

**PROTECTING LGBT PEOPLE
SEEKING ASYLUM:
GUIDELINES ON THE
REFUGEE STATUS DIRECTIVE**

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Introduction

In 2004, the European Union adopted a Directive setting out the minimum rules governing conditions under which refugee status is granted¹. It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded refugee status, but also the rights of persons once they are recognised as refugees. Amongst those who apply for asylum, some are lesbian, gay, bisexual and transgendered (LGBT). In some cases, they will be fleeing persecution unrelated to their sexual orientation, for example, due to their involvement in political movements opposed to the government of the country of origin. In other cases, an individual's sexual orientation is the principal reason why they have experienced persecution or are at risk of persecution. The Directive will be highly relevant to the processing of such claims within the EU.

The Directive will enter into force on 10 October 2006. By then, all national legislation should be in compliance with the requirements of the Directive. Certain states have special 'opt-out' arrangements for EU immigration legislation. In this case, the Directive does not apply to Denmark, but it applies to all the remaining 24 states. The purpose of these guidelines is to identify the relevant parts of the Directive for LGBT persons and to enable national organisations to assess if national legislation meets the Directive's standards in this area.

¹Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12. Available at:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf

1. Background to the Directive

Although all Member States have ratified the 1951 Geneva Convention on the status of refugees, the way in which this Convention is applied in practice varies considerably. Whilst some Member States have established case-law on awarding asylum in cases of sexual orientation persecution (e.g. Germany, UK), in other states, this has not yet been accepted as a reason for granting refugee status. The European Union wishes to promote better coordination between national asylum systems and, to this end, there was agreement on the need to have common minimum standards on the grounds for awarding refugee status. It must be emphasized that the Directive sets *minimum* standards; it does not prevent national legislation being more generous in the criteria for recognising refugees.

During the negotiation of the Directive, ILGA-Europe and national LGBT organisations campaigned for explicit reference to persecution on the basis of sexual orientation and gender identity to be included within the Directive. Although the final reference to sexual orientation remains somewhat ambiguous, its presence in the Directive represents significant progress. It should also be noted that, while the Directive does not include specific reference to gender identity, it does include references to gender-specific acts which will be discussed below (see section 7).

2. The main contents of the Directive

The Directive sets out the criteria for judging whether someone should be recognised as a refugee. The basic test to determine who qualifies for refugee status is drawn from the Geneva Convention:

'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...²

This definition can be difficult to satisfy. In particular, it normally requires evidence of persecution targeted at the individual applicant. In some cases, there may not be sufficient evidence of persecution against that individual, but the general human rights situation in their country of origin militates against return. In order to deal with such scenarios, the Directive creates a second status, *subsidiary protection*. This will be awarded where individuals do not qualify as refugees, but where there are 'substantial grounds' supporting the presence of 'a real risk of suffering serious harm' if returned to the country of origin. Many asylum applications based on claims of sexual orientation persecution fail because of a lack of evidence. Therefore, the alternative status of subsidiary protection will be very relevant for LGB persons.

In addition to the criteria for these two statuses, the Directive also sets out the basic social rights of refugees and persons receiving subsidiary protection in areas such as employment, healthcare, housing and education. The Directive does not govern the procedures for handling asylum applications, e.g. appeal procedures or 'fast track' processes for certain types of application. These will be governed by another Directive, yet to be adopted.³ Moreover, the current Directive does not set the rules for the living conditions of persons waiting for a decision on their application; this is dealt with by the Reception Conditions Directive.⁴

The following guidelines will focus on the provisions of the Directive with particular importance to LGBT persons. It will examine the assessment of applications; award of refugee status; award of subsidiary protection status; and rules relating to family members.

²Art. 2(c), Directive 2000/83.

³Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2001] OJ C62 E/231.

⁴Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, [2003] OJ L31/18.

3. The assessment of applications for international protection

(a) The source of persecution

Persecution based on sexual orientation can come from a number of sources. In some states, there are discriminatory laws, most notably, laws criminalising consensual sexual relations between persons of the same-sex. These may be actively enforced, in which case the state is a direct source of persecution. In other instances, persecution arises from wider social attitudes and behaviour, for example, harm inflicted by members of the family or homophobic hate crimes. The Directive clarifies that protection must be provided in respect of both state and non-state actors. Article 6 defines the 'actors of persecution and serious harm' as:

'(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm ...'

Article 7 specifies that protection by the state requires reasonable steps to ensure 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution'. Therefore, the Directive would cover a situation where the state could prevent homophobic hate crimes, but tacitly tolerates such crimes by failing to provide proper police or judicial protection for individuals.

Guideline: National legislation must include protection against persecution arising from state actors as well as from non-state actors where the country of origin is unable or unwilling to provide such protection.



(b) Rules of evidence

In practice, it is often difficult for individual applicants to provide sufficient proof of persecution.⁶ This is especially problematic for LGB applicants who may have concealed their sexual orientation in order to minimise the risk of persecution. Moreover, there will be instances where an individual only comes out after departure from the country of origin. The Directive provides some guiding principles that could assist in the handling of sexual orientation claims:⁷

- * **The absence of documentary evidence should not be decisive;**
- * **Credible, coherent and plausible statements by the applicant should be accepted, especially where the applicant explains the absence documentary evidence;**
- * **A risk of persecution arising from acts engaged in after leaving the country of origin can qualify, provided these are consistent with 'convictions or orientations' already held before departure.**



Guideline: National legislation should not make documentary evidence a pre-requisite for granting refugee status. It should permit claims arising from activities undertaken after leaving the country of origin.

⁶See ILGA-Europe's Report on EU's role in ending criminalization of same-sex acts in third countries (2005) available at www.ilga-europe.org (under publications/non-periodic publications).

⁷Para. 37, 'Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe', Report of the Committee on Migration, Refugees and Demography (Council of Europe), Doc. 8654, 25 February 2000.

⁸Art. 4(5) and art. 5(1), 5(2).

4. Qualification for refugee status

There are two elements to qualifying for refugee status: *persecution and persecution for a reason covered by the Directive*.

(a) Persecution

One difficulty experienced by LGB asylum-seekers is that evidence of sexual orientation discrimination in the country of origin is not always regarded as amounting to persecution. For example, in *R (on the application of Ragman) v Special Adjudicator*⁸ an English court accepted that the claimant had suffered discrimination as a gay man in Romania, but it held that this was not of such gravity for it to be treated as persecution. On the one hand, the Directive requires acts of persecution to be 'a severe violation of basic human rights',⁹ which implies a high threshold. On the other hand, the Directive also contains a non-exhaustive list of forms of persecution:

'(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner ...'¹⁰

Whilst discrimination is not defined in the Directive, its preamble makes reference to respecting the Charter of Fundamental Rights (Recital 10), which includes sexual orientation within the list of prohibited grounds of discrimination.¹¹

Guideline: The definition of 'persecution' in national legislation should explicitly include sexual violence, discriminatory laws, discriminatory law enforcement measures and laws / law enforcement operated in a discriminatory fashion.



⁸[2000] All ER 1634.

⁹Art. 9(1)(a).

¹⁰Art. 9(2).

¹¹Art. 21(1), full text available at: http://www.europarl.eu.int/charter/pdf/text_en.pdf

(b) Persecution for a reason covered by the Directive

It is not sufficient simply to demonstrate the presence of persecution; this must be connected to a reason covered by the Directive. The list of protected reasons is based on the 1951 Geneva Convention. Whilst this does not expressly mention sexual orientation, it does include the broad ground of persecution due to 'membership of a particular social group'. This category has been the vehicle for recognising persecution linked to sexual orientation. In 2001, Amnesty International noted that at least 18 countries had granted asylum to individuals due to sexual orientation persecution.¹²

What is the definition of a 'particular social group'? The Directive sets out two general criteria:¹³

- * **the members of the group 'share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it';**
- * **the group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society'.**

Applying these criteria, the Directive states:

'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. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States ...'¹⁴

This statement contains three important elements.

(i) Member States must include within national legislation the possibility for refugee status to be awarded in respect of persecution based on sexual orientation. The Directive recognises that in principle the ground of 'particular social group' can include groups based on sexual orientation.

(ii) In any individual case, it will have to be determined if a social group based on sexual orientation exists in that particular country of origin. In reaching a conclusion on this question, the general criteria mentioned above will have to be applied. There may be argument in relation to some countries whether 'lesbian' or 'gay' identities exist in the sense of a social group. This is ultimately a matter for case-by-case decision by adjudicators.

(iii) Unlawful sexual activity within the EU Member States is not covered by the concept of sexual orientation. This statement does not have implications in practice since no EU state criminalises consensual, adult same-sex sexual relations.

Guideline: National legislation should expressly recognise that 'a particular social group' includes groups defined on the basis of sexual orientation.



¹²Amnesty International, Crimes of hate, conspiracy of silence - torture and ill-treatment based on sexual identity (London: Amnesty International, 2001) 49. Available at:

<http://web.amnesty.org/library/Index/ENGA400162001?open&of=ENG-347>

¹³Art. 10(1)(d).

¹⁴Art. 10(1)(d).

5. Qualification for subsidiary protection status

As mentioned earlier, the Directive also provides an alternative to refugee status which is called 'subsidiary protection'. This status is granted on the basis of the existence of a real risk of 'serious harm' if returned to the country of origin. This is defined as:

**'(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.'**¹⁵

Whilst not specific to sexual orientation, there are countries where homosexuality remains punishable by the death penalty. A more frequent occurrence is torture based on an individual's sexual orientation.¹⁶ Therefore, this alternative to refugee status may be of special relevance to LGB asylum-seekers.



Guideline: National legislation should include provision for subsidiary protection where there is a real risk of the individual facing the death penalty or torture in their country of origin.

¹⁵Art. 15.

¹⁶See ILGA-Europe's Report (cited above, footnote 5) and Amnesty International (cited above, footnote 12).

6. Persecution of transgender persons

While ILGA-Europe had proposed specific reference to persecution based on 'gender identity', this was not included in the final text of the Directive. Nevertheless, the Directive does recognise that 'gender-specific' acts fall within the concept of persecution.¹⁷ In relation to the definition of 'particular social group', the Directive states 'gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'.¹⁸ The meaning of this statement is far from clear. As with sexual orientation, issues are likely to arise concerning whether the group is regarded within society as having a distinct identity. In some countries, it may be possible to demonstrate the existence of a transgender community/identity, but this will require case-by-case determination.

Guideline: National legislation should recognise the existence of gender-specific acts of persecution and that a particular social group may be defined by reference to gender.



¹⁷Art. 9(2).

¹⁸Art. 10(1)(d).

7. The family members of applicants for international protection

Certain provisions within the Directive concern the family of the person applying for refugee status or subsidiary protection. In particular, social rights of refugees, such as access to work, will be extended to family members even where they do not individually qualify for refugee status / subsidiary protection.¹⁹ The definition of family is subject to two general preconditions: (a) the family already existed in the country of origin, and (b) the family members are currently present in the same Member State. This Directive is not, therefore, concerned with immigration rights for family reunification. Subject to these criteria, 'family members' includes:

'the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens'.²⁰

This provision requires unmarried couples to be included in legislation relating to refugees / persons receiving subsidiary protection where:

*** national law or practice provides comparable treatment for married and unmarried couples;**

*** this comparable treatment occurs in areas of law relating to non-nationals.**

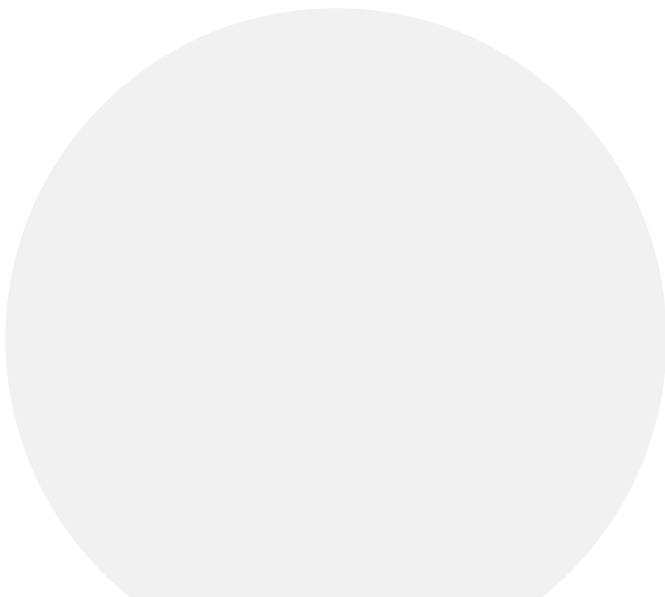
This test will be most easily satisfied in relation to Member States with registered partnership laws. These laws typically provide for similar treatment in immigration matters for married partners and registered partners (e.g. Netherlands, Sweden, Denmark, Finland, UK).

Guideline: *Where national legislation on refugees provides rights to family members, unmarried couples must be included if they are treated in a comparable way to married couples within national law relating to non-nationals.*



¹⁹Art. 23(2).

²⁰Art. 2(h).





IMPLEMENTATION PROCESS - THE NEXT STEPS

By 10 October 2006, Member States must ensure that their domestic legislation complies with the Directive on refugee status. To assist organisations in monitoring implementation of and full compliance of national legislation with the Directive, you will find below a list of steps to take in the coming months.

- 1/ Does the national legislation comply with the Directive?**
- 2/ What if national legislation does not meet this checklist?**

1/ Does the national legislation comply with the Directive?

* Using these guidelines, national legislation or proposed national legislation should be checked for compliance. Administrative practices should also be reviewed to ensure that they do not contravene the provisions of the Directive.

COMPLIANCE CHECKLIST - By 10 October 2006, national legislation should:

- * Include protection against persecution arising from non-State actors
- * Not make documentary evidence a pre-requisite for granting refugee status
- * Explicitly include sexual violence, discriminatory laws and laws or law enforcement operated in a discriminatory fashion in the definition of 'persecution'
- * Expressly recognise that 'a particular social group' includes groups defined on the basis of sexual orientation
- * Include a provision for subsidiary protection where there is a real risk of the individual facing the death penalty or torture in their country of origin
- * Recognise the existence of gender-specific acts of persecution and that a particular social group may be defined by reference to gender
- * Include unmarried couples in the definition of family if national law treats married and unmarried couples in a comparable way in law relating to non-nationals



2/ What if national legislation does not meet this checklist?

- * Identify strategies to initiate a change in national legislation where it is necessary (e.g. lobby parliamentarians, rally support from other NGOs and other civil society organisations, launch a public-awareness campaign, etc.)**
- * Publicise any individual cases where families are negatively affected by the non-compliance and seek legal advice on possible remedies with reference to the Directive**
- * Bring non-compliance to the attention of the Ministry responsible for asylum legislation**
- * Make specific reference to the Directive in any document, public statement and letter to government and elected officials you send regarding the issue of freedom of movement**
- * Raise the issue with other NGOs working on asylum law issues**
- * Bring your concerns to the attention of the Commission. (The relevant office is the Immigration and Asylum Unit, Directorate B 'Immigration, Asylum and Borders', DG Justice, Freedom and Security, European Commission)**
- * Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions**

Further information is available:

ILGA-Europe - a report on the EU's role on criminalisation of same-sex acts in third countries

<http://www.ilga-europe.org/> (under publications/non-periodic publications)

Directorate-General for Justice and Home Affairs - refugee definition:

http://europa.eu.int/comm/justice_home/doc_centre/asylum/refugee/doc_asylum_refugee_en.htm

European Council on Refugees and Exiles (ECRE):

<http://www.ecre.org/>

Amnesty International - European Union Office:

<http://www.amnesty-eu.org/>



In 2004 the European Union adopted a Directive setting out the minimum rules governing the award of refugee status. This new EU legislation, which defines criteria for being granted refugee status as well as the rights of people recognised as refugees, breaks ground by including specific reference to sexual orientation. As a result, the Directive will be highly relevant to the processing of asylum claims made by lesbian, gay, bisexual and transgendered people (LGBT)

The purpose of these guidelines is to identify the relevant parts of the Directive for LGBT persons and to enable national organisations to assess whether national legislation meets the Directive's standards in this area.