



Getting it Right

30 recommendations for improving the lives of people claiming asylum on the basis of sexual orientation or gender identity (SOGI) in Germany

It is now nearly forty years since the first SOGI asylum claims were recognised, and a great deal of progress has been made at a global and European level. There is increased awareness of SOGI persecution as well as examples of good policy and practice that should be publicised and replicated. However, alongside these, the SOGICA project found many areas where improvement is urgently needed, and we address these here. These recommendations largely reflect the views of almost 500 people, those who participated in the SOGICA project's interviews, focus groups and online surveys.

These recommendations are written in the midst of the COVID-19 pandemic, which, among other things, has shown that at times of crisis inequalities between individuals and groups in society widen. This underlines the need for domestic legislation and policy to be based on international refugee and human rights standards, and not dependent on the good will of the government of the day. This will help ensure that in future global crises we really will be 'all in it together'.

We are aware that some improvements to the German asylum system depend on the reform of the Common European Asylum System (CEAS) at EU level. However, here we focus on recommendations that can be implemented at **national level**, also in light of the substantial discretion left to EU Member States by relevant EU provisions on asylum procedures and reception.

Recommendations: asylum law and policy

1. Safe passage to Europe

While these recommendations aim to improve asylum law and policy in Germany, that is not enough and individuals at risk need to be actually able to reach Europe to claim protection. Even when passage to Europe for SOGI minorities fleeing persecution is possible, it is almost always extremely risky and costly. Building on the 2018 motion by the European Parliament, **the German government** should expand and consolidate humanitarian admission programmes and visas to help people in flight reach Europe safely.

2. A statistical evidence base

Any transparent and accountable asylum system needs to maintain and publish rigorous and up-to-date statistics on different types of asylum claims and their outcomes. Yet, within Europe, there are still no clear and comprehensive statistics for SOGI claims. **The Federal Office for Migration and Refugees (BAMF)** should record the number of SOGI claims submitted, and the grounds used to accept or refuse them (for instance, by indicating the Convention ground or lack thereof, persecution or lack thereof, and credibility or lack thereof). This information should be made public in order to support the work of all people, organisations and authorities working within the asylum system and with claimants, including NGO service providers, lawyers and researchers.

3. Sensitive handling of the Dublin Regulation (III)

When examining whether the BAMF is responsible for the asylum application or whether the applicant is sent back to another EU member state, SOGI needs to be considered in the individual assessment of the case. The **Federal Government** is advised to check carefully whether the specific needs of SOGI claimants are met when returned to a respective Dublin state.

4. Implementing the right to information

Claimants are often unaware at the time of their arrival that SOGI can be a basis for claiming asylum. This contributes to 'late' and poorly prepared claims. We recommend that all relevant **German authorities**, as well as **non-State actors** involved in the management of asylum claimants' arrival, provide information about asylum and the right to make a SOGI-based claim, including in easy-read formats and different languages, at a minimum at ports of entry and at asylum interview, reception and accommodation centres. At the start of the screening or initial interview, the **interviewer** should confirm that the claimant is aware of the different reasons for claiming asylum, including SOGI persecution, and that confidentiality is ensured at all stages of the process. However, none of these measures should mean that failure to declare SOGI as the basis for claiming asylum is subsequently held against claimants.

5. Doing justice to 'late' claims

SOGI asylum claimants are likely to make their asylum claim sometime after arriving to the host country for a number of reasons, including their lack of awareness that SOGI is a legitimate basis for claiming asylum and their likely fear of disclosure to officials or to other people they come in contact with. Yet, 'late disclosure' continues to be a factor that is held against claimants and used to discredit their claims. The **BAMF and the administrative courts** should not discriminate against 'late' claims, as confirmed by European jurisprudence.

6. Limiting the duration of asylum procedures

The length of time that many claimants must wait for an initial decision and then for their appeal – sometimes totalling years – is a cause of much distress, as during this period people are often unable to study, work, secure family reunion or move forward in any way with their lives. The **BAMF and the administrative courts** need to invest in building their capacity to shorten the time and publish targets for both initial decisions to be made and for appeals to be decided, although not at the expense of a thorough consideration of claimants' claims.

7. Statutory guidance on SOGI asylum

The **BAMF** should produce and make public strict guidelines for decision-makers on SOGI claims and ensure they are applied consistently and regularly reviewed. SOGI asylum claimants and refugees should be recognised as the main source of expertise in this field of policy and law, and should be involved in preparing and delivering guidance and training materials.

8. Mandatory training

Even though the BAMF has internal instructions on SOGI claims, there is a worrying degree of inconsistency in decision-making, with claimants from the same country and sometimes with very similar experiences receiving inconsistent decisions. **The German government** should ensure provision of better training for all parties, including all decision-makers (not only special officers), judges, interpreters, and service-providers, to improve their confidence in the quality of their work as well as to benefit SOGI asylum claimants. Training should be mandatory on induction and repeated at regular intervals, and should cover all relevant aspects for a fair evaluation of SOGI claims (for instance, terminology, interview techniques the use of COI, anti-stereotyping approach).

9. Promoting a culture of empathy

The specificities of guidance and training materials depend on the institutional context, however there are some elements that should be included in all materials, including: the importance of empathy, awareness of equality and human rights, appropriate terminology, confidentiality assurances, how to create a safe space, training on the effects of trauma on individuals and unconscious bias. We also recommend that the **BAMF and the administrative courts** should develop a code of conduct that includes equality and diversity as key principles.

10. Improving legal advice and representation

SOGI asylum claims are often particularly complex and require legal representatives who have experience and expertise in this area. Yet, many claimants have difficulty accessing good legal advice, in particular those in remote accommodation. Part of the problem is a general lack of sufficient funding for legal aid, and **the German government** needs to invest in this area to make sure that claimants can access legal aid lawyers also for the preparation of their initial claim, and that legal aid does not depend on the likelihood of success, as this is currently the case in court proceedings. This is not only an ethical requirement, but also in the interest of legal and administrative efficiency.

11. Offering adequate interpretation services

Interpreters have an important role in interviews and at judicial hearings, and it is critical that SOGI claimants are able to feel confident about interpreting services in both these settings. An interpreter who is homophobic or transphobic, or perceived by the claimant to be such, can seriously damage communication. The **BAMF and the administrative courts** should provide adequately selected and trained interpreters to ensure a confidential, neutral and specialised approach in the interpretation of SOGI cases. Authorities should also allow claimants to request a replacement where they have concerns about the interpreter provided. Claimants should be informed that they have the right to request a male or female interpreter and the exercise of this right should be facilitated.

12. Procedural needs

There are a number of practical improvements that the **BAMF and the administrative courts** should make both in relation to interview and appeal hearings and ensure these are consistently implemented across the 16 federal states. Officials should always introduce themselves, check the claimant's name and confirm how they would like to be addressed. Claimants should be informed that they have the right to request a male or female interviewer and the exercise of this right should be facilitated. Confidentiality protocols should be in place, and the claimant should be informed of these. Interviewers and judges should avoid questions that seek a linear evolution or moment of discovery such as 'when did you realise you were gay (or lesbian/bisexual/transgender/etc.)'. In general, open-ended questions should be asked that allow the claimant to tell their story in their own time and terms. To improve accountability and claimants' trust in proceedings, there should be accessible complaints procedures.

13. No such thing as 'safe countries'

Germany has long designated some countries as 'safe', meaning that claims from these countries will be assumed to be unfounded or less likely to be successful. This is not only in conflict with the need to carry out an individual assessment of each asylum claim, but is particularly problematic for SOGI claims, as SOGI rights and protection may be denied in countries with otherwise acceptable standards. **The German government** should no longer designate some countries as 'safe'.

14. Accelerated procedures

'Safe country' lists are often accompanied by 'fast-track' procedures, including at borders, which are detrimental to SOGI claimants, whose cases are recognised as being complex and time-consuming to prepare. Rather than making use of accelerated decision-making procedures for claimants of certain nationalities, **German asylum authorities** should favour the same thorough consideration to all claims. This also applies to all claims that are processed in the AnkER centres.

15. Improving the quality of Country of Origin Information (COI)

Accurate and extensive COI is critical to good asylum decision-making, yet data on SOGI asylum is scarce and often outdated, leading to flawed decisions. The **BAMF and the administrative courts** should make better use of existing resources, such as the European Asylum Support Office (EASO) COI portal in decision-making and further develop their own COI resources. General and SOGI asylum NGOs should be invited to contribute their expertise and knowledge (and appropriately paid for their input).

16. Making use of all the Refugee Convention grounds

In order to recognise the many factors and identities that are the basis for SOGI persecution, **German asylum and judicial decision-makers** should make better use of all the Refugee

Convention grounds when assessing SOGI asylum claims, rather than invariably relying on the 'particular social group' (PSG) category. Where the PSG category is used, **BAMF and administrative courts** should follow UNHCR guidance and only require that claimants either share an innate or fundamental characteristic or common background, or are perceived as having a distinct identity as a group – not both.

17. Persecution over membership of a PSG

To accurately reflect international refugee law and European jurisprudence, **German asylum authorities** should stress that the question for **decision-makers** to ask is not whether claimants are 'truly' LGBTIQ+ (lesbian, gay, bisexual, trans, intersex, queer and others), but only whether they are likely to be persecuted on SOGI grounds if they were to be returned to the country of origin.

18. Criminalisation of same-sex sexual acts as persecution

Against UNHCR guidance, decision makers often do not recognise legislation criminalising same-sex sexual acts as persecution unless that legislation is enforced and entails significant penalties. This ignores the broader societal discrimination that accompanies legislation and the fact that unenforced legislation may be enforced at any time. Furthermore, these laws usually do not have to be applied because people in these countries hide their SOGI and/or because society "takes over" the persecution. When LGBTIQ+ people are imprisoned, reasons other than SOGI are often given on the papers. The **BAMF and the administrative courts** should recognise criminalisation of same-sex sexual acts, regardless of enforcement, as sufficient to make a finding of persecution. Following this, **BAMF and administrative courts** should also recognise that, as criminalisation usually applies to a country's entire territory, there can rarely be internal flight or relocation alternatives for SOGI claimants from those countries.

19. Abolishing 'discretion reasoning'

The **BAMF** now recognises that it is unacceptable to require SOGI claimants to return to their country of origin and live 'discreetly' by concealing their sexual orientation or gender identity. However, 'discretion reasoning' persists in the assumption that it is reasonable to return to their countries of origin claimants who would voluntarily 'choose' to hide their sexual orientation or gender identity. This is a dangerous policy in assuming that decision-makers can establish the future behaviour of an individual and ignoring the fact that choosing whether or not to disclose their SOGI is rarely completely within the individual's control. **BAMF and administrative courts** should thus remove all traces of 'discretion' thinking from decision-making.

20. Standard and burden of proof

Asylum claimants are often required to meet unfairly high evidentiary standards. In practice, asylum and judicial authorities apply a standard of proof that goes beyond the 'reasonable degree' threshold claimants are required to meet under international refugee law, often simultaneously violating the principle of the benefit of the doubt. Asylum authorities also often fail to adopt a sufficiently active role in evidence-gathering. Instead, the **BAMF and the administrative courts** should respect the correct standard of proof, including the principle of the benefit of the doubt, and share the burden of proof with asylum claimants.

21. Use of humane means of evidence

Although it is now accepted that evidence of an explicit sexual nature should not be elicited or accepted, interrogating claimants about their relationships and behaviour regularly goes beyond what should be permissible. Excessive scrutiny of claimants' sexual history and experiences of persecution still takes place in interviews and hearings. This fails to respect their personhood and would not be acceptable in other settings. The **BAMF and the administrative courts** should apply the same standards of civility and dignity to SOGI (and all) asylum claimants as to any other member of society when gathering evidence.

22. Stereotyping

Decision-makers often fail to understand the individual claimant because of assumptions and prejudices. These include, among others, expectations that claimants have a partner or are sexually active, take part in LGBTIQ+ activism, provide a 'coming out' narrative, and have difficulty reconciling their SOGI with their religious beliefs. Conforming to such stereotypes undermines the individual

premise of refugee decision-making. The **BAMF and the administrative courts** should not make use of 'stereotyped notions' neither during the interviews, nor in their decisions.

23. Credibility

Credibility is a key element in many, if not most, SOGI asylum decisions, by which we mean overall belief in the claimant's testimony. Decision-making is too often based on an attempt to objectively 'prove' a claimant's SOGI and starts from a position of scepticism that the claim is 'genuine'. Time and again during our fieldwork, claimants asked us, despairingly or wearily: 'So how can I prove my SOGI?' We recommend that the **BAMF and the administrative courts** take the evidence, particularly the personal testimony, submitted by claimants as the starting point for credibility assessment. The default position should be belief in claimants' account of who they are and what has happened to them.

24. Facilitating family reunification

If international protection is granted, a first priority for some individuals is to be reunited with their children and partners. **The German government and the administrative courts** should ensure that definitions of family include same-sex unions for the purpose of family reunification, and the evaluation of SOGI claimants' requests should take into account both their difficulty in having their relationships recognised in their countries of origin or transit, as well the connected struggle to provide evidence of such unions.

Recommendations: beyond the asylum adjudication process

25. Promoting social integration

We recommend that **the German government** develops holistic policies for refugee integration that recognise the specific needs of SOGI claimants. The priority for such policies is to ensure that every claimant and refugee feels safe and welcomed from the time of arrival, and is quickly recognised as a respected member of the host society, starting from reception and accommodation centres. This is essential in light of the increasing hostility to refugees (and migrants more generally) in Europe, juxtaposed with persistent and often increasing homophobia and transphobia.

26. Safe and adequate accommodation

Many SOGI asylum claimants are housed in general accommodation or reception centres where their needs are unrecognised or – worse – they experience discrimination. All relevant **central and local authorities** need to pay particular attention to the safety of SOGI claimants in asylum accommodation, where residents are vulnerable to homophobic, transphobic, racist and anti-migrant violence and hate crime. **German authorities** should give SOGI claimants the choice to be accommodated with other SOGI claimants in separate facilities if that is their wish, and in any case avoid any 'camp-style' accommodation. There are particular concerns for trans claimants, making trans-specific accommodation managed by NGOs upon request a priority. Individuals should have as much choice as possible about the area where they live and the type of housing in which they live, and have access to appropriate information, support groups and social activities.

27. Fostering physical and mental health

SOGI asylum claimants have particular health needs that are often overlooked: like many asylum claimants, they are likely to have mental health problems and often suffer from depression. Hormonal or gender-affirming therapy for trans claimants and refugees, including continuity of medical care, is also an area of need. **German health authorities** should increase service provision in both these areas and ensure SOGI asylum claimants and refugees are aware of their healthcare entitlements. More broadly, access to healthcare should be universal, not restricted to emergency provision, and include staff and interpretation services trained on asylum and SOGI matters.

28. Facilitating equal access to the labour market and education system

SOGI claimants are often discriminated against at work on grounds of both SOGI and ethnic background or refugee status. They may also need to rely on community support to find work – all factors which may make it hard for them to be open about their identities, and make it necessary for **the German government, employers and trade unions** to take measures to tackle these particular

experiences of workplace discrimination. The difficulty to enjoy the right to work, in combination with a long asylum process, may not have a particular SOGI dimension but was raised by nearly all of our participants as a cause of stress and hardship. This means that **the German government** should further improve access to the labour market, further and higher education, and training.

29. Nurturing civil society initiatives and NGOs

Asylum claimants often trust NGOs and depend on them for support, far more than they depend on other service providers. There are excellent refugee as well as SOGI organisations that offer invaluable help. However, NGOs often support either refugees or SOGI minorities, but not both. This means SOGI asylum claimants and refugees are not always able to obtain holistic services that are responsive to all their needs. There must be adequate funding for SOGI-specific refugee NGOs to expand their reach. There is also potential for **NGOs** working in different fields to explore partnership options and develop joint or shared services, but always drawing on the expertise of the SOGI-specific refugee organisations and SOGI refugees themselves. Community organisations set up by SOGI claimants themselves are a huge source of support and expertise but often face a particular struggle to obtain funding. **Funders** should make their funding more accessible to new community organisations with expertise on SOGI asylum.

30. International cooperation for fostering LGBTIQ+ equality

It should always be remembered that granting refugee status to SOGI asylum claimants who have reached Europe, while vital, is a poor alternative to preventing individuals needing to flee their countries of origin and undergo perilous and costly journeys to Europe in the first place. **The German government**, alone and in cooperation with the EU, Council of Europe and other regional and international organisations, should encourage greater respect for SOGI minorities' rights and needs around the world, including by building the capacity of LGBTIQ+ activists and NGOs. **The German government** should also support the improvement of the CEAS, where higher standards of human rights protection can be achieved during the negotiations of the upcoming relevant reform.

In making these recommendations we are aware that there is a bigger picture; that many of the problems that affect SOGI minorities claiming asylum are shared with other claimants, refugees and migrants more generally – issues such as racism, a culture of disbelief, reductions in legal advice and representation, and arbitrary and inconsistent decision-making. While these issues are beyond the scope of this project, we believe these recommendations are a basis for making some focussed and often small changes that would nonetheless make a real difference to the lives of SOGI and other asylum claimants and refugees within the larger context of the struggles for the rights of all refugees and SOGI minorities.

The SOGICA project

*SOGICA is a four-year (2016-2020) European Research Council-funded project based in the University of Sussex that researches the legal and social experiences of SOGI asylum claimants in Europe, with a particular focus on Germany, Italy and the UK. The project's methodology consisted of 143 interviews with SOGI asylum claimants and refugees, NGOs, policy-makers, decision-makers, members of the judiciary, legal representatives, and other professionals; 16 focus groups with SOGI asylum claimants and refugees; 24 non-participant contextual observations of court hearings; documentary analysis and freedom of information requests. Full details of the project and all our activities and resources are available on the project website www.sogica.org. The full socio-legal analysis of our findings is presented in the book *Queering Asylum in Europe* (Springer 2020).*



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