers that Article 20 (1) (e) is not applicable because the application is not identical to the first one.

On the 13<sup>th</sup> of July of 2012 Rogers files a writ before the Ministry of the Interior in order to develop the statements.

On the 18<sup>th</sup> of July 2012 Rogers presents two reports before the Asylum Office:

1) A report of the NGO Rescate in which the psychologist exposes Roger's fear of discrimination, homophobia, rejection and social isolation, and how adaptive behaviour helps him to survive in any environment. He explains the reasons why he refused to reveal his sexual orientation in the first international protection application: *I did not know if I could tell this there, if the Government supports you. In my country the Government would not support you, in my country you can not talk about this issue and I did not know if I could have problems here.* Additionally, according to the psychologist, the lack of information about the procedure, the confidentiality and the fear of speaking in front of an African interpreter, increased his distrust.

2) A psychiatric report of the public Hospital Doce de Octubre where he is medically treated for anxiety symptoms.

On the 23<sup>rd</sup> of July 2012 the Asylum Office rejects his application on the basis of:

- The interpretation of Article 20.1.e) of the Spanish Asylum Law, considering the second application as a reiteration of the one filed in 2011 "...because there is no substantial change from what was alleged then", "being pre-existing circumstances to his request that can not be considered as new circumstances".
- The case officer argues that "having had occasion to plead this homosexuality on which this second request is based and not having done so, there being no justified reason for this since he was already alleging a homosexual relationship in exchange for money. Thus, this can not be considered a new circumstance".
- The Asylum Office considers it very surprising that the psychiatric and psychological reports are being provided now, taking into account that he has lived in Spain for six years without receiving treatment when he arrived here.

The Ministry of the Interior, under the proposal of the Asylum Office of Spain, may, by means of a reasoned decision, refuse to admit applications when: [Spanish Asylum Law Article 20 1 e)] *the requesting person has repeated an application already denied in Spain or submitted a new application with other personal data, provided that no new circumstances relevant to the particular conditions or situation of the country of origin or habitual residence of the person concerned;*

### **Judicial proceeding on admission to procedure**

As we said before, in the administrative proceeding explanation of the case at hand, an appeal was brought to the Spanish Administrative Court<sup>6</sup> (Juzgado Contencioso-Administrativo) in order to argue admittance of the asylum application. The Administrative Court analyses article 20.1 e) of Law 12/2009 Regulating the Right of Asylum and Subsidiary Protection (LRASP). This article establishes the legal procedure on the admissibility of “second asylum applications”. It is needed to present new relevant circumstances on personal conditions or situation of the country of origin or habitual residence of the person concerned. We will not go into details, as this article and the specific circumstances of the case studied were analysed above.

On this matter, the Administrative Court coincides with the Asylum Office assessment when it comes to evaluating the new circumstances presented in the new asylum application. It assesses that the new asylum application is a reiteration of the previous one. Since the pieces of evidence added to the dossier (psychological and psychiatric reports; additional allegations) are not relevant enough to prove new circumstances.

It should be underlined that the Administrative Court claims the first asylum application, which was already denied, is based on homosexuality reasons. When the reality is that Rogers did not recognize he was homosexual. He just alleged he suffered a persecution due to having sex with an American man for money.

Thus, the Administrative Court assessment is to deny admittance to study the second asylum application.

Then, Rogers’s legal representation brings an appeal to the Spanish National High Court (Audiencia Nacional). This Court analyses whether the new personal information added to the second application should be consider a reiteration of the previous application or if it is a new circumstance that justifies a new Asylum Office assessment.

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<sup>6</sup> Juzgado Central Contencioso Administrativo. Procedimiento abreviado 0000992/2012

According to Directive 2005/85 CE, of 1<sup>st</sup> December (no longer in force), 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: *"Member States may consider an application for asylum to be inadmissible ... if ... the applicant has submitted an identical application following a final decision"*. Spanish domestic Law regulates this under article 20.1 e) LRASP.

Several case-laws of the Spanish National High Court (SAN (4<sup>a</sup>) the 18<sup>th</sup> May and 18<sup>th</sup> June of 2014 (Rec.41 y 44/2014)) assert *"The existence of an earlier denial resolution transfers to the requesting party the burden of pleading and, where appropriate, at least proving at least that there has been a relevant change in the circumstances of the country or in its personal situation or new circumstances. This is not necessarily identified with the contribution of data or antecedents that previously could not have been invoked"*.

The National High Court in this case claims:

*"The rule has an open texture and therefore allows for allegations of existing facts even prior to the first application, provided that the reasons for which the new facts could not be invoked or justified were reasonably justified. Consequently, there is no preclusion in the allegation of "new relevant circumstances", which may be invoked, even when they were prior to the previous request, and the reasons for which the allegation could not previously have been made."*

In contrast with the assessment of the Asylum Office and Administrative Court, this gives significant value to the added reports, pointing out fear of the negative consequences of manifesting his sexual orientation, as well as the feeling of shame as reasons that may justify Rogers's concealment of his sexual orientation in his first request.

Therefore, the National High Court holds, on 4<sup>th</sup> March 2015, that there is a new relevant circumstance which justifies the admissibility to study this asylum application<sup>7</sup>. The Court refers to the CJEU sentence of 7<sup>th</sup> November 2013 (C-199/12 y C-201/12).

### **Administrative proceeding on granting asylum**

On the 7<sup>th</sup> of October 2015, Rogers submits a writ explaining in more detail the way he discovered his homosexuality.

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<sup>7</sup> Sentencia de la Audiencia Nacional: Sala de lo Contencioso, 1075/2015, N° de recurso 94/2014.

On the 1<sup>st</sup> of April 2016, the applicant presents a writ explaining all the details of the persecution story.

The Asylum Office of Spain interviews the asylum seeker on the 25<sup>th</sup> of August 2016 in order to gain more information: the psycho-social report made by the LGBTI program of the Social Services of Madrid where the traumas of his sexual orientation are assessed as consistent and plausible.

On the 21<sup>st</sup> of September 2016, the Asylum Office of Spain gives refugee status to Rogers, indicating that: *Although the applicant has not suffered any persecution by his authorities, of the set of declarations and especially those relating to his residence in Spain, there are factors that give credibility to his request for international protection because of his sexual orientation and, therefore, even if he has not been persecuted by his authorities, he could be persecuted in Senegal because he can not freely express his sexuality.*

## 5. MEMORANDUM

We would like to enumerate some **reasons** that can cause "late disclosure":

- Context of the first interview at the border and on the territory: The formalization of the claim occurs in a place where there is no privacy. Many times, asylum seekers are forced to explain their persecution story in big rooms where other interviews are taking place at the same time.

- Language barriers: sometimes interpreters are homophobic, or the asylum seeker is afraid or ashamed of telling his/her story to a fellow citizen who is interpreting in the interview. Both interviewers and interpreters do not always make an effort to provide an open, reassuring, non-judgmental and non-biased environment to create an atmosphere of trust.

- Applicant's lack of knowledge of the importance of certain data: at the border (airports; Ceuta and Melilla; Detention Centers), the first time an asylum seeker talks to a lawyer is during the asylum claim interview. The lawyer does not have the right to see the applicant before the formalization of the asylum claim.

- Fear and distrust of applicants toward authorities of Member States: authorities of the applicant's country of origin may be the agents of this persecution as a result of sexual orientation. Authorities of Member States could be seen in the same way as those from

the applicant's country of origin.

- Lack of knowledge and lack of empathy of the interviewers and decision makers: We have noted that in some cases, decision makers had confused prostitution with sexual orientation as in the Senegalese case above; or use terms like "homosexual condition" or "sexual alternative" to discuss gender and sexual identity issues.

As the Spanish Ombudsman claims: "It is indispensable that they be given training prior to beginning their work regarding interviewing techniques, techniques for an effective credibility assessment and training for dealing with case files on LGTB or gender-related issues"<sup>8</sup>

- Internalized homophobia: applicants who have been subjected to persecution as a result of their sexual orientation may have internalized their society's homophobia and thus denied their sexual orientation to themselves. Moreover, applicants may also still be in the process of coming to terms with their own identity and be reluctant or unable to openly express their sexual orientation.

- Applicant's lack of information about the procedure: with the exception of border proceeding, having a lawyer present is only mandatory in judicial proceeding, not in administrative proceedings.

- Lack of specialized Tribunals: (see "Guidelines").

- "Typical claim" phenomenon: so often traffickers or persons who facilitated an applicant's journey provide him/her with a story for his/her claim. This makes certain asylum claims a "typical claim"; for example, a Cameroon applicant claiming persecution based on sexual orientation reasons because he "has been caught" by his uncle (or the receptionist of the hotel/ or the neighbour) while he was having sex with a person of the same sex. As a consequence, the credibility assessment becomes more and more strict. This issue has been taken into account in the judicial proceeding of the Cameroon case.

### **Consequences:**

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<sup>8</sup> Study of ASYLUM IN SPAIN International Protection and Reception System Resources Madrid, June 2016. Spanish Ombudsman, available: [https://www.defensordelpueblo.es/wp-content/uploads/2016/07/Asylum\\_in-\\_Spain.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2016/07/Asylum_in-_Spain.pdf)

- Lack of credibility based on stereotypical images of LGBTI and personal and emotional judgments:

*“Credibility is a way by which the interviewer is able to express his ignorance of the world. What he finds incredible is what surprises him.”*

The assessment of the testimony of the claimant is, in most of the cases, the single basis the asylum seeker can build his application on, risking being judged with preconceptions by decision makers, who find the story plausible or not depending on how it fits in their narrow conception of LGBTI people (appearance, way of expressing him/herself, determine coming out experience, etc). As a result, many LGBTI asylum seekers might feel judged due to continuously doubting behaviour of the case officers and judges, who do not believe their persecution based on LGBTI reasons.

As Zsolt Bobis says in his paper “You are not what you ought to be; Credibility Assessment in Sexuality-Based Asylum Cases”: “decision-makers can easily *exclude outsiders’ stories* if those are in tension with their in-built preconceptions and biases about LGBT people.”

Decision makers and interviewers expect to hear LGBTI love stories that ignore the fact that oppressive regimes make same sex relationships find their expression merely through sexual acts.

The invisibility of bisexuality usually makes decision-makers not believe the persecution story.

It is important to note, sexual orientation is about a person’s identity, i.e. about “profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”. It is not a question of whether or not that identity is manifested through acts.

- Lack of homogenisation of the criteria:

The Asylum Office of Spain and Spanish Tribunals might ignore European Court of Justice case law (e.g. A, B and C vs. Staatssecretaris van Veiligheid en Justitie and X, Y, and Z vs, Minister voor Immigratie in Asiel), so there is no unified interpretation of how to assess "late disclosure" cases. As a consequence, each case-officer follows his/her own understanding of "late disclosure".

- Risk of "refoulement":

The fact that decision-makers do not take "late disclosure" into account; can mean the rejection and deportation of the asylum seeker who did not come out during the first interview at the border.

The Spanish Commission for Aid to Refugees (CEAR) <sup>9</sup>states in one of the gender guidelines that it has developed:

“The ban on sending back refugees is included in article 33.1 of the Geneva Convention as a vital guarantee of the exercise of the right to asylum. However it is also a basic element in the customary ban on torture and cruel, inhuman or degrading treatment or punishment. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (art.3) states that *no one shall be subject to torture or inhuman or degrading treatment or punishment*, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3.1) forbids the States party from expelling, sending back or extraditing anyone to another” state *whenever there are justified reasons to believe that they would be in danger of being subjected to torture*.

- Lack of exhaustiveness in terms of Country of Origin Information:

Case-officers should manage accurate information on Country of Origin or place of habitual residence in order to study the dossier properly.

- Lack of background awareness:

Case-officers might not take into consideration the asylum-seeker’s background (education, cross-cultural communication, family context, practices of authorities from the country of origin, etc) in order to conclude an asylum request.

However, the Procedural Directive 2013/32/ EU<sup>10</sup> provides four points of special importance for LGBTI applications:

1. Requires the Member States to adopt identification mechanisms for vulnerable persons, including those targeted on grounds of their sexual orientation or gender identity.
2. Establishes as mandatory the personal interview. In this personal interview it is necessary:
  - carried out under conditions necessary to enable applicants to present the reason for persecution for which they are applying for asylum in a comprehensive manner.

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<sup>9</sup> *Guía en asilo y género, CEAR Euskadi: <https://cear-euskadi.org/guia/en/asilo-y-genero-2/>*

<sup>10</sup> *<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0032>*

-that the interviewer takes into account the personal or general circumstances of the application, including cultural background, gender, sexual orientation, gender identity or vulnerability of the applicant.

3. Provides for a specific guarantee in case of denial of international protection of a LGBT person: it is required that the resolution is always individualized (even in cases where the applicants are dependent or relatives of one another) and is properly motivated.

4. Regulates the minimum criteria on the use of medical evidence to prove the credibility of the report:

*"1. The willfulness and free consent of the applicant is compulsory. If the applicant refuses to carry out the medical examination, such conduct can not substantiate any evidence or affect the grant or refusal of international protection.*

*2. Absolute respect for the dignity of the individual and his fundamental rights, such as the right to physical and psychological integrity or the right to privacy. In addition, medical testing should be as invasive as possible.*

*3. Medical professional qualification. Medical examination must be performed by qualified medical professionals who can guarantee the reliability of the result.*

*4. The gratuity of the medical test. Unless the applicant wishes to take the examination with other professionals or at another time to the one indicated by the competent authorities, the receiving State shall bear the costs of the medical examination."*

As a result of the lack of background awareness, case officers or judges might make stereotypical assumptions.

- Intersectionality:

The identities that can intersect and are usually ignored by interviewers and decision-makers include: gender, race, social class, ethnicity, nationality, sexual orientation, religion, age, mental disability, physical disability, mental illness, and physical illness as well as other forms of identity. When these diverse identities intersect, they create a whole that is different from the component identities. For instance: it is not the same to be homosexual than to be homosexual, part of an ethnic minority, a woman, and have some functional diversity.

- Lack of awareness of psychological consequences of his/her migration process: disorientation, anxiety, fear and trauma among others:

*"Last year, more than 1.4 million people applied for asylum in Europe, mainly in Germany. More than 10 percent have undergone permanent changes in their personalities due to terrible experiences in areas devastated by the war such as Syria,*

*Iraq and Eritrea. Half of the Syrian refugees have mental health problems. The noxious nature of social stress is highlighted in a study conducted at the University of Maastricht, showing that social exclusion increases the risk of psychosis by changing the sensitivity of the brain to the neurotransmitter dopamine. Another finding in a series of studies, which contradicts malicious clichés, is that few immigrants and refugees with mental illnesses become violent.”<sup>11</sup>*

For some people, the need to avoid disclosure of past experiences, whether for personal or cultural reasons, will be a major motivation.

- Lack of evidence:

Spanish case-law<sup>12</sup> in several sentences (Senegal case) holds that a full proof is not needed in the asylum field, a half-full or circumstantial proof is needed though. Therefore, it gives a significant space to the tribunal and administrative reasoning and understanding, triggering a higher threshold of credibility to the applicant’s statements<sup>13</sup>. As a consequence, the applicant’s behaviour becomes an important indicative, such as: delay in claiming asylum; the applicant did not apply for asylum in a safe third country, etc. Circumstances that are considered by the Tribunal in the Cameroon case analyzed above.

According to the report “Beyond proof”, these behaviours can be grouped into three categories that include:

- Behaviour considered indicative of the applicant’s lack of fear of persecution or risk of serious harm.
- Behavior by the applicant in the Member State considered indicative of credibility.
- Behaviour considered indicative of the applicant’s propensity to deception and dishonesty, and therefore indicative of non-credibility.

The Qualification Directive under Article 4.5.d), provides where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation when it fulfills different circumstances:

- a) the applicant has made a genuine effort to substantiate his application;
- b) all relevant elements at the applicant’s disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;

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11 Refugiados y salud mental: curate ipsum, Daniel Raventós Julie Wark 21/07/2017, available:

<http://www.sinpermiso.info/textos/refugiados-y-salud-mental-cura-te-ipsum>

12 STS 19 de junio de 1989; STS 16 de febrero de 2009.

13 *Beyond Proof, UNHCR, chapter 6: assessing the Applicant’s Behaviour.*

- c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- e) the general credibility of the applicant has been established.

As the QD provides minimum standards, any other standard adopted by Member States must be of a "more favourable" nature.

The UNHCR Handbook (1979) states that while the burden of proof (or duty on the claimant) to establish their case, lies with the claimant, there is a shared duty between the claimant and the state examiner (judge or decision-maker) to evaluate all the relevant facts.

Indeed, in some cases, the examiner should use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself/herself.

- Assessment on the delay in applying for asylum:

As we said above one of the circumstances taken into account under Article 4.5 QD is delay in claiming asylum, word-for-word:

*"the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so"*

The UNHCR has noted this article could be read in a manner which is prejudicial to the rights of the applicant, depending on the meaning attributed to "*at the earliest possible time*" and "*good reason for not having done so*".

The European Court of Human Rights has concurred with state authorities in their reasoning that a failure to apply for asylum three years after entry into the putative country of asylum indicated that the applicant did not consider himself to be in strong need of protection.

Individual circumstances should be taken into consideration when analysing the delay. Decision-makers and judges should not assume that people will always behave rationally. The rationality of case-officers and judges should not expect people who fear persecution or serious harm based on sexual orientation and or sexual identity would immediately verbalise his/her sexual orientation and/or sexual identity. Neither should they expect that applicants would engage with the proper legal procedures.

- The applicant may be under the control of the trafficker:

The person who facilitated the applicant's journey and entry to EU may exercise a control around the asylum claim. The applicant may be under the control of others who have cautioned against or prevented an application being lodged.

## **6. FIELDWORK**

We had the opportunity to hold a meeting with the LGBTI group that the NGO "Mercedes Migraciones" coordinates. The participants came from different countries: Kyrgyzstan, Uganda, Venezuela, Mali, México, Argentina, and Jamaica. They all were asylum seekers. Firstly, they were asked to explain in a piece of paper how the first interview experience felt like for them.

Hereinafter, we will literally write some of the reasons why LGBTI people do not express their LGBTI identity at the beginning of the International Protection procedure:

*"Because it is something that I had never said out loud and I had been able to manifest it only with one person. I had never said it to an interviewer. Specially to a person behind a desk, looking at the computer while I am speaking, someone I have never seen before and for whom that procedure is a routine."* Young woman from Venezuela.

*"Because sexual orientation is not thought to be related to international protection".* Venezuelan man.

*"Cross contamination of information confidentiality".* Jamaican man.

*"The policeman/woman, during the interview, recommended that I focus on political grounds".* Man from Venezuela.

*"As I come from the Northern Mali area, and we have problems with rebels there. I didn't think my sexual orientation is important for my asylum claim"* Man from Mali

*“The interviewer kept talking to me in masculine although my lawyer and I explained to him that I am transsexual and I consider myself a woman”. “The interviewer did not know the meaning of the acronym LGBTI”. Transsexual woman from Mexico.*

*“Because of internalized homophobia, ignorance of the process, fear of being discriminated against, because I have no evidence of persecution based on sexual orientation, because they did not inform me adequately before starting the interview, for fear of being rejected and returned to my country of origin, which is where I suffered family and social persecution.” Venezuelan man.*

*“I did not express my harassment and persecution in the Asylum Office because I did not feel safe and calm. My lawyer advised me to go to the LGTBI office (public institution) and there I began to express myself. There I understood that I had internal homophobia and that I did not accept my bisexuality. After several group sessions and appointments with the psychologist, I feel more confident about myself and defending my rights. On the day of the interview, I was not able to explain I was bisexual to the agent who did the interview, so I preferred to talk only about politics.” Venezuelan man.*

These are some examples of “late disclosure” reasons that agree with our previous analysis, taking into account that (at least) four of them admitted to not being able to explain their sexual orientation or gender identity persecution reason in the very first step of the process.

We would like to highlight that the majority of the asylum seekers that participated in the meeting were afraid and suspicious of Police because of their “*universal LGTBiphobia*” and the manners of the agents (that treated them as criminals). They complained about the lack of access to proper information before the interview and the language problem (the boy from Uganda claimed the English interpreter was not translating his words at all).

The social worker, who also participated in the meeting, explains, “Trans people that have not had sexual reassignment surgery are usually questioned by Police and often not treated with the gender they feel comfortable with”.

We must underline that three of the participants, asked us not to read out loud their papers because they still feel embarrassed.

## **7. SOME CONCLUSIONS**

We are concerned about the tendency to draw negative credibility findings as a result of "late disclosure".

After our previous analysis, we wanted to stress some issues we consider to be significant:

**\*Interpretation and implementation of article 20.1. e) Spanish Asylum Law.** There is a risk of ignoring the change of circumstances that brings new details of the story, documentation and reports.

Article 20 (1) (e) of Law 12/2009, which regulates the right to asylum and subsidiary protection, holds the Minister of the Interior in order to refuse to accept applications for asylum by means of a reasoned decision when the requesting person has repeated an application already denied in Spain or submitted a new application with other personal data, provided that no new circumstances arise relevant to the particular conditions or situation of the country of origin or habitual residence of the person concerned.

In cases like these, the asylum seeker should explain the reason(s) why he/she did not allege the LGBTI persecution in the first application but, in words of the General Council of the Judiciary<sup>14</sup> "given the multiplicity and different nature of possible motivations, it is disproportionate probative requirement".

The enforcement of the Article 20 (1) (e) of Law 12/2009 risks a miscarriage of justice, with irreparable consequences, as decision-makers do not take into consideration the fact that the applicants had provided new circumstances and the reasons why they were not able to do so at the first interview. In the cases analyzed above, case workers refuse to accept applications:

- *"...because there is no substantial change from what was alleged then"*
- *Because of "being pre-existing circumstances to his request that can not be considered as new circumstances"*

As we have been verifying, in most of the cases, second applications are being refused since they are considered reiterations, ignoring the existence of new relevant circumstances to the applicant's particular situation, or the situation of his country of origin.

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14 [http://www.poderjudicial.es/cgpi/es/Poder\\_Judicial](http://www.poderjudicial.es/cgpi/es/Poder_Judicial)

file:///C:/PortablesMIR/Informe%20al%20P%20de%20RD%20Reglamento%20de%20la%20Ley%20Derecho%20de%20Asilo.pdf

**\*Lack of knowledge and implementation of European Court of Justice case law:**

There is significant European Court of Justice case-law in terms of ““late disclosure””, such as; CJEU – Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014. This case law at hand analyzes different issues around sexual orientation claims, among them, "late disclosure".

The Court holds “an applicant’s claim based on sexual orientation (gender identity) cannot be considered as not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution.”

Moreover, it must be observed that the obligation laid down by Article 4(1) of Directive 2004/83 to submit all elements needed to substantiate the application for international protection ‘as soon as possible’ is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

Hence, in accordance with the applicant’s right to be heard under the Charter, the applicant should be afforded the opportunity to explain the delay and the reasonableness of that explanation should be taken into account.

Despite the paramount importance of this judicial precedent on ““late disclosure”” we have not found any Spanish case law that mention this CJEU assessment.

**\*Masculinisation of International Protection applications:** we have confirmed that, not only migration is a very masculinised phenomenon but also the LGBTI community: the vast majority of LGBTI asylum seekers are men and we have not been able to study any "late disclosure" case of a woman or a trans person.

The book *Refugiadas*<sup>15</sup> also highlights the low number of asylum applications carried out by lesbian women. That may be because “Women usually have less economic resources and less independence to leave their countries, so access to the asylum procedure is more difficult, or virtually impossible (Crawley, 2001), as asylum requests must be made

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15 *Refugiadas: una mirada feminista al derecho internacional*. Carmen Miguel Juan. 2016.

outside the country. country of their nationality or habitual residence. Even if the country of asylum is obtained, lesbian women are subjected to certain forms of persecution that are usually directed against women in the domestic sphere, which makes their evidence difficult.”

Also, the punishments that are often addressed to lesbian women are contextualised in the private area (unlike those to men) and hard to prove: physical abuse, forced sexual relations with men, forced marriage, etc.

**\*Good practices:** Fortunately, we have also found some positive changes in the Asylum Office of Spain in the field of "late disclosure":

**-The Case of Jay-** a Nigerian man who applied for International Protection in 1995 for economic reasons. His case was denied and in 2010 he asked again for asylum explaining that the first time “as he was told to give economic reasons”, that “in his country can not practice his sexual orientation” and that “he had always had the same homosexual orientation, but in his country a family man means a lot of responsibility and can not say that he is gay”.

He was interviewed by a new case officer and developed his persecution story explaining his forced marriage with a woman and pointed out that “he did not allege his sexual orientation [in the first application] because Nigerians are very homophobic and did not feel safe and did not trust the people who were in front of him [during the interview]”. He added that “he started feeling attracted by man when he was 17-18 years old” and felt guilty because he was catholic. In the first asylum interview “he spoke no Spanish and depended on other people” and that he “did not know migrant organizations”.

The proposed report that ended up as an asylum status recognition indicates: “In the specific case of the applicant, the alleged sexual orientation can be considered established, since in the interview he clarifies aspects of his initial story that cast doubt on the truthfulness of his statements about his orientation; among others, the reasons why he did not refer to his homosexuality in his first request. In view of this, and of the legal and social context described in the previous section, the applicant's fears of persecution and / or violence in case of return to Nigeria can be considered justified”.

- Besides, we need to stress good and innovative practices in Spanish Courts proceedings<sup>16</sup>:

**-The Case of Yanick-** The High Supreme Court accepts a testimony as evidence in order to prove the credibility of the alleged sexual orientation persecution on rejected asylum claim. The witness is a person who lived with the Cameroon asylum seeker during the years when persecution took place and while travelling to Spain.

The Asylum Office and previous judicial instance maintain the asylum claimant shared general and imprecise information. However, the previous judicial instance did not accept the testimony.

The High Supreme Court considers previous judicial instance violates the norms governing acts and procedural safeguards not accepting the testimony as a proof. This Court claims the testimony could provide additional information, since *“He is a direct witness of the facts that have led the petitioner, Yanick, to leave his country and seek refuge in ours ”*

The refusal to accept this testimony deprived of a legitimate means requested by the appellant to support his claim by proving the facts at issue. At the same time, it violated his right to defense.

We consider it is a good practice in order to prove any imprecise information considered by the Asylum Office. Rather than using this procedural tool to prove sexual orientation, it might be used to prove the "late disclosure".

We think it is a good practice as far as the testimony is not based on: stereotypical assumptions on homosexuality; applicant’s sexual practices; photographic or video evidence of intimidate acts. Otherwise, the testimony will not be compatible with the applicant’s human dignity and right to private life.

Following the report “Sexual Orientation Issues in the Asylum Claim” of the UK Border Agency, the Asylum Office of Spain has developed a respectful test in order to enable claimants to explain the development of their identity and sexual orientation. The main goal is to help the petitioner to explain his/her story to the interviewers in a receptive and safe environment, avoiding questions about sexual acts which may affect to his/her dignity.

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16 Tribunal Supremo Sala 3ª, sec 3º, S 12-02-2014, rec.864/2013

**\*Guidelines:**

We are aware about the difficulty in changing the working methodology of the Asylum Office and Judicial authorities. However, we consider there are some changes, which would enhance the asylum case file examination, specially asylum claims based on sexual orientation and "late disclosure".

Some guidelines are detailed below:

- LGBTI training for all the decision-makers in order to get an understanding of a possible "late disclosure" or to differentiate basic concepts in the field of identity and sexual diversity.
- As the Spanish Ombudsman proposed, establishing a rotation in the assignment of case files would avoid subjectivity. Besides, it would warrant the objectivity which the case file examiner must have on dealing with each asylum case.
- Lines of actions should be determined in the case examination phase in order to reduce as much as possible any stereotyped assumption or political idea a case officer might have.
- It is really important to establish a reassuring atmosphere and to ensure confidentiality during the asylum interview. Hence, providing specialized training on the conduct of interviews and assessment of credibility where sexual orientation and gender identity is an issue, and of appropriate and respectful handling of the interview in LGBTI cases would be a way to enhance it.
- The creation of specialized Tribunals in order to ensure access to an effective remedy before a court or tribunal, to lay down relevant procedural rules and time limits, and to provide for arrangements regarding the right to remain pending the outcome of the appeal. The creation of such bodies, as many others states of the EU already have, , presupposes the recognition by governments of the vulnerability of a certain group and a need for protection.

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