

HUMAN RIGHTS COMMENT

Open minds are needed to improve the protection of LGBTI asylum seekers in Europe

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Two LGBTI persons fled Syria to seek asylum in Europe - Photo Bradley Secker

In many states around the world, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons face serious violations of their human rights on account of their sexual orientation, gender identity or sex characteristics. These include [killings](#), violence, the [criminalisation of same-sex relations](#), and severe discrimination. Such violations also occur within the Council of Europe area. In my statement for the [International Day Against Homophobia, Transphobia and Biphobia \(IDAHOT\) 2018](#), I particularly highlighted the shocking reports of targeted persecution of LGBTI persons by law enforcement officers, including in Chechnya in the Russian Federation and in Azerbaijan. I also commented on the disturbingly widespread problem of homophobia and transphobia, including daily violent incidents, in other European states.

Whilst we must work tirelessly for better protection of the human rights of LGBTI persons, we also need to

be mindful and understanding of the fact that sometimes they have no other choice but to flee and seek safety outside their own states. In many Council of Europe member states, however, LGBTI asylum seekers face a number of [challenges](#) to seeking such safety, which require urgent attention.

Sexual orientation and gender identity in domestic asylum laws

Firstly, the way that international standards are interpreted and applied in different Council of Europe member states may prevent LGBTI asylum seekers from being granted the protection they need. The 1951 Refugee Convention, to which all Council of Europe member states are parties, sets the main framework for providing international protection. It defines a refugee as a person who is unable or unwilling to return to his or her country of origin because he or she will be persecuted, that is, be subjected to serious human rights violations. Furthermore, to be recognised as a refugee, such persecution must take place on the basis of one of five grounds: race, nationality, religion, political opinion, or membership of a particular social group. The [Guidelines on International Protection No. 9](#) of the United Nations High Commissioner for Refugees (UNHCR) make clear that sexual orientation and gender identity fall under the Convention grounds, especially under the notion of membership of a particular social group. Similarly, the Committee of Ministers of the Council of Europe, in [Recommendation CM/Rec\(2010\)5](#) noted that member states “should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.” The recast European Union (EU) Qualification Directive (2011/95) also requires EU member states to pay specific attention to sexual orientation and gender identity.

Explicit recognition in states’ domestic laws that sexual orientation and gender identity fall within the grounds set out in the Refugee Convention adds an important layer of legal protection for LGBTI asylum seekers. Despite this, not all Council of Europe member states have [explicitly recognised](#) sexual orientation, gender identity, and/or sex characteristics in their asylum laws.

Other important elements of UNHCR’s Guidelines also need proper implementation when making asylum decisions. This includes recognising specific forms of treatment or discrimination as persecution within the meaning of the Refugee Convention. The Guidelines highlight a number of factors that should be taken into consideration when assessing whether an LGBTI person would be subjected to persecution if returned to the country of origin. These include attempts to change the applicant’s sexual orientation or gender identity by coercion, the existence of laws criminalising same-sex relationships, and specific actions by so-called non-state actors, such as family members or extremists groups.

A particular concern is the notion that LGBTI persons could be expected to conceal their sexual orientation or gender identity to escape human rights violations if returned to their countries of origin. This approach was firmly [rejected](#) by the The Court of Justice of the EU (CJEU) in 2013. Earlier this year, the European Court of Human Rights, in its decision in the case of [I.K. v. Switzerland](#), also emphasised that sexual orientation was a fundamental facet of an individual’s identity and awareness and that, in consequence, individuals submitting a request for international protection based on their sexual orientation could not be required to hide it.

Stereotyping and disbelief in the asylum procedure

Apart from the proper application of international standards, LGBTI persons may also encounter problems in convincing European states' asylum authorities of their sexual orientation or gender identity. Asylum decisions rely to a large extent on the authorities' assessment of whether the claim made by the asylum seeker can be considered credible. Asylum interviews play a central role in assessing this credibility. As documented by a recent [report](#) by the EU Fundamental Rights Agency (FRA), the way these interviews are conducted with LGBTI asylum seekers is too often inadequate. Interviewers often base their questions on stereotypes and unfounded assumptions about their countries of origin.

Authorities may also fail to recognise that in many LGBTI persons' countries of origin sexual orientation, gender identity and sex characteristics are taboo topics, often invoking feelings of shame and fear in the person. The presence of an interpreter coming from the community of origin of the asylum seekers can be unsettling. This may hamper the asylum applicant's ability to provide information in the way that the interviewer expects. A common problem is also that asylum seekers are afraid to mention their sexual orientation or gender identity immediately at the beginning of the asylum procedure. They may then face bureaucratic barriers, or even rejections of their claim, when putting forward such information at a later stage. It may also lead to the late identification of specific protection and needs, such as medical care for trans and intersex people.

Particularly problematic is the practice of applying humiliating tests or questioning to ascertain the sexual orientation of an asylum applicant. In 2010, FRA raised alarm over the then-used practice of 'phallometric testing' in the Czech Republic, noting that such tests were in contradiction with the prohibition of torture and inhuman or degrading treatment, as well as the right to private life. In such tests, applicants who claimed asylum based on their homosexual orientation had their physical reactions to heterosexual pornographic material measured. In 2014, in a case concerning the Netherlands, the CJEU [found](#) that detailed questioning about a person's sexual practices infringed on the right to privacy and family life, and that the need to protect human dignity prohibited asylum authorities from requiring "evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or ... the production by him of films of such acts." This also extends to the use of psychological personality testing to verify a person's sexual orientation, the CJEU [found](#).

Identification and safe reception

Early identification of vulnerabilities is essential. This should take into account the fact that LGBTI persons may have already had very traumatic experiences in their countries of origin and on their way to the country of asylum, such as sexual violence, trafficking or other physical or psychological abuse. Authorities should thus ensure that specific needs, such as health care or psychosocial assistance, can be identified as quickly as possible. The European Asylum Support Office (EASO) has developed a [tool](#) to assess asylum seekers' special procedural and reception needs, which includes factors related to sexual orientation and gender identity.

In the context of assessing vulnerabilities and risks, authorities should also be aware that even within the

country of asylum, LGBTI persons' safety may not be assured. For example, LGBTI persons may face harassment, isolation and discrimination by other asylum seekers in reception centres. Such problems may force them to avoid reception centres and therefore miss out on access to basic services. In this situation, LGBTI persons may again become particularly vulnerable to falling victim to exploitation and trafficking.

The above-mentioned Recommendation of the Committee of Ministers calls on states to protect LGBTI asylum seekers, including by taking appropriate measures "to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty". In the case of [O.M. v. Hungary](#), the European Court of Human Rights also emphasised that "authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place." This, in my view, implies a broad obligation on state authorities to ensure that LGBTI asylum seekers who are in their care are protected from harassment, discrimination and violence, including in reception centres. There may not be a single 'best model' to do so, but training for staff of reception centres, providing clear information to residents about the inclusion of LGBTI people, and establishing a safe environment for LGBTI asylum seekers are all crucial. Some important initiatives, such as Berlin's [Model for the Support of LGBTI Refugees](#), which includes counselling, training and the provision of a specific shelter for at-risk LGBTI asylum seekers, may lead the way in further developing good practices.

Key steps moving forward

As a first key step to improve the protection of LGBTI asylum seekers, European states should ensure that their laws explicitly recognise a well-founded fear of persecution on the basis of sexual orientation, gender identity and sex characteristics as valid grounds for recognition as a refugee.

Secondly, the application of those laws should take into account the authoritative guidance provided by UNHCR, including on the specific forms of persecution LGBTI people may face, the existence of criminal laws related to sexual orientation or gender identity, and the importance of recognising the role of persecution of LGBTI persons by non-state actors.

Thirdly, there is an urgent need for practical guidance and training for all those involved in the asylum procedure, including interviewers, decision-makers and interpreters. Authorities should make full use of resources already available, such as those produced by the [International Commission of Jurists](#) and [ILGA-Europe](#), and co-operate with civil society groups to develop trainings, including those aimed at avoiding stereotyping. This is crucial to ensure claims for asylum by LGBTI persons are approached with an open mind, and handled in a respectful, informed and sensitive way during the asylum procedure. Intrusive questioning or physical or psychological tests should never be part of the asylum procedure and should be urgently banned in all countries where they are still applied.

Finally, Council of Europe member states should look at the national application of existing tools for assessing vulnerabilities of LGBTI asylum seekers, such as those developed by EASO, and engage in further research and exchange about how to ensure safe reception conditions, as well as the specific care they may need.

The need to take these steps is especially pressing at a time when I see the institution of asylum under pressure across Europe. LGBTI asylum seekers are particularly at risk of becoming victims of the rolling back of protection, with potentially disastrous consequences for their safety and dignity.