

EMERGING PROTECTION OF THE LGBTIQ COMMUNITY: GOOD PRACTICES AND SHORTCOMINGS IN THE ASYLUM PROCESS

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Abstract

This article aims to analyse the asylum process within the European Union, more specifically with regard to the LGBTIQ people. Firstly, it will create a list of legal instruments and complementary documents, which will determine the degree of protection offered by both international organisations and transnational NGOs. Secondly, in light of previous evolution of interpretation, the article seeks to present the framework, which leads to the possibility of granting refugee status to LGBTIQ persons. Although gender is not a specific reference in the refugee definition, it is widely accepted that persecution and harm can be inflicted on persons non-conforming to the traditional gender roles. Thirdly, it explores the challenging factors that are taken into account when granting refugee status to applicants with such sensitive grounds for the claims. Alongside the third part of the essay lies the question the paper seeks to ask. Therefore, the research is attempting to determine the extent of the protection offered to LGBTIQ asylum seekers and what can be improved in said process, both at the European level and national level.

¹ This essay represents the personal opinions of the author and should not be construed as an official stance of the Romanian Ministry of Foreign Affairs

Keywords

Asylum; refugee status; LGBT; European Union; Qualification Directive; Asylum Procedures Directive.

1.INTRODUCTION

LGBTIQ rights have been a contentious topic in academic and politic circles for a considerable amount of time. As a natural consequence, there is a clear international polarisation of states into supporters and opponents of LGBTIQ equality rights. While it is notable that the Western hemisphere is in the former camp, with the European Union as its leader, this attitude of acceptance and inclusion is not unanimously endorsed.

In light of its role as an important global actor, the European Union seeks to create a safe and inclusive environment for LGBTIQ people both within its borders and outside of them. In doing so, many small steps have been taken over the course of the years. More recently, however, the endorsement of LGBTIQ equality rights within the European institutions determined a bolder attitude, which resulted in the first-ever strategy prepared by the European Commission. 'LGBTIQ Equality Strategy 2020-2025' envisions an even more inclusive society, seeking to complete and adapt the actions previously commenced (European Commission 2020).

While said strategy successfully incorporates a wide variety of measures to be taken in order to move forward on the path towards European consensus, we argue that proposals referring to the asylum system need to be prioritised due to their importance in the safety of LGBTIQ people. Therefore, this article will focus on the situation of LGBTIQ asylum seekers within the European borders, taking into consideration the impact of other international organisations and transnational NGOs.

As it is expressed in various international legal sources, as well as in academic research, special procedural guarantees need to be effectively put in place with regard to certain applicants, especially due to their gender, sexual orientation and/or gender identity (SOGI) (European Parliament and Council Directive

2013/32/EU). At the EU level, what is interesting about the asylum system is the fact that it represents a unique form of regulation. '[I]t is not just one State regulating its asylum system but it is a confluence of States that have to be more or less in agreement in order to harmonise their regulation system and its administrative practices' (Begazo 2019).

Although the European institutional actors are attempting to regulate better handling of applicants with special requirements, the usage of directives and recommendations as sole means of obtaining better results leads to a heterogeneous application of EU law. The specificity of directives consists of certain freedom offered to the Member States concerning the implementation measures, thus justifying a range of different practices which creates senses of doubt and uncertainty amongst LGBTIQ asylum seekers. In addition, particularly considering this agenda, actions are defined by an unwillingness to harmonise this domain at the European level (van der Vleuten 2014). As an example, some Member States have included SOGI as grounds for persecution and special guarantees oriented for these applicants. Nonetheless, the majority is not part of this example.

2.LEGAL BASIS

The primordial legal basis, from which all subsequent acts derive and are inspired, is the 1951 Refugee Convention, signed by 149 States, under the auspices of the UN Refugee Agency. Building on its provisions, certain international instruments have also served as the basis for EU's regulations in term of this matter. Noteworthy are the Yogyakarta Principles and the Guidelines created by the UN High Commissioner for Refugees (UNHCR 2012). In the European Union, the main legal instruments existent in this matter are two directives, completed by recommendations and strategies without binding effects. Directive 2011/95/EU, which declares that SOGI is an important criterion for the legal recognition of refugee status, is the most important European act, completed by Directive 2013/32/EU. Besides, the European Union works towards consolidating a Common European Asylum System, a

process which is supervised and guided by the European Asylum Support Office (EASO). Concerning LGBTIQ people's applications for international protection, according to the aforementioned Strategy, EASO will improve the asylum-seeking process within the Member States through recommendations, toolkits and guidelines.

Complementary to the institutionalised framework, the work of transnational NGOs is highly relevant. Due to a low number of specialists in matters related to SOGI within the institutions of international entities, it became the responsibility of large NGOs to replenish the existent deficiencies and to efficiently collaborate with the UN and, mainly, the EU. To exemplify, the works of ILGA-Europe (probably one of the broadest NGOs advocating for LGBTIQ rights) offer the necessary insights and statistics that European institutions and agencies need in their process to improve the protection of LGBTIQ rights.

3. GRANTING LGBTIQ PEOPLE REFUGEE STATUS

According to the Qualification Directive, in assessing the reasons for persecution, Member States shall take into account, *inter alia*, membership to a particular social group. Following, the Directive explicitly mentions: 'Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. (...) Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group' (European Parliament and Council Directive 2011/95/EU).

In analysing said membership to a particular social group, three aspects need to be emphasised in order to clarify how LGBTIQ applicants can fit in this category. The Qualification Directive defines a particular social group as having these two elements: 'members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant

country, because it is perceived as being different by the surrounding society' (European Parliament and Council Directive 2011/95/EU).

The two relevant international entities guaranteeing protection for LGBTIQ asylum seekers (the UN and the EU) have distinct approaches. The former considers that the two elements stipulated in the definition of membership to a particular social group should be alternative (EASO 2020), while the EU adopted, through CJEU's case-law, a cumulative approach.

Firstly, the common characteristics are regulated to be comprised of innate attributes, a common background *or* a characteristic fundamental to identity. Given the abstract nature of these three concepts, it has been previously argued that the distinction between them is often difficult to obtain and that, to some extent, they are complementary notions. About the subject of our research, SOGI can be regarded as a characteristic so fundamental to one's identity that a forced renunciation cannot be a possibility. It is important to mention that the UNHCR Guidelines No. 9 offer a broader interpretation of the legal acts concerning this matter. Thus, the common characteristics aspect of said membership cannot be limited strictly to the fear of persecution itself as a shared trait (UNHCR 2002).

Secondly, the distinct identity in the relevant country requirement entails that the applicant is perceived as being distinct by other society members. This social differentiation may take the form of stigma or singling-out either by laws or by society members, thus justifying the protection offered in cases of both State and non-State persecution. As an example of ostracism determined by States, the mention of CJEU's case-law is relevant. More specifically, in the *X, Y and Z* case the Court concluded that criminalisation of homosexual acts negatively affects the perception of those persons by the surrounding society, thus being able to qualify as members of a particular social group (Cases C-199/12 and C-201/12).

Thirdly, it is important to clarify some aspects of membership. The existence of a particular social group is not dependent on activities conducted by its members, nor on the cohesiveness of its members (EASO 2020). Furthermore, the size of a social group is also considered irrelevant when assessing its existence. As per UNHCR's Guidelines, members of a particular social group are not required to associate or be socially visible for the purpose of being granted refugee status (UNHCR 2012).

4. FACTORS TAKEN INTO ACCOUNT IN ASSESSING ASYLUM CLAIMS

Relevant provisions being established within the EU, with important input from specialists, academics and transnational NGOs, to a certain extent the process, from the points of view of steps, attitudes and guarantees is explicitly defined. The problem, however, arises with the assessment of measures of implementation put in place by the Member States, or a lack thereof. In a paper researching the situation of LGBTIQ asylum seekers from 2017, FRA concluded that official statistics on the asylum claims based on SOGI are practically non-existent (FRA 2017). This administrative deficiency represents a crucial obstacle in the evolution towards more comprehensive and efficient protection for these persons.

Given the small amount of information that has been gathered, we proceed to analyse factors taken into account during the assessment of LGBTIQ people's asylum claims. In order to offer a complete image preexistent measures, as well as reform proposals, will be included.

4.1. Well-founded fear of persecution and criminalisation

The well-founded fear of persecution, one of the main criteria assessed, entails taking into account both individual and contextual circumstances (UNHCR 2012). While persecution can have a fairly broad interpretation, it has been established that in relation to LGBTIQ asylum claims it is comprised of factors such as abuse, violence, restriction of freedom of expression or assembly, and the most dangerous, criminalisation of certain behaviours. Although the simple disapproval from family or certain society members is not a component of this interpretation of persecution, it is largely accepted that given a specific context, its effects are noteworthy. Discrimination is yet another component which can amount to persecution, given that such measures had consequences of a substantially prejudicial nature.

Many LGBTIQ asylum seekers come from countries where consensual same-sex relations are prohibited by law. Despite considerable international disapproval of such provisions, we still witness States where homosexual acts are punished by the death penalty, prison terms and corporal punishments. A decision by CJEU establishes that the mere criminalisation of consensual same-sex acts cannot be defined as persecution, but an applied term of imprisonment must be regarded as a disproportionate punishment (Cases C-199/12 and C-201/12). Despite this precedent being created, protection must be offered not only to people to whom such laws have already applied but also to those seeking to avoid them. In other words, criminalisation of such acts in the applicants' country of origin should be a sufficient criterion to lead to the recognition of refugee status (Jansen and Spijkerboer 2011).

4.2. Credibility

Notably, the majority of asylum cases concerning LGBTIQ persons are based on statements of the applicant. Being the only sources of evidence, decision-makers must decide whether a claim is truthful or not. Such situations are problematic when combined with certain practices, such as interviews held by non-specialised personnel and the use of medical and psychological examinations.

The specificity of these asylum claims lays, also, on the problematic approach of the examiners, since the assessment is based on assumptions about how a 'true' LGBTIQ person behaves. Lacking the necessary training, the examination of asylum claims on SOGI grounds is frequently based on a limited understanding of the complexity and subjectivity of the matter (ILGA-Europe 2014).

Non-confirming to the expected gender roles can represent a particular peril for LGBTIQ asylum-seekers. Nevertheless, in the decision-making process reliance on assumptions and on visible markers, or lack thereof, should be completely avoided. In addition, as it has been stated in international instruments concerning the subject, previous heterosexual relationships and parenthood cannot justify the rejection of asylum claims (Marzova 2019). A good practice

has been put in place in Italy, where the factor taken into account is the current sexual orientation (Jansen and Spijkerboer 2011).

Furthermore, as a consequence of such indifferent attitudes towards grasping the intricacy of gender-related aspects, the asylum seekers are often required to answer sexually explicit, or even inappropriate, questions which not only are a violation of privacy but can also hinder the applicant. As a proposed alternative, interviewers should focus on the narrative of the LGBTIQ person with the use of follow-up questions instead of inquiring about past sexual experiences or knowledge of LGBTIQ organisations, bars or local celebrities.

A worrisome measure preferred by the Member States consists of resorting to medical and psychological examinations in order to determine the credibility of claims based on SOGI. Asylum seekers are expected to provide irrefutable evidence of belonging to the LGBTIQ community, and when such proofs are insufficient, decision-makers seek the expertise of psychiatrists and medical doctors. In countries such as Hungary or Bulgaria, the process of granting refugee status to LGBTIQ people includes discussions between applicants and forensic experts, but also psychological tests such as Rostarch and Szondi (FRA 2017). In spite of being considered outdated and with a low degree of relevancy and that homosexuality ceased to be considered a mental disorder by WHO in 1990, the results of such tests are still decision-making factors.

Medical examinations are considered to be infringements of basic human rights and must not be used. This approach has also been formulated in UNHCR's Guidelines and the Yogyakarta Principles. As mentioned earlier, the transposition of relevant acts within the EU borders reveals the specificity of every Member State, creating differentiated systems. One controversial measure discovered in the Czech Republic was the use of phallometric tests in order to determine a person's sexuality (Marzova 2019). Although the applicants are informed and the procedure is consensual, we argue that in light of a well-founded fear of persecution in the country of origin the consent is evidently flawed. Criticism formulated by NGOs and the UNHCR determined the suspension of this practice in 2009.

4.3. The Discretion Requirement

Frequently people all over the globe decide to conceal their sexuality out of fear of being harmed by others. Such attitudes are determined by the reactions of disclosing characteristics not conforming to the expected gender roles, which could consist of abuse, violence, discrimination, torture, murder etc.

An unfortunate common practice of Member States is enforcing the discretion requirement (or an indiscretion requirement, as stated by French authorities) during the assessment of asylum claims introduced on the base of SOGI (Jansen and Spijkerboer 2011). As a consequence, LGBTIQ people's applications are rejected on the grounds that there is no reason to fear as long as they remain discreet. Rejection of granting refugee status can be justified by the concealment of their sexual orientation or gender identity, thus requiring the applicant to have exposed these traits publicly in order to be granted asylum.

The discretion requirement in most cases actually entails that LGBTIQ persons should renounce the expression of their sexual orientation or gender identity, characteristics so fundamental to one's identity, as established earlier. We adhere to the opinion that this criterion 'goes against the core of international and European refugee and human rights law' (Jansen and Spijkerboer 2011) and cannot be a valid reason for denying refugee status.

Following this approach, the Court of Justice of European Union has clarified that requirements consisting of concealment or restraint cannot be valid. Furthermore, the effect of CJEU's case-law determines an adjustment of policies and practices in the Member States in order to prevent national authorities from rejecting asylum claims on the ground that persecution can be avoided through the discretion of the applicant (Cases C-199/12 and C-201/12).

4.4. Late disclosure

In optimal situations, applicants who seek refugee status relate, coherently and comprehensively, all the circumstances that can contribute to enhancing their chances of receiving asylum. This is not always the case for LGBTIQ asylum

seekers, such as fear, previous stigmatisation or persecution are aspects which guide their actions. From a psychological point of view, it is more than understandable. Nevertheless, late disclosure of sexual orientation or gender identity as the real grounds for submitting an application can affect the credibility of LGBTIQ people's cases.

The Asylum Procedures Directive clarifies the procedural aspects that need to be followed in such situations: 'Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure' (European Parliament and Council Directive 2013/32/EU). In practice, however, certain Member States' asylum systems regard the final decisions in asylum claims as having the implications of a *res judicata* (Jansen and Spijkerboer 2011). In other words, if an application has been rejected, only in situations when new facts and circumstances are presented can it be reevaluated.

The problem with this approach, *res judicata*, is that often claims based on SOGI submitted at a later stage are not taken into account. And if they are, most probably the reasons justifying the late disclosure are not assessed. We argue that such aspects are highly relevant to the assessment process and national competent authorities must carefully consider them, especially their role in the broader personal context of the applicant. The disregard of such factors can lead to *refoulement* (coerced return of an asylum seeker who has the right to be granted refugee status in its country of origin, where the risk of persecution is real), which is contrary to international refugee law.

4.5. Country of Origin Information

In asylum claims' assessments every piece of information that can be gathered is important, especially when it concerns sensitive issues such as SOGI. Thus, Member States are under the obligation of ensuring that precise up-to-date information is obtained with regard to such asylum claims (European Parliament and Council Directive 2013/32/EU). The focus of the information

should be on whether or not criminalisation of certain behaviour is in force, on the general attitude of authorities or even if persecutions by non-statal entities occur.

In terms of LGBTIQ persons, the evidence usually gathered in other asylum claims are scarce or difficult to obtain, due to a series of factors such as a lack of reports of persecution or discrimination. When COI is lacking, national authorities tend to equate the absence of statistics with a generally good situation for LGBTIQ people in their country of origin. Such was the case in two separate claims before the Romanian authorities, regarding a transgender woman and two Vietnamese gay men (Jansen and Spijkerboer 2011). We consider that rejection of asylum claims, arguing that the applicants have a generally good situation in their country of origin, cannot infer from a shortage of data. The UNHCR has clarified that when COI is lacking, the applicant's statements are sufficient for the decision-makers to draw conclusions.

While gathering information requires a case-by-case approach, general statistics can facilitate the work of the already overloaded national authorities. This falls within the responsibilities of international and European agencies as well as those of transnational NGOs. To exemplify, one of the main tasks of the European Asylum Support Office is collecting data from countries of origin, drafting reports to present its conclusions.

A common practice within the Member States is using the so-called safe country of origin lists. Safe countries of origin are characterised by a democratic system and political circumstances in which persecutions, torture, inhumane or degrading treatments do not occur. Although created in the scope of creating a secure process for asylum seekers, the downside of such lists is the omission of referencing the specific risks of persecution on grounds of SOGI (FRA 2017). In addition, we consider that states which criminalise certain behaviours, such as consensual same-sex relations, are not safe countries, and thus should be excluded from the lists.

4.6. Interviewers

Interviewers play a crucial role in the asylum-seeking process, in particular when dealing with claims based on grounds such as SOGI. Having established that LGBTIQ applicants necessitate a higher degree of care and a special set of guarantees, the requirement of instructed, specialised, personnel comes as a natural consequence. The peril of unskilled interviewers can hinder applicants, with a higher risk in cases where LGBTIQ persons seeking refugee status have previously been subjected to violence or abuses in their country of origin.

While standards at European and international level exist, and are well-regulated, due to the liberty offered to member states regarding measures of application these criteria are not met. For example, certain ground rules have been established in order to enhance senses of safety and hope amongst applicants: interviews must be confidential, applicants are given the possibility of soliciting an interviewer or interpreter of the same gender (European Parliament and Council Directive 2013/32/EU).

As for special guarantees, the Asylum Procedure Directive mentions that the Member States must provide adequate support, such as sufficient time. In UNHCR's Guidelines, a clear interdiction is stated, stating that interviewers cannot solicit from LGBTIQ applicants evidence consisting of documents or photographs of intimate acts.

Nevertheless, many of the circumstances that arise concern are connected to the approach chose by the interviewers. Appropriate communication is a key element in undergoing this stage of the asylum process since the use of non-offensive vocabulary and appropriate terminology create a 'safe space' for the applicant. Such good practices provide the necessary impetus for LGBTIQ persons to expose the true nature of their fear. Moreover, the progress made by complying with other rules concerning the asylum process can be cancelled if inappropriately trained interviewers process the case. This was the case for Finland, where despite efficiently assessing credibility (through enquiries into the feelings of difference, stigma and harm inflicted upon LGBTIQ applicants), the caseworkers' lack of skills and knowledge delayed the progress (FRA 2017).

In order to achieve the desired outcome, starting 2015 Member States are under the obligation of providing adequate training to asylum authorities' personnel (ILGA-Europe 2014). EASO plays an essential role in training all personnel. Analysing European Commission's first strategy on the protection of LGBTIQ persons a clear focus is placed on finalising the reformation of the Common European Asylum System started in 2016. Furthermore, EASO, the relevant European body in this area, is constantly improving and increasing its training modules. Given that Member States rely on EASO to provide specialised knowledge, this body has been developing two tools that will facilitate the assessment of individual conditions and the interaction with vulnerable applicants by national asylum authorities. Unfortunately, at the moment the participation in EASO's modules on SOGI issues is lower in comparison with its other modules.

5.CONCLUSIONS

This paper discussed the role of the European Union in the development, implementation and enforcement of an effective asylum process for LGBTIQ people. Given its role as both an important global actor and the leader of the fight against discrimination, the EU attempts to create cohesion between Member States in regulating a safer asylum process. In analysing this topic two main aspects have been placed in the focus of attention. Firstly, it has been explained how LGBTIQ persons can be offered refugee status from a legal point of view. Thus, the membership to a particular social group has been interpreted accordingly. Secondly, the assessment of asylum claims relied on various factors which have been put under the microscope. In this part, the essay sought to provide an overview of how such factors weigh in the decision-making process, and particularly to critically analyse the existing problems and actions that EU bodies and institutions undertake to seek improvement. To conclude, although progress is made at a European level, the future's uncertainty is guaranteed by a lack of uniformity across Member States.

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