Please cite as: EUAA, '5.5 LGBTI applicants in the asylum procedure' in *EASO Asylum Report 2021*, January 2022.

5.5 LGBTI applicants in the asylum procedure

LGBTI persons are still subject to human rights abuses and face threat in many parts of the world. While detailed and comprehensive data are not available, the number of asylum applications based on sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) have been estimated to have increased. A sensitive approach is required with this profile of applicants as they may be scared to talk about their SOGIESC during the asylum procedure. In fact, many LGBTI persons still felt threatened in reception facilities in EU+ countries, which calls for the need to adapt centres and the provision of safe spaces and confidential environments so that authorities can effectively follow up the concerns. Developments in 2020 centred around the provision of information and the definition of a safe country for applicants with gender-related special needs.

Malta introduced a new provision to the Procedural Standards for Granting and Withdrawing International Protection Regulations to include that a particular social group might be based on sexual orientation and SOGIESC should be given due consideration when determining membership of a particular social group or identifying the characteristics of such a group.[1323]

Sweden adapted the content and language of the authority's website with more specific information for LGBTI applicants, focusing on support and the importance of disclosure. Changes to the "Handbook for Migration Matters" included the updating and expanding of the concepts of SOGIESC.

In its reassessment of safe countries of origin, the Dutch Secretary of State for Justice and Security considered Brazil to be safe, with the exception of LGBTI persons because they increasingly face violence and stigma in their home country. As such, LGBTI applicants for international protection are no longer subject to an accelerated procedure but receive a much more detailed individual assessment of their circumstances and safety in the country of origin.

The topic was also brought to the courts in 2020. In *B (Gambia) and C (Switzerland) v Switzerland*, the ECtHR ruled that Switzerland had violated the ECHR, Article 3 when removing a Gambian gay applicant who would face persecution and a real risk of ill treatment in his country of origin. Having assessed the situation in Gambia, where same-sex acts carry a criminal penalty, the court held that sexual identity is part of someone's identity and it should not have to be concealed to avoid persecution.

The Federal Administrative Court (FAC) in Switzerland held that unbearable psychological pressure for homosexuals in Syria justifies granting refugee status to a Syrian man whose application had previously been rejected. The man had not initially claimed he was gay in his application, but in his appeal to the case he explained that this was a main reason for having left Syria. The FAC held that sexual orientation can be a reason for persecution in Syria, based on country of origin reports and the Syrian legislation which criminalises same-sex acts.

The Appeals Authority in Greece determined that an LGBTI applicant from Iran should be granted refugee status because sexual minorities are often subject to abuses and harassment by state authorities.

The Transgender Europe (TGEU) highlighted that, if trans persons within the asylum process are not identified, their access to provisions, such as health care, legal assistance, education and crime-reporting, may be impeded.[1324]

Legal gender recognition is often only available after being granted international protection, and in some countries, such as Hungary, there are no mechanisms in place for trans applicants to gain access to legal gender recognition. In Rana v Hungary, the ECtHR found Hungary in violation of the ECHR, Article 8 (right to respect for private and family life) when a trans-gender refugee from Iran could not legally change his gender and name in Hungary. The applicant, who was born female in Iran but identified as a male from an early age, was granted international protection since he had suffered persecution in Iran due to his gender identity. However, when the applicant applied for a gender and name change, he obtained a formal rejection decision without examining the application on the merits because he did not have a birth certificate from Hungary, which is the only way to change the birth register in the country. Although the Constitutional Court rejected the complaint since the national law does not include any statutory basis for name changes for non-Hungarian citizens, it underlined that the right to change a name is fundamental and called on the parliament for a legislative change.

Civil society organisations noted that various practices exist across EU+ countries in granting international protection to applicants with gender-related special needs. Queer Base Austria observed divergent recognition rates for applicants with diverse SOGIESC from different countries of origin, both at the first and second instance of the asylum application.[1325]

The French research centre for political affairs, CERSA, published a report which analysed the procedures to prove sexual orientation in the asylum procedure, focusing specifically on the collection of evidence.[1326] The report recommended that authorities provide adequate training to staff on LGBTI-related matters, especially to OFPRA staff and CNDA judges. Other recommendations included regular updating of information about the legal and social situations in countries of origin and monitoring the quality of translations. The French Defender of Rights subsequently presented the results of the research and published a summary of the report.[1327]

CIDOB in Spain published an analysis of the Spanish asylum system’s preparedness for LGBTI applicants, describing areas for improvement, such as inconsistencies and contradictions in the credibility assessment. They also underlined the importance of providing adequate reception facilities and access to services.[1328]

[1323] Act No XL of 2020 to amend the Refugees Act, Cap. 420. https://parlament.mt/media/107749/1-act-40-online.pdf
[1324] Transgender Europe. (December 2020). *Trans Refugee Network Consultation: 2020 Report.*
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[1328] Barcelona Centre for International Affairs. (June 2020). *¿Es España realmente LGTBI-friendly con las personas refugiadas? Las deficiencias del sistema de asilo español para el colectivo LGTBI [Is Spain really LGTBI-friendly with refugees? The shortcomings of the Spanish asylum system for the LGTBI group]*. https://www.cidob.org/en/publications/publication_series/notes_internacionals/n1_233/es_espana_realmente_lgtbi_friendly_con_las_personas_refugiadas_las_deficiencias

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