

LGBTQI+ persons in the asylum procedure

Online practical training
1 & 2 December 2021

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



Background

Within the framework of the 70th anniversaries of the 1951 Convention relating to the status of refugees (1951 Convention) and the European Convention on Human Rights (ECHR), UNHCR and the Council of Europe jointly organized on 25 November 2020 a training on “*applications for international protection based on sexual orientation and/or gender identity (SOGI) or religion in the light of international refugee and European human rights law*”. UNHCR and the Council of Europe are now organizing a follow-up training on substantial and procedural aspects of asylum applications lodged by lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) persons, to which you are kindly invited.

Protection against persecution based on SOGIESC

Unlike race, religion, nationality or political opinion, persecution based on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) is *not* explicitly mentioned in Article 1(A)(2) of the 1951 Convention. States have, though, increasingly interpreted the refugee definition of Article 1(A)(2) as including persons fleeing persecution for reasons of their sexual orientation and/or gender identity, *inter alia* based on the argument that they constitute a social group defined by fundamental immutable characteristics.¹

The ECHR does not include the right to asylum. However, Articles 2 and 3 ECHR have been interpreted by the ECtHR as providing protection against all forms of return to places where there is a real risk that an individual would be subjected to irreparable harm. The Court’s interpretation of Articles 2 and 3 has thus evolved into an expression of the *non-refoulement* principle in many ways similar to Art. 33(1) of the 1951 Convention. Although the two *non-refoulement* obligations are not identical, a risk of persecution according to Article 1(A)(2) of the 1951 Convention is likely to also lead to *non-refoulement* protection under Articles 2 and 3 ECHR. The interpretation of Articles 2 and 3 ECHR might, therefore, inform the interpretation of Art. 1(A)(2) of the 1951 Convention and vice versa.

The ECHR may oblige signatory states to extend protection against *refoulement* to individuals who claim a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country, related to SOGIESC.² The ECtHR has ruled repeatedly that asylum

¹ 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*, HCR/GIP/12/09, 23 October 2012, and also UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 72, available at: <https://www.refworld.org/docid/4f33c8d92.html>.

² See also Council of Europe, *Recommendation CM/Rec (2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, available at: <https://www.coe.int/en/web/sogi/rec-2010-5>; Council of Europe Commissioner for Human Rights, *Open minds are needed to improve the protection of LGBTI asylum seekers*, available at <https://www.coe.int/en/web/commissioner/-/open-minds-are-needed-to-improve-the-protection-of-lgbti-asylum-seekers-in-europe>; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020.

seekers should not be required to lie or to exercise restraint about their sexual orientation or other protected characteristics. Furthermore, ECHR obligations are not only relevant for the outcome of an asylum procedure. They also have consequences for the asylum procedure and prohibit any treatment that is contrary to human dignity.

Substantive and procedural aspects of asylum applications based on SOGIESC

In many parts of the world, LGBTQI+ persons are subject to serious human rights abuses because of their **real or perceived sexual orientation, gender identity, gender expression and sex characteristics, particularly when these do not conform to dominant social and cultural norms**. Persecution, including discrimination from both **State and non-State actors** force LGBTQI+ persons – including children and elderly individuals – to flee their countries of origin or places of habitual residence in search of a safe environment in which they can exercise their rights.

LGBTQI+ persons seeking international protection often experience barriers to the adjudication of their asylum claims. **A lack of systematic and comprehensive data on SOGIESC-based protection claims** makes it difficult to assess overall refugee recognition rates by country or region. Reports show that practices vary and that some jurisdictions are more restrictive than others. This is believed to be partly because some adjudicators and lawyers **do not have a sufficient understanding of what sexual identity actually entails**. They might believe that sexual orientation only relates to sexual acts and ignore the fact that **sexual identity is a much broader concept** that includes being able to meet a partner, engage in a same-sex relationship, socialize and express one's sexuality without fear of experiencing harm. Another related issue is the lack of **understanding of the link between transgression of gender-related legal or cultural norms and claims of persecution** based on sexual orientation and gender identity. **Continued use of the "discretion" requirement**, under which asylum applicants are expected to hide their sexual orientation or gender identity, is also an area of concern.

Stereotypical images of how LGBTQI+ persons act or should act is not only problematic for the adjudication of the claim but also for the interview. **Bias, and invasive questioning**, a lack of confidentiality and privacy in the interview itself and use of insensitive or prejudiced interpreters in interview procedures are examples of practices make it more difficult for applicants to reveal or credibly prove their SOGIESC and well-founded fear of persecution based on SOGIESC. In addition, they themselves may not be in line with the ECHR.³

³ See, for example, ECtHR, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999, especially §§ 117 -123.

Training

According to UNHCR and the Council of Europe, specific training to address these concerns can help to ensure that the need for protection of LGBTQI+ asylum seekers is properly determined in the asylum procedure. To this end and taking into account the busy working schedule of all stakeholders, UNHCR and the Council of Europe are jointly organizing an **online training**, which will take place in the **mornings of 1 and 2 December 2021**. The training will provide:

- an insight into international and European human rights and refugee law standards, ECtHR case-law and UNHCR positions on applicants for international protection with an asylum claim based on SOGI; and
- practical guidance to ensure a correct application of existing standards during the asylum interviews and in the decision-making process at first and second instance.

The training targets the legal community in Switzerland and Liechtenstein, including the asylum authorities, judges and staff of the Federal Administrative Tribunal and legal representatives.

Registration and translation

Those interested in participating in the online training are kindly asked to register no later than 25 November 2021 by sending an email to Margarite Zoeteweyj (zoetewei@unhcr.org). The training will be held in English and German. The availability of simultaneous translation into English, German and French depends on the number of participants that explicitly request translation in the registration mail.

Agenda

Day One

9.00-9.15 Welcome

- ▶▶ Word of welcome from UNHCR / Council of Europe (Eleni Tsetsekou, Head of the SOGI Unit at the Council of Europe)
- ▶▶ Introduction, ground rules and overview of the training (Margarite Zoeteweyj, Protection Associate, UNHCR Office for Switzerland and Liechtenstein)

9.15-10.00 Why are we here?

Facilitator: Dr. Petra Sussner, Humboldt University Berlin

- ▶▶ 9.15-9.30: Input from Dr. Petra Sussner to set the scene and expectations for the training
- ▶▶ 9.30-9.50: Interview with Effie Alexandra Nolasco, co-president of Asile LGBTQI, on her personal experiences in the Swiss asylum system
- ▶▶ 9.50-10.00: questions from the participants

10.00-11.00 Key concepts: Human rights and LGBTQI+ asylum seekers

Facilitator: Laura-Maria Alexandroiu, Council of Europe

- ▶▶ 10.00-10.30 International and European human rights standards in relation to sexual orientation, gender identity and expression, and sex characteristics; Laura-Maria Alexandroiu, Lawyer, Sexual Orientation and Gender Identity Unit, Council of Europe
- ▶▶ 10.30-11.00 Selected ECtHR case-law in relation to asylum claims based on SOGI; Roberta Muscat, Lawyer, European Court of Human Rights, Council of Europe

11.00-11.15 Coffee break ☕

11.15-13.00 SOGIESC and substantive issues in the asylum procedure

Facilitator: Petra Sussner

- ▶▶ 11:15-11:45 Input & Overview: Preliminary rulings on SOGIESC cases (CJEU and national courts); Dr. Petra Sussner
- ▶▶ 11:45-12:10 Break Out Rooms: Case studies (Principles)
- ▶▶ 12:10-12:15 Break
- ▶▶ 12:15-13:00 Discussion Case Studies & Mentimeter Quiz

Day Two

9.00-9.15 Welcome, review of day one and overview of day two

Facilitator: Dr. Petra Sussner

9.15-10.00 Representation of LGBTQI+ asylum applicants in Switzerland

- ▶▶ Mr. Jacopo Ograbek (lawyer with Groupe santé Genève) analyses the Swiss practice with regard to the asylum applications of LGBTQI+ persons in Switzerland from the perspective of a lawyer, representing asylum seekers in the Swiss asylum system

10.00-11.30 Interviewing LGBTQI+ asylum applicants: the creation of a safe space

- ▶▶ 10-10:10: Practical Exercise „Gaydar“
- ▶▶ 10:10-10:30: Input: Heteronormativity: Difficulties & Dilemmas
- ▶▶ 10:30-11:00: Break Out rooms: Exercise „Stepping Out of the Box“ (Alternatives)
- ▶▶ 11-11:30: Discussion & Mentimeter Quiz

11.30-11.45 Q & A, group discussion

11.45-12.00 Close and evaluation