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Human Rights and Multi-level Governance**



The European Court of Human Rights jurisprudence  
toward LGBT refugees

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# Alle miø sorellø

“When WE lose the right to be different,  
WE lose the privilege to be free”  
Charles Evans Hughes

# The European Court of Human Rights jurisprudence toward LGBT refugees

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# Introduction

The subject of this thesis is the jurisprudence of the European Court of Human Rights on asylum claims for refugees part of the LGBT community<sup>1</sup>. The thesis' objective is to answer the question of whether European jurisprudence has positively developed in analyzing LGBT refugee asylum claims in its methods and approach. And to highlight what are still the most critical issues and difficulties in approaching this vulnerability at a regulatory and legislative level.

The analysis is composed of two chapters. The first part consists of an assessment of the various international and European instruments that stand to protect refugees, on the one hand, and people belonging to the LGBT community on the other hand. The second part of the thesis is a detailed and methodical analysis of the various cases that have been reviewed by the European Court of Human Rights over the last 30 years. The schematic study is followed by a comparative, multi-level analysis of the main characteristics and notions that I was able to derive from approaching the study of this new intersectionality. The research work concludes with Annex I, a guide provided by the UNHCR on "Resettlement Assessment Tool: Lesbian, Gay, Transgender and Intersex Refugees"<sup>2</sup>. It is a form of 30 questions that the United Nations High Commissioner for Refugees published in May 2019 to provide a concrete and comprehensive questionnaire for all social and legal practitioners who work with such a vulnerable group as refugees part of the LGBT community.

The study begins by defining of who a refugee is at the international level and what guarantees, and rights are granted to them by the international community. To do so, we move from Article 14 of the 1951 Universal Declaration of Human Rights. It continues with the analysis of the refugees' identification criteria, i.e., the reasons why they would face persecution in their country of origin and why they consequently

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<sup>1</sup> The term LGBT stands for Lesbian, Gay, Bisexual and Transgender. The LGBT community is often referred to as a community because people who identify under this label have something in common, be it their sexual orientation or gender identity.

The United Nations, Office of the High Commissioner for Human Rights; Free and Equal, definitions, OHCHR; 2022

[<https://www.unfe.org/definitions/>]

<sup>2</sup> UNHCR; The United Nation High Commissioner for Refugees; Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees; 1992; UNHCR; 2022

[<https://www.unhcr.org/4d93528a9.pdf>]

cannot return. Special importance will be enclosed in the membership of a particular social group since the LGBT community can be defined as such. Insofar, as its members share certain characteristics that cannot be changed and which they cannot be asked to renounce, because part of their identity<sup>3</sup>.

The second part of the first chapter analyses the existing international instruments to protect the vulnerabilities generated to the LGBT community. It starts with the Yogyakarta principles, moves through concrete and precise definitions of the LGBTI<sup>4</sup> anagram, and concludes by offering an analysis of the existing instruments in terms of procedures and settings to guarantee the best possible welcome while avoiding stereotypes, systematic discrimination, and institutional violence.

The first chapter concludes with a study of the available European instruments used as a basis for the reception of LGBT refugees. The analysis of these instruments ends with the analysis of the first two cases that reached out to the EU Court of Justice. X, Y and Z, and the case of A, B and C. These two cases will form the basis for further European jurisdiction during the following years. The major outcome of the first sentence is that LGBT refugees, do form a particular social group because of their sexual orientation and/or gender identity<sup>5</sup>. Moreover, the Courts state that applicants should not be asked to conceal their nature to survive in their country of origin<sup>6</sup>. The second judgment is important from several points of view because it first prohibits the authorities from asking for audio/visual evidence or, other formats, that demonstrate the declared sexual orientation. In addition, it is declared legitimate and understandable not to admit their gender orientation at the first possible opportunity. On the one hand,

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<sup>3</sup> United Nations High Commissioner for Refugees; Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Refworld, 2001; page 8  
[<https://www.refworld.org/docid/3b20a3914.html>]

<sup>4</sup> Indeed, there is a difference between the term LGBT and LGBTI. Although I also introduce the term I, which stands for intersexual, I decide not to analyse cases belonging to this specific conceptual sphere. There are several reasons for this; on the one hand, many I-persons do not identify themselves in the queer panorama, on the other hand, through my analysis I have only found one case of an I-person that went all the way to the European Court of Human Rights. This case is the last of the second chapter; L.B. v France, Application no 67839/17, lodged on 11 September 2017.

<sup>5</sup> European Law Blog; C-199/12, C-200/12, C-201/12 – X, Y, Z v Minister voor Immigratie en Asiel: A Missed Opportunity or a New Dawn?; European Law Blog; 2013  
[<https://europeanlawblog.eu/2013/11/13/c-19912-c-20012-c-20112-x-y-z-v-minister-voor-immigratie-en-asiel-a-missed-opportunity-or-a-new-dawn/>]

<sup>6</sup> EDAL; European Database of Asylum Law; Amnesty International and the International Commission of Jurists Joint Observations on sexual orientation and the Qualification Directive; The European Database of Asylum Law; 2013 [<https://www.asylumlawdatabase.eu/en/content/amnesty-international-and-international-commission-jurists-joint-observations-sexual>]

it is wrong to force someone to a coming out not felt at that time. On the other hand, because our focus is still on refugees. Therefore, people who come from contexts in which they have risked the death penalty for their mere sexual attraction to people of the same sex<sup>7</sup>. Thus, if we put ourselves in their shoes, it is easy to understand why a refugee seeking international protection does not want to open up and show this part of himself in front of national operators<sup>8</sup>.

The second chapter is, therefore, a detailed analysis of nearly 30 cases that have come to the European Court of Human Rights in the last 30 years. These cases have been extrapolated from the SOGICA database<sup>9</sup> research finalized with European funds Horizon that had the goal of collecting and classifying all the existing materials and information on LGBT refugees in Europe. The judgements I collected, have been organized within a scheme, to have a clearer reading of them. From the judgements, I extrapolated different information; some of these are mere personal data, such as the reference of the case, who was appealing (then sexual orientation or gender identity, country of origin and year of birth), and the section of the court. Other data are more legal information such as the main articles on which the trial was based, the existing laws in the country of origin on deprivation or limitations for people part of the LGBT community and the waiting time for the judgment. This biographical information are followed by details on what deprivation of rights and freedoms this category of refugees is forced to endure in their country of origin. Finally, there are the outcomes, in which it is simply stated whether asylum has been recognized or not and whether this judgment has had a positive effect on ECHR case law in the analysis of subsequent cases.

For the comparative analysis, various biographical data are considered. Those are the country of origin, the country of refuge, the age, the gender identity, or the sexual orientation. In addition, I formulated a detailed analysis of the articles that the defense uses against the ECHR to protect refugees from the LGBT community. Arguably,

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<sup>7</sup> InfoCuria; Documenti; JUDGMENT OF THE COURT (Grand Chamber), 2 December 2014; InfoCuria; 2022

[<https://curia.europa.eu/juris/document/document.jsf?docid=160244&doclang=EN>]

<sup>8</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Report of Cases; JUDGMENT OF THE COURT (Grand Chamber), 2 December 2014; SOGICA; 2022

[[https://www.sogica.org/wp-content/uploads/2017/04/CELEX\\_62013CJ0148\\_EN\\_TXT-1.pdf](https://www.sogica.org/wp-content/uploads/2017/04/CELEX_62013CJ0148_EN_TXT-1.pdf)]

<sup>9</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Database; SOGICA; 2022

[<https://www.sogica.org/en/sogica-database/>]

Article 3, the prohibition of torture, has already played a fundamental role in justifying the asylum claim. At the same time, we know that most of the refugees who went on appeal identify as gay and, many of these are young adults under the age of 30. Most asylum applications are made by people from the Middle East, particularly from Iran, a country of which we are aware of the strong Sharia restrictive measures against women and “non-compliant” people.



# Chapter 1 - How the international law of human rights recognizes the refugee category and what it states in their favor

## 1.1 Refugee concept in the international law

### 1.1.1 Refugee definition in the international law

In the aftermath of World War I, millions of people have been forced to leave their homelands and belongings in search of refuge. Those were the first refugees of the twenty century and governments found themselves unable to satisfy their primary needs because of a lack of international and shared laws on refugees' human rights or simply because it was still impossible to imagine a shared set of values and law set up to protect human rights. To this dramatic picture, between 1939 and 1945 even more millions became refugees because of forcibly displacement, deportations, or resettlements<sup>10</sup>. The international community needed to proactively act and find a common solution to protect this new generation of refugees<sup>11</sup>.

The first instrument devised after the Second World War was the Universal Declaration of Human Rights<sup>12</sup>; the 1948 Declaration is a cornerstone for the protection of international human rights and outlines which are the inviolable rights that must always be granted to everyone. Specifically, articles 1 and 2 clarify that “all human beings are born free and equal in dignity and rights” and that “everyone is entitled to all the rights and freedoms set forth in this Declaration”<sup>13</sup>; considering that no one is excluded from this first and clear description, also refugees and people seeking for international protection have the rights to ask and enjoy international protection provided by international human rights law based on the equality and non-discrimination principles<sup>14</sup>. Furthermore, the Convention sets some general standards that signing

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<sup>10</sup> The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR, September 2011; page 3 [<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>11</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, 2017; page 6 [<https://www.unhcr.org/3d4aba564.pdf>]

<sup>12</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; 2022; [<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>13</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; 2022; articles 1 and 2 [<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>14</sup> Office of the High Commissioner of Human Rights; Guidelines on International Protection No.9; UNHCR, 23

states must respect towards refugees, such as article 14. This represents the first internationally legally recognised definition and concept on who a refugee is.

- “1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or acts contrary to the purposes and principles of the United Nations.”<sup>15</sup>

Throughout the 20th century, the international community worked out to find a shared solution to the refugees’ issue and in 1951, a declaration relating to the Status of Refugees was adopted during an international Conference held by the newly established United Nations Organization<sup>16</sup>. The Convention was thought to reaffirm the humanity behind the human being and to strengthen the shared values embodied by customary law in most of the religious and cultural traditions around the World. At the same time, it was designed to solve the problems of states that found themselves receiving large numbers of refugees on their territory after the end of the Second World War, thus it states in its first article:

“For the purposes of the present Convention, the term “refugee” shall apply to any person who: as a result of events occurring before 1 January 1951”<sup>17</sup>.

Although the drafters may have been satisfied with the wording of the text, it was soon realized that the refugee problem could not be contextualized and settled within a well-defined time frame. Rather it was a recurring problem within the contemporary world and for which a broader definition would be needed, they needed to contextualize a notion that not only addressed to the Second World War refugees<sup>18</sup>. Thus, during the

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October 2012 [https://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html#:~:text=International%20Protection%20No.-,9%3A%20Claims%20to%20Refugee%20Status%20based%20on%20Sexual%20Orientation%20and,of%20Refugees%2C%2023%20October%202012]

<sup>15</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; 2022. [https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement]

<sup>16</sup> The UN Refugee Agency; Convention and Protocol relating to the Status of Refugees; Convention; 2022; page 2 [https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html]

<sup>17</sup> The UN Refugee Agency; Convention and Protocol relating to the Status of Refugees; Convention; 2022; article 1 [https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html]

<sup>18</sup> Oxford Handbooks Online; The internal law of Refugee Protection; Oxford University Press; 2022 [https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021]

years, the same convention has been subject to “amendments”, further declarations, handbooks, and procedures that had the objective to place the refugee problem in space and time and provide more precise guidance on what procedures states and courts should follow when faced with a myriad of different situations. Although the refugee definition remains a cornerstone of international law, today there is a different kind of awareness of who may be persecuted or may be in danger because of a personal characteristic. For this reason, refugee law has adapted and expanded to encompass the most diverse categories and the most vulnerable groups in society, such as LGBT people.

If we read the first article of the Convention together with the explications present in the 1967 protocol<sup>19</sup>, the refugee definition loses its geographical and temporal limits that were imposed by the convention, so broader speaking a refugee is any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. To claim refugee status, the person must be outside the country of origin or residence. It implies that he/she crossed international borders, if it is not the case, we are in front of an internally displaced person (IDP). Moreover, the person does not need to have fled because of fear of persecution, or even actually to have been persecuted. The fear of being subject to future persecution is enough to seek international protection and asylum<sup>20</sup>. This can be deduced from the first article of the convention, which states:

“Owing to well-founded fear of being persecuted [...] 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”<sup>21</sup>.

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<sup>19</sup> Office of the High Commissioner of Human Rights; Protocol relating to the status of Refugees; OHCHR; 2022 [https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees]

<sup>20</sup> Oxford Handbooks Online; The internal law of Refugee Protection; Oxford University Press; 2022 [https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021]

<sup>21</sup> The UN Refugee Agency; Convention and Protocol relating to the Status of Refugees; Convention; 2022; article 1 A (2) [https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html]

The Refugee Convention and its protocol are the cornerstones of refugees' international protection because they speak about refugee definition, and which are the legal obligations of signatory states towards them<sup>22</sup>. Lately, they have been joined by the New York Declaration on Refugees and Migrants, adopted in September 2016. It was adopted by 193 states and reaffirms after 55 years the shared values of the international community towards the protection of refugees as one of the most vulnerable groups in society<sup>23</sup>.

Consequently, according to the 1951 Convention and all legal and international instruments adopted after it, a refugee is anyone who is outside the borders of his or her state and cannot come back because of fear of persecution. Moreover, persecution can be based on various factors such as race, religion, nationality, or membership of a particular social group. The Convention utilizes a right-based approach and enshrines the UN core values that must be respected for their unique and worthy nature as human beings.

What is Persecution by international law?

According to Article 1 A (2), a person to be considered a refugee needs to have a well-founded fear of being persecuted in his or her country of origin or habitual residence. This fear must refer to one of the five grounds established by the 1951 Convention. However, the document does not explicitly state what is meant by persecution and there is no universally accepted definition<sup>24</sup>. The International Criminal Court (ICC) defines persecution in article 7.2 as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”<sup>25</sup>.

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<sup>22</sup> The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR; September 2011; page 3 [<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>23</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 10; [<https://www.unhcr.org/3d4aba564.pdf>]

<sup>24</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 132 [<https://www.unhcr.org/3d4aba564.pdf>][<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>25</sup> International Criminal Court; Rome Statute of the International Criminal Court; ICC; 2011; article 7.2 [<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>]

The persecution can comprehend a series of human rights violations, including the threat to life or freedom and some different forms of harm. At the same time, persecution can emerge also from cumulative acts that will amount to persecution, whose effects will lead to intolerable or prejudicial situations for the concerned person. The “amount” of persecution cannot be counted, it depends on how the refugee will perceive it and it may vary according to individual and non-changeable characteristics of the individual, e.g. age, gender and psychological condition<sup>26</sup>.

Moreover, persecution can be organized by states’ authorities, family members, or criminal or harmed groups and the State must cover a position of impossibility to protect this category against the experienced or hypothetical future violence.

### 1.1.2 The Identification criteria

As already explained in the previous paragraphs, a refugee is any person who can meet the standards and definition criteria established by article 1 A (2) of the 1951 Convention on Refugees. More specifically, he or she should prove that could incur persecution for reasons of “race, religion, nationality, membership of a particular social group or political opinion”<sup>27</sup>. This is known as a “causal link”<sup>28</sup>.

Sometimes one or more grounds of the description may overlap; specifically, someone can be persecuted because of his race and at the same time because of his or her political opinion<sup>29</sup>. Other times, one of the factors linked to the convention might be

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<sup>26</sup> Mediciens Sans Frontieres; The Practical Guide to Humanitarian Law; MSF; 2022

[[https://guide-humanitarian-law.org/content/article/3/persecution-1/#:~:text=The%20ICC%20Statute%20defines%20persecution,group%20or%20collectivity%E2%80%9D%20\(Art.](https://guide-humanitarian-law.org/content/article/3/persecution-1/#:~:text=The%20ICC%20Statute%20defines%20persecution,group%20or%20collectivity%E2%80%9D%20(Art.)]

<sup>27</sup> The UN Refugee Agency; Convention and Protocol relating to the Status of Refugees; Convention; 2022; article 1 A (2) [<https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>]

The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR; September 2011; page 3 [<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>28</sup> The causal link means “for reasons of”. Thus, to fulfill the refugee definition, an individual’s well-founded fear of being persecuted must be related to – be “for reasons of” – one or more of the five Convention grounds.

United Nation High Commissioner for Refugees; UNHCR position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual’s membership of a family or clan engaged in a blood feud; UNHCR; 2006; page 5

[<https://www.refworld.org/pdfid/44201a574.pdf>]

<sup>29</sup> United Nations High Commissioner for Refugees; Handbook and Guidelines on procedures and criteria for determining refugees status, under the 1951 convention and the 1967 protocol relating to the status of refugees; refworld; 2011; page 16

[<https://www.refworld.org/docid/4f33c8d92.html>]

present but are not the main reason for the persecution. If the persecution is driven by a non-state actor, the causal-link can be established only if the reason for persecution is present in the Convention, or because the state failed to protect the victim from persecution.

### Race and political opinion

Under the convention, race is understood as belonging to any ethnic group because it is common to use the term “race” as a synonym when speaking about ethnic groups or specific minorities living within the borders of a state. Discrimination on the ground of race has found a large condemnation all around the world because it is also a huge violation of human rights. Therefore, racial discrimination represents an important element in determining the existence of persecution<sup>30</sup>.

Normally, belonging to a particular racial group is not enough to claim the refugee status, it can be conferred only when the dignity and the safety of the person are at risk. Not all racial groups are in danger but only those who respond to identification criterias. Most of the time a person can experience persecution because of interrelated reasons and ethnicity, in communion with religion and political opinion can be one of them<sup>31</sup>.

### Religion

The Universal Declaration of Human Rights acknowledges the right to freedom of thought, conscience, and religion<sup>32</sup> that can be manifested with the individual intention to change his or her religion or spiritual belief freely. Moreover, this right can be exercised in the manifestation of one's religion and the right to pray privately or collectively in public places. Usually, the only affiliation to a particular religious group

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<sup>30</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 133  
[<https://www.unhcr.org/3d4aba564.pdf>][<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>31</sup> United Nations High Commissioner for Refugees; Handbook and Guidelines on procedures and criteria for determining refugees' status, under the 1951 convention and the 1967 protocol relating to the status pf refugees; refworld; 2011; page 17  
[<https://www.refworld.org/docid/4f33c8d92.html>]

<sup>32</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; OHCHR; 2022  
[<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

might not be enough to claim the refugee status but it can be the sum of different grounds, as we have seen in the previous paragraph<sup>33</sup>.

### Nationality

The term nationality needs to be read as membership of a particular social group, as in the case of the race. It cannot only imply the “citizenship” definition. Nationality might be perceived as an ethnic or linguistic minority and, as such it could become ground for persecution. As in the case of the racial ground, it might not be easy to distinguish between persecution arising because of political opinion or because of nationality because in case of state conflicts and persecutions, they might converge<sup>34</sup>.

### Membership of a particular social group

A particular social group is understood as a group of people sharing habits and social status. It is also considered the ground the least clear and for this reason, there have been different interpretations of its meaning. Some interpretations emphasize the persecution, others the importance that the group has within the state. Other analysis says that those qualities or characteristics must be innate and unchangeable; thus, because of their immutability, people might be persecuted and incur risks<sup>35</sup>.

Another interpretation of its meaning shares that the same characteristics do not need to be close to the person’s identity and do not need to be innate. Examples of this second interpretation are the person member of a professional group, as the journalists. Those people do not share a common background or a history but at the same time, they might be at risk of persecution because of being representative of a specific category. E.g. journalist and based on research and the work that they carry out<sup>36</sup>. At

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<sup>33</sup> United Nations High Commissioner for Refugees; Handbook and Guidelines on procedures and criteria for determining refugees status, under the 1951 convention and the 1967 protocol relating to the status of refugees; refworld; 2011; page 16

[<https://www.refworld.org/docid/4f33c8d92.html>]

<sup>34</sup> United Nations High Commissioner for Refugees; Handbook and Guidelines on procedures and criteria for determining refugees status, under the 1951 convention and the 1967 protocol relating to the status of refugees; refworld; 2011; page 17

[<https://www.refworld.org/docid/4f33c8d92.html>]

<sup>35</sup> United Nations High Commissioner for Refugees; Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Refwold, 2001; page 7

[<https://www.refworld.org/docid/3b20a3914.html>]

<sup>36</sup> United Nations High Commissioner for Refugees; Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Refwold, 2001; page 8

the same time, people claiming asylum based on their sexual identity, sexual orientation, and heritage might be considered to belong to this category if the expression of their fundamental rights has been deprived.

Anyway, both interpretations are considered valid if the scope is to ensure protection for those who need it. "It would include those who cannot change their innate or historic characteristics and those who should not be required to renounce them"<sup>37</sup>.

The gender-related persecution is one ground that usually is included in the belonging of a particular social group clause because neither gender nor sexual orientation is cited and explained under article 1 of the 1951 Convention. Persecution can be gender-related according to the methods used and up to the target of the persecution. E.g., the racial rape during wars as a punishment for that specific group of women but, also to create a whole generation of "mongrels" that hardly will be accepted by the society. Other cases that may fall under this definition of belonging in a social group based on sexual orientation can be the refusal to wear clothing or acting as the dominant culture provides for your gender role in society. Thus, the violence that these people can face from their society can be considered serious enough to be used to seek international protection<sup>38</sup>.

### Political Opinion

The ground of political opinion should be interpreted in a broad sense, and it should include any opinion concerning any matters linked to the state's governance or society. It moves beyond the identification with a specific political party or organized ideology and can include a huge variety of opinions and thoughts. E.g. Even opinions concerning gender roles and related roles face the society could be a political opinion that some states might not accept and decide to persecute<sup>39</sup>.

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[<https://www.refworld.org/docid/3b20a3914.html>]

<sup>37</sup> United Nations High Commissioner for Refugees; Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Refwold, 2001; page 7

[<https://www.refworld.org/docid/3b20a3914.html>]

<sup>38</sup> United Nations High Commissioner for Refugees; Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Refwold, 2001; page 9

[<https://www.refworld.org/docid/3b20a3914.html>]

<sup>39</sup> Michigan Journal of International Law; Toward a New Framework for Understanding Political Opinion; University of British Columbia, Allard School of Law; 2016; pages 6,7,8

[<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1092&context=mjil>]



However, to have a different political opinion from the major group within the society is not enough to claim asylum and to be considered a refugee, this ground can be applied only when the different political opinion might result in persecution by the states' authorities or by the community<sup>40</sup>. Therefore, 'political opinion' can be defined as the possibility of being able to enjoy fundamental rights, as set out in Article 19 of the Universal Declaration of Human Rights<sup>41</sup>. Everyone has the right to express their opinion without interference, and everyone has the right to freedom of expression and to exercise this right as they see fit within the scope of the law<sup>42</sup>.

### 1.1.3 Regional instruments protecting refugees' human rights

The protection of refugees' human rights and the defense against discrimination have been further analyzed and framed into regional practices. In fact, nowadays every region of the world can boast of regional practices and norms that defend the rights of refugees and that best suit their own customs, practices, and values. At the same time, those rules suit the best regional migration fluxes and are a concrete answer to the refugee situation in that every region lives in a different way. A detailed analysis of these regional instruments is beyond the scope of this paper, and, for this reason, I will only analyze the instruments devised by the Organization of African Unity and the European Union. The former because it is particularly curious and the latter because it is an integral part of the work in chapter two.

#### Organization of African Unity

To this extent, the OAU<sup>43</sup> decided to deal with the post-colonial era refugee movement and issues with the 1969 OAU Convention on the Specific Aspect of Refugees'

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<sup>40</sup> United Nations High Commissioner for Refugees; Protection Training Manual for European Border and Entry Officials; UNHCR; 2022; page 4  
[<https://www.unhcr.org/4d944d089.pdf>]

<sup>41</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; OHCHR; 2022; art 19  
[<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>42</sup> Michigan Journal of International Law; Toward a New Framework for Understanding Political Opinion; University of British Columbia, Allard School of Law; 2016; page 9  
[<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1092&context=mjil>]

<sup>43</sup> Wikipedia; Organization of African Unity; Wikipedia; 2022  
[[https://en.wikipedia.org/wiki/Organisation\\_of\\_African\\_Unity](https://en.wikipedia.org/wiki/Organisation_of_African_Unity)]

Problems in Africa<sup>44</sup>. It is the basic and universal instrument relating to the refugees' issue in Africa and even if approves and reaffirms the definition set in the 1951 Convention, expands the definition by adding reasons of:

“External aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality”.

This clause is explicit in the reality of the African continent's experience, as it adds to the international definition of the fear of foreign occupation, which can be identified with a throwback to colonialism. At the same time, the organization also adds "events that disturb public order", undoubtedly in reference to the continent's strong socio-political instability, due to borders that are often defined on paper and to a power concentrated in the hands of a few that very often ends in authoritarian or dictatorial regimes.

European Union<sup>45</sup>

The most developed regional system in terms of asylum and the shared procedure is the European Union. In 1999 it decided to create a common European asylum system based on the full and inclusive application of the Geneva Convention. Since then, four different instruments have been adopted and each one of them addresses special content to refugee law in areas not addressed by the 1951 Convention.

The instruments adopted by the European Union are the temporary protection<sup>46</sup>, the reception of asylum-seekers<sup>47</sup>, the qualification for refugee status or the “subsidiary protection”<sup>48</sup>, and the rights and status to which beneficiaries are entitled<sup>49</sup>; and

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<sup>44</sup> Refworld, Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"); Refworld; 2022

[Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")]

<sup>45</sup> This is just an introduction to the Refugees Rights that the European Union guarantees and protects through its international instruments. A more detailed analysis of its work will be studied in the second chapter.

<sup>46</sup> The European Commission; Migration and Home Affairs, Temporary Protection; European commission website, 2022

[[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en)]

<sup>47</sup> The European Commission; Migration and Home Affairs, Reception Conditions; European commission website, 2022

[[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/reception-conditions\\_it](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/reception-conditions_it)]

<sup>48</sup> The European Commission: Migration and Home Affairs, who qualifies for international protection; European

standards for asylum procedures. Moreover, the European Union created a Regulation called “Dublin III”<sup>50</sup> that established the criteria for determining which European Member State is responsible for examining an asylum application. To provide operational support, the EU also created two agencies that operate on the EU external borders, those are Frontex<sup>51</sup> and the European Agency for Asylum, that has recently supplanted the EASO - the European Support Office<sup>52</sup>.

The 2007 Charter of Fundamental Rights has a value equal to that of the EU’s founding treaties and includes also the right to asylum and *non-refoulement* and includes a non-extradition provision in case of serious risk of being harmed and injured. Moreover, the Court of Justice of the European Union (CJEU) enjoys the right to interpret all the EU asylum instruments and to rule on any infringement by Member states. Over the years the CJEU and the European Court of Human Rights of the Council of Europe had a significant influence on the European development of international refugee law and on the respect of the European Convention on Human Rights and Fundamental Freedoms<sup>53</sup>.

#### 1.1.4 Which rights they can enjoy according to the 1951 convention

The 1951 convention, in conjunction with the 1967 protocol, establishes the respect of certain inviolable rights towards refugees, three of which I will analyze are articles 3, 31, and 33 which tell respectively of non-discrimination, non-penalization (of the unlawful refugees present in the country of refugee) and *non-refoulement* of refugees.

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commission website, 2022

[[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection\\_it](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection_it)]

<sup>49</sup> EUR-Lex; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; EU website; 2022  
[<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>]

<sup>50</sup> The United Nations Refugees Agency; The Dublin Regulation, Asylum in Europe; the UNHCR; 2022  
[<https://www.unhcr.org/4a9d13d59.pdf>]

<sup>51</sup> Frontex, Latest Update, Frontex, 2022 [<https://frontex.europa.eu/>]

<sup>52</sup> European Union Agency for Asylum; News; EUAA; 2022 [<https://euaa.europa.eu/>]

<sup>53</sup> The Council of Europe, European Convention on Human Rights; CoE; 2022  
[[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)]

## Non-Discrimination

The non-discrimination principle is a cornerstone in the human rights protection, and it is even included in the Universal Declaration of Human Rights<sup>54</sup>. Later it was also taken up by the 1951 Convention relating to the Status of Refugees. Even if refugees are legally granted a set of rights, it is important to recognize the situation in which the refugee lives and if those rights can be truly and completely enjoyed by them or if they are just granted by international law but the hosting state has not been willing or able to make these rights enjoyable by the hosted refugees. The refugee convention with article 3 states that states should not act with discriminatory measures toward the refugee population present in their country:

“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”<sup>55</sup>

This article, prohibiting the state to discriminate against refugees, results in a series of positive provisions. These correspond to the various rights that refugees can enjoy in the country of refuge, such as the freedom of movement; the freedom in creating a family life, including family unity; the right to work; the right to education; the free access to courts; the right to social welfare and health care; and other rights<sup>56</sup>. Every state is obliged to implement its international obligations in good faith, which often means incorporating international treaties into domestic law, and setting up appropriate mechanisms so that those who should benefit are identified and treated accordingly<sup>57</sup>.

On this subject, we can analyze the refugees' rights to housing<sup>58</sup>. Even though the international conventions and a set of international or regional instruments affirm the

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<sup>54</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; OHCHR; 2022; article 7  
[<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>55</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; OHCHR; 2022; article 3  
[<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>56</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 203  
[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>57</sup> Oxford Academic, The International Law of Refugee Protection; Oxford Academic; 2014  
[<https://academic.oup.com/edited-volume/28193/chapter-abstract/213108129?redirectedFrom=fulltext>]

<sup>58</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration;

refugees' right to freely choose where to live, everyday life results being a little different<sup>59</sup>. Most of the time and in most of the country's refugees live in refugee camps in rural areas and they depend on humanitarian aid. So even though they have the right to freely and lawfully live among the host community, the host governments frequently insist on the establishment of refugee camps for reasons of public order or security, or to avoid competition between refugees and nationals<sup>60</sup>.

#### Non-Penalization of refugees unlawfully present in the country of refugee

Before starting to analyze article 31 it is important to state that it is not a crime to cross an international border without authorization in order to seek asylum, thus the 1951 convention re-affirms:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence<sup>61</sup>”.

So, if a refugee comes directly from a country where he or she was fearing persecution because of any ground of the already mentioned Convention, he or she cannot be punished for the illegal entry or presence, instead, the country must analyze his or her claim for asylum. Moreover, the UNHCR's Executive Committee affirmed that detention should be avoided and should be reported only in presence of particularly difficult<sup>62</sup>. However, many states agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker

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OHCHR; 2022; article 21

[<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>59</sup> <https://www.ohchr.org/en/special-procedures/sr-housing/migration-and-right-housing>

<sup>60</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 203

[<https://www.unhcr.org/3d4aba564.pdf>] [<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement>]

<sup>61</sup> Office of the High Commissioner of Human Rights; Universal Declaration of Human Rights; Declaration; OHCHR; 2022; article 31

<sup>62</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 92

[<https://www.unhcr.org/3d4aba564.pdf>]

traveling irregularly or with false travel documents to lodge an asylum application at any stage of the journey because in danger<sup>63</sup>.

Here, a distinction must be made between direct arrival, which corresponds to the direct arrival from the country where he or she was suffering persecution with respect to one of the clauses of Article 1A (2) of the Refugee Status Convention, and arriving from a third country, where the person has transited but has not applied for asylum. The asylum application can be accepted if this transit country is considered to be dangerous for the applicant's own safety. E.g., if we are talking about persons belonging to a particular ethnic group who are persecuted in several countries<sup>64</sup>.

The case of the transit country is an interesting one, especially for refugees who flee on foot and are therefore forced to physically cross several countries before they feel safe and can seek refuge. For example, this is the case of many refugees who arrive on foot from the Balkan route and who consequently have their fingerprints already registered in states such as Greece or Croatia, countries that are no longer considered 100 percent safe due to the violence exercised by the police on refugees and the poor reception conditions in refugee camps<sup>65</sup>.

#### Non-refoulement<sup>66</sup> Principle

National constitutions and legislations implement the principles established by international agreements by adopting good practices and national laws. They can carry out this task in several ways, either by referring directly to the rights of refugees to be accepted and not rejected, or by speaking more generally in relation to the risk of torture. Those risks include the death penalty, other inhuman or degrading treatment or

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<sup>63</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 34  
[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>64</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 92  
[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>65</sup> Border Violence Monitoring Network; Balkan Regional Report - September 2022; Border Violence Monitoring Network; 2022  
[<https://www.borderviolence.eu/balkan-regional-report-september-2022/>]

<sup>66</sup> Refouler is a French word that is usually translated with the English expression “to push back”; checked in Cambridge dictionary; <https://dictionary.cambridge.org/dictionary/french-english/refouler>

punishment or to treatment violating human dignity<sup>67</sup>. Today, the principle of *non-refoulement* underpins for international refugee law, but it also an integral part of human rights protection, implicit in the subject matter of any of such rights, and it is an important rule of customary international law<sup>68</sup>. In fact, article 33 states:

“No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion”

The right of refugees to be protected from the forced return is perhaps one of the most important rights within international refugee protection. The article also prohibits states from refusing the entry to a refugee if he or she is at the state borders and prohibits forced removal from the country if it directly or indirectly implies the refugee's return to the state he or she was fleeing from. Moreover, the article must be applied by the state wherever it can exercise authority, even outside its borders and on high seas<sup>69</sup>. Some examples of this principle are the extreme savings operated in the Mediterranean Sea by SeaWatch and Mediterranea to save as many people as possible where the state is most lacking in resources or will.

At the same time, the *non-refoulement* principle is also present under the international law of human rights and customary law. In the human rights law, many provisions and regional instruments that prohibit the removal of anyone (whether refugee or not) if he or she is a risk of inhuman or degrading treatment and torture<sup>70</sup>. Under international human rights law, the prohibition of refoulment is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced

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<sup>67</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 19 [https://www.unhcr.org/3d4aba564.pdf]

<sup>68</sup> Oxford Handbooks Online; The internal law of Refugee Protection; Oxford University Press; 2022 [https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021]

<sup>69</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 20 [https://www.unhcr.org/3d4aba564.pdf]

<sup>70</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 20 [https://www.unhcr.org/3d4aba564.pdf]

Disappearance (ICPPED)<sup>71</sup>. To this extent, the Office of the High Commissioner for Human Rights published a series of recommendations and principles on human rights at international borders and even guidelines for police officers working on borders on how to behave with migrants and refugees, which being very difficult jobs where you are easily subject to stress and as a result you may be more vulnerable<sup>72</sup>. At the same time, lots of NGOs patrol borders to report cases of pushbacks operated by local police, violence, and abuse of power, most of the time occurring by police on irregular migrants and refugees<sup>73</sup>. One of them is the “Border Violence Monitoring Network”<sup>74</sup>, a group of NGOs operating all along the Balkans (Eastern European Borders) with the purpose of monitoring, analyzing, and reporting a series of violence and exploitation that are occurring over the years in these regions. During the years they have been able to create a database with all the pushbacks that occurred over the years<sup>75</sup>.

The *non-refoulement* principle can also be defined as a cornerstone of customary law<sup>76</sup> because it is commonly accepted and shared, those states must not push back any person who might fear persecution into to his or her country of origin. We can define the *non-refoulement* principle as part of the customary law also because it is incorporated into international treaties and adopted at regional and international levels then it has been reaffirmed by the 1967 UN Declaration on territorial asylum and systematically integrated by UNHCR in resolutions, so it implies that it is universally recognized as a binding principle and that states need to respect<sup>77</sup>. Thus, even if a state is not a signatory of the 1951 Convention, it has a normative character that implies moral

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<sup>71</sup> Office of the High Commissioner for Human Rights; The Principle of non-refoulement under international human rights law; OHCHR; 2022

[<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-refoulementUnderInternationalHumanRightsLaw.pdf>]

<sup>72</sup> Office of the High Commissioner for Human Rights; Publications; UNHCR; 2022

[<https://www.ohchr.org/en/publications>]

<sup>73</sup> Office of the High Commissioner for Human Rights; Migrants in vulnerable situations; OHCHR; 2022

[<https://www.ohchr.org/en/migration/migrants-vulnerable-situations>]

<sup>74</sup> Borders Violence Monitoring Network; latest news; BVMN; 2022

[<https://www.borderviolence.eu/>]

<sup>75</sup> Borders Violence Monitoring Network; Statistics; BVMN; 2022

[<https://www.borderviolence.eu/statistics/>]

<sup>76</sup> Customary international law is made up of rules that come from "a general practice accepted as law" and that exist independent of treaty law. International law comes from both treaty law and rules of what is known as customary international law. Treaties are written conventions in which States formally establish certain rules. Customary international law, on the other hand, is not written but derives from "a general practice accepted as law". International Committee of the Red Cross; Customary International Humanitarian law; ICRC; 2022

[<https://www.icrc.org/en/document/customary-international-humanitarian-law-0>]

<sup>77</sup> Refworld; The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93; Refworld; 2022

[<https://www.refworld.org/docid/437b6db64.html>]



obligation and a non-written commitment toward the *non-refoulement* and other states<sup>78</sup>.

#### 1.1.5 The exclusion criteria according to the 1951 convention

So far, we have discussed who a refugee is, what instruments states set for their protection, and what rights they can enjoy at the international level. It is therefore important to make a parenthesis on who is not a refugee and what are the exclusion criteria according to the 1951 convention. In fact, the Convention cannot be applied to all refugees because some categories have been excluded from enjoying such protection. These are listed in Article 1(C) to (F).

The Convention shall not apply to people who voluntarily re-availed themselves of the protection of the country of their nationality, re-acquired their citizenship or obtained another nationality, or because of the circumstances that allowed them to have the refugee status cease to exist. Moreover, the convention must not apply to people that are receiving protection from other UN agencies<sup>79</sup>, one example is people living in Palestine. In fact, the UN created a special agency to protect Palestinians refugees and to better address their needs<sup>80</sup>. In concrete, the convention does not apply to Palestinians who were refugees as a result of the 1948 or 1967 Arab-Israeli conflicts because they could enjoy international assistance and protection from appropriate organizations<sup>81</sup>, such as the UNRWA<sup>82</sup>.

The convention cannot apply either to refugees that have already obtained citizenship and legal protection from another state<sup>83</sup> or to people toward whom there are serious

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<sup>78</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 38  
[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>79</sup> The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR; September 2011; article 1(D)  
[<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>80</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East; Highlights; UNRWA; 2022  
[<https://www.unrwa.org/>]

<sup>81</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 144  
[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>82</sup> The United Nations Relief and Works Agency for Palestine Refugees in the Near East

<sup>83</sup> The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR;

reasons for considering that they have committed crimes against peace, war crimes, crimes against humanity, and other serious but non-political crimes outside the country of refuge. Hence, no one who is guilty of acting against the purpose of the UN might be eligible for international protection<sup>84</sup>.

The rationale for these exclusion clauses is two-faced. First, certain acts are so grave that they make the perpetrator undeserving of refugee protection. Secondly, the refugee protection framework should not stand in the way of serious criminals facing justice<sup>85</sup>. UNHCR's Executive Committee has called on States to apply the exclusion clauses "scrupulously" to protect the integrity of the institution of asylum<sup>86</sup>.

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September 2011; article 1(E)

[<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>84</sup> The UN Refugee Agency; The 1951 Convention relating to the Status of Refugees and its 1976 protocol; UNHCR; September 2011; article 1(F)

[<https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>]

<sup>85</sup> The UN Refugee Agency; A guide to international refugee protection and building state asylum systems; Handbook for parliamentarians N°27, UNHCR; 2017; page 145

[<https://www.unhcr.org/3d4aba564.pdf>]

<sup>86</sup> Refworld; Safeguarding Asylum No. 82 (XLVIII) – 1997; Refworld; 2022

[<https://www.refworld.org/docid/3ae68c958.html>]

## 1.2 Understanding how international law defines and protects the LGBTI community

### 1.2.1 The Yogyakarta principles

Even though the refugee convention drafted by ONU dates 1951, the rights of LGBT refugees never covered an important role in international law until the 90s<sup>87</sup>. The first internationally accepted and agreed definition, followed by international standards was only published in 2006 at the Yogyakarta meeting. During this occasion, distinguished exponents of law with different backgrounds and experiences in human rights codified sexual orientation and gender identity under the International Human Rights Law<sup>88</sup>. From this moment on, the Yogyakarta principles bound international standards toward which each state must comply.

Yogyakarta principles have been a concrete answer to the continuous violation of human rights towards the LGBT community. Those have been implemented in 2017<sup>89</sup> and used by the UN and the EU as a reference and a guideline to protect this community's rights<sup>90</sup>.

The importance of Yogyakarta principles lays down in its introduction and preamble, where is explained that sexual orientation and gender identity are integral to every person's dignity and thus must not be the basis for discrimination or abuse. Moreover, the convention enshrines some important definitions; in fact sexual orientation is defined as "each person's capacity for profound emotional, affectional and sexual

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<sup>87</sup> Intersectionality The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasizes that discrimination against women based on sex and gender can be linked to other types of discrimination based on other factors, such as class, ethnicity, age, disability and health status. A man who is gay, living with HIV and without a secondary school diploma might experience discrimination due to his sexual orientation, gender identity, health condition and socioeconomic status as linked to his educational background. A transgender woman who is deaf, of a particular ethnicity and a refugee, may face discrimination and barriers due to any of these factors. Each of these types of discrimination is based on different but interlinked power structures and asymmetries that interact to create multi-faceted or inter-linked discrimination, which can lead to stigmatization, exclusion, abuse, and violence. <https://www.unhcr.org/611e33704> page 31

<sup>88</sup> Refworld; the Yogiakarta Principles; principles on the application of international human rights law in relation to sexual orientation and gender identity; page 10 [<https://www.refworld.org/pdfid/48244e602.pdf>]

<sup>89</sup> In 2017, the Yogyakarta principles were revised and implemented. Since then, the Yogyakarta+10 has been used, a document that has been updated and includes a new analysis and new nuances of the principles that cannot be ignored by people in the queer community.

<sup>90</sup> The Yogyakarta Principles; The Yogyakarta Principles; 2022 [<https://yogyakartaprinciples.org/>]

attraction to, and intimate and sexual relation with, individuals of a different or same or more than one gender”. Gender identity is understood as the “individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body”<sup>91</sup>.

The principles do not create any new law or obligation, only stress the existing ones based on international human rights laws, as an expression of treaties, treaty bodies, specialized courts and commissions<sup>92</sup>. Even though in many countries LGBTI rights have been increasingly recognised, there are several states where queer<sup>93</sup> people<sup>94</sup> continue to be discriminated against, marginalised and criminalized due to their sexual orientation or gender identity.

The importance of Yogyakarta principles lie down in the formulation of sexual orientation and gender identity definition. Gender identity refers to a person’s, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender. “Gender identity” refers to the innermost concept of self as male, female, both, neither or non-binary. It depends on how the individual perceives themselves and what they call themselves<sup>95</sup>. It depends of internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerism<sup>96</sup>. For most people, sexual orientation or gender identity is determined at an early age and for others, it can evolve across a person’s lifetime<sup>97</sup>.

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<sup>91</sup> Refworld; the Yogyakarta Principles; principles on the application of international human rights law in relation to sexual orientation and gender identity; page 6 [<https://www.refworld.org/pdfid/48244e602.pdf>]

<sup>92</sup> The Yogyakarta Principles; An Activist’s Guide to The Yogyakarta Principles; 2006; page 10 [[https://outrightinternational.org/sites/default/files/Activists\\_Guide\\_Yogyakarta\\_Principles.pdf](https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf)]

<sup>93</sup> Queer is a term describing sexuality that rejects the definitions of female and male as sexual and social behaviour. Often the term queer is used as an umbrella term for sexual identity within a particular community, the LGBT community. The term is also used to describe the group as a whole and create queerness among people who do not define themselves as heterosexual or cis-gender. Britannica; queer sexual politics, definition and uses; Britannica; 2022 [<https://www.britannica.com/topic/transgender>]

<sup>94</sup> CAP; Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways; Center for American Progress; 2017 [<https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>]

<sup>95</sup> Human Rights Campaign; Sexual Orientation and Gender Identity Definitions; Human Rights Campaign; 2022 [<https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>]

<sup>96</sup> The Yogyakarta Principles; An Activist’s Guide to The Yogyakarta Principles; 2006; page 8 [[https://outrightinternational.org/sites/default/files/Activists\\_Guide\\_Yogyakarta\\_Principles.pdf](https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf)]

<sup>97</sup> The United Nations High Commissioner for Refugees; Resettlement Assessment Tool: Lesbian, Gay,

The second of these principles recognizes that every human being is entitled to state' protection against discrimination based on sexual orientation or gender identity and specifies that states shall embody non-discrimination principles in their national constitutions and ensure their realization. Moreover, they should adopt appropriate legislative measures to eliminate discrimination in the public and private sphere and ensure the enjoyment of human rights<sup>98</sup> under SOGI<sup>99</sup> issues. The Y+10 also contains obligations related to asylum, torture, health, and human rights defenders; it is rather an innovative tool developed in 2017 by the international community.

The adoption of the Yogyakarta document has been fundamental in achieving growing respect for LGBT rights as states have ensured their fulfillment. The foremost principle to focus on is the 23rd; the right to seek asylum. It reaffirms everyone's right to seek and enjoy asylum in other countries in case of persecution, related to their sexual orientation or gender identity. It further adds:

“A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.”<sup>100</sup>

Moreover, persecution is accepted as a ground to seek asylum and no policy or practice should discriminate against asylum seekers; no person should be removed if he or she might face persecution, torture or other degrading treatments and punishments based on a person's gender identity and sexual orientation. Several situations can end in persecution or hostile and discriminatory behavior toward LGBT people; it includes forced marriage, physical and sexual violence, arbitrary arrest, and

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Bisexual, Transgender and Intersex Refugees; UNHCR 2022; page 2  
[<https://www.unhcr.org/51de6e5f9.pdf>]

<sup>98</sup> The Yogyakarta Principles; The Yogyakarta Principles; 2022; page 11  
[<https://yogyakartaprinciples.org/>]

<sup>99</sup> Acronyms for: Sexual Orientation and Gender Identity

<sup>100</sup> Refworld; the Yogyakarta Principles; principles on the application of international human rights law in relation to sexual orientation and gender identity; page 27  
[<https://www.refworld.org/pdfid/48244e602.pdf>]

the threat of arrest or execution<sup>101</sup>. More detailed norms and procedures concerning the right of asylum for LGBT people are analyzed by the UNHCR 2009 directive n°9<sup>102</sup>.

### 1.2.2 The LGBTI international definition

Often the term gay is used as a synonym of the word LGBTI, just think about gay pride, which is called gay and not LGBTI pride, a rainbow washing that made invisible all the other nuances contained within the same word, which is gradually broadening and beginning to encompass more and more categories that are too often left behind and becoming invisible in front of civil society. In fact, in the LGBT community, there is a strong lack of representation of L persons<sup>103</sup>; in addition, B persons almost do not exist in the eyes of the media and for the community itself, there is still some indecision about the role and belonging of I persons<sup>104</sup>. Those are just some of the debates that go on in the everyday LGBTI world and within it<sup>105</sup>.

Moreover, it is important to underline that for most people, especially refugees coming from states where they cannot enjoy their rights, and to be homosexual is considered a crime, this term and this classification might result to be offensive and too strict. Hence, it is important to remember that for most people sexuality is fluid, and it is difficult to stick around closed definitions. L and G letters respectively mean lesbians and gay, thus people that are physically and mentally attracted to same-sex individuals. On the contrary, the B indicates bisexual individuals, people who are physically and mentally attracted by both sexes, so men and women.

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<sup>101</sup> The Yogyakarta Principles; An Activist's Guide to The Yogyakarta Principles; 2006; page 72 [https://outrightinternational.org/sites/default/files/Activists\_Guide\_Yogyakarta\_Principles.pdf]

<sup>102</sup> The United Nation High Commissioner for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR 2022 [https://www.unhcr.org/3d58ddef4.pdf]

<sup>103</sup> Maxine Wolf; Invisible women in in invisible places: lesbians, lesbians bars and the and the Social Production of PeopleEnvironment Relationships; University of New York, USA, 1992; page 3 [https://www.epfl.ch/labs/lasur/wp-content/uploads/2018/05/WOLFE.pdf]

<sup>104</sup> The United Nations High Commissioner for Refugees; Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees; UNHCR 2022; page 20 [https://www.unhcr.org/51de6e5f9.pdf]

<sup>105</sup> The Council of Europe; LGBT+; LGBT stands for lesbian, gay, bisexual and transgender/transsexual people. However, it is recognised that those four letters do not necessarily include all those whose sexuality is not heterosexual, or whose gender identity is not based on a traditional gender binary.; Council of Europe, 2022

[https://www.coe.int/en/web/gender-matters/lgbt-#%2267587584%22:[3];]

The T<sup>106</sup> stands for transgender and refers to all the individuals whose gender identity is not aligned with their assigned sex at the moment of the birth<sup>107</sup>. Thus, they might undergo gender resignation through hormone therapies, and voice and genital changes but these operations are not essential to describe a person as transgender<sup>108</sup>. A concept that has recently come into force and does not disturb almost anyone's sensibilities is "assigned male or female at birth". This means that the male or female sex was decided at birth but does not correspond with the identity that the individual recognize himself or herself in, and the acronyms used are AMAB or AFAB<sup>109</sup>. Only on 25th May 2019 the WHO did withdraw transgenderism from the list of mental disorders<sup>110</sup>. Human Rights Watch admitted that this move would have a "liberating effect on transgender people worldwide"; human rights issues such as legal recognition, should be separate from medical procedures. However, if a person in a transition moment requires medical support, those services should be available and accessible<sup>111</sup>.

I, on the other hand, indicate intersex people, all those people who, without medical intervention, developed primary or secondary sex characteristics that do not fit "neatly" into society's definitions of male or female. Many visibly Intersex people are mutilated in infancy and early childhood by doctors to make the individual's sex characteristics conform to society's idea of what normal bodies should look like. Intersex people are

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<sup>106</sup> When we talk about T-persons, it is strict to make a distinction. The term transgender is used as an umbrella term for all people who have a gender expression that differs from the gender assigned at the time of birth. The term transsexual is no longer considered politically correct and should therefore only be used if the person referred to, specifies that they wish to be referred in these terms. Often this term is used by all those who have undergone therapy in order to be trained in gender identity.

Healthline; sexual health, Is There a Difference Between Being Transgender and Transsexual?; Healthline; 2019

[<https://www.healthline.com/health/transgender/difference-between-transgender-and-transsexual>]

<sup>107</sup> This is why it is important to always ask which pronouns one prefers to refer to a person and to use language that is as restrained as possible so as not to hurt anyone's feelings and not harm the other person's identity. The Center; The lesbian, gay, bisexual and transgender community center; Pronouns, Why Matter; The Center; 2022 [<https://gaycenter.org/pronouns/>]

<sup>108</sup> The Center; The lesbian, gay, bisexual and transgender community center; What is LGBTIQIA+?; The Center, 2022 [<https://gaycenter.org/about/lgbtq/#transgender>]

<sup>109</sup> Istituto Superiore di Sanità; Info Trans; Glossario ed identità di genere; Istituto Superiore di Sanità, 2022 [[https://www.infotrans.it/it-schede-8-glossario\\_transgender](https://www.infotrans.it/it-schede-8-glossario_transgender)]

<sup>110</sup> The Time; The World Health Organization Will Stop Classifying Transgender People as Having a 'Mental Disorder'; The Time; 2022

[<https://time.com/5596845/world-health-organization-transgender-identity/>]

<sup>111</sup> Human Rights Watch; New Health Guidelines Propel Transgender Rights, World Health Organization Removes 'Gender Identity Disorder' Diagnosis; Human Rights Watch News; 2022 [<https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights#>]

relatively common, although society's denial of their existence has allowed very little room for intersex issues to be discussed publicly<sup>112</sup>. Someone considers that intersex condition can be fixed with biomedical intervention, while others think it is a violation of human rights and body integrity, especially if decided by doctors or parents during childhood. It is discussed if intersex people should be included in the SOGIESC criteria or not because they certainly need protection and because experienced most of them as exploitation and humiliation like those endured by the LGBT community<sup>113</sup>.

Over the years, the gay community is expanding and beginning to encompass more and more sexual orientations and gender identities and the discussion moved towards wider topics such as gender expression and sex characteristics as explained in Yogyakarta Principles Plus 10<sup>114</sup>. It is important for civil society, policymakers, and stakeholders to be aware of the changes within it to respond to their needs in a timely and effective manner, finding appropriate solutions to their various needs. One policy among others could be offering good integration toward LGBT refugees granting adequate health and psychological support in the country of refugee. At the same time, gender expression and sex characteristics move us away from a western view of sexuality and help us better understand how it can be expressed in other cultures and parts of the world<sup>115</sup>.

Within this panorama, it is therefore important to give credit and visibility to all those realities and associations that actively work to advocate for the community to make the social stigma suffered by this group known as much as possible and to find alternative solutions and policies, including those of understanding and acceptance. One of these is ILGA-World, The International Lesbian, Gay, Bisexual, Trans and Intersex Association, which operates with this aim, and which is organized into six different

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<sup>112</sup> University of California; Lesbian, Gay, Bisexual and Transgender Resource Center; General Definition; University of California, UCSF; 2022 [<https://lgbt.ucsf.edu/glossary-terms>]

<sup>113</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022, para 12 [<https://www.unhcr.org/611e33704>]

<sup>114</sup> The Yogyakarta Principles plus 10; Additional Principles and State Obligations on the application of international Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender expression and Sex Characteristics to complement the Yogyakarta Principles; The Yogyakarta principles plus 10, 2017 [[https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)]

<sup>115</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022, para 12 and 13 [<https://www.unhcr.org/611e33704>]



regional groups to better respond to their specific needs. Those are the Pan-African, Asian, European, Latin American, North American and Oceanian sections<sup>116</sup>.

ILGA-Europe are an independent, international non-governmental umbrella groups uniting over 600 organizations from 54 countries across Europe and Central Asia<sup>117</sup>. ILGA focuses on equality, inclusiveness, and accountability and every year monitors and reports LGBT situations in the study area. With the data collected, it can create a database and various reports to measure the respect of fundamental rights and freedoms for LGBTI people and analyze whether the state is able to increase them over time or not. At the same time, it also reports all situations of violation of rights and all countries where the death penalty or imprisonment as punishment for homosexual acts is still present<sup>118</sup>. Moreover, ILGA-World creates a year-report where it is analyzed if the state improved national laws in favor of the LGBT community or if it is still strict. In the analysis is involved a depth study of countries that still legitimize death penalty, imprisonment, and punishment toward the gay community. This instrument results to be fundamental when studying a n asylum claim based on such criteria.

Still, 78 countries around the world criminalize people based on their sexual orientation and 5 apply the death penalty, as mentioned in the last ILGA-World annual report. As a result, many LGBTI people decide to flee their home country and seek asylum in Europe, even if it is not an easy process<sup>119</sup>. European Countries and authorities lack specific measures to protect LGBT people, insufficient respect for their privacy and human dignity, no consideration of taboo and stigma in the country of origin and a general lack of country-of-origin information.

Having these data on hands is easy to understand that many LGBTI people did not have that much sexual experience in their home country and that their sexual orientation and gender identity might not be disclosed to family and friends. This should not be a reason to deny protection but a valid ground to grant it<sup>120</sup>. If the refugee

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<sup>116</sup> ILGA World; About Us; ILGA World, 2022 [<https://ilga.org/about-us>]

<sup>117</sup> ILGA Europe; About Us; ILGA Europe, 2022 [<https://www.ilga-europe.org/about-us/who-we-are/>]

<sup>118</sup> ILGA Europe; Policy briefing on LGBTI refugees and EU asylum legislation; ILGA Europe; 2021 [<https://www.ilga-europe.org/policy-paper/policy-briefing-on-lgbti-refugees-and-eu-asylum-legislation/>]

<sup>119</sup> ILGA Europe; Policy briefing on LGBTI refugees and EU asylum legislation; ILGA Europe; 2021 [<https://www.ilga-europe.org/policy-paper/policy-briefing-on-lgbti-refugees-and-eu-asylum-legislation/>]

<sup>120</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity

managed to escape persecution and harmful treatment it does not mean that he or she will not face it in future, thus it is important to examine what will happen if the applicant is returned to his or her country of origin<sup>121</sup>. It is also important to note that not all these individuals will self- identify with the LGBTI terminology. Some may be unaware of these labels or may only be able to draw upon (derogatory) terms used by the persecution<sup>122</sup>.

UNHCR 2021 Global Roundtable on “LGBTIQ+ Persons in Forced Displacement and Statelessness” underlines that many people have experienced gender-based violence due to SOGIESC characteristics either or both in the country of origin and asylum. The psychological, social and emotional repercussions can be life-threatening, thus a reason to seek asylum<sup>123</sup>. Sexual violence survivors might not have access to clinical management of trauma tailored to their special needs and might be victims of stigma and social barriers (especially if male, transgender or gender non-conforming)<sup>124</sup>.

Although we are aware of the various form of violence and discrimination suffered by homosexuals outside European Union borders’, it is important to reconfirm that even in the EU there is still work to be done to ensure that the rights of all are respected<sup>125</sup>. ILGA's 2022 annual report on state-sponsored homophobia<sup>126</sup> gave each country a percentage to indicate respect for fundamental freedoms and equality. Azerbaijan

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within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR; 2022; para 30 and 31  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>121</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022; para 42  
[<https://www.unhcr.org/611e33704>]

<sup>122</sup> The United Nations High Commissioner for Refugees; Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees; UNHCR 2022; page 3  
[<https://www.unhcr.org/51de6e5f9.pdf>]

<sup>123</sup> The United Nations High Commissioner for Refugees; LGBTIQ+ Refugees, 6. Health care and mental health; The UNHCR, 2022  
[<https://www.unhcr.org/handbooks/ih/age-gender-diversity/lgbtiq-refugees>]

<sup>124</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; para 69 The UNHCR 2022; [<https://www.unhcr.org/611e33704>]

<sup>125</sup> ILGA Europe; Rainbow Index 2022 Reflecting the legal and policy human rights situation of lesbian, gay, bisexual, trans and intersex (LGBTI) people in Europe; ILGA Europe, 2022  
[<https://www.ilga-europe.org/files/uploads/2022/06/rainbow-index-2022.pdf>]

<sup>126</sup> In the latest report published by ILGA, several issues of importance to the LGBT community at international level are analyzed. Besides including a dossier on the death penalty for homosexual acts and behaviour, it analyses the criminalisation of consensual acts between adults and the various restrictions on freedom of sexual expression and gender differences.

scored 2 per cent, Turkey and Russia 4 per cent, placing them at the bottom of the ranking. In first place was Malta with 92% followed by Denmark and Belgium<sup>127</sup>.

### 1.2.3 UNHCR Guidelines and procedures on LGBT refugees

In October 2012, the UNHCR<sup>128</sup> issued guidelines on international protection number 9 referring to asylum seekers claiming refugee based on SOGIESC<sup>129</sup> criteria. Discrimination and gender-related persecution fall under Article 1A (2) of the 1951 Convention and under the 1967 Protocol; moreover, people who fall into this category form a specific group towards which discrimination and persecution are feared, which is why the United Nations decided to issue these basic guidelines for practitioners<sup>130</sup>. Consequently, this orientation comes at an already important historical moment in which the Yogyakarta Principles were promulgated, although not binding, reflecting the principles of international law.

It is widely documented that LGBTI people are discriminated against and persecuted, and they are the target of killing, sexual and gender-based violence and accused of immoral or deviant behavior. In these countries, public authorities are not willing or able to stop persecution resulting from the impunity of perpetrators and explicit abuse or persecution of the victim. These are widely documented situations reported by international NGOs such as Amnesty International<sup>131</sup>; Human Rights Watch<sup>132</sup> or various fact-finding monitoring and reporting missions<sup>133</sup>. Therefore, the international

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<sup>127</sup> ILGA Europe; Rainbow Map 2022 Reflecting the legal and policy human rights situation of lesbian, gay, bisexual, trans and intersex (LGBTI) people in Europe; ILGA Europe, 2022  
[<http://www.ilga-europe.org/files/uploads/2022/06/rainbow-map-2022.pdf>]

<sup>128</sup> The United Nations High Commissioner for Refugees; Homepage; UNHCR 2022  
[<https://www.unhcr.org/>]

<sup>129</sup> Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics.

<sup>130</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; page 1, The UNHCR; 2022  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>131</sup> Amnesty International Italia; Cecenia: Uomini sospettati di omosessualità rapiti, torturati e uccisi; Amnesty International Italia; 2022  
[<https://www.amnesty.it/appelli/cecenia-uomini-sospettati-omosessuali-rapiti-torturati-uccisi/>]

<sup>132</sup> Human Rights Watch; Maps of anti-LGBT Laws Country; Human Rights Watch, 2022  
[[http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/)]

<sup>133</sup> The United Nations High Commissioner for Human Rights; Forcibly Displaced LGBT persons face major challenges in search of safe haven; OHCHR; 2022

community must be aware of the discrimination against the queer community around the world and find a solution, at least by offering asylum because of such persecution.

Even though the main human rights treaties do not explicitly recognize a right to equality and non-discrimination based on sexual orientation and gender identity, it is nowadays prohibited by international human rights law. The Covenant on Civil and Political Rights<sup>134</sup> defines discrimination as follows:

“Should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>135</sup>

Therefore, if a person experiences discrimination based on their sexual orientation or gender identity, they have the right to seek international protection. Some prejudices are denial of free access to healthcare and healthcare facilities, or blackmail and threats from family and friends. Those acts leading to violence, exploitation, imprisonment, and death penalty<sup>136</sup>.

The guidelines specify that not all the applicants identify themselves with LGBT terminology and cannot be aware of these labels, therefore decision-makers should be flexible on their use. Moreover, in some culture man who use to have sex with other

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[<https://www.ohchr.org/en/statements/2022/05/forcibly-displaced-lgbt-persons-face-major-challenges-search-safe-haven>]

<sup>134</sup> The United Nations, Human Rights Office of the High Commissioner for Human Rights; International Covenant on Civil and Political Rights; United Nations, Human Rights Office of the High Commissioner for Human Rights; 2022

[<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>]

<sup>135</sup> The United Nations Office of the High Commissioner for Human Rights; The United Nations Office of the High Commissioner for Human Rights; OHCHR; 2022, para 7 page 2

[<https://www.refworld.org/docid/453883fa8.html>]

<sup>136</sup> The United Nations High Commissioner for Refugees; LGBTIQ+ Refugees, 6. Health care and mental health; The UNHCR; 2022

[<https://www.unhcr.org/handbooks/ih/age-gender-diversity/lgbtiq-refugees>]

men do not identify themselves as gay<sup>137</sup>. However, they further add that everyone has the right to live in a society which accepts him or her for what he or her is without hiding or being persecuted. Thus, sexual orientation and gender identity are fundamental characteristics of human beings and cannot be changed or hidden and the person cannot be asked to do that to survive<sup>138</sup>.

The intersection between gender, sexual orientation and gender identity is an integral part of the assessment of claims raising questions of sexual orientation and/or gender identity. UNHCR guidelines on gender-related persecution specify that a claim based on sexual orientation always contains a gender element, thus might be relevant to analyze in which way the claimant refused to adhere to social or cultural norms or behaviors attributed to his or her gender as understood by the society in which he or she is living in<sup>139</sup>. Therefore, most of the time, homosexuals or transvestites people faced public humiliation, hostility, abuse, and discrimination.

Often the rights and freedoms of LGBTI persons are violated so extensively that they cause very serious psychological and physical problems. Rape is one of these because it is used as a degrading, intimidating, and discriminating means. Other treatments can be forced conversion therapies or gender reassignment against the individual's will. However, it must be underlined that the individual doesn't need to have suffered these forms of abuse and persecution to seek asylum in another country, it is enough for the individual to be afraid of being the target of such violence, which is very often institutionalized or normalized<sup>140</sup>. The deprivation of the right to assembly, family or

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<sup>137</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR; 2022 page 5 para 11  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>138</sup> Council of Europe; SOGI: Sexual Orientation and Gender Identity; CoE; 2022  
[<https://www.coe.int/en/web/sogi>]

<sup>139</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR; 2022, para 16 page 5  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>140</sup> Vrije Universiteit Amsterdam (VU University Amsterdam), Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe, September 2011,  
[<https://www.refworld.org/docid/4ebba7852.html>]

expression also constitutes a serious violation of fundamental human rights, although it does not fall within the definition of persecution<sup>141</sup>.

Even though violence and human rights abuses might be faced by LGBTI people and might have common elements, it is important to distinguish among them. Lesbian women experience harm because of their position in society and their inter-relation and gender identity because in most society women are less powerful than men, so they are considered as easy to dominate and make them change their mind. Lesbian women are often more obliged than men to marry someone of the opposite sex and in a society where women are considered only wives and mothers, lesbian women tend to be invisible and considered as outsiders. Thus, they face a higher risk of persecution and harm by non-state actors such as family or community and they usually have less access to a protection and support network<sup>142</sup>.

Usually, a Transgender person are part of even a smaller group and can face different forms of persecution. In addition to threats, sexual and verbal violence, and persecution, most of the time they face discrimination in accessing to the health care, linked to a risk of exposure to harm if their gender is not legally recognized<sup>143</sup>. Someone who has changed or is willing to change his or her visible sexual characteristics, might be perceived as a danger for the society<sup>144</sup>. They are considered as individuals who want to challenge gender roles and lifestyles imposed by the culture in which they are living in.

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<sup>141</sup> Office of the High Commissioner for Human Rights; Reports on Gender: The Law of Inclusion & Practices of Exclusion; OHCHR; 2021; page 6  
[[https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/Reports\\_on\\_Gender\\_Final\\_Summary.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/Reports_on_Gender_Final_Summary.pdf)]

<sup>142</sup> Refworld; UNHCR Guidance Note on Refugee claims Relating to Sexual Orientation and Gender Identity; UNHCR 2022  
[<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=48abd5660&skip=0&query=guidance%20note%20sexual%20orientation>]

<sup>143</sup> Forge, Transgender rate of violence; Forge 2012  
[<https://forge-forward.org/wp-content/uploads/2020/08/FAQ-10-2012-rates-of-violence.pdf>]

<sup>144</sup> Refworld; UNHCR Guidance Note on Refugee claims Relating to Sexual Orientation and Gender Identity; UNHCR 2022, page 9  
[<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=48abd5660&skip=0&query=guidance%20note%20sexual%20orientation>]

Assessing the “well-founded fear of being persecuted” in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case<sup>145</sup>. The UN Guidelines underline that those states must take into account the degree of fear the applicant proves against the country of origin and discover if the homophobia climate is widespread in the claimant’s country of origin. Even though COI does not show the criminalization of same-sex consensual relationships, it is important to consider the degree of public morality and public law applied toward the homosexual community and how they are discriminated against by civil society.

Thanks to the 2009 UN Guidelines, being a member of the SOGIESC group falls within the "membership of a particular social group", the LGBTI community is always considered as a group and suffers discrimination and violence as such. It often does not need to intersect with other motives or crimes, he or she is only persecuted for his or her sexual orientation or gender identity. However, it might happen that a person persecuted because of SOGI grounds could also be in danger because of his or her political ideas, ethnic or religious affiliation. In short, intersectionality in these cases is rather normal.

Nowadays most industrialized countries recognize that LGBTI people might be eligible for international protection under the 1951 Convention and 1967 Protocol<sup>146</sup>. Consequently, an LGBTI person can claim asylum in the event of discrimination and persecution in his or her country of origin by invoking his or her membership in a specific group<sup>147</sup>. The group is defined by the UNHCR as:

“A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will

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<sup>145</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR; 2022; para 28  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>146</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022; para 51  
[<https://www.unhcr.org/611e33704>]

<sup>147</sup> The United Nation High Commissioner for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR 2022, para 26  
[<https://www.unhcr.org/3d58ddef4.pdf>]

often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights"<sup>148</sup>.

#### 1.2.4 Procedural issues identified by UNHCR

LGBTI individuals require a supportive environment while determining their status, thus it is important to provide them a safe location and a legal representative who is sensible toward these themes. Some applicants might suffer from stress and trauma due to the internalized homophobia they lived and might not be willing to tell what they have been through or admit that they are part of such social group<sup>149</sup>. Some elements can be considered fundamental during the status determination; for example, creating a bond of trust between the applicant and the interviewer, ensuring the applicant that all the information is confidential, and that the interpreter (if needed) has a confidential bond. Again, the interviewer must maintain an objective approach to not jump into conclusions and use stereotypes. Stereotypes should not intervene in hearings and status determination because most of the time they are extremely false and discriminatory.

The interviewer and the interpreter should not express any judgement on the applicant's sexual orientation or gender identity, whether verbally or through body language, therefore officers must take self-awareness and specialized training courses to work with vulnerable categories. Also important is to use a vocabulary that is not offensive to anyone; inappropriate words and terminology could make the applicant feel uncomfortable and threatened. Moreover, even scientific, and neutral terms might result offensive and pejorative to people coming from another culture and for whom those meanings have a strong and negative connotation. For this reason, taking specific

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<sup>148</sup> The United Nation High Commissioner for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR 2022, para 11 [<https://www.unhcr.org/3d58ddef4.pdf>]

<sup>149</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022, para 60 [<https://www.unhcr.org/611e33704>]



courses on LGBTI issues and having a mediator or interpreter who is sensitive to the subject can be a great help, and above all can foster gain the trust of the applicant<sup>150</sup>.

The respect for fundamental human rights, the sensitivity of the individual and privacy must be the basis of the interviews, at the same time the applicant must be asked whether he/she feels comfortable with the chosen interpreter and his/her gender. Open-ended and specific questions need to be created in a non-judgmental way to allow the applicant to explain his or her claim. Among others, important questions might include self-identification, childhood, self-realization, gender identity, non-conformity within society, family relationships, romantic or sexual relationships, community and religion.

Self-identification should be considered an indication of the applicant's sexual orientation and gender identity. Some of them may have internalized deep homophobia and great intolerance, as a result of which they may be induced to deny their sexual orientation or lie about it due to their lived experiences<sup>151</sup>. In addition, self-realization, the coming-out phase and self-identification may be interesting topics to cover in an interview to understand the applicant's identity. Some are aware of their sexual orientation; others are on the path of self-understanding<sup>152</sup>.

Moreover, family relationships should be analyzed attentively; the applicant might not have disclosed his sexual orientation to family members due to fear of violence and threats; at the same time, he or she could be married or have children because otherwise could not have the choice to survive in that context and specific society. Thus, it is important to analyze every detail attentively and not hear the applicant with other family members at the same time<sup>153</sup>. Guidelines specify that detailed questions about the applicant's sex life should be avoided. It is not an effective method of ascertaining the well-foundedness of the applicant's fear of persecution on account of his or her sexual orientation and/or gender identity.

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<sup>150</sup> The United Nations High Commission for Refugees; GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; The UNHCR; 2022, para 60  
[<https://www.unhcr.org/509136ca9.pdf>]

<sup>151</sup> Ibidem, para 63.i

<sup>152</sup> American psychological association, Sexual Orientation & Homosexuality, the APA.org, 2021  
[<https://www.apa.org/topics/lgbtq/orientation>]

<sup>153</sup> AILA, American Immigration Lawyer Association; USCIS Guidance for Adjudicating LGBTI Refugee and Asylum Claims, AILA 2015, pages 39 and 40  
[<https://www.aila.org/infonet/uscis-guidance-adjudicating-lgbti-refugee-asylum>]

Knowledge of LGBTI groups and associations can be a determining factor in verifying homosexuality or at least the individual closeness to the subject, at least in the Western world. The lack of knowledge and participation in the queer world, however, should not be analyzed as a lack of credibility. Lack of engagement with other members of the LGBTI community in the country of asylum or failure to join LGBTI groups there may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices, or fear of exposure<sup>154</sup>.

### 1.2.5 Evidence taken into account in the analysis of the asylum application

Often, the testimony of the applicant is the first and only source from which evidence can be taken, especially in cases where it is the family itself that persecutes the subject. The interview is the only element through which information can be obtained and the applicant should never be asked to show evidence such as documents or photos of intimate acts. At the same time, one cannot ask for medical and gynecological control because these types of tests have been considered to infringe on the applicant's basic human rights and dignity. Although in the case of T-persons, surgery operations and hormone treatments can be brought in as proof<sup>155</sup>. The UNHCR 2021 Discussion paper on LGBTIQ+ person in forced displacement further adds that it is in no way possible or justifiable to utilize medical truisms attached to the applicant's genital organs to test arousal and thus confirm or deny one's homosexuality. Moreover, this practice is considered degrading and violating fundamental rights of the applicants themselves<sup>156</sup>.

The information on the country of origin of the applicant may not be available, but this does not mean that the applicant is lying. Non-governmental organizations and other activists are doing their best to document the situation of violations of basic human

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<sup>154</sup> Office of the High Commissioner of Human Rights; Guidelines on International Protection No.9; UNHCR, 23 October 2012, para 63 viii  
[<https://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html#:~:text=International%20Protection%20No.-,9%3A%20Claims%20to%20Refugee%20Status%20based%20on%20Sexual%20Orientation%20and,of%20Refugees%2C%2023%20October%202012>]

<sup>155</sup> Ibidem; para 64 and 65

<sup>156</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022; para 61  
[<https://www.unhcr.org/611e33704>]

rights and some of these have a specific focus on LGBTI people, such as ILGA-World, as already mentioned<sup>157</sup>. Often there are very few queer people living in these states because of fear of persecution and social stigma. However, information can be collected by foreigner's activist groups and human rights advocates<sup>158</sup>.

The UNHCR 2021 Discussion paper on LGBTIQ+ person in forced displacement provides some snapshots on SOGI forced displacement; for example, in the west and central Africa region 14 out of 15 States criminalize same-sex relations between adults; in 2 States is applied the death penalty and in 7 States there are legal barriers to register LGBTI organizations<sup>159</sup>. In the Eastern regions as, the Horn of Africa and the Great Lakes, 9 out of 11 States criminalize consensual same-sex relations between adults and, 1 State is attempting to apply the death penalty<sup>160</sup>. In Southern Africa, 6 out of 16 States criminalize consensual same-sex relations between adults, in 2 States public law is invoked to criminalize LGBTIQ+ act because considered against the public decency<sup>161</sup>. In the Middle East and Northern Africa, 18 out of 20 States in this region criminalize consensual same-sex relations between adults, with 5 imposing the death penalty and at least 14 presenting barriers to the legal registration of LGBTIQ-focused civil society organizations. However, 7 States are parties to the 1951 Refugee Convention and 1967 Protocol and many of the countries hosting significant LGBTIQ+ displaced populations are not signatories<sup>162</sup>. In Asia and the Pacific 21 out of 45 States criminalize consensual same-sex relations between adults, with 2 States applying the death penalty and 11 presenting barriers to the legal registration of LGBTI-focused civil society organizations<sup>163</sup>.

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<sup>157</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022, para 55

[<https://www.unhcr.org/611e33704>]

<sup>158</sup> Office of the High Commissioner of Human Rights; Guidelines on International Protection No.9; UNHCR, 23 October 2012, para 66

[<https://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html#:~:text=International%20Protection%20No.-,9%3A%20Claims%20to%20Refugee%20Status%20based%20on%20Sexual%20Orientation%20and,of%20Refugees%2C%2023%20October%202012>]

<sup>159</sup> Ibidem, page 33

<sup>160</sup> Ibidem, page 34

<sup>161</sup> Ibidem, page 35

<sup>162</sup> Ibidem, page 39

<sup>163</sup> Ibidem, page 37

### 1.3 Where European legislation meets international refugee protection for the LGBTI community

As already mentioned, from the outset the European Union has equipped itself with legislative and specific instruments to guarantee the rights of all citizens of the union and at the same time to ensure minimum standards of guarantees for refugees. The rights of individuals have been established in different times, in different ways and different forms, in fact, alongside the Convention on Human Rights is present the Charter of Fundamental Rights, which encapsulates them all in one document<sup>164</sup>. Moreover, to ensure that the rights enshrined in this instrument are respected, the European Court of Human Rights (ECtHR) was created to settle disputes between states and inter-state citizens and the European Agency for fundamental rights (FRA) based in Vienna<sup>165</sup>.

Neither the TFEU<sup>166</sup> nor the EU Charter of Fundamental Rights defines the terms 'asylum' or 'refugee', but both refer explicitly to the Geneva Convention and its Protocol<sup>167</sup>. Article 18 of the European Charter of Fundamental Rights set in fort the right to seek asylum in the European Union and states:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

Moreover, if we want to talk about refugee rights and their intersectionality with the vulnerability issue, it is imperative to analyze the work done by the various European

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<sup>164</sup> Commissione Europea, perché abbiamo bisogno della carta? La Carta dei diritti fondamentali, il suo contenuto e il suo rapporto con la Convenzione europea dei diritti dell'uomo. La Commissione Europea, 2022

[[https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter\\_it](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_it)]

<sup>165</sup> FRA, The European Union Agency for Fundamental Rights; about Fra, FRA, 2022

[ <https://fra.europa.eu/en/about-fra>]

<sup>166</sup> Official Journal of the European Union; Consolidated version of the treaty on the functioning of the European Union; official Journal of the European Union; 2022

[<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>]

<sup>167</sup> European Parliament; Asylum Policy Factsheet, the European Parliament, 2022

[<https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy>]

agencies. Just to name a few of them, they are the European Council on Refugees and Exiles (ECRE)<sup>168</sup>, the European Asylum Support Office (EASO)<sup>169</sup>, that become the European Union Agency for Asylum (EUAA)<sup>170</sup> and the Asylum Information Database (AIDA)<sup>171</sup>. The ELENA (European Legal Network on Asylum) is a forum promoting the highest human rights standards for refugees and asylum seekers<sup>172</sup>. All of them work actively on asylum and migration issues and regularly publish reports on developments in the various situations experienced by asylum seekers and how member States and the Union could guarantee a better integration and reception based on shared values and ideas.

### 1.3.1 European Convention on Human Rights

The European Union firmly upholds human rights, in fact as early as 1950 the European Convention on Human Rights was ready to be signed by the Member States; it was the first instrument to give effect to certain rights stated in the Universal Declaration of Human Rights and to make them bind<sup>173</sup>. Since 1950 the convention has been amended several times and supplemented with some rights not foreseen in the original version. In fact, one of the latest amendments was made on February 1, 2022, regarding the principle of subsidiarity and reducing the time limit within which an application may be made to the Court following the date of a final domestic decision<sup>174</sup>. Thanks to these products and instruments, the convention and the rights contained within it remain up to date with the needs of nowadays refugees. Moreover, the amendment made in February 2022 is the 224th in 60 years<sup>175</sup>.

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<sup>168</sup> ECRE; The European Council on Refugee and Exile; Homepage, ECRE 2022

[<https://ecre.org/>]

<sup>169</sup> EUAA; Agenzia dell'Unione Europea per l'asilo; Navigazione, EUAA, 2022

[<https://www.sem.admin.ch/sem/it/home/international-rueckkehr/kollab-eu-efta/easo.html>]

<sup>170</sup> EUAA; European Union Agency for Asylum; Homepage Portail; EUAA; 2022

[<https://euaa.europa.eu/>]

<sup>171</sup> AIDA; Asylum Information Database, The concept of vulnerability on European asylum procedures, AIDA, 2020

[[https://asylumineurope.org/wp-content/uploads/2020/11/aida\\_vulnerability\\_in\\_asylum\\_procedures.pdf](https://asylumineurope.org/wp-content/uploads/2020/11/aida_vulnerability_in_asylum_procedures.pdf)]

<sup>172</sup> ECRE; ELENA The European Legal Network on Asylum; ELENA Our Work, ECRE 2022

[<https://ecre.org/our-work/elena/>]

<sup>173</sup> ECHR; The European Convention on Human Rights; all protocols and documents; ECHR 2022

[<https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>]

<sup>174</sup> Council of Europe Portail; Treaty Office; Conventions; Council of Europe Portail; 2022

[<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=213>]

<sup>175</sup> Council of Europe Portail; Treaty Office; Complete list of the Council of Europe's treaties; Council of

The European Convention on Human Rights covers an important role because of the rights and freedoms that it protects, and the system it created. It is one of the most important instruments in the EU because it contains the foundational values on which the union itself is based<sup>176</sup>. In fact, thanks to the establishment of the European Court of Human Rights, individuals might bring their complaint case against the state when their rights and freedoms have been disrespected<sup>177</sup>. The Court has the right to examine individual complaints against the state but also inter-state complaints. These measures have been undertaken by the signatory states to ensure that every state would always respect the guarantees contained in the convention and which it vowed to fulfill through the signing. The court that is directly linked to the convention and judges its compliance is the European Court of Human Rights (ECHR) whose headquarters is in Strasbourg<sup>178</sup>.

Nowadays the Convention has been signed, ratified and entered into force in 47 European states and the last state to adopt it was Montenegro in 2007 while the first states signed it in 1950 and started to be effective as early as 1953. In the case of Montenegro, we are talking about a “delay” in compliance with EU standards of more than 50 years. At the same time, it is surprising because it gained independence from the Republic of Serbia only a year earlier, in 2006<sup>179</sup>. After Russia was expelled from the Council of Europe in March 2022, the States parties are now 46.

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Europe Portail; 2022

[<https://www.coe.int/en/web/conventions/full-list>]

<sup>176</sup> Parlamento Europeo e Attualità; Cinque cose da sapere sulla Carta europea dei diritti fondamentali; parlamento europeo; 2019

[<https://www.europarl.europa.eu/news/it/headlines/society/20191115STO66607/cinque-cose-da-sapere-sulla-carta-europea-dei-diritti-fondamentali>]

<sup>177</sup> Council of Europe; The European Convention on Human Rights, a living instrument; the Council of Europe; 2021, page 4

[[https://echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf)]

<sup>178</sup> Citizen Information Board; Information, Advice, Advocacy; Charter of Fundamental Rights; Citizen Information Board; 2022

[[https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/eu\\_law/charter\\_of\\_fundamental\\_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties](https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties)]

<sup>179</sup> Wikipedia; Montenegro; Wikipedia 2022 [<https://it.wikipedia.org/wiki/Montenegro>]

### 1.3.2 Implementation of the European Charter of Fundamental Rights (ECHR)

In early 2000, the European Union adopted the Charter of Fundamental Rights, which entered into force in 2009 within the Lisbon Treaty<sup>180</sup>, with the purpose of promoting human rights within the territory of the EU. However, many of the rights set out by the convention were already established by the European Convention on Human Rights, EU treaties, Case law of the Court of Justice of the European Union and National Institutions<sup>181</sup>. Poland is the only EU member state in which the Charter is not fully applicable since the country signed an opt-out clause for domestic political reasons<sup>182</sup>.

The European Charter of Fundamental Rights enshrined citizens' individual rights within the 28 member states of the EU and NHRs (National Human rights Institutions) are working toward its implementation, are thus fundamental to support an effective judiciary system<sup>183</sup>. At the same time, the Chart has supremacy over national laws, has a direct effect and can be invoked before national courts. Moreover, it is an innovative instrument cause includes modern rights such as data protection, the right to a good administration, freedom to conduct business and rights of the elderly<sup>184</sup>.

The Charter has a broad mandate which includes human rights monitoring, reporting, advisory function, complaint and litigation, human rights education and raising awareness. The Court of Justice of the European Union in Luxembourg is the court responsible for regulating the breach of the rights contained in the Charter.<sup>185</sup>

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<sup>180</sup> European Parliament; Fact Sheet on the European Union; The Treaty of Lisbon; The European Parliament: 2022

[<https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>]

<sup>181</sup> Citizen Information Board; Information, Advice, Advocacy; Charter of Fundamental Rights; Citizen Information Board; 2022

[[https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/eu\\_law/charter\\_of\\_fundamental\\_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties](https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties)]

<sup>182</sup> ParlEU2020.de; Parliamentary Dimension; Protecting human rights: Questions and answers about the EU Charter of Fundamental Rights; 2022

[<https://www.eu2020.de/eu2020-en/news/article/-/2423224>]

<sup>183</sup> ENNHRI; The European Network of National Human Rights Institutions; Implementation of the EU Charter of Fundamental Rights; The European Network of National Human Rights; 2019, page 1

[<https://ennhri.org/wp-content/uploads/2019/11/Implementation-of-the-EU-Charter-of-Fundamental-Rights-Activities-of-NHRIs.pdf>]

<sup>184</sup> Ibidem, page 2

<sup>185</sup> Citizen Information Board; Information, Advice, Advocacy; Charter of Fundamental Rights; Citizen

One of the most important issues is for sure how and when to apply the articles contained in the Charter itself. In this situation, the Member State acts as an agent or as a representative of the EU because it enforces laws on behalf of and in the Union itself. This situation occurs with the execution or transposition of legal acts undertaken by EU institutions and agencies. It can concern regulations<sup>186</sup>, directives<sup>187</sup>, external agreements<sup>188</sup> and specific treaty provisions<sup>189</sup>.<sup>190</sup>

According to article 52 of the same Charter<sup>191</sup>, it can be applied in any limitation on the exercise of the rights or freedoms recognized by the Charter itself. Rights contained in the legal instrument should be applied to respect the principle of proportionality and limitation can be foreseen only if necessary to meet the scope and objectives recognized by the Union and if necessary to protect the freedom of others<sup>192</sup>. Limitations of the applicability are listed in article 52 and are allowed only if<sup>193</sup>: provided

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Information Board; 2022

[[https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/eu\\_law/charter\\_of\\_fundamental\\_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties](https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html#:~:text=The%20Charter%20was%20declared%20in,The%20EU%20Treaties)]

<sup>186</sup> A regulation is a binding legislative act and must be entirely applied across the EU. For example, when the council wants to be sure that a particular standard is applied and respected in all member countries, it issues a regulation.

European Union; Institutions, Types of legislation; the European Union; 2022

[[https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en)]

<sup>187</sup> A directive is a legislative act set out as a goal that every Eu country must achieve. However; it is up to every country to establish rules and procedures to reach that specific objective. The decision is a bonding act for the country to which it is addressed and is directly applicable, without the State adapting or modifying its domestic laws.

European Union; Institutions, Types of legislation; the European Union; 2022

[[https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en)]

<sup>188</sup> An external agreement is an agreement made between one or more states parties to the CoE and one or more states not parties to the council.

<sup>189</sup> A formal agreement or contract between two or more states, such as an alliance or trade arrangement.

Reverso Dictionary; Treaty provision definition, treaty meaning; Reverso Dictionary; 2022

[<https://dictionary.reverso.net/english-definition/treaty+provision#:~:text=a%20a%20formal%20agreement%20or,such%20a%20contract%20is%20written>]

<sup>190</sup> FRA; European Union Agency for Fundamental Rights; Applying the Charter of Fundamental Rights of the European Union in Law and policy making at national level; European Union Agency for Fundamental Rights; 2022; page 43

[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-charter-guidance\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf)]

<sup>191</sup> EUR-Lex; Charter of Fundamental Rights; Official Journal of the European Union; EUR-Lex; 2022

[<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>]

<sup>192</sup> FRA; European Union Agency for Fundamental Rights; Applying the Charter of Fundamental Rights of the European Union in Law and policy making at national level; European Union Agency for Fundamental Rights; 2022; page 47

[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-charter-guidance\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf)]

<sup>193</sup> FRA, The European Union Agency for Fundamental Rights; about Fra, FRA, 2022; article 52

[<https://fra.europa.eu/en/about-fra>]



by law, must respect the rights and freedoms, must pursue the objectives, and respect the principle of proportionality<sup>194</sup>.

The Charter is divided into 6 parts according to the categories of fundamental rights:

- Dignity, art.1 to 5 which includes right to life, right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labor<sup>195</sup>.
- Freedom art. 6 to 19 which consists of; the right to liberty and security, respect for private and family life, protection of personal data, right to marry and start a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, right to education, professional freedom and right to work, freedom to conduct business, right to property, right to asylum, protection in the event of removal, deportation and extradition<sup>196</sup>.
- Equality art. 20 to 26 which are expressed in; equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between women and men, rights of the child, rights of the elderly, and inclusion of people with disabilities<sup>197</sup>.
- Solidarity art. 27 to 38 with; workers' right to information and consultation within the enterprise, right to bargaining and collective action, right of access to employment services, protection in case of unjustified dismissal, fair and just working conditions, prohibition of child labor and protection of young people in the workplace, family life and work life, social security and social assistance, health protection, access to services of general economic interest, environmental protection, consumer protection<sup>198</sup>.

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<sup>194</sup> FRA; European Union Agency for Fundamental Rights; Applying the Charter of Fundamental Rights of the European Union in Law and policy making at national level; European Union Agency for Fundamental Rights; 2022; page 48

[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-charter-guidance\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf)]

<sup>195</sup> Council of Europe; The European Convention on Human Rights, a living instrument; the Council of Europe; 2021 [[https://echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf)]

<sup>196</sup> Equality and Human Rights Commission; What is the European Convention on Human Rights?; Equality and Human Rights Commission; 2022

[<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>]

<sup>197</sup> Amnesty International UK; What is the European Convention on Human Rights? Amnesty International UK; 2018 [<https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>]

<sup>198</sup> EUR-Lex; Glossary of summaries; European Convention on Human Rights (ECHR); EUR-Lex; 2022 [<https://eur-lex.europa.eu/EN/legal-content/glossary/european-convention-on-human-rights-echr.html>]

- Citizenship art. 39 to 46 which are articulated in; right to vote and stand in elections to the European Parliament, right to vote and stand in municipal elections, right to good administration, right of access to documents, European Ombudsman, right to petition, freedom of movement and residence, diplomatic and consular protection.
- Justice art. 47 to 50 which consist of; the right to have an effective remedy and an impartial judge, presumption of innocence and rights of defense, principles of legality and proportionality of crimes and punishments, and right not to be tried or punished twice for the same offense<sup>199</sup>.

### 1.3.3 Differences between the European Convention on Human Rights and the European Charter of Fundamental Rights

One of the most important differences is the applicability; the charter is binding on EU member states only. Thus, states who are not members of the EU are not obliged to obey it. On the contrary, the convention is a treaty enacted by the Council of Europe<sup>200</sup> and it is binding toward all 47 of the States.

Rights Guaranteed by the treaties, all the rights guaranteed by the EU Convention on Human Rights are also enshrined in the EU Charter of Fundamental Rights; however, the Charter guarantees additional rights not foreseen by the original Convention. Some of them are the right to asylum, and the right to have a good governance<sup>201</sup>.

Scope of the instruments; the charter only applies when member states are applying EU laws, so states are bound by it only if operating in an area governed by EU laws; on the other hand, the Convention is binding no matter what states do and where they are operating. Any action they carry out has to enter within the scope of the Convention and respect it.

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<sup>199</sup> Parlamento Europeo Ufficio in Italia; Benvenuti sul sito del Parlamento Europeo; Parlamento Europeo; 2022

[[https://www.europarl.europa.eu/italy/it/scoprire-l-europa/carta-dei-diritti-fondamentali\\_1%C3%A0](https://www.europarl.europa.eu/italy/it/scoprire-l-europa/carta-dei-diritti-fondamentali_1%C3%A0)]

<sup>200</sup> The Council of Europe includes EU members states but not only; part of the Council are also Armenia, Azerbaijan, Ukraine, Russia and Turkey

<sup>201</sup> Equality and Human Rights Commission; What is the European Convention on Human Rights?; Equality and Human Rights Commission; 2022

[<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>]

Enforcement: the Convention has a specific Court with the mandate to ensure that states comply with the rights foreseen in the ECHR, in Strasbourg. The individuals can directly apply to that Court if states do not respect rights contained in the Convention if certain admissibility criteria are satisfied. However, there is no possibility for citizens to apply directly to any Court if they think that their fundamental rights contained in the convention have been violated.

Moreover, the preamble of the Eu Charter of Fundamental Rights expressly refers to the European Convention of Human Rights and to the jurisprudence of the European Court of Human Rights; it states “the Charter reaffirms the rights resulting from the European Convention of Human Rights”<sup>202</sup>. The Charter also states that it should not be interpreted as a limit to the application of rights guaranteed in the European Convention because it remains a minimum standard and the Charter might serve to guarantee more rights that can go beyond the basic freedoms guaranteed by the Convention.

#### 1.3.4 European law with LGBT refugees

As already introduced, the topic of refugees and intersectionality, because of the LGBTI group, is studied by various agencies and thanks to their reports and analysis we can draw up good practices common or not in Europe or at least guidelines that states and asylum seekers officers should follow.

A significant number of people arriving in Europe are lesbians, gay, transexual or intersex, and they claim asylum due to the persecution they faced or might face in their country of origin. The EU asylum law<sup>203</sup> recognizes exclusively sexual orientation and gender identity as reasons for persecution, but some Member States recently introduced also the gender expression and sex characteristics as a ground for

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<sup>202</sup> FRA; The European Union Agency for Fundamental Rights; About FRA and the EU’s Rights Agency; The European Union Agency for Fundamental Rights; 2022; page 8 [https://fra.europa.eu/en/about-fra]

<sup>203</sup> European Union Commission; Migration and Home Affairs; Homepage; European Union Commission; 2022 [https://home-affairs.ec.europa.eu/index\_en]

protection. In addition, Member States are creating special courses and practices for their staffs<sup>204</sup>.

Moreover, most of them face persecution also during the journey or in the transit country, upon their arrival in the state of asylum, there are numerous stories of transgender people being raped in Libya<sup>205</sup> or in greek refugee camps<sup>206</sup>. They might qualify as vulnerable persons in need of special protection and legal representation, reception therefore, the conditions and health care measures must be tailored to their needs.

In September 2020 the European Commission presented a New Pact on Migration and Asylum<sup>207</sup> including legislative and non-legislative tools to reach out a political agreement. However, ILGA-Europe raises concerns about some provisions set to ensure protection based on SOGIESC in the European asylum system. The rainbow NGO stresses that sexual orientation and gender identity as well as gender expression and sex characteristics should be considered as a ground to protect when studying case laws in the CJEU<sup>208</sup>.

### 1.3.5 EU legal basis

The objective of the European asylum policy is to offer an appropriate status to non-EU nationals while respecting the principle of non-refoulement and seeking to develop a

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<sup>204</sup> ILGA Europe; Policy Briefing on LGBTI Refugees and EU asylum legislation; ILGA Europe; 2021 [https://www.ilga-europe.org/files/uploads/2022/05/policy-briefing-lgbti-refugees-and-eu-asylum-legislation.pdf]

<sup>205</sup> Human Rights Watch; Stemming the Flow, Abuses Against Migrants, Asylum Seekers and Refugees; Human Rights Watch, 2006 [https://www.hrw.org/report/2006/09/12/stemming-flow/abuses-against-migrants-asylum-seekers-and-refugees]

<sup>206</sup> DW Europe; Transgender refugees start new lives in Greece; On the back of a groundbreaking court decision, two transgender refugees has found the freedom to start a new life in Greece. Marianna Karakoulaki and Dimitris Tosidis report from Thessaloniki; DW Europe; 2018 [https://learnerman.dw.com/en/transgender-refugees-in-greece-reclaim-their-dignity/a-44551880]

<sup>207</sup> Commissione Europea; New Pact on Migration and Asylum, un nuovo inizio in materia di migrazione in Europa; Commissione Europea; 2022 [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum\_it]

<sup>208</sup> ILGA Europe; Policy Briefing on LGBTI Refugees and EU asylum legislation; ILGA Europe; 2021, page 2 [https://www.ilga-europe.org/files/uploads/2022/05/policy-briefing-lgbti-refugees-and-eu-asylum-legislation.pdf]

common framework in European asylum policy. One of the articles on which it is based is Article 18 of the Charter of Fundamental Rights, as seen above, in addition very important articles outlining its modality<sup>209</sup> share 67 (2), 78 and 80 of the Treaty on the Functioning of the European Union (TFEU)<sup>210</sup>. Indeed, the Union reiterates its desire to create a common asylum policy<sup>211</sup>, applying the principle of non-refoulement and using a common status for refugees in the event that one or more member states are faced with an emergency situation characterized by a sudden influx of third-country nationals<sup>212</sup>. Article 80 adds that they are governed by the principle of solidarity and fair sharing of responsibility between the Member States, including in financial terms.

From 1999 to 2004 the European Union went through a first phase of the Common European Asylum System (CEAS) by establishing criteria and mechanisms to determine the member state responsible for examining the asylum application to store and compare necessary data and information, such as fingerprints. This also determined some minimum standards for the reception conditions of asylum seekers, qualification criteria for international readiness and the type of protection granted<sup>213</sup>.

From 2004 to 2010 the Hague called for a new program as a second phase, going beyond the minimum standard and developing a single asylum procedure comprising common guarantees and an uniform status for those granted protection. This deadline was postponed to 2012 and is known as the European Pact on Migration and Asylum<sup>214</sup>. The Treaty of Lisbon, which entered into force in December 2009, changed this situation. It transformed asylum measures from the setting of minimum standards to the creation of a common system comprising a uniform statute and procedures.

This system included an uniform status of asylum and a common procedure to grant asylum or subsidiary protection. Furthermore, it comprehended criteria and mechanisms to determine which member state is responsible for analyzing the

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<sup>209</sup> European Parliament; Fact Sheets on the European Union; Asylum Policy; European Parliament; 2022 [https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy]

<sup>210</sup> Official Journal of the European Union; Consolidated Version of the Treaty on the functioning of the European Union; European Union; 2012 [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF]

<sup>211</sup> Ibidem article 67

<sup>212</sup> Ibidem article 78

<sup>213</sup> European Parliament; Fact Sheets on the European Union; Asylum Policy; European Parliament; 2022

[https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy]

<sup>214</sup> Ibidem

application and standards concerning the reception centers. With the adoption of the Lisbon treaty, particular emphasis was placed on article 80 TFEU and on solidarity between member states, subject that also caused some internal friction among the States<sup>215</sup>.

On 23 September 2020, the Commission issued the New Pact on Migration and Asylum<sup>216</sup> to give a fresh start to the stalled CEAS reform. The pact aimed to strike a new balance between responsibility and solidarity. This new instrument introducing more effective procedures, control and organize Schengen and the external borders effectively, show solidarity between member states and be international partners by supporting countries hosting refugees and fighting human trafficking<sup>217</sup>.

One of the most important instruments for determining refugee status belonging to the LGBTI community is the Qualification Directive (2011/95/EU), which defines the criteria for granting protection and explicitly mentions sexual orientation and gender identity as one of the grounds for possible persecution in Article 10<sup>218</sup>. In addition, according to Article 18 (3) of the Reception Conditions Directive (2013/33/EU)<sup>219</sup>, when analyzing an asylum application, states should take into account the specificities related to gender identity and age of the applicant and the situation of vulnerability experienced in his or her group of origin/belonging<sup>220</sup>. Furthermore, Article 21 contains a list of persons who may qualify as vulnerable according to the directive<sup>221</sup>; although LGBTI persons are not

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<sup>215</sup> Oxford Academic; The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection? Oxford Academic; 2012

[<https://academic.oup.com/rsq/article/31/4/1/1572616>]

<sup>216</sup> European Commission; New Pact on Migration and Asylum; the European Commission; 2022  
[[https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en)]

<sup>217</sup> Ibidem

<sup>218</sup> Official Journal of the European Union; Consolidated Version of the Treaty on the functioning of the European Union; European Union; 2012

[<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>]

<sup>219</sup> Gazzetta Ufficiale dell'Unione Europea; Direttiva 2013/33/UE del Parlamento Europeo e del Consiglio; Gazzetta Ufficiale, 2013

[<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0033&from=lv>]

<sup>220</sup> FRA; The European Union Agency for Fundamental Rights; Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers; ; The European Union Agency for Fundamental Rights; 2017

[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-march-2017-monthly-migration-report-focus-lgbti\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-march-2017-monthly-migration-report-focus-lgbti_en.pdf)]

<sup>221</sup> Those are; unaccompanied minors, pregnant women and victims of torture

mentioned in it, it is not an exclusive list and consequently, queer persons may be part of it in case of special need or protection<sup>222</sup>.

The Asylum, Migration, and Integration Fund (AMIF) is the main funding instrument in the EU budget and previously allocated long-term resources, e.g., in the period, 2014 to 2020 was increased from EUR 3.31 billion to EUR 6.6 billion. for the following period: 2021 to 2027 the AMIF budget increased to 9.9 billion to organize migration and asylum including the solidarity shown by states when the resettlement alternative was adopted<sup>223</sup>. Although funds allocated and international legal instruments to manage the refugee situation are numerous, few or none of them address specific needs such as vulnerabilities within the refugee group.

### 1.3.6 Analysis of the first European cases

The first cases analyzed at the European level of applicants from the LGBT community were analyzed by the EU Court of Justice and this established clear parameters for collecting data and assessing refugee status on the basis of sexual orientation<sup>224</sup>. The court specifies that the collection of data to analyze the case of these individuals must respect the core rights contained in the Charter of Fundamental Rights, specifically Article 1, namely dignity and 7, respect for private and family life. In a specific manner one must:

- Analyze the specific situation of the applicant and not move on stereotypes.
- Don't ask question about the applicant's sexual practices are contrary to the exercise of private and family life.

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<sup>222</sup> FRA; European Union Agency for Fundamental Rights; Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU - Comparative legal analysis - Update 2015; European Union Agency for Fundamental Rights; 2022; page 98  
[<https://fra.europa.eu/en/publication/2015/protection-against-discrimination-grounds-sexual-orientation-gender-identity-and>]

<sup>223</sup> European Parliament; Fact Sheets on the European Union; Asylum Policy; European Parliament; 2022  
[<https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy>]

<sup>224</sup> ECRE; The European Council on Refugee and Exile; Hope and criticism following CJEU ruling on claims from LGBTI asylum seekers; ECRE; The European Council on Refugee and Exile; 2022  
[<https://ecre.org/hope-and-criticisms-following-cjeu-ruling-on-claims-from-lgbti-asylum-seekers/>]

- Make people undergo medical or psychological tests to prove sexual orientation violate individual dignity<sup>225</sup>.

### 1.3.6.1 X, Y and Z case vs the Court of Justice

The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel interpreting the Qualification Directive 2004/83/EC. The Organization for Refuge, Asylum and Migration (ORAM)<sup>226</sup>. A global LGBTI refugee organization proclaims that the ‘European Union Court of Justice rules that lesbian and gay asylum seekers can’t be told to “go home and hide”<sup>227</sup>.

This first case provided fundamental elements to move in the recognition of asylum for LGBT refugees, in fact, the CJEU ruling is fundamental and is a starting point and basis for all other cases in the EU as well. Important principles for the rights of queer refugees are reaffirmed here: they form a particular social group following the 1951 Geneva definition; the criminalization of homosexual acts is not sufficient to constitute persecution, although imprisonment as a sentence for homosexual acts must be considered as a disproportionate measure; it is forbidden to deport applicants who come-out and fear persecution<sup>228</sup>.

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<sup>225</sup> FRA; The European Union Agency for Fundamental Rights; Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers; ; The European Union Agency for Fundamental Rights; 2017  
[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-march-2017-monthly-migration-report-focus-lgbti\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-march-2017-monthly-migration-report-focus-lgbti_en.pdf)]

<sup>226</sup> Oram International; European Union Court of Justice rules that lesbians and gay asylum seekers can’t be told to go home and hide; Oram International; 2022  
[<https://www.oramrefugee.org/post/european-union-court-of-justice-rules-that-lesbian-and-gay-asylum-seekers-can-t-be-told-to-go-home>]

<sup>227</sup> EDAL; European Database of Asylum Law; The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel; The European Database of Asylum Law; 2022  
[<https://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>]

<sup>228</sup> FRA; The European Union Agency for Fundamental Rights; Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers; ; The European Union Agency for Fundamental Rights; 2017; page 6  
[[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-march-2017-monthly-migration-report-focus-lgbti\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-march-2017-monthly-migration-report-focus-lgbti_en.pdf)]



The case concerns three asylum seekers coming from Sierra Leone, Uganda and Senegal and received in Netherlands, where they applied for international protection based on their homosexuality, even though never persecuted on this bases<sup>229</sup>. They added that in their context they could be punished up to 5 years only on the basis of their sexual orientation. Thus, the Dutch Court asked the CJEU for clarification. Although this judgement is far from guaranteeing asylum to all homosexual persons and has left behind much criticism<sup>230</sup>, provided important guidance to national authorities who have to determine an LGBT application for international protection arriving from the LGBT community<sup>231</sup>.

In conclusion, the court states that yes, LGBT refugees do form a particular social group (PSG) because of their sexual orientation or gender identity. Thus, these characteristics make them form a sub-group and distinguishes them from the surrounding community<sup>232</sup>. Furthermore, the applicants should not be asked to conceal their nature in order not to be persecuted<sup>233</sup>, and persecution of homosexual acts does not constitute persecution per se, according to the international instruments with which we have endowed ourselves<sup>234</sup>.

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<sup>229</sup> InfoCuria; Giurisprudenza; Judgment of the Court (Fourth Chamber); InfoCuria  
[<https://curia.europa.eu/juris/document/document.jsf?docid=144215&doclang=EN>]

<sup>230</sup> Humanity Action; (In)credibly Queer: Sexuality-based Asylum in the European Union; Humanity Action; 2015  
[[https://humanityinaction.org/knowledge\\_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/](https://humanityinaction.org/knowledge_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/)]

<sup>231</sup> EDAL; European Database of Asylum Law; The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel; The European Database of Asylum Law; 2022  
[<https://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>]

<sup>232</sup> European Law Blog; C-199/12, C-200/12, C-201/12 – X, Y, Z v Minister voor Immigratie en Asiel: A Missed Opportunity or a New Dawn?; European Law Blog; 2013  
[<https://europeanlawblog.eu/2013/11/13/c-19912-c-20012-c-20112-x-y-z-v-minister-voor-immigratie-en-asiel-a-missed-opportunity-or-a-new-dawn/>]

<sup>233</sup> EDAL; European Database of Asylum Law; Amnesty International and the International Commission of Jurists Joint Observations on sexual orientation and the Qualification Directive; The European Database of Asylum Law; 2013  
[<https://www.asylumlawdatabase.eu/en/content/amnesty-international-and-international-commission-jurists-joint-observations-sexual>]

<sup>234</sup> EDAL; European Database of Asylum Law; Amnesty International and the International Commission of Jurists Joint Observations on sexual orientation and the Qualification Directive; The European Database of Asylum Law; 2013 [https://www.asylumlawdatabase.eu/en/content/amnesty-international-and-international-commission-jurists-joint-observations-sexual]

### 1.3.6.2 A, B and C vs the Court of Justice

The 2nd December 2014; the CJEU analyzed the request for a preliminary ruling in the proceedings of A (C-148/13), B (C-149/13) and C (C-150/13) coming from the Netherlands and started in March 2013. The Court, applying article 4 (3c) of Directive 2004/83/EC and Article 13 (3a) of Directive 2005/85/EC respectively for the minimum standard of qualification and on the minimum standards of protection, an asylum seeker's claim based on his sexual orientation must be supported by evidence analyzed by the authorities themselves<sup>235</sup>.

Furthermore, Article 4 of the Directive 2004/83/EC in conjunction with Article 7 of the Charter of Fundamental Rights must be interpreted to exclude explicit questions about the sexual practices of applicants. The same article interpreted with the first article of the EU Charter of Fundamental Rights prevents the authorities from requiring tests to prove and support the applicant's homosexuality. At the same time, it is forbidden to ask him to show videos or sex scenes. Art. 4 (3) of Directive 2004/83 read with 13 (3a) of Directive 2005/85 explains in this context that it is not to be considered a lie not to make a coming out at the first opportunity. Also, because no one should be forced to express his or her sexual orientation or gender identity against his or her will. For many, it is indeed difficult to speak about this topic if one is escaping from a context of persecution and denying of fundamental freedoms<sup>236</sup>.

This case is considered a cornerstone in the European LGBT asylum seekers jurisprudence because the European Court stated that evidence of a sexual nature cannot be demanded from applicants and this principle has generally been respected by national courts<sup>237</sup>. The subjects involved in this trial are three homosexual boys from Gambia, Afghanistan and Uganda who claimed to suffer persecution in their home

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<sup>235</sup> InfoCuria; Documenti; JUDGMENT OF THE COURT (Grand Chamber), 2 December 2014; InfoCuria; 2022

[<https://curia.europa.eu/juris/document/document.jsf?docid=160244&doclang=EN>]

<sup>236</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Report of Cases; JUDGMENT OF THE COURT (Grand Chamber), 2 December 2014; SOGICA; 2022

[[https://www.sogica.org/wp-content/uploads/2017/04/CELEX\\_62013CJ0148\\_EN\\_TXT-1.pdf](https://www.sogica.org/wp-content/uploads/2017/04/CELEX_62013CJ0148_EN_TXT-1.pdf)]

<sup>237</sup> SSRN; Interview to Nuno Ferreira, University of Sussex; SSRN; 2022

[<https://deliverypdf.ssrn.com/delivery.php?ID=707091125114113022107095116109013077118020024084061089000004118106021070002073099096026057102032006102108123118117114092102013038034045078021107097126096068095099001069030017006072001024083084005012029023069121118104075124114114099001115109015016111025&EXT=pdf&INDEX=TRUE>]

countries because of their sexual orientation. Although Article 4 of Directive 2004/83 applies to all asylum application cases, it should be noted that the authorities changed the methods of collecting relevant evidence<sup>238</sup>.

Furthermore, the Court states that one cannot make a judgement solely based on stereotypical facts about homosexuals, such as whether he is known and frequents LGBT venues and whether he is a rights activist in his country. Those can be considered as useful information to gather but should not be the only information on which to base the case<sup>239</sup>. The authorities' questions on sexual practices are reiterated to be against Article 1 of the European Charter of Fundamental Rights and violates the dignity of the individual. Consequently, such evidence cannot be accepted even if spontaneously shown by the applicant; it could only set a precedent. To sum up, the Court holds that not declaring homosexuality at the outset to the relevant authorities cannot result in a conclusion that the individual's declaration lacks credibility<sup>240</sup>.

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<sup>238</sup> EDAL; European Database of Asylum Law; CJEU - Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014; EDAL, 2022

[<https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c%E2%80%91c%E2%80%91c%E2%80%9115013-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-2>]

<sup>239</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Report of Cases; JUDGMENT OF THE COURT (Grand Chamber), 2 December 2014; SOGICA; 2022; para 62

[[https://www.sogica.org/wp-content/uploads/2017/04/CELEX\\_62013CJ0148\\_EN\\_TXT-1.pdf](https://www.sogica.org/wp-content/uploads/2017/04/CELEX_62013CJ0148_EN_TXT-1.pdf)]

<sup>240</sup> EDAL; European Database of Asylum Law; CJEU - Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014; EDAL, 2022

[<https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c%E2%80%91c%E2%80%91c%E2%80%9115013-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-2>]

## 2. Analysis of cases that have been examined by the European Court of Human Rights in Strasbourg from 1990 to nowadays

### 2.1 Introduction to the European system and analysis of LGBTI refugee cases

Over the years, a significant number of people arrive in Europe and apply for asylum on the basis of their vulnerability because they are part of the LGBTI community. As already seen, claiming asylum based on SOGIESC<sup>241</sup> characteristics can be understood as a ground of the Refugee Convention. Even though, the EU asylum law<sup>242</sup> recognizes exclusively sexual orientation and gender identity as a reason of persecution, some member states adopted specific laws to protect vulnerabilities, gender expression, and sex characteristics. Thus, they are understood as a ground to seek protection<sup>243</sup>. In EU law, the 2011 Qualification Directive elaborates who is eligible for protection in the EU.

Sexual Orientation and Gender Identity or Expression and sex characteristics of asylum seekers and refugees is a particular field of interest and research because for too long states have not been able to grant those people the necessary guarantees they needed to face the path they were going through and social, and cultural stigma. Thus, in 2016 a group of researchers specialized on this topic decided to apply for a European call and use the funds to research and study the conditions of access and reception that states offer to this category of refugees. The project that took the name SOGICA - Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge<sup>244</sup>, ended in 2020. It came out with numerous papers<sup>245</sup>, some recommendations<sup>246</sup> and databases<sup>247</sup>. Consequently, I have used the database they

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<sup>241</sup> SOGIESC acronym stands for: Sexual Orientation and Gender Identity or Expression and sex characteristics

<sup>242</sup> In EU law, the 2011 Qualification Directive elaborates who is eligible for protection in the EU

<sup>243</sup> ILGA Europe; Policy briefing on LGBTI refugees and EU asylum legislation; ILGA Europe; 2021

[<https://www.ilga-europe.org/policy-paper/policy-briefing-on-lgbti-refugees-and-eu-asylum-legislation/>]

<sup>244</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Project Aims; SOGICA; 2022 [<https://www.sogica.org/en/the-project/>]

<sup>245</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Publications; SOGICA; 2022 [<https://www.sogica.org/en/publications/>]

<sup>246</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Union case study; SOGICA; 2022

create as the primary source for the research contained in this second chapter. Thanks to their collection and classification of the cases that have gone through the European Court of Human Rights in Strasbourg, my research and analysis have been more fluid and coherent<sup>248</sup>.

Although the Strasbourg Court does not take decisions that consider the outcome of asylum claims as such, it does decide on the violation of ECHR articles that may protect asylum claimants<sup>249</sup>. In doing so, the court moves between the effective protection of human rights and the sovereignty of states in regulating the flow of migration and refugees. As it will be seen in the cases analyzed below, the court mainly uses the violation of Articles 3 and 2, i.e. the prohibition of torture and the right to life. In one of the first judgments issued by the European Court of Human Rights, the case *F vs the United Kingdom* the court clearly states:

“However, expulsion by a Contracting State of an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question if expelled, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.

The Court does not exclude that analogous considerations might apply to Article 2 of the Convention where the return of an alien puts his or her life in danger, as a result of the imposition of the death penalty or otherwise.

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[[https://www.sogica.org/en/case\\_studies/european-union/](https://www.sogica.org/en/case_studies/european-union/)]

<sup>247</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Database; SOGICA; 2022

[<https://www.sogica.org/en/sogica-database/>]

<sup>248</sup> Council of Europe; the European Convention on Human Rights, a living instruments; Council of Europe; 2022

[[https://echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf)]

<sup>249</sup> UCL Press; FRINGE, Queer migration and asylum in Europe; UCL Press; 2021; chapter 5, page 6

[<https://www.uclpress.co.uk/products/141641>]

The Court will therefore examine together the applicant's complaints under Articles 2 and 3 of the Convention."<sup>250</sup>

The work of the Strasbourg Court has been fundamental and supportive for LGBTI activists and groups because they have been empowered in front of governments thanks to their access to European courts and the political arena. The ECtHR has been very proactive in defending and guaranteeing the rights of sexual minorities<sup>251</sup>.

Although the work of the ECJ and Strasbourg has never been mutually clear and supportive, there are plenty of examples of judicial dialogue. Increasingly, the CJEU's experience has been used to analyze and meet Strasbourg's demand.<sup>252</sup> The CJEU jurisprudence has been used as an argument in favor to reinforce both positive and negative argumentation. X, Y and Z decision is a cornerstone in European judgment and it has been used both as a key to subsequent guidance and as the basis for several essays and analyses that analyzed how the European jurisprudence is modified and in some ways developed from this case. At the same time, it also explains how states have acted in comparison to it and whether they have modified their domestic laws to provide asylum for the most vulnerable groups.

The CJEU decisions in 2013 case of X, Y and Z and the 2014 decision in A, B and C, drew some positive elements for the applicant, nevertheless their applications have been considered manifestly ill-founded<sup>253</sup>. These marked a path for the recognition of the rights of homosexual refugees and a progressive opening of the system. While regarded as positive examples, many other times these cases have been used to deny asylum on a SOGI basis.

In the first case, the court analyzed the application of three homosexual asylum seekers coming from countries in which same-sex relationships were criminalized up to the death penalty. Even though rejected by the national court, the European decision

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<sup>250</sup> European Court of Human Rights; Fourth Section Decision as to the Admissibility of Application no. 17341/03 by F. against the United Kingdom; European Court of Human Rights; 2022 [[https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-24020%22%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-24020%22%7D)]

<sup>251</sup> UCL Press; FRINGE, *Queer migration and asylum in Europe*; UCL Press; 2021; chapter 5, page 8 [<https://www.uclpress.co.uk/products/141641>]

<sup>252</sup> UCL Press; FRINGE, *Queer migration and asylum in Europe*; UCL Press; 2021; chapter 5, page 13 [<https://www.uclpress.co.uk/products/141641>]

<sup>253</sup> UCL Press; FRINGE, *Queer migration and asylum in Europe*; UCL Press; 2021; chapter 5, page 14 [<https://www.uclpress.co.uk/products/141641>]

was positive ruling because considered in line with the purpose of the European Refugee Regulation<sup>254</sup>. At the same time, the court recognizes a fundamental truth, namely that a person's sexual identity is a fundamental characteristic for his or her identity and therefore cannot be renounced or hidden<sup>255</sup>. In addition, the court states that undergoing a penalty of imprisonment because of consensual homosexual acts is a disproportionate measure and a discriminatory punishment<sup>256</sup>.

For what concerns the case of A, B and C, they were disbelieved by the Dutch authorities of being gay cause on their accounts, the hypothesis of their homosexuality was implausible. The court confirms that the self-identification must be considered as a starting point, however; assessment must be taken from the individual situation and personal circumstances of the applicant<sup>257</sup>. Consequently, the assessment and judgment cannot be based on stereotypes, questioning sexual practices, asking for a test (production of video evidence of sexual acts; it would be contrary to article 1 of the Charter and would compromise an individual's dignity) or adverse findings concerning for delay<sup>258</sup>.

Alongside all this evidence and questions that cannot be asked, it is also explained what the courts can verify<sup>259</sup>. In 2013. The UNHCR created an assessment tool to determine the status of LGBTI refugees. This has the purpose to enhance UNHCR's effectiveness and harmonizing procedures for assessing Lesbian, Gay, Bisexual,

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<sup>254</sup> International Commission of Jurists; Advocate for justice and Human Rights; X, Y and Z: a glass half full for "rainbow refugees"?; ICJ; 2014  
[<https://www.icj.org/x-y-and-z-a-glass-half-full-for-rainbow-refugees/>]

<sup>255</sup> EDAL; European Database of Asylum Law; The Netherlands Council of State gives judgment on X., Y., Z. case concerning persecution based on sexual orientation; EDAL; 2014  
[<https://www.asylumlawdatabase.eu/en/content/netherlands-council-state-gives-judgment-x-y-z-case-concerning-persecution-based-sexual>]

<sup>256</sup> International Commission of Jurists; Advocate for justice and Human Rights; X, Y and Z: a glass half full for "rainbow refugees"?; ICJ; 2014  
[<https://www.icj.org/x-y-and-z-a-glass-half-full-for-rainbow-refugees/>]

<sup>257</sup> EDAL; European Database of Asylum Law; CJEU - Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014; EDAL, 2022  
[<https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c%E2%80%9114813-c%E2%80%9114913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-2>]

<sup>258</sup> European Law Blog; C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims; European Law Blog; 2022 [ <https://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/> ]

<sup>259</sup> Refworld; Opinion of Advocate General: A, B and C, Joined Cases C-148/13, C-149/13 and C-150/13, European Union: Court of Justice of the European Union, 17 July 2014; 2022; para 35  
[<https://www.refworld.org/cases,ECJ,53c8e84b4.html>]

Transgender, and Intersex (LGBTI) refugees for resettlement. It includes a 14-page guide and 6 pages of questionnaires with 31 questions. The questions should not be taken literally but are intended as a guide for practitioners and state authorities who need to verify and confirm the refugee's identity and truthfulness<sup>260</sup>. The questions will be attached as an annex at the end of the thesis<sup>261</sup>.

The next section contains an analysis of the cases that have come before the European Court of Human Rights from 1990 until today. This is followed by a comparative analysis of the same cases supported by graphics and detailed explanations of the topics analyzed.

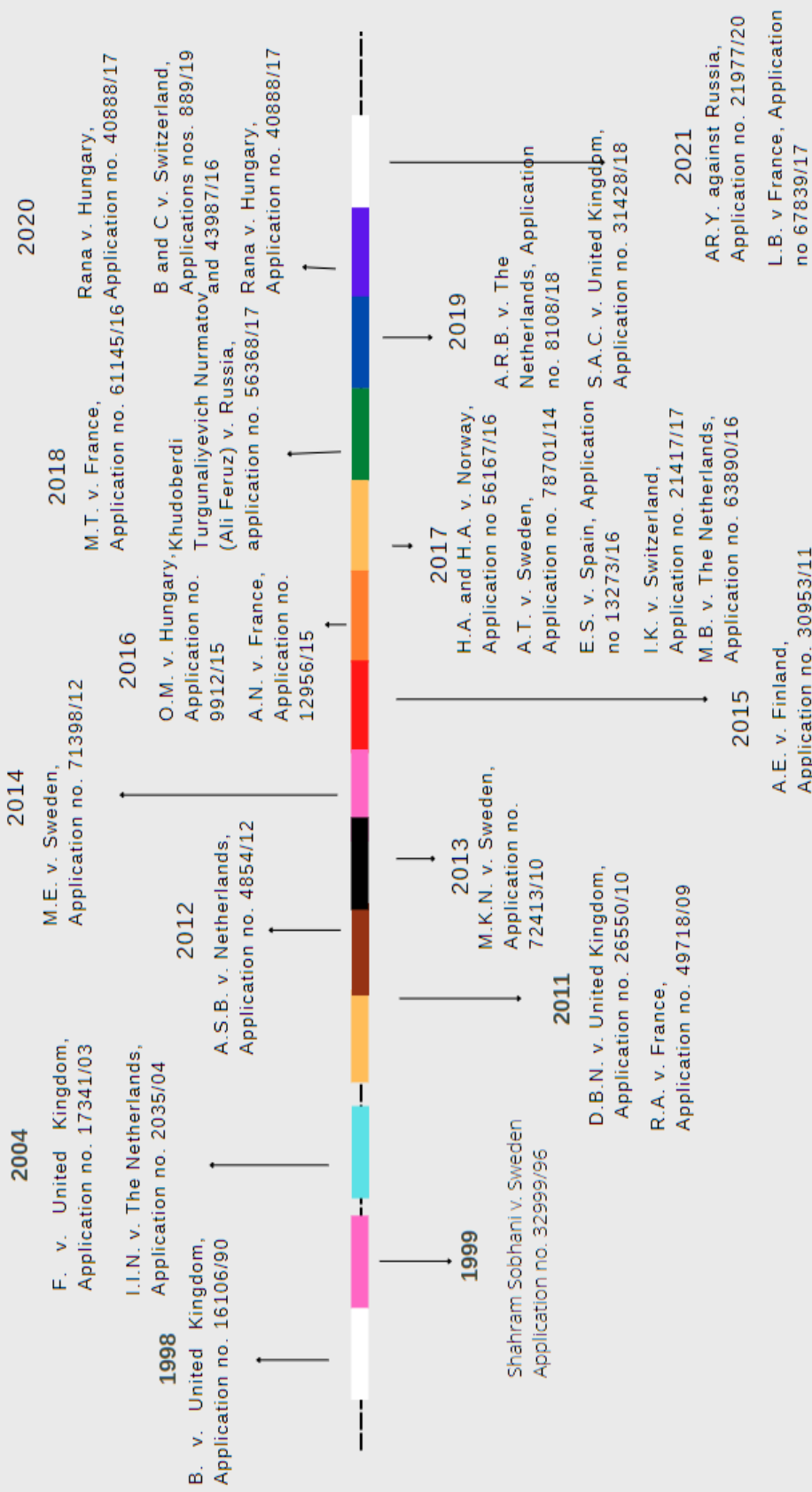
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<sup>260</sup> UNHCR; The United Nation High Commissioner for Refugees; Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees; UNHCR 2013  
[<https://www.unhcr.org/51de6e5f9.pdf>]

<sup>261</sup> UNHCR; The United Nation High Commissioner for Refugees; Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees; 1992; UNHCR; 2022  
[<https://www.unhcr.org/4d93528a9.pdf>]



# TIME-LINE OF CASE LAW IN ECHR



## 2.2 ECHR case-law analysis

<b>Case analysis form</b>	
<b>Case Reference</b>	1. B. v. United Kingdom, Application no. 16106/90, 10 February 1990
<b>Asylum Seeker</b>	Gay Northern Cypriot man 30 years old born in 1958 and moved in UK for study reason in 1977
<b>Decision Maker</b>	European Commission of Human Rights, third section
<b>Main legal basis</b>	Articles 8, 13 and 14 ECHR Application manifestly ill founded
<b>Legislation in Country of Origin</b>	The Turkish Cypriot community is openly abused, threatened and persecuted; in addition, the police closely monitor their activities and the Cyprus Penal Code punishes homosexual behavior in sections 171, 173 of Chapter 154.
<b>Waiting time for judgment</b>	The request for asylum based on SOGI ground was only formulated in 1988 and the European Court's answer came in 1990.
<b>Legal representative</b>	Mr. J. P. Gardner, Solicitor, and Stephanie Grant, Solicitor, Bindman and Partners, of London

<p><b>Overview</b><sup>262</sup></p>	<p>The applicant moved to the UK in 1977 with a student visa to complete his university studies; his leave to remain expired in 1983 so the Secretary of State issued a deportation order against him. The order was served in 1986 with directions to Cyprus.</p> <p>In 1986 the applicant wrote the Home Secretary asking for the permission to remain on the ground of his homosexual stable relationship. In fact, already in 1985, he was living with his boyfriend, they had a shared bank account with whom they bought a flat and opened a travel agency.</p> <p>In 1988 the applicant's layer made a claim for asylum based on a well-founded fear of being persecuted in his country of Origin due to the applicant's homosexuality. However, the Secretary of State informed the applicant that no one was being persecuted in Cyprus due to their sexual orientation, so the Office did not revoke the deportation order.</p> <p>In 1988 the applicant challenged the lawfulness of the Secretary of State's deportation order because; firstly, he admitted being a refugee and second the Secretary of State did not comply with article 8 of the European Convention on Human Rights. In his application, the claimant referred to the criminal penalties imposed by sections 171 and 173 of Chapter 154 of the Criminal Code of Cyprus. In 1989 his application was rejected.</p> <p>The applicant complained that his removal from the UK would constitute interference with his private life, according to article 8 para 2. To this extent, he refers to the private relationship he has, and to the concept of family and home. He further submits that he would be unable to continue his relationship in a country where homosexual activity is criminalized. Moreover, neither the right to file an individual petition does not extend to the acts of the Turkish authorities in the occupied part of Northern Cyprus.</p> <p>He further added that the decision of his removal constitutes discrimination toward the gay couple. Likewise, the application points out that he is without an effective remedy as required by Article 13 of the Convention in respect of the decision of the Secretary of State.</p> <p>He filed a case against the commission in 1990, which argued "In the present case the Commission notes that the applicant formed his relationship with Mr R. at a time when he was aware that he had no right to remain in the United Kingdom"<sup>263</sup>. The commission adds that there will not be lack of respect for his private life within the meaning of article 8. The possibility that the applicant will be</p>
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<sup>262</sup> European Court of Human Rights; as to the admissibility of Application No. 16106/90 by B. against the United Kingdom; European Court of Human Rights; 2022  
[\[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-874%22\]}\]](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-874%22]})

<sup>263</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Database, As to the admissibility of Application No. 16106/90 by B.against the United Kingdom, SOGICA Database; 2022; page 4  
[\[https://www.sogica.org/wp-content/uploads/2018/11/B.-v.-THE-UNITED-KINGDOM.pdf\]](https://www.sogica.org/wp-content/uploads/2018/11/B.-v.-THE-UNITED-KINGDOM.pdf)

	<p>subject to ostracism “does not outweigh valid considerations relating to the proper enforcement of immigration controls”<sup>264</sup>. Thus, the application is considered manifestly ill-founded according to article 27 para 2. For what concern the discrimination moved by the court because of their homosexuality, the court answered that they must protect families, but they do not have to give similar protection to stable relationships. So, the discrimination is not moved based on their sexual orientation but on the kind of relationship established by the partners.</p>
<p><b>Outcomes</b><sup>265</sup></p>	<p>Application declared manifestly ill founded, thus inadmissible.</p>

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<sup>264</sup> Ibidem, page 5

<sup>265</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 202 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	2. Shahram Sobhani v. Sweden, Application no. 32999/96, 10 July 1998
<b>Asylum Seeker</b>	Gay Iranian man, 25 years old born in 1971
<b>Decision Maker</b>	European Commission of Human Rights, third section
<b>Main legal basis</b>	Articles 2, 3 and 8 8.1, 30.3, 30.1b. 37, 37.1-b
<b>Legislation in Country of Origin</b>	Has not taken into account by the European Court
<b>Waiting time for judgment</b>	Not applicable
<b>Legal representative</b>	Mr. Stig-Åke Petersson, a legal adviser of the Swedish Federation for Gay and Lesbian Rights (Riksförbundet för sexuellt likaberättigande) in Stockholm
<b>Overview<sup>266</sup></b>	<p>In 1994 the applicant arrived in Sweden but applied for asylum only in 1995 and his application was rejected by the Immigration Board, issuing an expulsion order. Thus, he appealed the decision but again it was rejected in 1996.</p> <p>He lodged a new application with the Appeals Board which stopped the expulsion order and referred a new application to the Government. In 1998 the Government quashed the expulsion order and granted the applicant a permanent residence permit.</p> <p>In 1996 the applicant claimed the court due to his expulsion order, invoking articles 2, 3 and 8 specifying that if returned to Iran he would be executed due to his homosexuality.</p> <p>The commission decided that it was desirable to not expel the applicant until the commission decided in light of both parties. In 1998 the Commission decided to give the applicant a permanent residence permit. Consequently in 1998, he expressed the wish to withdraw the application.</p>
<b>Outcomes<sup>267</sup></b>	The applicant withdrew application when the Sweden Government

<sup>266</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Application No. 32999/96 by Shahram SOBHANI against Sweden; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2017/05/SOBHANI-v.-SWEDEN.pdf]

<sup>267</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge –

	granted him a residence permit.
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SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 202  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<b>Case analysis form</b>	
<b>Case Reference</b>	3. F. v. United Kingdom, Application no. 17341/03, 22 June 2004
<b>Asylum Seeker</b>	Gay Iranian man, 30 years old born in 1973
<b>Decision Maker</b>	European Court of Human Rights Fourth Section, Decision
<b>Main legal basis</b>	Articles 2, 3, 5, 5.1f and 8, 8.1ECHR
<b>Legislation in Country of Origin<sup>268</sup></b>	“The country materials showed that there was a possibility of under-reporting of executions and floggings and that there was not much detailed reporting of those cases in the media. It appeared however that in 1990 at least three gay men and two lesbian women were beheaded, in 1992 there was an execution for offences including sodomy, in 1995 a man was stoned for repeated adultery and the act of sodomy and in 1998 a man was hanged for having gay sex, as well as having committed adultery and drugs offences. Evidence also suggested that activity short of actual sodomy could attract severe penalties, such as flogging and for such lesser acts four witnesses were not necessary” <sup>269</sup>
<b>Waiting time for judgment</b>	Application made in 2003, judgment arrived in 2004
<b>Legal representative</b>	Mr S. Winter, a solicitor practicing in Glasgow.

<sup>268</sup> European Court of Human Rights; fourth decision as to the admissibility of application no.17341/03 by F.against the United Kingdom; The European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-24020%22%5D%7D>]

<sup>269</sup> Ibidem, page 9

<p><b>Overview</b><sup>270</sup></p>	<p>The applicant entered in UK in 2001 claiming asylum because of feared persecution based on his sexual orientation. He stated that security forces came to his house because he had a satellite and got suspicious about the double bed that he used to share with his partner. They got arrested and beaten, after having spent three months in prison, he got released thanks to his family that paid a bribe threatened on a sentence of death penalty due to his homosexuality.</p> <p>The Secretary of State rejected his asylum application because the witness did not seem credible. Why did the authorities keep him in prison for three months without executing him? Why did he not claim asylum in Turkey?</p> <p>The applicant raised a complaint under articles 3 and 8 of the Convention and in 2002 the Adjudicator rejected his appeal. Although homosexuality is theoretically punished in Iran, 4 eyewitnesses of penetration or 4 confessions of the 4 active partners are needed to prove homosexual acts. Several scholars have also stated that homosexuality in Iran was tolerated if practiced in the private sphere and that there were no cases of persecution of homosexuals. Therefore, the court concluded that it was quite impossible that the police had behaved in this way and that the story of his escape was implausible, implying that he was not telling the truth.</p> <p>The applicant appealed to the Immigration Appeal Tribunal on the ground of article 8, because of the existence of Iran laws prohibiting the adult consensual activity. The Immigration Appeal Tribunal rejected the applicant's application for leave to appeal, finding no error of law and that the Adjudicator had quite properly found that there would be no breach of the applicant's human rights if removed to Iran.</p> <p>The applicant complained that if expelled to Iran he would face extra-judicial killing, under article 2; risk of torture and ill-treatment, article 3, arbitrary detention article 5, and would not receive a fair trial in the Iran judicial system, article 6. Within article 8, his physical and moral integrity with respect for his private life would be infringed. He would come to immediate notice to authorities due to his visa regulation violation<sup>271</sup>.</p> <p>The European Court pointed out that the applicant did not raise articles 2 and 3 in domestic proceedings, adding that he should have shown which risk he could face if come back to Iran and not just general treatment of homosexuals out there. However, the Court showed an under-reporting of executions and punishments toward homosexuals in Iran; most of the time Iranian courts obtain confessions through torture and homosexual prisoners are severely punished.</p> <p>Even though the Contracting state has the right to control aliens</p>
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<sup>270</sup> Council of Europe; European Court of Human Rights; fourth section decision as to the admissibility of application no.17341/03 by F. against the United Kingdom; the Council of Europe; 2022 [https://www.sogica.org/wp-content/uploads/2017/04/F.-v.-the-UNITED-KINGDOM.pdf]

<sup>271</sup> Ibidem, page 8



	<p>and asylum when dealing with expulsion it is interesting to give rise to article 3. The Court however affirm that the material and proofs sowed by the applicant do not disclose any situation of active persecution based on his homosexual relationship. The Court is not persuaded that the applicant has shown that he was living a real risk of falling foul of the authorities on that ground.</p> <p>For what concerns articles 5 and 6, the court says that he did not raise those complaints in the domestic proceedings, those provisions cannot be engaged by an expulsion decision. Moreover, there is no concrete indication that the applicant would face arrest or trial or any particular charge.</p> <p>Finally with article 8, the Court recalls that the applicant was never at risk of ill-treatment, and it had never been established the applicant's moral integrity would be affected within the scope of article 8.</p>
<b>Outcomes</b> <sup>272</sup>	Application manifestly ill-founded thus declared inadmissible by the court.

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<sup>272</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 202 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	4. I.I.N. v. The Netherlands, Application no. 2035/04, 9 December 2004
<b>Asylum Seeker</b>	Gay Iranian man, 29 years old Born in 1975
<b>Decision Maker</b>	European Court of Human Rights Third Section, Decision
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin<sup>273</sup></b>	<p>Article 108 of the Iranian Criminal Code punished homosexual conduct between two men. The hadd-punishment is the death penalty, and the manner of execution is established by the judge. It punished both partners that acted with free will. If both partners are minors, they will be judged according to ta'zirat. The ta'zirat punishment may run to 74 whiplashes. the punishment for homosexual acts not involving intercourse is 100 whiplashes. If someone has been punished three times because of homosexual behavior, the fourth time he will be executed. Kissing another man out of lust attracts a ta'zirat punishment of up to 60 whiplashes. This homosexual intercourse must be witnessed by 4 religious men and women witness are not valid<sup>274, 275</sup>.</p> <p>A Danish fact-finding mission dating 2002 reported that the penalty for homosexual acts is death by hanging and there is no minimum punishment; however, burden of proof is heavy, the witness must testify in court and both people have to admit their relationship<sup>276</sup>.</p> <p>However, as reported in the judgment, in Iran there is a lack of human rights reports, so we cannot be sure what is the treatment of homosexual people, not only in courts and trials but also in civil society, if they are free to live their life or if they are obliged to hide<sup>277</sup>.</p>
<b>Waiting time for judgment</b>	The whole 2004, he applied in January and got an answer in December

<sup>273</sup> European Court of Human Rights; Third section decision as to the admissibility of Application no. 2035/04 by I.I.N. against the Netherland; the European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67880%22%5D%7D>]

<sup>274</sup> Council of Europe; European Court of Human Rights; Third Section decision as to the admissibility of Application no. 2035/04 by I.I.N. against the Netherlands; the Council of Europe; 2022; page 5  
[<https://www.sogica.org/wp-content/uploads/2017/04/I.I.N.-v.-THE-NETHERLANDS.pdf>]

<sup>275</sup> The most recent general official report on Iran of the Netherlands Ministry of Foreign Affairs, dated April 2004 and in so far as relevant, states as mentioned.

<sup>276</sup> Ibidem, page 7

<sup>277</sup> Ibidem; page 8

<b>Legal representative</b>	He is represented before the Court by Mr H.A. Limonard, a lawyer practicing in Zwolle
<b>Overview<sup>278</sup></b>	<p>In 2001 the claimant applied for asylum in the Netherlands, admitting to having been arrested in 1999 during demonstrations. He added to being ill-treated and released after one day. He claimed that in 2001 he had been caught by a policeman while he was kissing a man in the alley. He was brought to the police station where he had to sign a declaration admitting his homosexuality and that he was caught in flagrante delicto. After being raped by the policeman he was released the day after. The applicant further argues that the same policeman raped him other times at the police station. In 2001 he took part in a protest with a friend, they were photographed and filmed, and his friend was arrested and released after a day. Sometime later his body was found in a ditch. Fearing the same fate, the applicant fled Iran and arrived in the Netherlands in 2003.</p> <p>In 2001 the Minister of Justice rejected the applicant's asylum request holding the lack of credibility. And the applicant's appeal against this decision was rejected in 2003 by the regional court of the Hague.</p> <p>The applicant complained that if expelled to Iran, he would fear treatment contrary to article 3 of the Convention due to his sexual orientation.</p> <p>The Government replied that homosexuality is not considered an offence under Iranian criminal law and 2001 and 2004 official reports show that these actions are not persecuted. The applicant argues that between 1998 and 1999, 14 Iranian homosexuals have been granted asylum in the US and 9 in Canada. He further added that if forcibly returned, he would have to renounce his identity which is a violation of his human rights.</p> <p>The court argued that there is no material to believe he will be subject to persecution and there are no substantial instances of trials, also because of the burden of proof required by Iranian law. Islamic law is more concerned with public immorality and not with private life affairs.</p> <p>ù. Even when he has been caught kissing another male he has not been punished or resulted in any criminal proceedings. Although homosexuals may be considered a vulnerable group, there is no evidence that the appellant may be subjected to treatment contrary to Art. 3.</p>
<b>Outcomes<sup>279</sup></b>	Application manifestly ill-founded thus the application was declared inadmissible. It found that the applicant has not established in his

<sup>278</sup> Council of Europe; Third Section decision as to the admissibility of Application no. 2035/04 by I.I.N.against the Netherlands; the Council of Europe; 2022  
[<https://www.sogica.org/wp-content/uploads/2017/04/I.I.N.-v.-THE-NETHERLANDS.pdf>]

<sup>279</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

	case that there were substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention on grounds of his homosexuality <sup>280</sup> .
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<sup>280</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022; page 6  
[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<b>Case analysis form</b>	
<b>Case Reference</b>	5. R.A. v. France, Application no. 49718/09, 8 February 2011
<b>Asylum Seeker</b>	Gay Pakistani man, 26 years old Born in 1985
<b>Decision Maker</b>	Fifth Section of the European Court of Human Rights
<b>Main legal basis</b>	Articles 2, 3 and 13 together with 2 and 3 ECHR
<b>Legislation in Country of Origin</b>	No information about the country of origin have been released
<b>Waiting time for judgment</b>	Application posed in 2009, judgment obtained in 2011
<b>Legal representative</b>	Me J. Cukier, lawyer in Paris.
<b>Overview<sup>281</sup></b>	The claimant appeals to the French state on the grounds of the restrictive measures that were implemented against him. Thus, he was forced to return to his home Country where he would risk his life based on his homosexuality. The first ruling of the French court was delivered in 2009, but he decided to submit his case also to the European Court of Human Rights, which replied in January 2011. However, after one year of waiting for the judgment, the applicant decides to drop his application.
<b>Outcomes<sup>282</sup></b>	The Court considers that there are no special circumstances affecting the observance of the rights guaranteed by the Convention or the Protocols thereto which require further consideration of the application. The case should therefore be struck out of the list. It lapsed because the applicant no longer wished to proceed.

<sup>281</sup> European Court of Human Rights; Fifth Section decision; Requête no 49718/09 présentée par R. A. contre la France; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng?i=001-103673>]

<sup>282</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; R. A. v. France (Fifth Section) 2011 (ECtHR); Sexual Orientation and Gender Identity Claims of Asylum;  
[<https://www.sogica.org/database/r-a-v-france-fifth-section-2011-ecthr/>]

<b>Case analysis form</b>	
<b>Case Reference</b>	6. D.B.N. v. United Kingdom, Application no. 26550/10, 31 May 2011
<b>Asylum Seeker</b>	Lesbian Zimbabwean woman, 32 years old Born in 1978
<b>Decision Maker</b>	European Court of Human Rights fourth section
<b>Main legal basis</b>	Articles 2, 3, 8, 13 together with 3, and 14 together with 3 and 13 ECHR
<b>Legislation in Country of Origin</b>	No sources other than the applicant's oral accounts were considered
<b>Waiting time for judgment</b>	The contestant applied in May 2010 and got an answer by the court in May 2011
<b>Legal representative</b>	Ms A. Gonzalez, a lawyer practicing in London with Wilson Solicitors LLP, assisted by Ms B. Asanovic and Ms C. Meredith, Counsel
<b>Overview<sup>283</sup></b>	<p>The applicant who arrived in the United Kingdom in February 2009 made an asylum application based on her sexual identity because she was perceived as an opponent of the Zimbabwean regime. She further explained that due to her sexual attraction toward women and her gender expression (she used to look like a man), she would be at risk due to her family and community. She added that in 1996 her girlfriend and she got attacked by a gang of six men who raped them for 2 hours and both got pregnant due to the attack. After six months her partner committed suicide, she, however, was able to give birth to her son, even though she tried to take her own life shortly after. She has been harassed by the local community for a long time, in 2005 and 2008 she was brutally beaten, and she also required knee surgery after the attack. Her asylum application was refused in 2009, however, her homosexuality was proven thanks to her witness to attacks. She was not given international protection because the persecution she faced was moved by private actors and was not state sponsored. Thus, the court affirmed that she would have been able to relocate within the country.</p> <p>“However, the Immigration Judge considered that any</p>

<sup>283</sup> European Court of Human Rights; Fifth Section decision; Requête no 49718/09 présentée par R. A. contre la France; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng?i=001-103673>]

	<p>discrimination experienced by the applicant in Zimbabwe had been limited because she had been able to work without difficulty and the number of incidents which had occurred was “small” and linked to her family’s disapproval of her gender identity and sexual orientation”<sup>284</sup>.</p> <p>In 2011, the chairman of the Fourth Chamber asked the government to respond in writing whether the appeal was acceptable. The government replied that they were having difficulty tracing the applicant and that she had probably voluntarily left the UK while traveling as a South African citizen, thus discovering that the applicant had been using a dual identity in the UK, one South African and one Zimbabwean.</p> <p>The government then notified the lady's representative twice, with no response. Consequently, imagining that the applicant was no longer interested in seeking asylum in England, the case struck out.</p> <p>The applicant complained that she could really face risk of being persecuted under article 2 and 3 of the convention if returned in Zimbabwe due to her sex orientation. Moreover, she also complained under article 8 the right of a private life that could not be possible in her country of origin.</p> <p>From her representative’s letter it emerges that she voluntarily departed from the UK in June 2010. The court considers that in those circumstances the applicant may be regarded as no longer wishing to pursue her application.</p>
<b>Outcomes</b> <sup>285</sup>	The application struck out because the applicant lost touch with the representative and left the country voluntarily.

<sup>284</sup> European Court of Human Rights; Fourth decision as to the admissibility of application no. 26550/10 by D.B.N. against the United Kingdom; European Court of Human Rights; 2022; page 2 [https://www.sogica.org/wp-content/uploads/2018/11/D.B.N.-v.-THE-UNITED-KINGDOM.pdf]

<sup>285</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	7. A.S.B. v. The Netherlands, Application no. 4854/12, 10 July 2012
<b>Asylum Seeker</b>	Gay Jamaican man, 40 years old Born in 1972
<b>Decision Maker</b>	European Court of Human Rights, Third Section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin</b>	Do not take into account because the applicant got asylum based on residence-permit
<b>Waiting time for judgment</b>	Application lodged in January 2012 and analyzed in April, same year
<b>Legal representative</b>	Mr M. Berg, a lawyer practicing in Amsterdam.
<b>Overview<sup>286</sup></b>	In 2009 the applicant asked for asylum in the Netherlands, stating he was fearing persecution and treatment contrary to article 3 because of his homosexuality. The final negative decision on his asylum request was given on 11 January 2012 by the Administrative Jurisdiction Division of the Council of State. In January 2012 the president of the chamber decided to apply rule 39 indicating it was in the interest of the parties to not expel the applicant as a pending proceeding on his account. In April 2012 the Government informed the court that the applicant got an asylum-based residence permit. Thus, the applicant did not reach the court anymore.
<b>Outcomes<sup>287</sup></b>	Application struck out noting in particular that the applicant had been granted asylum in the Netherlands, and finding that, consequently, there was no longer any risk of his expulsion to Jamaica <sup>288</sup> .

<sup>286</sup> European Court of Human Rights; Third section decision as to the admissibility of Application no. 4854/12 A.S.B. against the Netherlands; the European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-112342%22%5D%7D>]

<sup>287</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<sup>288</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022; page 6



<b>Case analysis form</b>	
<b>Case Reference</b>	8. M.K.N. v. Sweden, Application no. 72413/10, 27 June 2013
<b>Asylum Seeker</b>	Gay Iraqi man, 52 years old Born in 1959
<b>Decision Maker</b>	European Court of Human Rights, Fifth Section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin</b>	In this case, the applicant's alleged homosexuality is called into question because it was exposed only at the time of the appeal and, there were more serious reasons that put his safety at risks, such as his Catholic and minority faith in Iraq. So the court does not research how homosexuality is viewed and understood by the Iraqi state, even as it admits it has little evidence to appeal to.
<b>Waiting time for judgment</b>	Application lodged in November 2010, solved in 2013
<b>Legal representative</b>	Mr A. Jussil, a lawyer practicing in Stockholm
<b>Overview<sup>289</sup></b>	<p>The president of the Section decided that the applicant should not be deported to Iraq all along the last of his proceedings. He arrived in Sweden in 2008 and he applied for asylum when he just arrived. He explained being Christian and married with two children and that his family was living in Syria. He said that he feared persecution due to his Christian belief but also because of his sheet-metal ownership. In 2006 he was kidnapped and threatened with money to pay some rebellious groups. The groups started asking for more money and threatening his life and well-being, so his family started to host him in some friend's house. However, his shop was blown up. In 2007 the family left Iraq for Syria paying a smuggler, the applicant left for Sweden at the end of 2007 and his family stayed in Syria.</p> <p>The immigration office thinks they are not serious threats against the applicant because he has been in Iraq for a year since the threats began and nothing has happened.</p> <p>The applicant appealed, adding that there was no internal relocation alternative for him in the Kurdistan Region, as there</p>

[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<sup>289</sup> Refworld; European Court of Human Rights, Fifth Section, case of M.K.N. v Sweden, (Application no. 72413/10), Strasbourg 09/12/2013; Refworld; 2022

[<https://www.refworld.org/cases,ECHR,51d2e3754.html>]

	<p>were entry restrictions and a requirement of a sponsor. He adds that since 2009 the mujahedin have been looking for him because they are aware of his homosexual relationship, so his partner is also in danger. He informs that he did not admit his homosexuality because he did not know it was an accepted thing in Sweden. Even though he had had this relationship, he wanted and needed to continue living with his wife.</p> <p>Regarding the applicant's statement that he had had a homosexual relationship, the court found that he had not given a reasonable explanation for his having made this claim so late in the proceedings.</p> <p>The applicant complained that if returned to Iraq, article 3 of the convention would be violated and the Court notes that the complaint is not manifestly ill-founded.</p> <p>So, if returned he would suffer torture and punishment because of the outbreak of violence in Iraq, because Christian and because of his homosexual relationship with another man.</p> <p>The Court notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion. Moreover, from the data and analysis possessed by the court, it does not appear that the violence is so severe that it cannot be returned to the state<sup>290</sup>. In addition, the Court also analyzed how dangerous it is to be Catholic in Iraq and concluded then that he would not face a real risk of persecution or ill-treatment on the basis of his religious affiliation alone.</p> <p>The question arises whether the vulnerability of the Christian group and the risks which the individuals face on account of their faith make it impossible to return members of this group to Iraq without violating their rights under Article 3. The Court considers, however, that it need not determine this issue, as there is an internal relocation alternative available to them in the Kurdistan Region<sup>291</sup>.</p> <p>The Court concludes that, although the applicant, as Christian, belongs to a vulnerable minority and irrespective of whether he can be said to face he may reasonably relocate to the Kurdistan Region, where he will not face such a risk. Consequently, his deportation to Iraq would not involve a violation of Article 3.</p>
<p><b>Outcomes</b><sup>292</sup></p>	<p>His deportation to Iraq would not involve a violation of Article 3 based on his religious belief. The Court held that the applicant could reasonably relocate to other regions in Iraq such as Kurdistan in the north. Lastly, the Court considered that the applicant's claim concerning the homosexual relationship was not credible<sup>293</sup>.</p>

<sup>290</sup> Ibidem, page 10

<sup>291</sup> Ibidem; page 11

<sup>292</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 202 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>293</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September

	<p>The implementation of the deportation order against the applicant would not give rise to a violation of Article 3 of the Convention;<sup>294</sup> The court continues to indicate to the Government under Rule 39 of the Rules of Court that it is desirable.</p>
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2022; European Court of Human Rights; 2022

[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<sup>294</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-121572%22%5D%7D>;

<b>Case analysis form</b>	
<b>Case Reference</b>	9. M.E. v. Sweden, Application no. 71398/12, 26 June 2014
<b>Asylum Seeker</b>	Gay Libyan man, 30 years old born in 1982
<b>Decision Maker</b>	European Court of Human Rights fifth section
<b>Main legal basis</b>	Article 3 ECHR and 35
<b>Legislation in Country of Origin<sup>295</sup></b>	Since the overthrow of Gadhafi in 2011, the Libyan situation continues to be insecure and unclear. Consequently, there is not enough information about the situation of homosexuals in Libya, so the Court finds some difficult to evaluate it. Although homosexual acts are punishable by imprisonment under the Libyan Penal Code, the Court did not find any information about people that have been persecuted or convicted for homosexuality since the end of the Gadhafi regime.
<b>Waiting time for judgment<sup>296</sup></b>	Judgment date June 2014, applied in 2012
<b>Legal representative</b>	Mr S.-Å. Petersson, a refugee administrator, working in Stockholm
<b>Overview<sup>297</sup></b>	The applicant is a Libyan man who has been living in Sweden since 2010, and who applied for asylum on the ground of persecution due to his involvement in weapon transportation. Some months later he raised another asylum application claiming to be gay, specifying that he married a man. The national migration board rejected the request because he gave contradictory statements, so he lacked in credibility. It found no obstacle to his returning to Libya to apply for a residence permit in Sweden on account of his family ties and marriage. The Migration Court dismissed the appeal stating that he was not in need of

<sup>295</sup> EDAL; European Database of Asylum Law; ECtHR – M.E. v. Sweden, Application No. 71398/12; EDAL; 2022 [https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-me-v-sweden-application-no-7139812]

<sup>296</sup> European Court of Human Rights; Fifth Section decision; Case of M.E. v. Sweden (Application no. 71398/12), Strasbourg 26 June 2014; European Court of Human Rights; 2022 [https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.E.%20v.%20SWEDE N.pdf]

<sup>297</sup> European Court of Human Rights; M.E. v. Sweden - 71398/12; European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22002-9547%22%7D}

	<p>international protection and his story was not credible. The European Court states that the national court decision is not final, they need to see and hear the applicant and state if he is credible or not, in this case, they thought the applicant was not credible cause he changed and added to his story over time. However, he can apply for a family reunion in Sweden and the waiting time will be only 4 months. Even though he has to come back to Libya and hide his sexual orientation, waiting for only four months “cannot by itself be sufficient to reach the threshold of Article 3 of the Convention”<sup>298</sup>.</p> <p>The applicant lodged a request to the Grand Chamber, which accepted it in 2014<sup>299</sup>.</p> <p>The Migration Board reassessed the application due to a general deterioration of the security in Libya and the applicant’s homosexuality constituted a danger to his safety. This subsequently led to the finding that, if returned, the applicant would be subjected to persecution on account of his homosexuality. The Swedish state then applies Article 37 in such a way that the citizen no longer risks deportation. However, the court “surmised that there were no special circumstances relating to human rights that required an ongoing examination of the case. The Court, thus, decided to strike the case out of its list”<sup>300</sup>.</p>
<p><b>Outcomes</b><sup>301</sup></p>	<p>No violation of Article 3 ECHR and acceptance of the ‘discretion argument’.</p> <p>The only dissenting judge does so by citing the case of X, Y, and Z, one of the earliest European jurisprudences on LGBT refugees. The judge is critical of this ruling because it goes on to introduce a new criterion hitherto never present: the duration. People cannot be expected to hide their sexual orientation to avoid persecution; it constitutes a limitation in exercising their fundamental rights and discrimination when compared to heterosexual people.</p> <p>The Court did not accept the applicant’s argument that it should continue to examine his case as it raised serious issues of fundamental importance relating to homosexuals’ rights and how to assess those rights in asylum cases all over Europe, as the Migration Court had considered the applicant’s sexual orientation in its decision of 17 December 2014<sup>302</sup>.</p>

<sup>298</sup> Ibidem; page 2

<sup>299</sup> EDAL; European Database of Asylum Law; ECtHR: Grand Chamber M.E. v Sweden (Application no. 71398/12) [Articles 3 and 8], 8 April 2015; EDAL; 2022 [https://www.asylumlawdatabase.eu/en/content/ecthr-grand-chamber-me-v-sweden-application-no-7139812-articles-3-and-8-8-april-2015]

<sup>300</sup> EDAL; European Database of Asylum Law; ECtHR – M.E. v. Sweden, Application No. 71398/12; EDAL; 2022; page 3 [https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-me-v-sweden-application-no-7139812]

<sup>301</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 202 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>302</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September

<b>Case analysis form</b>	
<b>Case Reference</b>	10. A.E. v. Finland, Application no. 30953/11, 22 September 2015
<b>Asylum Seeker</b>	Gay Iranian man (Kurd and Muslim) Not specified how old he is
<b>Decision Maker</b>	European Court of Human Rights, fourth section Committee
<b>Main legal basis</b>	Article 3 ECHR 37 and 37.1
<b>Legislation in Country of Origin</b>	The national board found that Iran was a relatively tolerant country toward homosexuals as long as it was not exercised in public. "Even though the death penalty could be imposed, the threshold for conviction was very high" <sup>303</sup> , even though homosexuals can be discriminated against in Iran, they are not systematically persecuted.
<b>Waiting time for judgment</b>	Application lodged in 2011 and analyzed by the Court in 2015
<b>Legal representative</b>	Mr Pirkka Lappalainen, a lawyer practicing in Tampere
<b>Overview<sup>304</sup></b>	<p>The applicant realized to be gay in his early childhood and he had four homosexual friends in his village. In 2008 all of them were arrested by local authorities during a party he did not attend. The day after the police came to his place looking for him and searched around, so he decided to leave for Turkey, where he spent a month, and then he reached Finland.</p> <p>He applied for asylum the same day he arrived in Finland, but the state rejected his claim in 2010 issuing him a removal order to Iran. The Court thought that it was unlikely that the applicant would be persecuted or arrested for his homosexuality also because he has been able to live in peace with his homosexuality in Iran for most of his life. In 2011 after an oral appeal, the Administrative Court rejected his appeal because in Iran both heterosexual and homosexual public behavior was punishable.</p>

2022; European Court of Human Rights; 2022; page 7

[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<sup>303</sup> Strada Lex; European Court of Human Rights (30953/11) - Court (Fourth Section Committee) - Decision - A.E. v. FINLAND; Strada Lex; 2022

[[https://www.stradalex.com/nl/sl\\_src\\_publ\\_jur\\_int/document/echr\\_30953-11](https://www.stradalex.com/nl/sl_src_publ_jur_int/document/echr_30953-11)]

<sup>304</sup> ILGA EUROPE; A.E. v. Finland; Asylum (Application No. 30953/11), March 2014; ILGA EUROPE; 2022

[<https://www.ilga-europe.org/case-law/a-e-v-finland/>]

	<p>In 2011 the applicant appealed to the Administrative Supreme Court, in 2012 his appeal was rejected.</p> <p>In 2012, the individual is still asking for the case to be reopened as he specifies that he is being persecuted and discriminated against because he is part of the homosexual minority in Iran. The court again specifies that it does not want to reopen his case.</p> <p>In 2012 he applied again for asylum in Finland, however; the court rejected his claim because there were no new grounds which had not already been examined, thus for the court the applicant did not require humanitarian protection. The Administrative Court rejected the applicant's appeal as well as his request for an oral hearing.</p> <p>The applicant lodged a further appeal with the supreme administrative court. However, in 2013, the court refused the appeal. On 20 November 2013 the applicant sought asylum for the third time in Finland. On 13 March 2014, the Immigration Service rejected his application and ordered his removal to Iran.</p> <p>In 2015, the applicant sought asylum for the fourth time and the Immigration Service advised the applicant to seek a residence permit based on studies or work reasons, if he wished to rely on these grounds. In 2015, the court rejected his asylum application but granted him a work residence permit for one year.</p>
<b>Outcomes</b> <sup>305</sup>	<p>The Court struck the application out of its list of cases, noting in particular that the applicant had been granted a continuous residence permit in Finland valid for a period of one year with a possibility of renewal and that he was thus no longer subject to an expulsion order. The Court therefore considered that the matter giving rise to the complaints in the case had been resolved<sup>306</sup>.</p>

<sup>305</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>306</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022; page 7 [https://www.echr.coe.int/documents/fs\_sexual\_orientation\_eng.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	11.A.N. v. France, Application no. 12956/15, 19 April 2016
<b>Asylum Seeker</b>	Gay Senegalese man 29 years old Born in 1983
<b>Decision Maker</b>	European Court of Human Rights, fifth section
<b>Main legal basis</b>	Article 3 ECHR and 35
<b>Legislation in Country of Origin<sup>307</sup></b>	Homosexuality is punishable under Senegalese law by up to five years imprisonment and a fine. Various international organizations, over the years, have witnessed and reported on the living conditions of the homosexual community forced into hiding. However, it is also true that the applicant was heard twice by OFPRA, that his evidence is unverifiable, and that the Senegalese government does not persecute the LGBT community as such. The Government underlines that Senegalese law criminalizes homosexuality, but Senegalese authorities do not persecute the homosexual group and a report dating from 2012 shows that laws criminalizing homosexuality are never applied.
<b>Waiting time for judgment</b>	Application lodged in March 2015, analyzed, and answered in May 2016
<b>Legal representative</b>	Me S. Danset-Vergoten, avocat à Lille.
<b>Overview<sup>308</sup></b>	The applicant explains that he understood to be gay very young but that he had the opportunity to freely express himself only at sixteen years old because he was scared about the possible reaction of the family and the community, being Muslim. When he turned nineteen years old, he got a job and met a boy with whom he fell in love and started a secret relationship; sometime later a friend of his found out about their story and started threatening and asking him for money to keep the secret. To be able to pay all the money demanded, he was forced to prostitute himself. Throughout this work, he met a French man who proposed to him to become a couple, but he did so in the middle of

<sup>307</sup> European Court of Human Rights; Fifth Section decision; Requête no 12956/15 A.N. contre la France; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-162839%22%7D%7D>]

<sup>308</sup> European Court of Human Rights; Cinquième Section Décision, Requête no 12956/15 A.N. contre la France, European Court of Human Rights; 2022  
[<https://www.sogica.org/wp-content/uploads/2018/04/A.N.-c.-FRANCE.pdf>]



	<p>a riot, so the participant understood his homosexuality and decided to run away from that location.</p> <p>In 2010, the friend who threatened him denounced his homosexuality and prostitution to his family, as a result, he admitted to being abducted and violently beaten by the members of his family. Once released from the hospital, he decided to seek refuge at a friend's house, but even there the family had managed to find him; he escaped from Senegal before being subjected to further violence.</p> <p>Once he arrived on French soil in May 2011, the police caught him and gave him an order to leave the state; moreover, his asylum request was rejected because the information he gave resulted in being stereotypical and inaccurate. He appealed with the help of a medical certificate stating that the scars on his body were the result of assault and violence. Only at that moment, he did admit to the court that he is homosexual, adding that he has been the victim of violence also in Lille. His version was confirmed by two testimonies that spoke about the aggression he lived by the non-gay-tolerant group; even the appeal has been rejected in April 2013.</p> <p>In 2014, he received a second notice to leave the country and, in a January 2015 ruling, the court in Lille refused to annul the sentence. Called on to appeal again in March 2015, the court confirmed that the testimonies and documents on the condemnation of homosexuality in Senegal were not sufficient to justify a fundamental fear of not wanting to return.</p> <p>The applicant says his deportation to Senegal would be contrary to Article 3, court responds that the applicant did not exhaust domestic remedies and the application has not been lodged in cassation. The court further adds that the applicant has been heard twice by the OFPRA and no violation of article 3 emerged.</p>
<p><b>Outcomes</b><sup>309</sup></p>	<p>The Court considers that it is in principle for the applicant to produce evidence capable of demonstrating that he would be exposed to a risk of treatment contrary to Article 3, it being for the Government to dispel any doubts about these elements.</p> <p>In the light of the foregoing, the Court considers that there are no grounds to believe that the applicant would be exposed to real risks of treatment contrary to Article 3 if he were returned to Senegal. Application manifestly ill-founded thus declared inadmissible.</p>

<sup>309</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	12. O.M. v. Hungary, Application no. 9912/15, 5 July 2016
<b>Asylum Seeker</b>	Gay Iranian man, 34 years old Born in 1982
<b>Decision Maker</b>	European Court of Human Rights, fourth Section
<b>Main legal basis</b>	Article 5 ECHR and 5-1, 5-1-b, 5-1-f, 41
<b>Legislation in Country of Origin</b>	Only the United Nations directive 9.7 is mentioned but no reports and fact-finding mission on the situation of homosexuals in Iran are considered.
<b>Waiting time for judgment</b>	Lodged in February 2015, deliberated in June 2016
<b>Legal representative</b>	Ms B. Pohárnok, a lawyer practicing in Budapest.
<b>Overview<sup>310</sup></b>	<p>The applicant crossed Hungarian borders illegally through Serbia and was taken into custody since he did not have the right to stay in the territory. He applied for asylum saying that he fled Iran because persecuted due to his sexual orientation and a criminal proceeding had been charged against him.</p> <p>After the hearing, the court ordered to detain the applicant, it was June 2014. At this stage, the court did not clarify the identity and the origin of the applicant yet. In the meanwhile, the law that regulated the asylum detention changed the length of this one so from 72 hours maximum, it became 60 days. He had a second hearing that ended with a detention proceeding for 60 days.</p> <p>One month later he had another hearing that ended up declaring the applicant's asylum request manifestly ill-founded, giving him another 60 days of detention. As a consequence the applicant's lawyer asked for the end of the detention and the designation of a place of residence; a week later the court-appointed another legal representative for the claimant and rejected the request to end the detention.</p> <p>On 22 August 2014, the asylum authority terminated the asylum detention and ordered a designated place of residence for the</p>

<sup>310</sup> European Court of Human Rights; Fourth decision on the CASE OF O.M. v. HUNGARY (Application no. 9912/15), European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-164466%22%5D%7D>]

	<p>applicant with measures securing his availability during the proceedings. On 31 October he was recognized as a refugee even if his detention lasted for two months.</p> <p>According to Guideline 9.7 of UNHCR, “Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse”<sup>311</sup>. Moreover, the applicant complained that his detention was arbitrary and not remedied with judicial review.</p> <p>In addition, the detention had not been lawful or proportional because no assessments have been taken on his case, thus his sexual orientation should have been considered.</p> <p>No arbitrary detention can be compatible with Article 5 § 1, and the notion of “arbitrariness” in that context extends beyond lack of conformity with national law<sup>312</sup>. Altogether, the Court cannot but observe that the applicant’s case was not assessed in a sufficiently individualized manner as required by the national law<sup>313</sup>.</p> <p>Lastly, the Court considers that, during the placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain an adequate reflection on the individual circumstances of the applicant, a member of a vulnerable group under belonging to a sexual minority in Iran<sup>314</sup>.</p>
<p><b>Outcomes</b><sup>315</sup></p>	<p>The detention of the applicant was based on an arbitrary decision of the court, without considering the specific situation of the applicant. Moreover, by failing to interrogate the subject, the court failed to take the necessary measures for his membership of a particular social group, namely that of homosexual persons.</p> <p>Violation of Article 5 of the ECHR EUR 7,500 for non-pecuniary</p>

<sup>311</sup> UNHCR; Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; UNHCR; 2022

[<https://cms.emergency.unhcr.org/documents/11982/43697/UNHCR%2C+Guidelines+on+International+Protection+No.+9.+Claims+to+Refugee+Status+based+on+Sexual+Orientation+and+or+Gender+Identity/a65b4858-0c5e-4e40-8240-bdeedd26a50b>]

<sup>312</sup> *ibidem*, page 12

<sup>313</sup> *ibidem*, page 14

<sup>314</sup> *ibidem*, page 16

<sup>315</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2021[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

	damage EUR 3,395 for costs and expenses. It found that the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran <sup>316</sup> .
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<sup>316</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022, page 9  
[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<b>Case analysis form</b>	
<b>Case Reference</b>	13. M.B. v. Spain, Application no. 15109/15, 13 December 2016
<b>Asylum Seeker</b>	Lesbian Cameroonian, 40 years old Born in 1976
<b>Decision Maker</b>	European Court of Human Rights, Third section
<b>Main legal basis</b>	Articles 3 and 2 of ECHR But also 13; 13+2; 13+3; 35; 37; 37.1 <sup>317</sup>
<b>Legislation in Country of Origin</b>	The ECtHR does not take into account the status of homosexual persons in Cameroon considering that the applicant may stop in Equatorial Guinea and apply for asylum there. In fact, coming from Cameroon she had made a stopover in this country but had not decided to remain there to seek international protection.
<b>Waiting time for judgment</b>	Application lodged in Mars 2015, answered in December 2016
<b>Legal representative</b>	Mme M.E. Muñoz Martínez, avocate de l'organisation non gouvernementale CEAR (Spanish Commission for Aid to Refugees) in Madrid.
<b>Overview<sup>318</sup></b>	The applicant arrived in Spain on a flight in 2015 and she got arrested by the Spanish border police. Soon after she applied for asylum protection claiming to be persecuted by her death-husband family who found out that she was entertaining a relationship with another woman. Moreover, she added that this family was also persecuting her because she refused to marry the brother of her dead groom, part of their ethnic tradition. She also admits that she has been a victim of ill-treatment by his husband all along their marriage and that he died of AIDS, a disease that he passed on to her. In 2015 her asylum application was rejected because the court thought that her history was contradictory, insufficient and lacking in credibility. The applicant asked for a re-examination of her claim

<sup>317</sup> European Court of Human Rights, Third section judgment; Requête no 15109/15 M.B.contre l'Espagne; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170641%22%7D%7D>]

<sup>318</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

	<p>and the Spanish UNHCR confirmed that her claim was coherent, appropriate, and sufficient to justify her asylum application. The decision was based on “the seriousness of the allegations and the situation of the LGBT collective in Cameroon”<sup>319</sup>. However, in 2015 her appeal was rejected. Consequently, she moved an appeal against the decision and asked to call for the removal of the order of expulsion from the country made against her.</p> <p>The state granted her suspension of a deportation order because she was a victim of violence but removed her soon after because her story did not seem credible; she was trying to enter the country illegally; if her late spouse's family was persecuting her, it would not have forced her to marry her brother; she could have sought protection in a third country, and there is no evidence of violence or threat against her.</p> <p>Invoking articles 2 and 3 of the Convention, the applicant complains of the risks she would run if returned to Cameroon and alleges that she did not have the benefit of an effective remedy, as required by article 13 of the Convention, to assert her claims under the two provisions.</p> <p>The Court struck the applicant’s complaint under Article 13 taken in conjunction with Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. Adding that before applying in front of the ECtHR she should have waited for the administrative procedure appeal before the Audiencia Nacional<sup>320</sup>.</p>
<p><b>Outcomes</b><sup>321</sup></p>	<p>The Court further declared inadmissible, as being premature, the applicant’s complaints under Articles 2 and 3 of the Convention. Noting that the applicant was not, at the time of its decision, at risk of being removed from Spanish territory and that, in the event that her asylum request is rejected by means of administrative procedure, she would have an opportunity of appealing before the Audiencia Nacional<sup>322</sup>.</p>

<sup>319</sup> European Court of Human Rights, Third section judgment; Requête no 15109/15 M.B.contre l’Espagne; European Court of Human Rights; 2022  
[\[https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170641%22%5D%7D\]](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170641%22%5D%7D)

<sup>320</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022; page 7  
[\[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf\]](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)

<sup>321</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[\[https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf\]](https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf)

<sup>322</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022; page 7  
[\[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf\]](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)

<b>Case analysis form</b>	
<b>Case Reference</b>	14. H.A. and H.A. v. Norway, Application no 56167/16, 3 January 2017
<b>Asylum Seeker</b>	Perceived gay Iranian man, 24 years old and 21 years old One of them born in 1992, the other in 1995
<b>Decision Maker</b>	European Court of Human Rights, fifth Section
<b>Main legal basis</b>	Articles 2, 3, 8 and 13 ECHR
<b>Legislation in Country of Origin<sup>323</sup></b>	The Court considers the United Nations Special Rapporteur on Iran concerning religious minorities and states “regrets that concerns remain around the situation of recognized and unrecognized religious minorities and that communities continue to report arrests and prosecution for worship and participation in religious community affairs, including in private homes” <sup>324</sup> . The Court further analyzes other reports and fact-finding monitoring activities on religious freedom in Iran and in the United Arab Emirates but nothing about the LGBT situation there.
<b>Waiting time for judgment</b>	Application lodged in 2016 and answered in January 2017
<b>Legal representative</b>	Mr R. Stub Christiansen, a lawyer practicing in Holmestrand, Norway
<b>Overview<sup>325</sup></b>	The applicants are two Iranian brothers living in Dubai; they entered Norway via Russia in 2015 with their mother and three little brothers and applied for asylum. To support their application, they admitted that they could not return to Dubai because they would depend on their father’s residence permit; if returned they would be considered apostates upon traveling to Iran and that they could not go to Nepal because of their mother’s citizenship was false. Both applicants say that they grew up in Dubai with a Tibetan mother and a father who was an alcoholic and had abusive tendencies. Their father also had another woman and some

<sup>323</sup> European Court of Human Rights; Fifth Section decision; Application no 56167/16 H.A. and H.A. against Norway; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170880%22%5D%7D>]

<sup>324</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Court of Human Rights, Fifth decision section Application no 56167/16 H.A. and H.A. against Norway; SOGICA database; 2022; page 5  
[<https://www.sogica.org/wp-content/uploads/2018/11/H.A.-AND-H.A.-v.-NORWAY.pdf>]

<sup>325</sup> Ibidem, page 12

	<p>children living in Iran. The younger one admits that he has never worked and the other that he has been working for the last 7 months before leaving. They also say to be Buddhist but that they could not practice their religion outdoors in Dubai. Their application for asylum was then rejected because they were not in danger of persecution either because they were Iranian or Buddhist.</p> <p>Both appealed this decision; the second brother says that Tibetan Buddhists are considered the most religious and that he wears symbols every day so he is in danger and cannot hide, especially since his father is Muslim and therefore can be persecuted. During their stay in Norway, their mother noticed that she wanted to divorce their father, so it is now impossible for them to return to Dubai.</p> <p>The first applicant recounted the same things about their religious faith and possible persecution; he admitted that he was homosexual and that this was a disgrace and shame to the family; that by running away together they had endangered and would be considered apostates because they were of a different religion. The other branch of the father's family could also have called the religious police.</p> <p>The immigration board rejected both appeals because their testimonies on their religious faith and all the adjunctive information seemed not credible. It found that it was improbable that either of the applicants would risk persecution, even though they were not Muslims.</p> <p>In September 2016, the applicants' mother and their three younger brothers were granted residence permits on humanitarian grounds. "The applicants complained that their removal to Iran would be contrary to Articles 2, 3 and 8 of the Convention. Moreover, they submitted under Article 3, in conjunction with Article 13, that the domestic authorities had failed to engage in rigorous scrutiny of all the facts on which their decisions were based"<sup>326</sup>.</p> <p>The Court observes that yes if expelled there will be a serious risk of punishment, torture or inhuman and degrading treatments contrary to articles 2 and 3. However, the applicant did not have brought their complaint before domestic jurisdiction, it follows that their application must be declared inadmissible for non-exhaustion of domestic remedies.</p>
<b>Outcomes</b> <sup>327</sup>	Application manifestly ill-founded thus, declared inadmissible because all levels of internal recourse have not been exhausted.

<sup>326</sup> Ibidem; page 7

<sup>327</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]



<b>Case analysis form</b>	
<b>Case Reference</b>	15. A.T. v. Sweden, Application no. 78701/14, 25 of April 2017
<b>Asylum Seeker</b>	Gay Iranian man, 23 years old Born in 1991
<b>Decision Maker</b>	European Court of Human Rights Third Section
<b>Main legal basis</b>	Articles 2 and 3 ECHR
<b>Legislation in Country of Origin<sup>328</sup></b>	No information about homosexual in Iran have been taken into account when analysing his asylum claim.
<b>Waiting time for judgment</b>	Application lodged in December 2014, April 2017
<b>Legal representative</b>	Mr S. Zebrowski, a lawyer practicing in Uppsala
<b>Overview<sup>329</sup></b>	<p>The applicant asked for Asylum in Norway, but the migration committee rejected his claim based on his sexual orientation, thus he decided to appeal to the European Court of Human Rights. He specified that Norway, rejecting his application was infringing articles 2 and 3 of the Convention cause if expelled he will be exposed to ill-treatment in Iran.</p> <p>The court decided that it was in the interest of the party not to expel the applicant until the proceeding was over.</p> <p>In 2017 the legal representative of the applicant declared that he wanted to maintain his procedure because they did not know if the migration board would accept his asylum request. He appealed on article 37 specifying that his case needs to be reviewed again because his homosexuality has not been considered.</p> <p>In 2017, the Government invited the Court to strike the application out of its list of cases because no specific circumstances concerning human rights respect had been found.</p> <p>The court added that he does not risk being expelled by Sweden anymore and his residence permit is being analyzed. The Court</p>

<sup>328</sup> European Court of Human Rights; Fifth Section decision; Application no. 78701/14 A.T. against Sweden, European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173834%22%5D%7D>]

<sup>329</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; European Court of Human Rights; Fifth Section decision; Application no. 78701/14 A.T. against Sweden, SOGICA Database; 2022

[<https://www.sogica.org/wp-content/uploads/2017/05/A.T.-v.-SWEDEN.pdf>]

	further observes that, should the applicant's request for asylum in Sweden be rejected by all domestic instances, he may lodge a new application with the Court.
<b>Outcomes</b> <sup>330</sup>	Application struck out because he obtained a residence permit in Sweden.

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<sup>330</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	16. E.S. v. Spain, Application no 13273/16, 19 October 2017
<b>Asylum Seeker</b>	Gay Senegalese man, 29 years old Born in 1987
<b>Decision Maker</b>	European Court of Human Rights, third section
<b>Main legal basis<sup>331</sup></b>	Articles 2, 3 and 13 ECHR; 13+2, 13+3, 35, 37, 37.1
<b>Legislation in Country of Origin<sup>332</sup></b>	No facts about Senegal and the status of homosexuals are given within the ruling, partly because the application was declared premature in this case, consequently it is not even for this court to have to legislate on the case.
<b>Waiting time for judgment</b>	Application lodged in March 2016 and answered in September 2017
<b>Legal representative</b>	Me M. Esparcia Gómez, avocate de l'organisation non gouvernementale CEAR (Commission espagnole d'aide aux réfugiés) à Madrid.
<b>Overview<sup>333</sup></b>	<p>The applicant arrived in Spain in February 2016 on a flight and got arrested by Spanish border police; however, with the help of a Spanish lawyer he posed an asylum claim explaining to be persecuted in Senegal because of his sexual identity.</p> <p>The Spanish Government rejected his claim because it was considered contradictory, not credible and did not have enough proof. The applicant urges reconsideration of their application, thus UNHCR confirmed that the information provided could be considered sufficient to justify his asylum claim due to the seriousness of the allegations and the situation of the LGBT collective in Senegal. However, it was rejected again.</p> <p>He files another appeal to the administrative branch of the government and after an initial rejection is granted the privilege of being allowed to stay in Spain during the duration of the entire trial. However, they declare that his claim is premature and for being taken into account and re-examined, he needs to cancel all</p>

<sup>331</sup> Asylum Database Eu; E.S. v. Spain Application no. 13273/16; Asylum Database: 2022  
[<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/ES%20v%20SPAIN%20-%20JOINT%20AMICUS%20icj%20ecre%20aire%20ilga%20hdt.pdf>]

<sup>332</sup> European Court of Human Rights, Third section judgment; Requête no 13273/16 E.S. contre l'Espagne; European Court of Human Rights; 2022  
[<https://www.sogica.org/wp-content/uploads/2017/10/E.S.-c.-ESPAGNE.pdf>]

<sup>333</sup> Ibidem

	<p>administrative procedures.</p> <p>He adds that if sent back to Senegal he could be subjected to torture and degrading treatment contrary to Articles 2 and 3 of the convention, the court responds that there has been no evidence of a risk to the applicant's integrity instead. The third intervening party, composed by AIRE<sup>334</sup>, ECRE<sup>335</sup>, HDT<sup>336</sup>, ILGA Europe stressed that expulsions of all those people who may be subjected to treatment contrary to Article 3, such as sexual minorities, should be avoided. UNHCR considers that the accelerated asylum procedures applied in Spain do not allow for an efficient examination of complex applications and in particular those based on sexual orientation and gender identity<sup>337</sup>.</p> <p>The court decides to strike out the complaint under Article 13 in conjunction with Articles 2 and 3 of the Convention; to declare inadmissible as premature the complaints under Articles 2 and 3 of the Convention.</p>
<b>Outcomes</b> <sup>338</sup>	Application partly struck out and partly considered premature.

<sup>334</sup> Wikipedia; The AIRE Centre; Wikipedia; 2022

[[https://en.wikipedia.org/wiki/The\\_AIRE\\_Centre](https://en.wikipedia.org/wiki/The_AIRE_Centre)]

<sup>335</sup> ECRE; The European Council on Refugee and Exile; Hope and criticism following CJEU ruling on claims from LGBTI asylum seekers; ECRE; The European Council on Refugee and Exile; 2022

[<https://ecre.org/hope-and-criticisms-following-cjeu-ruling-on-claims-from-lgbti-asylum-seekers/>]

<sup>336</sup> Human Dignity Trust; About Us, We use the law to defend the human rights of LGBT people globally; Human Dignity Trust; 2022

[<https://www.humandignitytrust.org/>]

<sup>337</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Court of Human Rights, Third section decision; Requête no 13273/16 E.S. contre l’Espagne; SOGICA; 2022; page 5

[<https://www.sogica.org/wp-content/uploads/2017/10/E.S.-c.-ESPAGNE.pdf>]

<sup>338</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<b>Case analysis form</b>	
<b>Case Reference</b>	17. I.K. v. Switzerland, Application no. 21417/17, 19 December 2017
<b>Asylum Seeker</b>	Gay Sierra Leonean man, 29 years old Born in 1988
<b>Decision Maker</b>	European Court of Human Rights, Third section
<b>Main legal basis<sup>339</sup></b>	Articles 3 and 14 ECHR 35
<b>Legislation in Country of Origin</b>	<p>A Sierra Leone law, from 1861, and never amended prohibits acts of intimacy between men. It was never implemented thus homosexuality was practiced in a concealed manner. The applicant stated that homosexual men and women were thus spared the discrimination and violence emanating from an intolerant society. Finally, the SEM stressed that, in the absence of the arrest warrant mentioned by the applicant, there was no indication that criminal proceedings had been opened against him<sup>340</sup>.</p> <p>At the same a 1861 law considers homosexuality as an infraction against the person, and it could be punished with 10 years of prison. Moreover, if not formally abolished, it was not applied. The Court of Justice of the European Union ("CJEU") stated that, it was necessary for prison sentences to be imposed to grant asylum<sup>341</sup>.</p> <p>A 2017 USA report showed that Sierra Leone's constitution did not offer protection against gender discrimination or sexual orientation and civil society discriminated against LGBTI groups. As a result, LGBT people often decide to force themselves into heterosexual relationships and young homosexuals are often rejected by their families, pushing them into prostitution<sup>342</sup>.</p>
<b>Waiting time for judgment</b>	Application lodged in March 2017 and Answered in December 2017
<b>Legal representative</b>	Represented by K. Stutz

<sup>339</sup> European Court of Human Rights; Third Section Decision; Requête no 21417/17 I.K. contre la Suisse; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-180412%22%5D%7D>]

<sup>340</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Court of Human Rights, Third Section decision, Requête no 21417/17 I.K. contre la Suisse; SOGICA, 2022; page 2  
[<https://www.sogica.org/wp-content/uploads/2018/04/I.K.-c.-SUISSE.pdf>]

<sup>341</sup> Ibidem, page 6

<sup>342</sup> Ibidem, page 7

**Overview**<sup>343</sup>

The applicant entered Switzerland in 2012 and applied for asylum; the SEM (Secrétariat d'état aux migrations) interviewed him twice in 2012 and 2014.

He explains that he discovered his homosexuality when he was twelve during the war when some rebels grew him and one of them chose him as his partner. He added that his family accepted his homosexuality and that he was part of ILGA and even took part in some riots in Freetown for the right to marriage. During the demonstration, participants were attacked by police and religious groups, and he was also jailed for 5 days. He specifies that he has been caught having sex with his new partner and they have been denounced to the local police who issued a warrant of arrest. From that moment he began to hide and decided to escape via Guinea and France.

In 2014, SEM rejected his asylum application, explaining that his accounts of homosexuality and what happened to him seemed far-fetched. In addition, his membership in ILGA seems suspicious as he does not know more than two members and does not know where the office is located.

Although the applicant may be homosexual, this does not mean that he or she is automatically persecuted by the law.

In 2014, the applicant intercepted the appeal and showed documents to prove his version of events. An 'invitation form' explains that it was an arrest warrant against him and several documents from ILGA, to which he claims to belong.

A section of Amnesty International was called upon to take a stand in the case; QueerAmnesty. After several meetings with the applicant, his statements seemed stereotypical and contradictory, but in any case, his sexual orientation could not be understood from the documents analyzed and within a couple of SEM sessions.

The TAF declared inadmissible his query also because the document he provided could not be original and nothing certifying his identity that he could be persecuted due to his sexual orientation. TAF added that simple homosexuality does not concern execution. Finally, the FAT considered that there was no element in the applicant's return to Sierra Leone and that such a measure did not violate Article 3 of the Convention for the Protection of Human Rights and Fundamental Rights and Fundamental Freedoms ("the Convention").

Analyzing the case and deciding, have been taken into account directive n°9 of UNHCR and article 1A(2) and a 2013 case; Minister voor Immigratie en Asiel c. X, Y et Z, C 199/12 and C 201/12.

The court states that sexual orientation must be considered a fundamental aspect of a person's identity and conscience; that credibility must be studied with caution and sensitivity.

The court explained that there were no serious grounds to believe that the applicant would be exposed to real risks contrary to Article 3 if sent back to Sierra Leone. Consequently, the application

<sup>343</sup> Ibidem

	appears manifestly ill-founded under Article 35 and dismissed.
<b>Outcomes</b> <sup>344</sup>	Application manifestly ill-founded thus declared inadmissible. Recognition of sexual orientation as fundamental characteristic and the unlawfulness of the 'discretion argument. The Court considered that there were not substantial grounds to believe that he would be exposed to a real risk of treatment contrary to Article 3 of the Convention in the event of his return to Sierra Leone <sup>345</sup> .

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<sup>344</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<sup>345</sup> European Court of Human Rights; Press Unit, Fact sheet on sexual orientation issues, September 2022; European Court of Human Rights; 2022, page 8  
[[https://www.echr.coe.int/documents/fs\\_sexual\\_orientation\\_eng.pdf](https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf)]

<b>Case analysis form</b>	
<b>Case Reference</b>	18. M.B. v. The Netherlands, Application no. 63890/16, 21 December 2017
<b>Asylum Seeker</b>	Gay Guinean man, 29 years old Born in 1988
<b>Decision Maker</b>	European Court of Human Rights, third section
<b>Main legal basis</b>	Articles 3 and 3 together with 13 ECHR
<b>Legislation in Country of Origin<sup>346</sup></b>	<p>The Official Country Assessment report on Guinea published in 2014 states: "Sexual acts between persons of the same sex is considered a violation of morals, or as unnatural acts. These [acts] are punishable by a prison sentence of at least six months and a maximum of three years and a fine of at least 100,000 francs and up to 1,000,000 francs. This criminalization applies even to parties who are of age and [who] have consented to the act... During the reporting period, no prosecutions have taken place for sexual acts between persons of the same sex". Most LGBT people do not reveal their sexual orientation because it is perceived as a disease or anomaly. In 2013 a group formed by over 30 homosexuals has been arrested by the police and they confiscated their telephone and jewellery, LGBT community protested with the authorities and the group has been released.</p> <p>Amnesty's 2015/2016 report on Guinea notes: At least three people were arrested because of their perceived sexual orientation<sup>347</sup>.</p> <p>The United States Department of State Country Reports on Human Rights Practices adds "Deep religious and cultural taboos against consensual same-sex sexual conduct existed. There were no official or NGO reports of discrimination based on sexual orientation or gender identity, although societal stigma likely prevented victims from reporting abuse or harassment. There were no active LGBTI organizations"<sup>348</sup>.</p>
<b>Waiting time for judgment</b>	Application lodged in November 2016 and answered in November 2017

<sup>346</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Court of Human Rights, third section decision, Application no. 63890/16 M.B. against the Netherlands; SOGICA 2022  
[<https://www.sogica.org/wp-content/uploads/2018/01/M.B.-v.-THE-NETHERLANDS.pdf>]

<sup>347</sup> Ibidem, page 9

<sup>348</sup> Ibidem, page 10



<b>Legal representative</b>	He was represented before the Court by Mr R.C. van den Berg, a lawyer practicing in Waalwijk.
<b>Overview</b> <sup>349</sup>	<p>The applicant posed an asylum application in 2010 and only months later, during an interview, he admitted to being gay and that he had a stable relationship for more than 5 years and that he met his partner every weekend in the shop where he used to work. Once they have been caught while having sex, beaten up by all the neighborhood and taken to the police. He has been imprisoned for 5 months and got a fine. A friend of his helped him get out of prison. However, in 2011 the ministry of immigration rejected his claim.</p> <p>The Deputy Minister submitted that he needed to adapt his policy for reviewing requests for international protection by persons on grounds of their homosexuality, because of the judgment by the Court of Justice of the European Union (hereafter, CJEU) in the joined cases of X, Y, and Z of 7 November 2013. In 2014 the immigration authorities conducted another interview and there he admitted to being gay and was detained in Guinea, however his application was rejected again because he was not believed of being homosexual. He was not able to give further detail about his partner, how many people were involved in the attack and how many police officers had come. The deputy minister concluded that the court had insufficient regard for whether the applicant would be able to live openly as a homosexual.</p> <p>The applicant left the Netherlands on an unknown date and applied for asylum in Belgium. He was returned to the Netherlands, where on 12 July 2016 he lodged a fresh asylum request. Again, he asked for asylum based on his sexual orientation and fear of being persecuted in Guinea. The applicant's lawyer also submitted some reports about the LGBT situation in Guinea, a report issued by ILGA, one by Amnesty and a Country report on human rights. Thus, being gay in Guinea is not illegal and the police do not persecute people just on the ground of their sexual identity, so there is no reason to think that the applicant could suffer repression. So, in 2016, his application was again rejected.</p> <p>The applicant complained under article 3 and under 3 together with 13 because he did not have access to an effective remedy. The court states that it is difficult to assess one's credibility and even if the domestic authorities considered every statement and information provided by the applicant, he was disbelieved. The Court adds that through the Guinean's document and information, cannot be derived that Guinean authorities pursue persecution toward LGBT.</p> <p>"In these circumstances, the Court is not convinced by the applicant's claim that the Dutch authorities have failed to duly assess the risk elements. Nor is there any evidence in the case to indicate that the Dutch authorities did not duly take the risk of</p>

<sup>349</sup> European Court of Human Rights, Third section judgment; Application no. 63890/16 M.B. against the Netherlands; European Court of Human Rights, 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-179921%22%5D%7D>]

	prosecution into account when assessing the risks faced by the applicant <sup>350</sup> . Thus, the Court concludes that there is no serious ground to believe the applicant would be exposed to serious risks, and the application should be dismissed as manifestly ill-founded
<b>Outcomes</b> <sup>351</sup>	Application manifestly ill-founded thus declared inadmissible.

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<sup>350</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; European Court of Human Rights, third section decision, Application no. 63890/16 M.B. against the Netherlands; SOGICA 2022, page 12

[<https://www.sogica.org/wp-content/uploads/2018/01/M.B.-v.-THE-NETHERLANDS.pdf>]

<sup>351</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	19. M.T. v. France, Application no. 61145/16, 27 March 2018
<b>Asylum Seeker</b>	Gay Cameroonian man, 33 years old Born in 1979
<b>Decision Maker</b>	European Court of Human Rights, Fifth section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin</b>	Not explained in the ECHR judgment
<b>Waiting time for judgment</b>	Application Lodged in 2016, answered in February 2017
<b>Legal representative</b>	Me F. Zind, avocat à Strasbourg.
<b>Overview<sup>352</sup></b>	<p>The applicant is a Cameroonian citizen who claims to have become aware of his homosexuality at a young age and to have had a stable relationship with a man until he disappeared and then to have dated other boys. When his family discovered his homosexuality, they first reported him to the police and then kicked him out of the house, but with the help of a friend, he managed to escape and reach France in 2012. He arrived in France, and he has been hosted by his sister, until when she discovered his homosexuality and threw him out of her house. The applicant met a boy with whom he fell in love and whom he wants to marry.</p> <p>The applicant was issued with an order requiring him to leave French territory, deciding and communicating where to go without delay and was put in administrative detention waiting for a sentence. The magistrate of the territorially competent administrative court rejected the appeal against these decisions. The French Office for the Protection of Refugees and Stateless Persons rejected the claimant's application for refugee status; however, the division's duty judge decided to inform the French government.</p> <p>The applicant complains of being exposed to a risk of treatment contrary to Article 3 if returned to Cameroon.</p>

<sup>352</sup> European Court of Human Rights; Fifth Section decision; Requête no 61145/16 M.T. contre la France introduite le 25 octobre 2016; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-172187%22%5D%7D>]

<b>Outcomes</b> <sup>353</sup>	His asylum application was therefore rejected because it was thought to be untrue <sup>354</sup> .
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<sup>353</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<sup>354</sup> European Court of Human Rights; Fifth Section decision; Requête no 61145/16 M.T. contre la France, European Court of Human Rights; 2022  
[[https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2261145/16%22\],%22itemid%22:\[%22001-182562%22}}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261145/16%22],%22itemid%22:[%22001-182562%22}})]

<b>Case analysis form</b>	
<b>Case Reference</b>	20. Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia, application no. 56368/17, 2 October 2018
<b>Asylum Seeker</b>	Gay Uzbek man, 30 years old Born in 1987
<b>Decision Maker</b>	European Court of Human Rights, third section
<b>Main legal basis</b>	Articles 3 and 5 ECHR
<b>Legislation in Country of Origin</b>	No information about LGBT status in Russia or Uzbekistan have been shown in the proceeding.
<b>Waiting time for judgment</b>	Lodged in August 2017 and communicated in December 2017
<b>Legal representative</b>	He is represented before the Court by Mr K. Koroteyev, Ms T. Glushkova, Mr D. Khaymovich, Ms T. Chernikova, and Ms D. Bakhareva, lawyers practicing in Moscow.
<b>Overview<sup>355</sup></b>	<p>The applicant is an Uzbek national arrested and detained in Russia. He is a journalist known as Ali Feruz who writes in a newspaper engaged in political and social issues and the topics, he speaks about are wide and comprehend crimes against migrants, discrimination against LGBT and other rights violations; moreover, he is openly gay. His mother is a Russian national and resides with two members of her family.</p> <p>He grew up between Uzbekistan and Russia and studied in both countries. He married a Kyrgyz national and in 2006 he moved back to Russia to study in an Islamic institute and moved back to Uzbekistan in 2007. In 2008 some policemen went to his residence in Uzbekistan and started questioning the legality of his spouse's residence permit; he had been beaten by them and questioned about his Islamic study and asked if he wanted to work with the authorities. He decided to flee Uzbekistan.</p> <p>He lived in Kyrgyz until 2009 and in Kazakhstan, until 2011, when he divorced his wife and decided to move to Russia soon later, he declared that he lost his Uzbek passport and decided not to ask for</p>

<sup>355</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Communicated on 20 December 2017 Third Section, Application no. 56368/17 Khudoberdi Turgunaliyevich NURMATOV against Russia lodged on 4 August 2017; European Court of Human Rights; 2022

[<https://www.sogica.org/wp-content/uploads/2018/01/NURMATOV-ALI-FERUZ-v.-RUSSIA.pdf>]

	<p>a new one because it required moving back to Uzbekistan and he was scared about police violence. In 2012 he started dating a man. In 2015 he applied for asylum in Russia, but his claim was rejected because the applicant's family tie was not enough to grant him asylum, neither his sexual orientation; the decision states: the mere fact of the applicant's belonging to a particular social group (non-traditional sexual orientation) does not justify his application for asylum"<sup>356</sup>.</p> <p>In 2016 the applicant asked for temporary asylum referring to his ill-treatment received in Uzbekistan and his homosexuality, as a ground for persecution. Once again, his claim was dismissed. In 2017 he applied for judicial review in Moscow.</p> <p>The same year the applicant was arrested in front of the house where he was living and was told to leave Russia because his visa-free stay had expired.</p> <p>Thanks to a judge he was released a month later but arrested again soon after, the district found him guilty and charged him with a fine of RUB 5,000 (EUR 82) and ordered his expulsion to Uzbekistan.</p> <p>The applicant appealed based on the risk of ill-treatment on account of his homosexuality; however, the Moscow City Court dismissed the applicant's appeal and upheld the expulsion order.</p> <p>The applicant complains that expulsion to Uzbekistan would mean a risk of ill-treatment and the existence of a law criminalizing homosexuality is enough to preclude his removal from the country. He also complained under articles 5.1 and 4 because of his unlawful detention.</p> <p>However, after being released he decided to move from Russia to Germany, where he was granted asylum. The court states that it is no longer justified to continue the examination of the application and that it does not find any violation of human rights. In total the applicant spent more than six months in prison and accordance with sub-paragraph f of Article 5.1, deprivation of liberty will be justified if deportation or extradition proceedings are in progress<sup>357</sup>.</p> <p>The Court finds that complaints under Articles 5.1 and 4 of the Convention do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints must be rejected, following Articles 35.3 and 4 of the Convention.</p>
<b>Outcomes</b> <sup>358</sup>	Application partly struck out and partly considered inadmissible.

<sup>356</sup> Ibidem, page 2

<sup>357</sup> LawEuro; European Court of Human Rights, NURMATOV (ALI FERUZ) v. RUSSIA, Third Section Decision, Application no. 56368/17 Khudoberdi Turgunaliyevich NURMATOV (ALI FERUZ) against Russia; LawEuro; 2022  
[<https://laweuro.com/?p=5248>]

<sup>358</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<b>Case analysis form</b>	
<b>Case Reference</b>	21. A.R.B. v. The Netherlands, Application no. 8108/18, 17 January 2019
<b>Asylum Seeker</b>	Gay Afghan man, 19 years old Born in 1999
<b>Decision Maker</b>	European Court of Human Rights, third Section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin</b>	The court does not analyze the situation in the country of origin but simply no longer considers the applicant in risk.
<b>Waiting time for judgment</b>	Lodged in February 2018, communicated in May 2018
<b>Legal representative</b>	Do not specified
<b>Overview<sup>359</sup></b>	<p>The claimant specified to be homosexual only during the second hearing in front of the court. Thus, his claim has not been thrust and his application rejected.</p> <p>Considering the applicants' claims he would face a real risk of ill-treatment in breach of article 3.</p> <p>He was subsequently granted a residence permit by the Netherlands and the Government asked that the case be struck out of the list. However, the applicant was opposed to this, on the grounds that he had a right to financial compensation for the years in which he had been forced to be homeless. The Court held that the dispute had been resolved, since the applicant had been granted a residence permit enabling him to remain in the Netherlands. In its view, just satisfaction could be awarded only if a violation of the Convention had taken place<sup>360</sup>.</p>
<b>Outcomes<sup>361</sup></b>	Application struck out because he received a residence permit by

<sup>359</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Communicated on 14 May 2018, Third Section, Application no. 8108/18 A.R.B. against the Netherlands lodged on 7 February 2018; European Court of Human Rights, 2022 [https://www.sogica.org/wp-content/uploads/2018/06/A.R.B.-v.-THE-NETHERLANDS.pdf]

<sup>360</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; A.R.B. v. The Netherlands (Application no. 8108/18) 2018 (ECtHR); SOGICA; 2022 [https://www.sogica.org/database/a-r-b-v-the-netherlands-application-no-8108-18-2018-ecthr/]

<sup>361</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022

	the Netherlands <sup>362</sup> .
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[<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

<sup>362</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; A.R.B. v. The Netherlands (Application no. 8108/18) 2018 (ECtHR); SOGICA; 2022 [<https://www.sogica.org/database/a-r-b-v-the-netherlands-application-no-8108-18-2018-ecthr/>]



<b>Case analysis form</b>	
<b>Case Reference</b>	22. S.A.C. v. United Kingdom, Application no. 31428/18, 5 December 2019
<b>Asylum Seeker</b>	Gay/bisexual Bangladeshi man, 38 years old Born in 1980
<b>Decision Maker</b>	European Court of Human Rights, First Section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin<sup>363</sup></b>	A Country Policy Noted dated December 2016 states that homosexuality is criminalized in Bangladesh, however rarely enforced. There are support groups and communities for LGBT people even though two well-known activists have been murdered in 2016. Overall, the LGBT treatment by society never reaches a persecutory level or degrading treatment. Male same-sex sexual acts are criminalized in Bangladesh under Section 377 of the Penal Code and punishable by life imprisonment. Reports indicate that LGBT persons are reluctant to be open about their sexual identity due to social stigma, pressures, and norms, and to avoid a level of discrimination and violence by non-state actors, LGBT community is closed and private.
<b>Waiting time for judgment</b>	Query posed in July 2018 and answered in November 2019
<b>Legal representative<sup>364</sup></b>	He was represented before the Court by Ms J. Ijaz, a lawyer practicing in Harrow.
<b>Overview<sup>365</sup></b>	The applicant entered the UK in 2007 with a tourist visa; even if it expired, he decided to stay and applied for leave to remain only in 2012, when it was refused with no right to appeal. In 2016 he claimed asylum on the ground that he feared persecution on return to Bangladesh as he is gay and bisexual. His asylum application was refused to explain that his sexual orientation was not credible. The applicant appealed to the Immigration and Asylum Chamber

<sup>363</sup> LawEuro; European Court of Human Rights; S.A.C. v. The United Kingdom; First Section, Application no. 31428/18 S.A.C. against the United Kingdom lodged on 5 July 2018; LawEuro; 2022 [https://laweuro.com/?p=5091]

<sup>364</sup> European Court of Human Rights; First Section decision; Application no. 31428/18 S.A.C. against the United Kingdom; European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-199320%22%7D%7D]

<sup>365</sup> LawEuro; European Court of Human Rights; S.A.C. v. The United Kingdom; First Section, Application no. 31428/18 S.A.C. against the United Kingdom lodged on 5 July 2018; LawEuro; 2022 [https://laweuro.com/?p=5091]

	<p>claiming that his removal from the UK would breach his rights under articles 2 and 3 of the Convention. The Tribunal identified the appropriate test for determining a claim for asylum based on sexual orientation<sup>366</sup>. “The Supreme Court stated that it was not compatible with the refugee convention for a state party to refuse asylum to a gay person who, if returned to his home country, would deny his identity and conceal his sexuality to avoid being persecuted”<sup>367</sup>.</p> <p>Having heard evidence from the applicant and his family, he is considered a credible witness, thus if returned he could fear persecution. Even if the applicant could face persecution and threats from his family members, it does not give rise to a real risk of persecution as engaged in Refugee Convention. Thus, the persecution risk is not well-founded, and his asylum claim is refused.</p> <p>He applied again in 2017 and again his claim was refused because even if he might be at some risk of persecution, such persecution would not likely amount to a breach of his human rights. Furthermore, insofar as the applicant now relied on the risk of possible assault from his family, there was no evidence to demonstrate an inability to relocate within Bangladesh to avoid any possible assault.</p> <p>The claimant complained under article 3 about the refusal of his asylum application in the UK based on his sexual orientation. He identifies himself as gay/bisexual and explains it could be a problem if returned to Bangladesh.</p> <p>The court granted him article 39 which allowed him to stay in UK territory until the ruling. Furthermore, the government commits to pay three thousand pounds in 3 months and once settled the case can be considered closed. On 28 June 2019, the claimant confirmed to the Court that he intended to withdraw the claim because of the settlement reached.<sup>368</sup></p>
<b>Outcomes</b> <sup>369</sup>	<p>Application struck out because the applicant received a settlement term, becoming the last resolution of the case. The applicant on terms to include a reconsideration of his asylum and human rights claim within three months of the submission of further evidence by the applicant<sup>370</sup>.</p>

<sup>366</sup> The Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 (see “Domestic law and practice”)

<sup>367</sup> LawEuro; European Court of Human Rights; S.A.C. v. The United Kingdom; First Section, Application no. 31428/18 S.A.C. against the United Kingdom lodged on 5 July 2018; LawEuro; 2022 [https://laweuro.com/?p=5091]

<sup>368</sup> European Court of Human Rights; First Section decision; Application no. 31428/18 S.A.C. against the United Kingdom; European Court of Human Rights; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/S.A.C.-v.-THE-UNITED-KINGDOM.pdf]

<sup>369</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>370</sup> European Court of Human Rights; First Section decision; Application no. 31428/18 S.A.C. against the United Kingdom; European Court of Human Rights; 2022 [https://www.sogica.org/wp-

<b>Case analysis form</b>	
<b>Case Reference</b>	23. Rana v. Hungary, Application no. 40888/17, 16 July 2020
<b>Asylum Seeker</b>	Recognized trans Iranian refugee, 30 years old Born in 1987
<b>Decision Maker</b>	European Court of Human Rights, fourth section
<b>Main legal basis</b>	Article 8 ECHR, 8.1 and 14
<b>Legislation in Country of Origin</b>	Not considered, the Hungarian position on the possibility of changing the name and gender for a non-citizen was important in this case.
<b>Waiting time for judgment</b>	Application lodged in May 2017 communicated in June 2020
<b>Legal representative</b>	The applicant was represented by Mr Cs. Tordai, a lawyer practicing in Budapest.
<b>Overview<sup>371</sup></b>	<p>The Iranian transgender refugee applicant asked the court to change his name in the official documents; the court denied this possibility because he did not have an Hungarian birth certificate. For this reason, the applicant appealed the decision.</p> <p>The applicant was assigned female at birth but identified himself as a male from an early age. He submitted the court of a medical certificate issued in 2013 where two doctors confirmed his personality disorder and sexual dysfunction.</p> <p>In 2015 he applied for asylum in Hungary, admitting that he was born female but that he preferred to be referred to with male pronouns and his gender expression was preferable to male's one. He had a "male" job, and he was attacked by a woman<sup>372</sup>.</p> <p>In 2015 he has been recognized the refugee status, assuming that he was been persecuted in Iran due to his transsexual identity. However, the Hungarian court did not questioned him about his transgender identity and if he needed any kind of legal protection. Only in 2016 he applied for a gender and name change to the</p>

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<sup>371</sup> European Court of Human Rights; Fourth Section decision; Application no. 40888/17 Jafarizad Barenji RANA against Hungary lodged on 29 May 2017; European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-175574%22]]

<sup>372</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; European Court of Human Rights, Fourth Section Decision, Application no. 40888/17 Jafarizad Barenji RANA against Hungary lodged on 29 May 2017; SOGICA, 2022 [https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-175574%22]]

	<p>Hungarian Immigration and Citizenship Office. However, the office informed him that he needed a Hungarian birth certificate, a document that the applicant did not have because he is born in Iran. So, he received a formal rejection without analyzing his case and documentation. The office dismissed the application at the end of 2016 explaining that being not born in Hungary he could not undergo the legal procedure.</p> <p>The applicant also moved a constitution complaint that has been declared admissible but rejected because with the existing laws, the judge could not have another sentence because he is a non-Hungarian citizen. The constitutional court admitted that the right to change one's name is a fundamental one, especially if it is linked to the right of gender reassignment and the inviolable dignity of the human being; because everyone has the right to have a name which is aligned to one's gender identity.</p> <p>The State was therefore obliged to adopt regulations that acknowledged gender reassignment and provided a discrimination-free opportunity to enter the resulting name change into the register. The complete lack of regulations excluded lawfully settled non-Hungarian citizens from the name-changing procedure, including those whose country of origin did not allow for such a procedure. Moreover, the constitutional court found that the lack of such provision was unconstitutional.</p> <p>Applicants who wanted to have his or her gender and name changed had to submit a medical opinion of transsexuality recommending gender reassignment with a psychologist's opinion. The court declared his complaint admissible<sup>373</sup>.</p>
<p><b>Outcomes</b><sup>374</sup></p>	<p>The European Court states that Hungary violated article 8 and has to pay a fine of EUR 6,500 for non-pecuniary damage and EUR 1,500 for costs and expenses.</p> <p>The right to respect for private life under Article 8 of the Convention extends to gender identity and individuals' names, as components of personal identity (see A.P., Garçon and Nicot v. France, nos. 79885/12 and 2 others, §§ 92-94, 6 April 2017 (extracts), and S.V. v. Italy, no. 55216/08, §§ 57-59, 11 October 2018). The present case concerns the inability of the applicant as a transgender refugee to obtain legal recognition of his gender identity and his resulting change of name. The "private life" aspect of Article 8 of the Convention is therefore applicable to the present case, a fact which was, moreover, not disputed by the Government.<sup>375</sup></p>

<sup>373</sup> European Court of Human Rights; Fourth Section Decision CASE OF RANA v. HUNGARY (Application no. 40888/17); European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203563%22%5D%7D}]

<sup>374</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>375</sup> European Court of Human Rights; Press Release, issued by the Registrar of the Court; A transgender man's lack of access to a procedure to recognise his gender violated the Convention; European Court of Human Rights; 2022 [https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5f11a2174]

<b>Case analysis form</b>	
<b>Case Reference</b>	24. B and C v. Switzerland, Applications nos. 889/19 and 43987/16, 17 November 2020
<b>Asylum Seeker</b>	Gay Gambian man, 43 years old Born in 1974 and 1948, registered their same-sex partnership in 2014 and they lived together until the second applicant death in 2019
<b>Decision Maker</b>	European Court of Human Rights, Third Section
<b>Main legal basis</b>	Article 3 ECHR
<b>Legislation in Country of Origin</b>	<p>Even though it is difficult to be homosexual in the Gambia, sexual orientation is not enough to claim asylum based on possible persecution in the country of origin.</p> <p>For many years homosexual acts had been criminalized in the Gambia, with sanctions of up to fourteen years' imprisonment. In 2014, the legislation had been amended to provide for life imprisonment in cases of aggravated acts. Under the previous President Jammeh, the authorities had targeted (suspected) LGBTI persons, and the long-standing campaign of hatred and persecution had promoted discrimination and violence against homosexuals. Even when the president changed in 2017, the law punishing homosexuals remained intact and consequently, there was the risk of ill-treatment. Thus, there was a homophobic social atmosphere.</p> <p>Third-party interveners submitted that LGBTI individuals had suffered and continued to suffer acts of persecution, including torture, other ill-treatment, arbitrary and discriminatory prosecution, and disproportionate punishment.</p>
<b>Waiting time for judgment</b>	Application lodged in 2016 and 2019, become final only in November 2020
<b>Legal representative</b>	They were represented by Ms B. Surber, a lawyer practicing in St Gallen.

<p><b>Overview</b><sup>376</sup></p>	<p>The applicants, a Gambian and a Swiss national respectively, lived in Switzerland together until the second applicant's death at the end of 2019.</p> <p>In 2008 the first applicant applied for asylum in Switzerland under a different identity and claimed to be from Mali. After his application was rejected and the removal order against him became final, he went missing and was thus not deported. In 2013 he lodged a second application claiming to be from Gambia and Mali and based his application on his sexual identity. He also admitted to having different relationships with a male there and in 2008 he has been caught while having sex in a hotel. He was prosecuted and sentenced to fourteen years, however, he managed to escape and reached Switzerland where he met his partner.</p> <p>In 2014 the Migration Office rejected the Asylum and ordered him to leave Switzerland because his account was not credible because his application wrote something different from what he admitted during the oral hearing. The first applicant had not substantiated that he had been persecuted, or been at risk of persecution, at the time he left the Gambia. There was no indication that the first applicant made his sexual orientation public or was close to an LGBT organization in Switzerland.</p> <p>In 2016 the court dismissed the first applicant's appeal, it found credible his homosexuality but not all the accounts about his family because he changed his witness several times. Moreover, nothing indicates that Gambian authorities are aware of his relationship with the second applicant. "In sum, any disadvantages which the first applicant might face in the event of a return to the Gambia did not meet the threshold of Article 3 of the Convention".</p> <p>In 2014 the second applicant filed a family reunification request, one year later the Migration Office rejected his claim based on the applicant's criminal records. He lodged an appeal split in two:</p> <ul style="list-style-type: none"> <li>• if the first could remain in Switzerland</li> <li>• if the second could be a grant residence permit</li> </ul> <p>The first applicant claimed that a refusal to issue a residence permit would infringe their right to the family unit as granted by the convention because the second couldn't relocate due to his health conditions.</p> <p>The courts decided to join both applications and to strike out the C application, however, the first applicant complains under Article 3 admissible because deportation in the Gambia would not breach the convention. Holds that there is no need to examine the admissibility of article 8.</p>
<p><b>Outcomes</b><sup>377</sup></p>	<p>The respondent State must pay the first applicant, within three</p>

<sup>376</sup> European Court of Human Rights; Third section decision, case of B and C v Switzerland, (Applications nos. 889/19 and 43987/16); European Court of Human Rights; 2022 [<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-206153%22%7D>]

<sup>377</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [<https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf>]

	months from the date on which the judgment becomes final following Article 44 § 2 of the Convention, EUR 14,500. Dismisses the remainder of the first applicant's claim for just satisfaction.
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<b>Case analysis form</b>	
<b>Case Reference</b>	25. R.Y. against Russia, Application no. 21977/20, 23 March 2021
<b>Asylum Seeker</b>	Gay Uzbek man, 24 years old Born in 1996
<b>Decision Maker</b>	European Court of Human Rights, Third Section
<b>Main legal basis</b>	Article 3 ECHR and 37, 37.1
<b>Legislation in Country of Origin</b>	Uzbekistan laws against homosexuals are not taken into account cause the applicant moved.
<b>Waiting time for judgment</b>	Application lodged in April 2020 and answer received in March 2021
<b>Legal representative</b>	He was represented before the Court by Mr A.I. Ryzhov and Ms T.S. Glushkova, lawyers practicing in Moscow
<b>Overview<sup>378</sup></b>	<p>The applicant, an HIV-positive openly gay man claimed that he would face a real risk of ill-treatment in case of his removal, in light of the criminal prohibition of consensual sex between men in Uzbekistan.</p> <p>In June 2020 the Court decided that thanks to article 39, the claimant could stay in Russia for the duration of the proceedings<sup>379</sup>. The claimant representative submitted observations on admissibility and a claim for expenses.</p> <p>In October 2020, the applicant decided to voluntarily leave Russia for Sweden and his representative asked the court to continue the examination of his proceeding, not facing expulsion anymore.</p> <p>In the letter of 14 December 2020, the Government requested to strike the application out of the list of cases, since the applicant no longer faced the risk of removal from Russia to Uzbekistan. They further maintained their position regarding the award of costs and expenses.</p> <p>Thus he was struck out from the list of cases because it is no longer justified to analyze his application. Accordingly, there appear to be</p>

<sup>378</sup> European Court of Human Rights; Third section decision, Application no. 21977/20 R.Y. against Russia; European Court of Human Rights; 2022

[<https://www.sogica.org/wp-content/uploads/2021/09/R.Y.-v.-RUSSIA-decision.pdf>]

<sup>379</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; R.Y. against Russia (Application no. 21977/20) 2020 (ECtHR); SOGICA; 2022 [<https://www.sogica.org/database/r-y-against-russia-application-no-21977-20-2020-ecthr/>]



	no grounds to award the applicant costs and expenses, finally the claim must be dismissed.
<b>Outcomes</b> <sup>380</sup>	Application stuck because he voluntarily left Russia to Sweden, where he does not face a risk of expulsion and repatriation <sup>381</sup> .

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<sup>380</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Table, Table 1. Council of Europe SOGI jurisprudence; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf]

<sup>381</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge – SOGICA; Third Section decision, Application no. 21977/20 R.Y. against Russia; SOGICA, 2022 [https://www.sogica.org/wp-content/uploads/2021/09/R.Y.-v.-RUSSIA-decision.pdf]

<b>Case analysis form</b>	
<b>Case Reference</b>	26. L.B. v France, Application no 67839/17, lodged on 11 September 2017
<b>Asylum Seeker</b>	Intersex Moroccan man
<b>Decision Maker</b>	European Court of Human Rights, Fifth section
<b>Main legal basis</b>	Article 3 ECHR and article 8
<b>Legislation in Country of Origin</b>	Do not specified
<b>Waiting time for judgment</b>	Application lodged in September 2017 and communicated in March 2021
<b>Legal representative</b>	Do not specified
<b>Overview<sup>382</sup></b>	<p>The applicant was deported to Morocco after a decision taken by the French Office for the Protection of Refugees and Stateless Persons to refuse him refugee status. He claims that his deportation caused the interruption of his medical treatment for sexual reassignment undertaken in France and unavailable in Morocco. He also states that his deportation to a state where intersex is not accepted and where he is perceived as a homosexual person, causes him to face social rejection and criminal prosecution by the authorities. He argues that these risks are exacerbated by his social and family isolation and the lack of official recognition by LGBTI organizations. He also argues that it is impossible in this country to continue his medical and surgical treatment for sexual reassignment begun in France and that he has thus been deprived of his right to gender identity.</p> <p>Instead, the appeal is based on the fact that the expulsion of the applicant from France goes against Article 3 of the convention, and, above all, the decision did not take into account the social exclusion of the intersex persons from the Moroccan community.</p> <p>In the light of the Paposhvili v. Belgium judgment ([GC], n°</p>

<sup>382</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; European Court of Human Rights; Fifth Section decision; Requête no 67839/17 L.B. contre la France introduite le 11 September 2017 communiquée le 18 mars 2021; SOGICA; 2022 [https://www.sogica.org/wp-content/uploads/2021/04/L.B.-c.-FRANCE.pdf]

	<p>41738/10, 13 December 2016), and having regard to the applicant's complaints and the documents submitted, the deportation to Morocco of the applicant, an intersex person, who had undergone medical treatment for sexual reassignment in France.</p> <p>The deportation to Morocco of the applicant, an adult intersex person undergoing medical treatment for sexual reassignment, constitutes a violation of Article 8 of the Convention, particularly given his lack of family ties and the impossibility of affirming his gender identity.</p>
<p><b>Outcomes</b><sup>383</sup></p>	<p>To appeal, the defense lawyer uses the Paposhvili VS Belgium case as an example<sup>384</sup>. Furthermore, the particular social status of intersex people in their country of origin and the treatment they have to undergo is not taken into account.</p>

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<sup>383</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; L.B. v France (Fifth Section) 2021 (ECtHR); SOGICA, 2022  
[<https://www.sogica.org/database/l-b-v-france-fifth-section-2021-ecthr/>]

<sup>384</sup> In the case CASE OF PAPOSHVILI v. BELGIUM, a similar situation is discussed, which is why it is taken as an example. In this case, Georgian citizens could not be sent away as they were receiving advanced medical care that would not have been possible in Georgia and consequently their state of health would have worsened.

### 2.3 Comparative case-law analysis

The first time the Strasbourg court decided on a SOGI case was in 1990 and it concerned a gay Cypriot man, claiming that his deportation to the Turkish Republic of Northern Cyprus (TRNC)<sup>385</sup> would constitute a violation of his fundamental human rights, according to articles 8, 13 and 14 of the European Convention of Human Rights. The applicant was living in the United Kingdom and had a relationship with a British citizen, moreover in TRNC intimate same-sex relationships are criminalized. On this occasion, the court declared the application inadmissible and ill-founded<sup>386</sup>.

Almost 10 years later, in *Shahram Sobhani v Sweden*, concerning an Iranian gay man who applied for asylum in Sweden on the ground of his homosexuality, his claim was denied<sup>387</sup>. While the European Court was analyzing if articles 2,3 and 8 were respected or not, the Swedish government annuls the deportation order granting him a permanent residence permit<sup>388</sup>, thus the claimant withdrew his application, and it was struck out by the commission.

These two cases, as well as many of the other cases analyzed, show how the European Court of Human Rights considered the application for international protection on SOGI grounds to be manifestly ill-founded. Several applications have been struck out, however; national authorities have taken important measures to grant asylum-based residence permit<sup>389</sup>. It is shown also in *A.S.B. v the Netherlands*<sup>390</sup>, when the state decided to concede a continuous working residence permit for one year, with the

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<sup>385</sup> European Court of Human Rights; as to the admissibility of Application No. 16106/90 by B. against the United Kingdom; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-874%22%5D%7D>]

<sup>386</sup> UCL Press; FRINGE, *Queer migration and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims*; UCL Press; 2021; page 10  
[<https://www.uclpress.co.uk/products/141641>]

<sup>387</sup> *Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA*; Application No. 32999/96 by Shahram SOBHANI against Sweden; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2017/05/SOBHANI-v.-SWEDEN.pdf>]

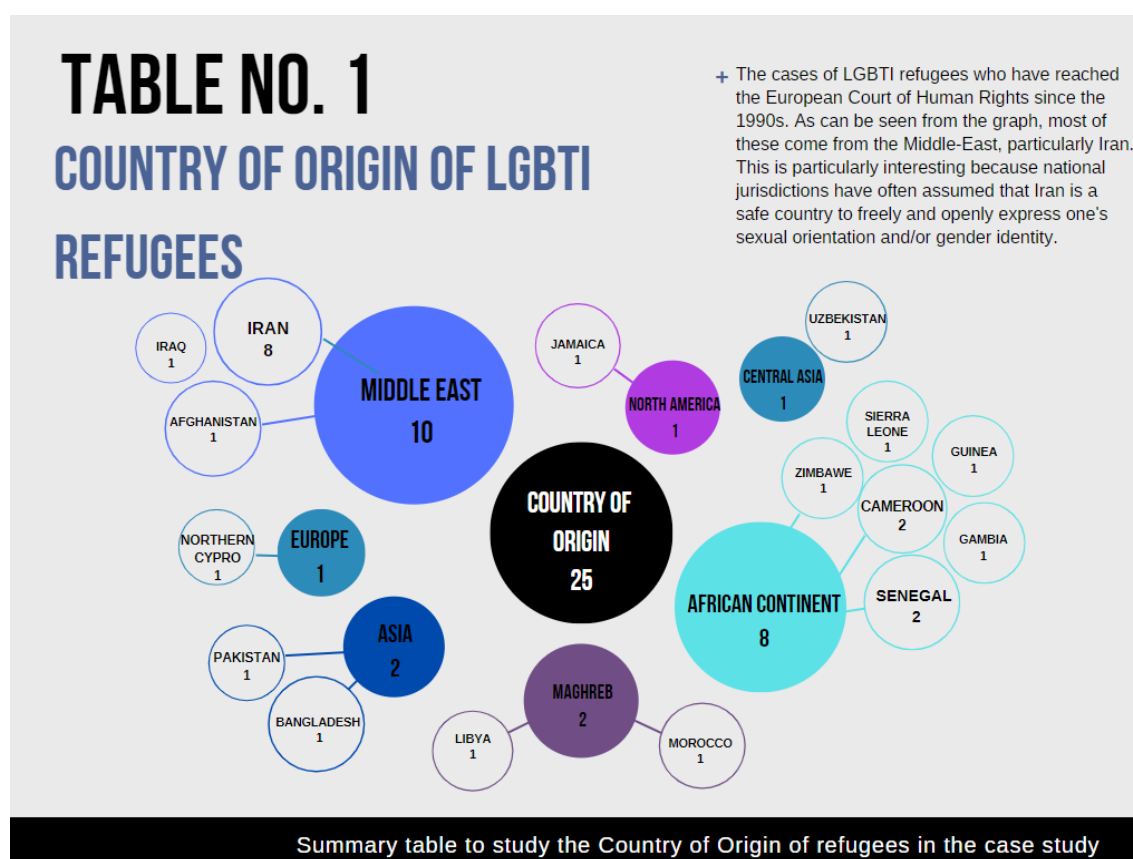
<sup>388</sup> UCL Press; FRINGE, *Queer migration and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims*; UCL Press; 2021; page 10  
[<https://www.uclpress.co.uk/products/141641>]

<sup>389</sup> *Ibidem* page 11

<sup>390</sup> European Court of Human Rights; Third section decision, Application no. 4854/12 *A.S.B. against the Netherlands*, the European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-112342%22%5D%7D>]

possibility of requesting a renewal. Again, it happened in *A.E. v Finland*<sup>391</sup>, agreeing to re-examine the asylum claim; in *M.B. v Spain*<sup>392</sup>, accepting a fresh asylum claim in *A.T. v Sweden*<sup>393</sup>, ordering that the claim be reassessed in *E.S. v Spain*<sup>394</sup>, and granting a residence permit to the applicant in *A.R.B. v the Netherlands*<sup>395</sup>.

### 2.3.1 Country of Origin of LGBTI Refugees



<sup>391</sup> Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA; *A.E. v. Finland* (Fourth Section) 2015 (ECtHR); SOGICA, 2022

[<https://www.sogica.org/database/a-e-v-finland-fourth-section-2015-ecthr/>]

<sup>392</sup> ILGA Europe; Application No. 15109/15, *M.B. v. SPAIN* European Court of Human Rights, Third Section; ILGA Europe, 2022

[[https://ilga-europe.org/files/uploads/2022/07/written\\_comments\\_2016-01-15\\_final.pdf](https://ilga-europe.org/files/uploads/2022/07/written_comments_2016-01-15_final.pdf)]

<sup>393</sup> European Court of Human Rights; Third Section Decision; Application no. 78701/14 *A.T. against Sweden*; European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173834%22%5D%7D>]

<sup>394</sup> European Court of Human Rights; Third Section Decision; Requête no 13273/16 *E.S. contre l'Espagne*; European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-178300%22%5D%7D>]

<sup>395</sup> European Court of Human Rights; Third Section Decision; Application no. 8108/18 *A.R.B. against the Netherlands* lodged on 7 February 2018; European Court of Human Rights; 2022

[<https://www.sogica.org/wp-content/uploads/2018/06/A.R.B.-v.-THE-NETHERLANDS.pdf>]

Table number one shows the countries of origin of refugees seeking asylum based on their Sexual Orientation or Gender Identity. The majority come from the Middle East; these are 10 of 25 and, in addition, 8 of them come from Iran. On the one hand, it is interesting that so many people seek asylum are from Iran and are not believed because Iranian law does not exactly prohibit homosexual relations, but on the other hand, there is a strong stigma against them, in addition to not being accepted, they are persecuted by both, national authorities and civil society. This can be seen from the testimonies, existing laws and reports issued by international organizations over the years.

In the case *I.I.N. v. Netherlands*, the Iranian citizen claimed to be homosexual, and the European Court of Human Rights analyzed all the relevant domestic and international material and issued that homosexuality represents a taboo in Iran. People cannot publicly display their sexual orientation or gender identity. However, “Homosexual contacts are not actively prosecuted. No cases of conviction solely for homosexual acts are known, although according to the Shari’a such acts attract the death penalty. If a conviction of a person also entails a charge of homosexuality, this is considered cumulatively in combination with other criminal offences related to alcohol, drugs and prostitution. A certain degree of openness is displayed in respect of these last matters”<sup>396</sup>.

Moreover, the Iranian Criminal Code does penalize homosexual relationships with death the penalty which is determined by a judge. The punishment is applied to both members of the sexual “intercourse” to the active and the passive one if they are adults and sound minds, thus if they have acted with their free will. If both partners are underaged, they can be punished with up to 74 whiplashes<sup>397</sup>. However, in cases involving Iranian homosexual citizens, it is explained how they manage to find gathering areas on their own. For example, some public parks in Tehran are known as

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<sup>396</sup> European Court of Human Rights; Third Section Decision; as to the admissibility of application no. 2035/04 by I.I.N. against the Netherlands; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67880%22%5D%7D>]

<sup>397</sup> Refworld; European Court of Human Rights, Fourth Section Decision, Application no. 17341/03 by F. against the United Kingdom; Refworld, 2022  
[<https://www.refworld.org/cases,ECHR,4ee21ffd2.html>]

meeting places for members of the LGBTI community, even if they are not safe for them<sup>398</sup>.

The last State-Sponsored Homophobia issued by ILGA World in 2020 confirms that Iran and other 5 countries<sup>399</sup> prescribe the death penalty for consensual same-sex sexual acts<sup>400</sup>. The death penalty violates Article 1 of CAT, which prohibits torture and cruel, inhuman and degrading treatment. A death sentence that includes hanging, which is the most used method of executing homosexuals<sup>401</sup>, it is increasingly recognized as contrary to causing suffering and pain to the individual<sup>402</sup>.

The countries that still impose death penalty for same-sex consensual sexual activity base their judgement on Sharia law which is composed by the Quran and the Sunna, the prophet Muhammad's customs and practices<sup>403</sup>. Sharia exists to establish a moral standard that the faithful have to follow and it regulates public behavior also in absence of law enforcement. Moreover, "there is a consensus among Islamic scholars that human beings are naturally heterosexual", that heterosexuality is "legally defined by the Islamic Shariah" and that "homosexuality is seen as a perverted deviation from the norm and all schools of Islamic thought and jurisprudence consider homosexual acts to be unlawful"<sup>404</sup>.

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<sup>398</sup> Refworld; European Court of Human Rights, Fourth Section Decision, as the admissibility of Application no. 17341/03 by F. against the United Kingdom; Refworld, 2022 [<https://www.refworld.org/cases,ECHR,4ee21ffd2.html>]

<sup>399</sup> Those are Brunei, Mauritania, Nigeria, Saudi Arabia and Yemen; all of them are UN member states. Moreover, other 5 UN states where certain sources indicate that the death penalty may be imposed for consensual same-sex conduct, but where there is less legal certainty on the matter. These countries are Afghanistan, Pakistan, Qatar, Somalia (including Somaliland) and the United Arab Emirates.

<sup>400</sup> ILGA World; State-Sponsored Homophobia, Global Legislation Overview Update 2020; ILGA World 2020; page 31 [[https://ilga.org/downloads/ILGA\\_World\\_State\\_Sponsored\\_Homophobia\\_report\\_global\\_legislation\\_overview\\_update\\_December\\_2020.pdf](https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf)]

<sup>401</sup> For instance, death by stoning is prescribed in Brunei and the Northern States of Nigeria, while death by hanging is employed in Iran.

<sup>402</sup> ILGA World; State-Sponsored Homophobia, Global Legislation Overview Update 2020; ILGA World 2020; page 33 [[https://ilga.org/downloads/ILGA\\_World\\_State\\_Sponsored\\_Homophobia\\_report\\_global\\_legislation\\_overview\\_update\\_December\\_2020.pdf](https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf)]

<sup>403</sup> Ibidem page 35

<sup>404</sup> Organization of the Islamic Cooperation: Independent Permanent Human Rights Commission, OIC-IPHRC study on sexual orientation and gender identity in the light of Islamic interpretations and international human rights framework (Jeddah, May 2017) para 16

Cameroon and Senegal are the states from where most of the African refugees came from; for what concerns the first one, there are explicit legal barriers that prohibits consensual same-sex sexual activities. Article 83 of the Law on Cybersecurity and Cybercrime (Law No. 2010/12) (2010) criminalizes with up to two years of imprisonment and a fine any electronic communication between individuals of the same sex for the purpose of a sexual proposition. Penalties are doubled when communication is actually followed by sexual intercourse. In addition, Section 264 of the Penal Code (2016) criminalizes the public utterance of any “immoral speech” and the drawing of the public’s attention to any “occasion of immorality”. Considering the criminalization of same-sex intimacy, a legal scholar has suggested that a publicly uttered speech advocating “unnatural sexual indulgence” would be considered “immoral”<sup>405</sup>.

We can make a single discourse and also talk about Senegal; both states openly criminalize homosexuality and same-sex sexual relations and, the maximum penalty is five years of prison, although not as severe as the death penalty in Iran, it is still an ungodly and wrong punishment that undermines the freedom of the indecorum and also his dignity<sup>406</sup>.

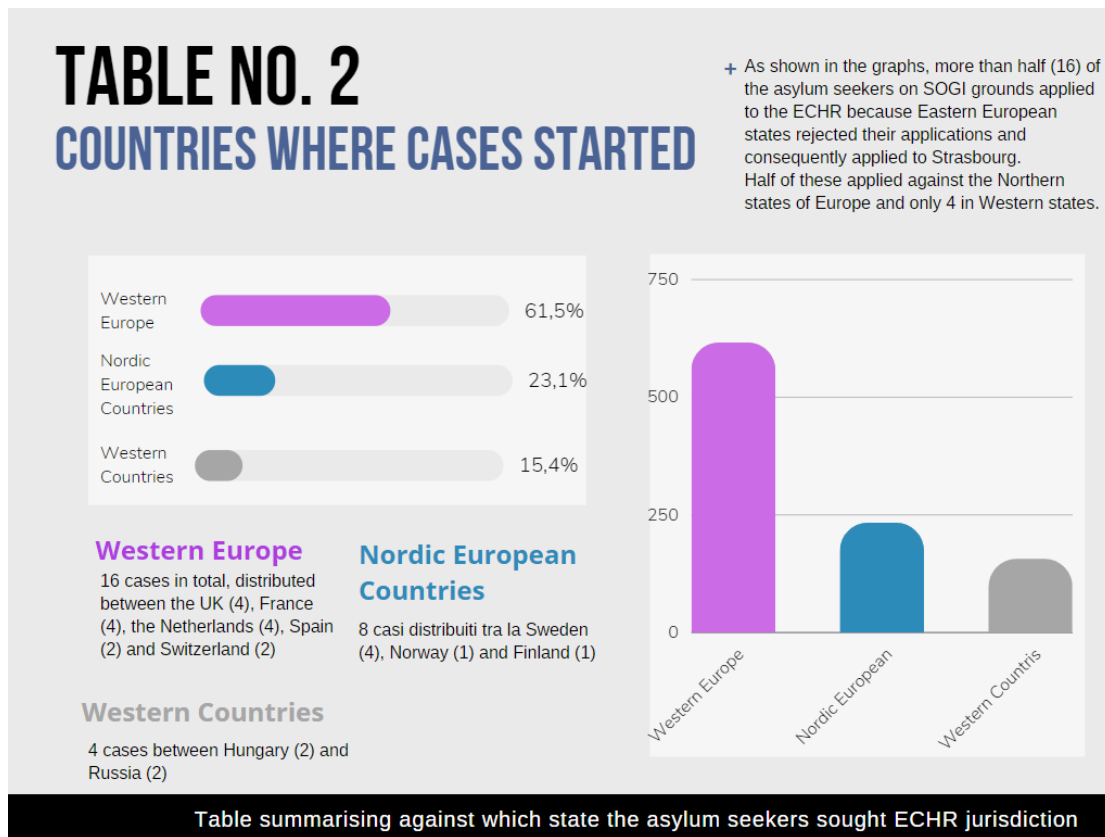
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<sup>405</sup> ILGA World; State-Sponsored Homophobia, Global Legislation Overview Update 2020; ILGA World 2020; page 146  
[[https://ilga.org/downloads/ILGA\\_World\\_State\\_Sponsored\\_Homophobia\\_report\\_global\\_legislation\\_overview\\_update\\_December\\_2020.pdf](https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf)]

<sup>406</sup> Ibidem page 325 and 326



## 2.3.2 Statistic on the country of Refuge



Of course, most of the refugees applied in western European countries and once rejected, went to the European Court of Human Rights. In most cases, the court in turn rejected these applications either for various reasons or because the state to which the refugee appeal decided to grant him/her some form of international protection or because the refugee did not decide to pursue the application.

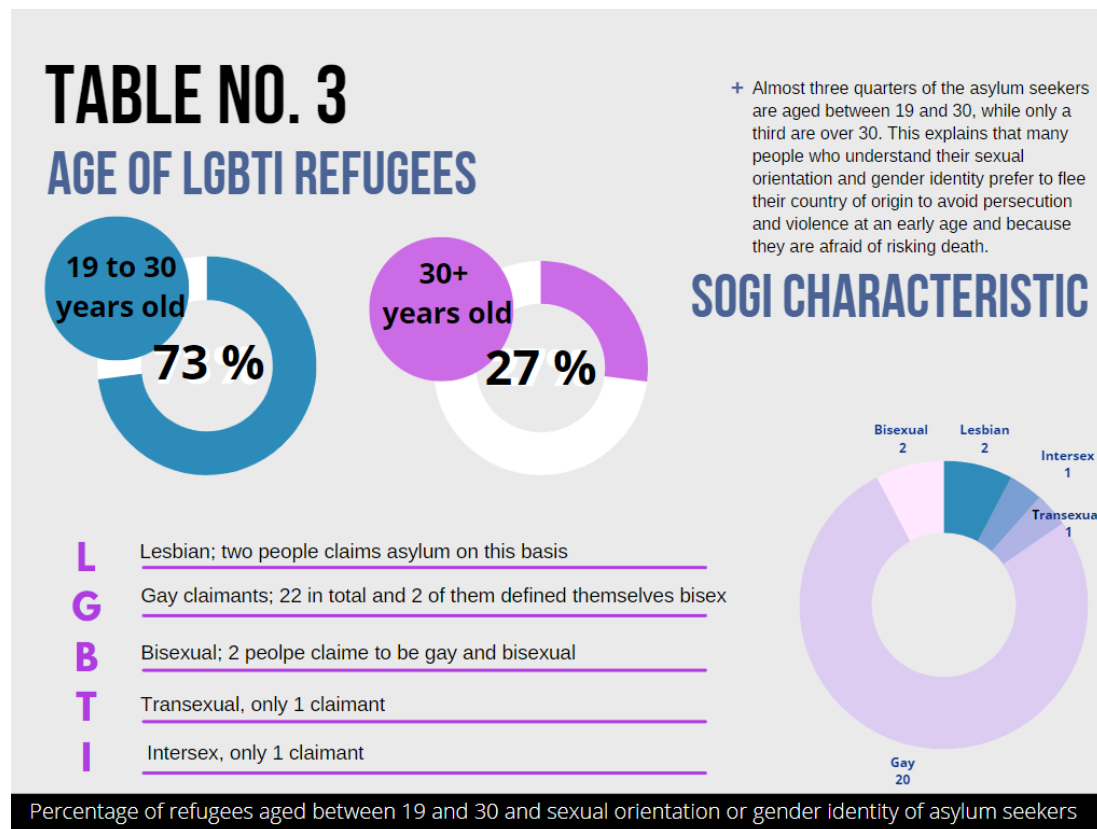
Interesting are the cases of those refugees who applied against Russia or Hungary, such as the cases of Ali Feruz vs Russia and O.M. vs Hungary. Indeed, in the first case, the Uzbek journalist was unjustly imprisoned by Russia for several months and was only able to free himself and live his sexuality freely and independently when he traveled to Germany and managed to obtain a residence permit<sup>407</sup>.

As for the second case, it is much more interesting because the applicant, a

<sup>407</sup> RadioFreeEurope, RadioLiberty; Journalist Ali Feruz: 'I'd Rather Die' Than Return To Uzbekistan, RadioFreeEurope, 2018  
[<https://www.rferl.org/a/uzbek-journalist-russia-human-rights-ali-feruz/29058736.html>]

transgender person, applied for a gender and name change at the registry office, which was rejected because he did not have a Hungarian birth certificate, it has been considered a serious violation of human rights by the ECHR and the state has been fined.

### 2.3.3 Age and sexual orientation or gender identity of LGBTI Asylum Seekers



From the analysis of the 26 cases that arrived at the European Union Court of Human Rights, we can analyze some very interesting trends, such as the sexual orientation and age of those who appealed to the court. Three-quarters of these are under 30 years old and consequently, a residual percentage can be considered properly adult.

What we can deduce is that refugees as part of the LGBTI minority prefer to flee their country of origin at a young age, when they realize they cannot be free to express their sexual orientation and gender identity. As a result, they undertake long and dangerous journeys to reach Europe and try to escape what would turn out to be a death sentence in their country of origin and seek asylum in Europe on SOGI bases. As highlighted in the analyzed jurisprudence, others did not even have real sexual experiences with the same sex or with the LGBTI community in their country of origin and decided to run away beforehand experience a true sexual liberation.

Regarding refugees over 30 years old, many of them have decided to flee after years and years of persecution and violence in their country of origin, as in the case of *D.B.N. v. the United Kingdom*<sup>408</sup> who says that in Zimbabwe both, she and her partner were persecuted, beaten and raped several times. She also adds that they both became pregnant as a result of this violence. However, even with such strong testimonies, the British state would not grant her asylum on SOGI grounds and consequently, she turned to the ECHR. In this as in other cases, the applicant decides to flee the country of origin after something terrible and tragic has happened to their partner. Consequently, after realizing that he has to live a limited life and in fear of being persecuted, as in *F. v. the United Kingdom*<sup>409</sup>.

From the same table we can analyze the sexual identity of applicants. 20 out of 26 declared themselves to be cisgender homosexual males, two cisgender bisexual males, two lesbian females, one intersex individual and one transgender. It can be explained because, on the one hand, it is easier to be believed or not if you admit your homosexuality and at the same time it is difficult to pretend to be a transgender or intersex person. These cases came to the European court mainly because the individuals in question were criminals wanted for other reasons and therefore their gender identity took a back seat when it came to securing the nation. This is true for the case of *L.B. v France*<sup>410</sup> who is a Moroccan national and who has been condemned several times for robbery and already spent some years in jail.

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<sup>408</sup> European Court of Human Rights; Fourth Section Decision; Application no. 26550/10 by D.B.N. against the United Kingdom; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-105192%22%5D%7D>]

<sup>409</sup> Council of Europe; European Court of Human Rights; fourth section decision as to the admissibility of application no.17341/03 by F. against the United Kingdom; the Council of Europe; 2022  
[<https://www.sogica.org/wp-content/uploads/2017/04/F.-v.-the-UNITED-KINGDOM.pdf>]

<sup>410</sup> Sexual Orientation and Gender Identity Claims of Asylum:A European human rights challenge –

## 2.3.4 Time employed by the European Court of Human Rights to decide



Interesting is the time taken by the ECHR to come up with a ruling. More than half of the cases were heard within a time frame of between one and two years. 34% more than two years, with two cases taking more than four years to get a finding. Only three cases were resolved in less than one year.

One of these cases, A.S.B. v. the Netherlands was only solved in 4 months because the government of the Netherlands finally granted the residence permit to the applicant so he will not risk being expelled to Jamaica anymore<sup>411</sup>. The same situation occurred with A.R.B. (Afghan national) v. the Netherlands and the sentence states as follows “the parties informed the Court that the applicant had been granted a residence permit

SOGICA;European Court of Human Rights; Fifth Section decision; Requête no 67839/17 L.B. contre la France introduite le 11 septembre 2017 communiquée le 18 mars 2021; SOGICA; 2022  
[<https://www.sogica.org/wp-content/uploads/2021/04/L.B.-c.-FRANCE.pdf>]

<sup>411</sup> European Court of Human Rights; Third section decision, Application no. 4854/12 A.S.B. against the Netherlands; European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-112342%22%5D%7D>]

enabling him to stay in the Netherlands. The Government requested the Court to strike the case out of its list of cases".<sup>412</sup> I.K. v. Switzerland was concluded in only 9 months because it was considered manifestly ill-founded by the Court. Moreover, the Court found that it did not need to assess the applicant's alleged violation of Article 14 of the Convention as it dealt with it under its assessment of an alleged violation of Article 3<sup>413</sup>.

If we want to consider those cases that took more than two years to be solved, the rulings and motivations used are much more interesting. In fact, out of nine cases, four were declared manifestly ill-founded because the ECHR did not find a violation of rights and two were declared settled. This was due to the state granting the refugee a residence permits with the possibility of its renewal. Only in two cases the Court did rule that yes, the applicant was right and consequently the state was wrong to deny asylum on a SOGI basis in the first instance in both cases, the state was obliged to pay some sort of fine to the applicant to justify the violation of his or her fundamental rights.

In *Rana v. Hungary*<sup>414</sup>, we are talking about a transgender person who was denied a formal change of gender identity and civil registration name by the European state because he did not have a Hungarian birth certificate, as an Iranian and a refugee on SOGI grounds. Consequently, the court admits that the state violated Article 8<sup>415</sup> of the European Convention on Human Rights and for this it must pay the applicant compensation of 6,500€ for non-pecuniary damage and 1,500€ in respect for cost and expenses<sup>416</sup>.

The second case won by the appellants is that of *B and C v. Switzerland*<sup>417</sup>, a same-sex couple consisting of a Swiss citizen and one originally from the Gambia. The two

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<sup>412</sup> LawEuro; European Court of Human Rights, *A.R.B. v. The Netherlands* (European Court of Human Rights), Third Section Decision, Application no.8108/18 *A.R.B. against the Netherlands*; LawEuro; 2022 [<https://laweuro.com/?p=328>]

<sup>413</sup> EDAL; European Database of Asylum Law; *I.K. v. Switzerland* (No. 21417/17), 18 January 2018; EDAL 2022 [<https://www.asylumlawdatabase.eu/en/content/ik-v-switzerland-no-2141717-18-january-2018>]

<sup>414</sup> European Court of Human Rights; Fourth Section Decision *CASE OF RANA v. HUNGARY*, Judgment; European Court of Human Rights; 2022 [<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203563%22%5D%7D>]

<sup>415</sup> Right to Respect for private and Family life

<sup>416</sup> European Court of Human Rights; Fourth Section Decision *CASE OF RANA v. HUNGARY* (Application no. 40888/17); European Court of Human Rights; 2022 [<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203563%22%5D%7D>]

<sup>417</sup> European Court of Human Rights, Third section judgment; *Case of B and C v. Switzerland* (Applications nos. 889/19 and 43987/16); European Court of Human Rights; 2022

were married in Switzerland and had been living together for decades; when C died, his partner was asked to leave the country. The court replies that this corresponds to a serious violation of Articles 3 and 8 of the European Convention on Human Rights, because if deported to The Gambia, he risks being exposed to ill-treatment by non-state authorities and the state would not be able to protect him. In addition, a verdict of expulsion would mean an infringement of private and family life. The court adds that the state must compensate the applicant EUR 14,500 as compensation for the costs and expenses of the trial<sup>418</sup>.

### 2.3.5 Articles used to justify the decision taken

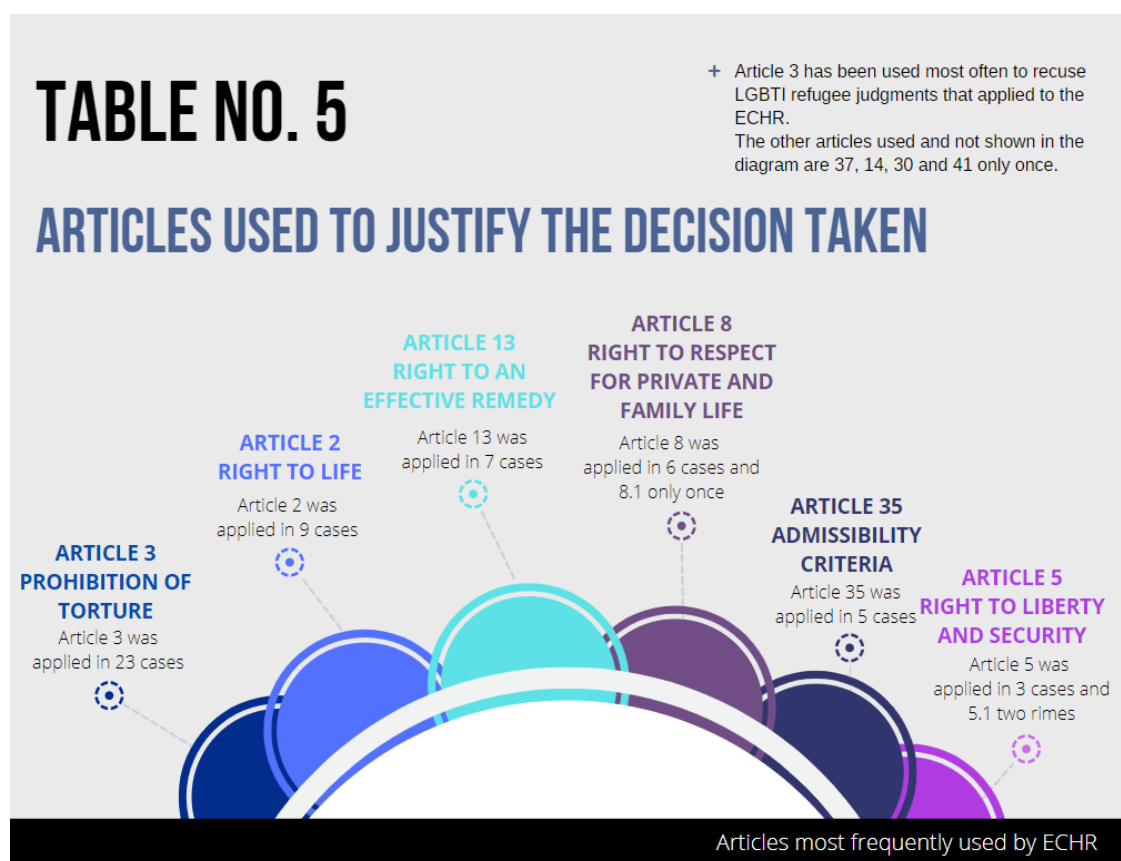


Table 5 shows which articles were most frequently applied by the ECHR to justify its decision and legal position. The most used is article 3; the prohibition of torture

[<https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-206153%22%22%22>]

<sup>418</sup> European Court of Human Rights, Third section judgment; Case of B and C v. Switzerland, Judgment; European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-206153%22%22%22>]

because it is well known and documented that in countries where the LGBTI community is not protected by any law, it is easier to be assaulted and become a victim of violence, persecution, and discrimination. Article 3 states:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>419</sup>

In 2021 throughout a Report, Amnesty International asserted that torture and ill-treatment suffered by the LGBTI community is surrounded by a conspiracy of silence, due to the social stigma attached to homosexuality and transsexuality all around the world.<sup>420</sup> Applicants cling to Article 3 because if they are sent back to their country of origin, they are afraid of suffering ill and degrading treatment and in some cases even the death penalty, such as in Iran. Very often, Article 3 is read in communion with Article 2<sup>421</sup>, the right to life, for the same reasons mentioned above. In many countries, homosexuality is criminalized and punished. As a result, a homosexual person will never be free to enjoy his or her freedom and gender expression and identity independently if he risks torture or death.

Article 13, the right to an effective remedy has been applied in 7 cases and, we can analyze how this article 13 has been introduced in the cases M.B v Spain in 2016 and E.S. v Spain in 2017 because in both cases the court answered similarly. Thus, within the first one it states: “In particular, it considers that the national authorities have not sufficiently examined the substance of its allegations and complains about the short time available to it to request interim suspension measures from the Audiencia

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<sup>419</sup> European Court of Human Rights; European Convention on Human Rights; European Court of Human Rights; 2022

[[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)]

<sup>420</sup> Amnesty International; Torture based on sexual identity -- an unacknowledged global shame; Amnesty International; 2022

[<https://www.amnesty.org/es/wp-content/uploads/2021/06/act790062001en.pdf>]

<sup>421</sup> 1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Court of Human Rights; European Convention on Human Rights; European Court of Human Rights; 2022

[[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)]

Nacional.”<sup>422</sup> Moreover, article 13 is read in combination with articles 2 and 3 all the time because not having access to a just remedy is a violation of the right to life and the prohibition of torture. Accordingly, this article claims:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>423</sup>

As a result, once these individuals had their asylum applications rejected, they appealed to the European Court of Human Rights for an explanation and to have their case analyzed one more time.

Another interesting article that has been used several times is the 8; “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>424</sup> If we stop and think about it a little, we understand how important its application is for a person from the LGBT community who has never had the opportunity to freely express his or her gender identity or gender expression. Consequently, if a gay person who comes from a country where being homosexual is a crime punishable either by death or punishment is denied the right to asylum, it also infringes Article 8, which provides for respect for family freedom and privacy.

In *D.B.N v. the United Kingdom*, the applicant complains that removal to Zimbabwe will completely destroy her private life because she will not have the opportunity to meet someone and engage in an homosexual relationship. As well as her mental and physical health would be compromised because of her sexual orientation and gender identity<sup>425</sup>. Another case in which article 8 is analyzed is *Rana v Hungary*, the affair of a

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<sup>422</sup> European Court of Human Rights, Third section judgment; Requête no 15109/15 *M.B. contre l’Espagne*; European Court of Human Rights, 2022

[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170641%22%5D%7D>]

<sup>423</sup> European Court of Human Rights; European Convention on Human Rights; European Court of Human Rights; 2022

[[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)]

<sup>424</sup> *Ibidem*

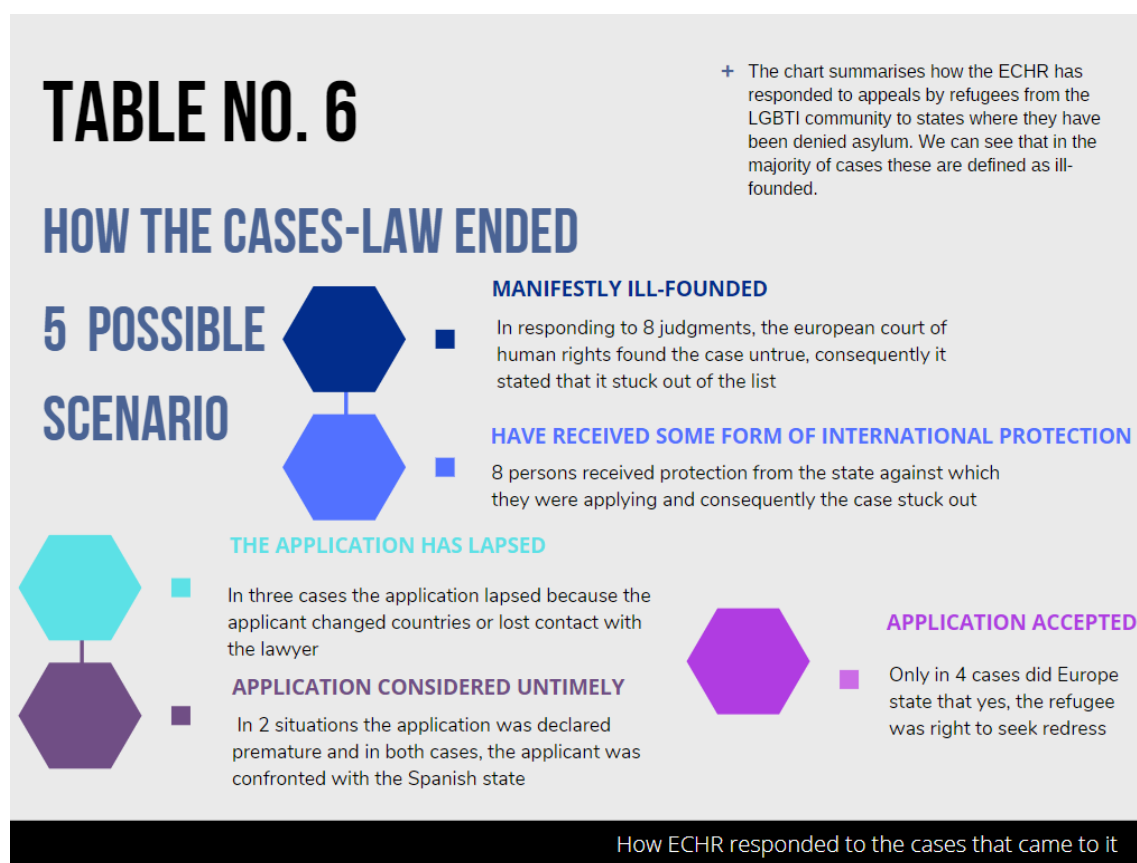
<sup>425</sup> European Court of Human Rights; Fourth Section Decision; Application no. 26550/10 by *D.B.N. against the United Kingdom*; European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-105192%22%5D%7D>]



transsexual Iranian person. In this situation, the Hungarian state did not allow him to change his name and identity from “female” to “male” in his identity documents. Again, it can be considered a violation of article 8 cause” everyone has the right to respect for his private and family life”<sup>426</sup>.

### 2.3.6 Percentage of cases accepted or rejected by the Court



On a few occasions, the Court has also struck out applications because of the applicants having lost contact with their legal representative, such as in *R.A. v France*<sup>427</sup>, involving a Pakistani gay man, and *D.B.N. v the United Kingdom*<sup>428</sup>. On

<sup>426</sup> European Court of Human Rights; Fourth Section Decision CASE OF RANA v. HUNGARY, Judgment; European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-203563%22%7D}]

<sup>427</sup> European Court of Human Rights; Fifth Section decision; Requête no 49718/09 présentée par R. A. contre la France; European Court of Human Rights; 2022 [https://hudoc.echr.coe.int/eng?i=001-103673]

<sup>428</sup> European Court of Human Rights; Fourth decision as to the admissibility of application no. 26550/10 by D.B.N. against the United Kingdom; European Court of Human Rights; 2022

other occasions, the application stuck out because the applicant did not reply to the observations, as in *M.T. v France*, involving a gay Cameroonian man<sup>429</sup>. For different reasons and contexts, the court also stuck out the application in *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v Russia*, which referred to an Uzbek gay man detained in Moscow<sup>430</sup>. In this case, the applicant was a well-known Uzbek gay journalist that after several months of detention in Russia obtained a visa to Germany, where he was granted asylum<sup>431</sup>.

The court found only three applications based on SOGI grounds and two of these led to a finding of no violation of an ECHR article. e. The first was the decision in *M.K.N. v Sweden*<sup>432</sup>, in which the Court finally recognized that sexual orientation and gender identity fall within the remit of the ECHR. However, they opted for the internal relocation, considering that it would not be dangerous for the applicant, thus they confirmed that the applicant's return to Iraq would not constitute a violation of Article 3. The second was the decision of *M.E. v Sweden*<sup>433</sup>, the court had to decide about a Libyan applicant to have had a same-sex relationship in Sweden and who was asked to return to Libya and ask for a family reunification visa. Even if the applicant admits that he had suffered death threats from his family because of his homosexuality, Strasbourg stated that the applicant should have been discreet about his sexuality while in Libya and that this did not amount to a violation of the article 3<sup>434</sup>.

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[<https://www.sogica.org/wp-content/uploads/2018/11/D.B.N.-v.-THE-UNITED-KINGDOM.pdf>]

<sup>429</sup> European Court of Human Rights; Fifth Section decision; Requête no 61145/16 *M.T. contre la France*, European Court of Human Rights; 2022

[<https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2261145/16%22%5D,%22itemid%22:%5B%22001-182562%22%5D%7D>]

<sup>430</sup> LawEuro; European Court of Human Rights, *NURMATOV (ALI FERUZ) v. RUSSIA*, Third Section Decision, Application no. 56368/17 *Khudoberdi Turgunaliyevich NURMATOV (ALI FERUZ) against Russia*; LawEuro; 2022

[<https://laweuro.com/?p=5248>]

<sup>431</sup> UCL Press; *FRINGE*, *Queer migration and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims*; UCL Press; 2021, page 11

[<https://www.uclpress.co.uk/products/141641>]

<sup>432</sup> Refworld; European Court of Human Rights, Fifth Section, case of *M.K.N. v Sweden*, (Application no. 72413/10), Strasbourg 09/12/2013; Refworld; 2022

[<https://www.refworld.org/cases,ECHR,51d2e3754.html>]

<sup>433</sup> EDAL; European Database of Asylum Law; ECtHR: Grand Chamber *M.E. v Sweden* (Application no. 71398/12) [Articles 3 and 8], 8 April 2015; EDAL; 2022

[<https://www.asylumlawdatabase.eu/en/content/ecthr-grand-chamber-me-v-sweden-application-no-7139812-articles-3-and-8-8-april-2015>]

<sup>434</sup> UCL Press; *FRINGE*, *Queer migration and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims*; UCL Press; 2021; page 11

[<https://www.uclpress.co.uk/products/141641>]

The only time the European Court found a violation of rights was in the case *O.M. v Hungary*<sup>435</sup> because Hungary had detained the applicant for more than two months and only afterwards had he been granted refugee status. The court alleges a violation of Article 5 particularly because of the applicant's vulnerability and awarded the claimant compensation. "Furthermore, *O.M. v Hungary* did not relate to the asylum claim itself, so there is effectively no finding of a violation of an ECHR article according to SMAC<sup>436</sup> as such"<sup>437</sup>.

Consequently, what we can say is that the Strasbourg jurisprudence that has developed around the notions of sexual minorities related to asylum claims has not been sufficiently specific and detailed in protecting applicants from possible persecution. That is why it fell to the state to take care of it and provide it with different kinds of protection. However, on the other hand, we have to consider that the asylum claims found credible by domestic authorities are decided positively at the domestic level, and only the ones that are not found credible reach Strasbourg<sup>438</sup>. Moreover, "If there were a genuine interest in defending individuals – either citizens or non-citizens – from human rights abuses, stories of structural violence or harassment would be enough to grant protection, without the applicants having to demonstrate a threat of death or an extreme punishment"<sup>439</sup>.

It is important to underline that in none of these decisions the courts refer to Yogyakarta Principles and only in the *I.K. v Switzerland*<sup>440</sup>, the court talks about UNHCR's guidelines on refugees' status based on sexual orientation and gender identity. This ignorance of international principles underlines the unwillingness of Strasbourg and the states to comply with them and apply them when an applicant

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<sup>435</sup> European Court of Human Rights; Fourth decision on the CASE OF *O.M. v. HUNGARY* (Application no. 9912/15), European Court of Human Rights; 2022  
[<https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-164466%22%7D>]

<sup>436</sup> Sexual Minority Asylum Claims

<sup>437</sup> UCL Press; *FRINGE*, Queer migration and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims; UCL Press; 2021; page 12  
[<https://www.uclpress.co.uk/products/141641>]

<sup>438</sup> *Ibidem*, page 13

<sup>439</sup> Ammaturo, Francesca Romana; Sexuality and citizenship in Europe: socio-legal and human rights perspectives in European Sexual Citizenship: Human Rights, Bodies and Identities; Sussex Research Online; 2017 [ <https://sro.sussex.ac.uk/id/eprint/74944/3/Nuno%20Ferreira%20-%20Sexuality%20and%20citizenship%20in%20Europe%20-%20Social%20%26%20Legal%20Studies%20-%20forthcoming.pdf>]

<sup>440</sup> EDAL; European Database of Asylum Law; *I.K. v. Switzerland* (No. 21417/17), 18 January 2018; EDAL 2022  
[<https://www.asylumlawdatabase.eu/en/content/ik-v-switzerland-no-2141717-18-january-2018>]

defines himself as homosexual or part of the LGBTI community more generally. If the court had instead understood and internalized these international standards and principles, the cases would have been analyzed from an intersectional perspective and included the needs of sexual minorities<sup>441</sup>.

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<sup>441</sup> UCL Press; FRINGE, *Queer migration, and asylum in Europe; An exercise in detachment: the Council of Europe and sexual minority asylum claims*; UCL Press; 2021; page 13  
[<https://www.uclpress.co.uk/products/141641>]

# Conclusion

To conclude, we have seen how, over the years, international and European legislation has increasingly changed and broadened to include the recognition of persons and refugees part of the LGBT community. We know that considerable progress has been made over the past 30 years to ensure the rights of persons belonging to the most vulnerable groups. Therefore, there is no doubt that this is a positive development in that we have been able to make international policies more inclusive.

Indeed, if we go back to the first chapter, the original definition of a refugee extended only to those who “as a result of events occurring before January 1951”<sup>442</sup>. Over time, this definition has also expanded to offer structural and procedural guarantees to all those individuals who found themselves forced to leave their place of residence due to persecution or other reasons covered by the declaration itself, after that date. Consequently, sexual orientation and gender identity also began to be accepted over time as a trigger for persecution. And since 1990<sup>443</sup> great strides have indeed been made to ensure that their rights and freedoms are respected.

It was only in 2006 that the international community equipped itself with real instruments to recognize the freedoms of the LGBT community and to protect it against discrimination and violence on a SOGI basis. The Yogyakarta principles represent a fundamental step for the entire community and defined some of the issues that had long remained vague or little known at the institutional level. In addition, these were revised and updated in 2017 to continue to be current and feasible, in line with new international issues.

In addition, in 2012 the United Nations published guideline no. 9 concerning refugees discriminated against on a SOGI basis. These guides show how practitioners should

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<sup>442</sup> The UN Refugee Agency; Convention and Protocol relating to the Status of Refugees; Convention; 2022; article 1 [<https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>]

<sup>443</sup> In May 1990, when homosexuality was removed from the list of mental illnesses by the WHO. It was a historic moment, which led in 2004 to the choice of 17 May as the date for the establishment of the International Day Against the *HomoTransPhobia*. However, nowadays here in Italy, it is preferable to use the term *omotransnegatività* because the community agreed on the fact that one cannot feel phobia towards another person, and at the same time the word itself was discriminatory towards all those on whom the term was used.

approach working with these vulnerable individuals. They also explain that one must put oneself in the shoes of refugees and understand that Western definitions of gay or homosexual person are not understood or they might be assimilated with a very negative connotation. Consequently, it is necessary to create a supportive environment and to have workers who are sensitive to the topic or at least well-informed about LGBT issues and the various forms of violence and exploitation to which these individuals are subjected in their countries of origin.

Furthermore, the UNHCR discussion paper on LGBTIQ+ persons in forced displacement adds that it is in no way justifiable to use medical devices attached to the applicant's genitals as evidence to confirm or otherwise possible homosexuality. The United Nations needed to make an official declaration because in several states this was considered a common test that LGBT refugees were obliged to undergo. This was declared a degrading practice that violates fundamental human rights<sup>444</sup>.

The European Union, from the very beginning of its creation, has drawn up treaties and charters to protect people's rights. The Treaty on the Functioning of the EU and the EU Charter on Fundamental Rights represent the cornerstone of the EU common law. Over the years, these instruments have been accompanied by international programs, new covenants, and directives. Among the most important there is the Qualification Directive (2011/95/EU), which defines the criteria for granting international protection and which specifies that sexual orientation and gender identity are grounds for persecution under Article 10. Furthermore, Article 18 (3) of the Reception Condition Directive (2013/33/EU) also states that when analyzing an asylum application, states must do so considering the possible vulnerabilities of the individual, such as belonging to a particular social group.

In conclusion, as we have seen, both international and European legislation has moved towards the recognition of rights and guarantees for persons belonging to the LGBT community. This has been done to proactively respond to the needs of individuals who have so far found no concrete help from state bodies and very often continued to suffer

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<sup>444</sup> The United Nation High Commissioner for Refugees; 2021 Global Roundtable LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper; The UNHCR 2022 [<https://www.unhcr.org/611e33704>]

discrimination and violence. These regulatory instruments, however, must be accompanied by good practices and concrete examples.

Analyzing the cases that reached out to the European Court of Human Rights, we realize that the Court decides on the violation of European Charter of Human Rights by moving between protecting human rights and respecting national sovereignty. In doing so, it relies on Articles 3 and 2 of the charter itself, respectively the prohibition of torture and the right to life. We can therefore say that the European Court of Human Rights has indeed been pragmatic in defending the rights and guarantees of sexual minorities<sup>445</sup>.

The CJEU decisions in the 2013 case of X, Y and Z and the 2014 decision in A, B and C, drew some positive elements for the applicant nevertheless, their applications have been considered manifestly ill-founded<sup>446</sup>. They paved the way for the recognition of the rights of gay and lesbian refugees and a gradual opening of the system. While regarded as positive examples, many other times these cases have been used to deny asylum on a SOGI basis.

There is no doubt that one of the most critical problems has been encountered, the lack of documentation regarding the country of origin. Very often, Courts do not have up-to-date information about the legal and social status of homosexuals in their country of origin. The only positive note is the state-sponsored homophobia reports published by ILGA World that periodically report on rights violations against LGBT people. Most of the cases analyzed in the thesis concern refugees from the Middle East, where Islam is the predominant religion. Therefore, it is also very often difficult to discern the law of the Koran from the law of the state, which often merges to form a single doctrine.

One of the most critical issues that can be noted when formulating a comparative analysis is the time it takes for the court to provide a ruling to the enforcer. It often takes more than a year and a half and, as a result, it has happened that the refugee has lost contact with the legal representative or has received another form of

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<sup>445</sup> UCL Press; FRINGE, Queer migration, and asylum in Europe; UCL Press; 2021; chapter 5, page 8

[<https://www.uclpress.co.uk/products/141641>]

<sup>446</sup> UCL Press; FRINGE, Queer migration and asylum in Europe; UCL Press; 2021; chapter 5, page 14

[<https://www.uclpress.co.uk/products/141641>]

international protection granted by the host state. If the court's objective is to defend the rights of individuals, citizens or not, it should certainly not attach itself to evidence or demonstrations of abuse and exploitation<sup>447</sup>.

The last negative note that can be highlighted is the poor preparation of the staff working with this category of fragile subjects. Although both the UNHCR and the European Union have issued guidelines, courses, and various tools to sensitize staff to the issue and to make them aware of the trauma that these individuals may have suffered, these in no way represent a must. And as a result, very often professional figures working in these environments have no idea who a gay or transsexual person is, or how to act and talk to him, so as not to practice micro-violence. Consequently, I would say that there is still a lot of work to be done and that all operators must be made aware of this issue. For this same reason, I decided to attach the tool resettlement, a guide of 30 questions that could be useful to any professional working in this field.

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<sup>447</sup> Ammaturo, Francesca Romana; Sexuality and citizenship in Europe: socio-legal and human rights perspectives in European Sexual Citizenship: Human Rights, Bodies and Identities; Sussex Research Online; 2017 [https://sro.sussex.ac.uk/id/eprint/74944/3/Nuno%20Ferreira%20-%20Sexuality%20and%20citizenship%20in%20Europe%20-%20Social%20%26%20Legal%20Studies%20-%20forthcoming.pdf]



# Annex I

## Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees

The following four steps should be followed to assess the resettlement needs of LGBTI refugees, and guide the preparation of the resettlement submission. See the attached User Guide for guidance.

**Step 1:** Identification of the resettlement need

**Step 2:** Conducting the resettlement interview

**Step 3:** Completing a Resettlement Registration Form (RRF)

**Step 4:** Selection of the resettlement country

Step 1: Identification of the Resettlement Need		
Ensuring LGBTI refugees' fair access to resettlement process		
1.1	Proper internal and external referral mechanisms for LGBTI individuals requiring protection interventions are in place.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
1.2	Pro-active outreach to LGBTI refugees is regularly conducted, including participatory assessments and assessments using HRIT.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
1.3	Resettlement staff are sensitized to the protection risks facing LGBTI refugees and are trained on how to serve them, including the use of appropriate terminology.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
UNHCR assessment of resettlement needs		
1.4	An LGBTI refugee, or refugee perceived to be LGBTI, has a protection need that warrants resettlement consideration. This may relate to their sexual orientation and/or gender identity, or to other circumstances of their life.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
1.5	<b>Legal Protection</b>	
	<ul style="list-style-type: none"> <li>Consensual same-sex relations are criminalized in the country of asylum.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>Access to employment, housing, health care, education and child custody is restricted due to discriminatory laws and practices towards LGBTI individuals in the country of asylum.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>LGBTI refugees do not have access to national asylum procedures in the country of asylum.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>LGBTI refugees fear reporting physical or sexual violence to the police, or receive no protection from the police.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
1.6	<b>Shelter and accommodation</b>	
	<ul style="list-style-type: none"> <li>The refugee lacks safe and appropriate housing.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee has been forced to move either to avoid being identified as LGBTI, or in response to threats, actual violence or eviction due to the refugee's sexual orientation and/or gender identity.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		

1.7	<b>Physical, psychological and sexual violence</b>	
	<ul style="list-style-type: none"> <li>The refugee was subjected to harassment, threats and insults due to their actual or perceived sexual orientation or gender identity.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee was subjected to physical violence, such as beatings, torture, abduction, honour-related violence or destruction of property.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee was subjected to sexual violence, including rape or penetration with an object.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee was subjected to or threatened with arrest, detention, prosecution and/or punishment.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee relies or relied on sex work for survival, and is or was exposed to physical dangers and health risks.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee faces psychological effects (e.g. PTSD, depression or anxiety) relating to past and ongoing physical and sexual violence, exclusion, and other harms flowing from LGBTI identity.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee believes that revealing his or her sexual orientation and/or gender identity would be likely to result in harassment and/or violence.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
1.8	<b>Family support</b>	
	<ul style="list-style-type: none"> <li>The refugee was subjected to forced marriage.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee was subjected to family violence that the authorities of the country of asylum were unable or unwilling to prevent.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee lacks family support due to rejection.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee's family support is dependent on the refugee not revealing sexual orientation and/or gender identity.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee depends on abusive relationships for basic needs such as protection, shelter and food.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
1.9	<b>Community support</b>	
	<ul style="list-style-type: none"> <li>The refugee was subjected to threats / violence from other refugees.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee was subjected to threats / violence from members of the local community.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee lacks social support.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
1.10	<b>Health care</b>	
	<ul style="list-style-type: none"> <li>The refugee faces severe barriers to accessing regular and/or emergency health care.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>The refugee faces severe barriers preventing access to HIV prevention or required treatment.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>Transgender and intersex individuals who have particular medical needs have no access to such treatment.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		

1.11	<b>Economic and social rights</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>■ The refugee lacks employment.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>■ The refugee faces abuse in the workplace or is at risk of dismissal.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
	<ul style="list-style-type: none"> <li>■ The refugee lacks access to food, including due to discrimination in food distribution.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
<b>Step 2: Conducting the Resettlement Interview</b>		
<b>Preparing for the resettlement interview</b>		
2.1	<p>Interview environment is supportive for LGBTI refugees. Measures to create such an environment include:</p> <ul style="list-style-type: none"> <li>■ Interviewers, interpreters and all other staff involved in the process are adequately trained and sensitized on how to serve LGBTI refugees.</li> <li>■ Specific requests made by the refugee in relation to the gender or nationality of interviewers or interpreters are considered.</li> <li>■ Additional safeguards for preserving the confidentiality of LGBTI persons, including interviewing separately without the presence of family members, and paying particular attention to the risk of family violence to LGBTI women and LGBTI youth.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		
<b>Conducting the resettlement interview</b>		
2.2	<p>The resettlement interview is conducted in a sensitive manner.</p> <ul style="list-style-type: none"> <li>■ The refugee is assured that all aspects of his / her case will be treated in confidence.</li> <li>■ The interviewer maintains an objective and non-prejudicial approach.</li> <li>■ The interviewer and the interpreter avoid expressing any judgment about the refugee's sexual orientation / gender identity.</li> <li>■ The interviewer and the interpreter use a non-offensive and appropriate vocabulary, and</li> <li>■ Questions about sexual orientation and gender identity are conducted in a sensitive manner, focusing on experiences and fears of harm and shame rather than on sexual experiences.</li> <li>■ Questioning about incidents of sexual violence is conducted with the same sensitivity as in the case of any other sexual assault survivors.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Remarks:</b>		

Step 3: Completing a Resettlement Registration Form (RRF)		
3.1	<p><b>Transgender and intersex refugees</b></p> <ul style="list-style-type: none"> <li>■ Use the refugee’s self-defined gender as “he” or “she” consistently throughout the RRF. Do not use “He/she”.</li> <li>■ If the person is female-to-male (FTM) transgender, refer to the person as he/him and record the sex as male.</li> <li>■ If the person is male-to-female (MTF) transgender, refer to the person as she/her and record the sex as female.</li> <li>■ Where the official documents from the country of origin / country of asylum indicate the person’s sex/gender as the changed gender identity, the person’s self-defined gender identity and the first (chosen) name reflecting the changed gender are used throughout the RRF.</li> <li>■ Where the official documents from the country of origin / country of asylum do NOT reflect the changed gender identity, the person’s sex and name at birth are recorded under the bio-data, and the chosen name reflecting the preferred gender identity is recorded under Alias Names. Chosen pronoun and preferred gender should be used throughout the RRF.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.2	<p><b>LGBTI refugees with partners</b></p> <p>If the LGBTI refugee has a partner, in principle, the partner should be recorded under Section 2. If the resettlement country requires the submission of the partner on a separate case:</p> <ul style="list-style-type: none"> <li>■ Cases of the couple are cross-referenced and listed in Sections 1 and 3 of each of the RRFs.</li> <li>■ The need for the couple to travel together to ensure that they are not separated is stressed in Section 7.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.3	<p><b>LGBTI refugee included in a case as a family member</b></p> <ul style="list-style-type: none"> <li>■ Any specific needs are recorded in <i>proGres</i>, to ensure that these needs are listed under “Specific Needs” of Section 2: Individual bio-data.</li> <li>■ If the LGBTI refugee does not wish other family members to know about his/her sexual orientation / gender identity, this request is highlighted in the RRF for the attention of the resettlement country.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.4	<p><b>Section 2: Individual bio-data</b></p> <ul style="list-style-type: none"> <li>■ Ensure the person’s self-defined gender identity under “sex” is recorded in <i>proGres</i>.</li> <li>■ The first (chosen) name reflecting the changed gender is recorded in <i>proGres</i>.</li> <li>■ If the LGBTI refugee has a partner, the partner is recorded under Section 2. If they are not living together, an explanation should be provided under Section 7.</li> <li>■ Any specific needs are listed in <i>proGres</i> and appear under “Specific Needs”</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.5	<p><b>Section 3: Relatives not included in this submission</b></p> <ul style="list-style-type: none"> <li>■ If the refugee is being submitted as a linked cross-referenced case, the partner of the linked case is noted.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

3.6	<p><b>Section 4: Refugee claim</b></p> <ul style="list-style-type: none"> <li>■ If the refugee’s sexual orientation and/or gender identity is part or all of the basis for the refugee claim, (usually on account of membership of a particular social group), this is explained in Section 4.1 “Summary of the Basis of the PRA’s Refugee Recognition” and in Section 4.2 “Summary of the Legal Analysis”.</li> <li>■ Summary and relevant COI (where available) is included to support persecution of LGBTI individuals in the country of origin.</li> <li>■ If the LGBTI refugee is submitted together with a partner, a separate statement of the partner’s refugee claim is included to strengthen the case and avoid a split decision from resettlement countries that require each refugee to have a claim.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.7	<p><b>Section 5: Need for resettlement</b></p> <ul style="list-style-type: none"> <li>■ Lack of Prospects for voluntary repatriation or local integration (Section 5.1): <ul style="list-style-type: none"> <li>○ How the discrimination, harassment and/or violence on account of the refugee’s sexual orientation and/or gender identity affects the refugee’s prospects for voluntary repatriation and local integration is explained.</li> </ul> </li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.8	<ul style="list-style-type: none"> <li>■ Resettlement submission category and prioritization (Section 5.2): <ul style="list-style-type: none"> <li>○ Any links between the refugee’s sexual orientation and/or gender identity and the primary (and secondary) submission category and the priority level are explained.</li> <li>○ The resettlement needs are assessed without reference to what the refugee may reasonably tolerate by way of being “discreet” or concealing his or her sexual orientation and gender identity.</li> <li>○ The resettlement needs are assessed taking into account persecution and discrimination experienced in distinct ways by lesbian, gay, bisexual, transgender or intersex people.</li> </ul> </li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.9	<ul style="list-style-type: none"> <li>■ Emergency or Urgent submissions (Section 5.3): <ul style="list-style-type: none"> <li>○ The need for urgent or emergency processing is justified.</li> </ul> </li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.10	<p><b>Section 6: Specific Needs Assessment</b></p> <ul style="list-style-type: none"> <li>■ Details of any specific type of assistance and support related to the refugee’s sexual orientation and/or gender identity required upon resettlement are provided.</li> <li>■ Where applicable, need for counselling services or medical treatment relating to harms experienced, or transition for transgender and intersex refugees are provided.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.11	<p><b>Section 7: Additional Remarks</b></p> <ul style="list-style-type: none"> <li>■ If the couple is forced to live separately in the country of asylum, it is explained here.</li> <li>■ If the couple is presented as separate, cross-referenced cases, the need for both cases to travel together is explained.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

3.12	<b>Section 8: Declaration</b> <ul style="list-style-type: none"> <li>All individuals over the age of 18, including LGBTI refugees, have signed the declaration.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
3.13	<b>Section 9: Attachments</b> <ul style="list-style-type: none"> <li>All medical reports or psychosocial assessments, if applicable.</li> <li>Any official documents indicating the refugee's sex/gender as the changed gender identity, if applicable.</li> <li>Any other documentation required by the circumstances of the case – e.g. a Medical Assessment Form (MAF)</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Step 4: Selecting the Resettlement Country</b>		
4.1	State admission criteria in relation to accepting LGBTI refugees and same-sex couples for resettlement are reviewed.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
4.2	Laws relating to sexual orientation and gender identity of the resettlement country are non-discriminatory and LGBTI-friendly.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
4.3	The specific type of assistance, support or treatment required upon resettlement is available in the selected resettlement country.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
4.4	The selected resettlement country is able to expedite processing for emergency and urgent cases.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<b>Emergency Procedures</b>		
	Case is an emergency, urgent or sensitive case that required temporary protection measures, such as placement in a safe shelter or evacuation to an ETF.	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

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