

3. Protection: violence and asylum

3.1. Introduction

There is a growing amount of evidence demonstrating that a significant number of LGBT persons in Council of Europe member states experience physical violence, harassment or assault because of their real or perceived sexual orientation and gender identity. Such violence may take different forms but is often driven by deep hatred, intolerance, disapproval or rejection of the sexual orientation or gender identity of the person. A commonly used term in this regard is “hate crime” or “hate-motivated violence”, which may be fuelled by speech and public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards LGBT people. Such speech can be expressed by fellow citizens, but also by political and religious leaders or other opinion makers, whether circulated by the press or the Internet. Sometimes state actors are involved in violence or harassment against LGBT persons, and in some instances family members.

Violence against LGBT persons is often not recognised and frequently ignored as a problem. The majority of member states of the Council of Europe have no explicit legal basis which recognises sexual orientation and gender identity in hate crime legislation. The Committee of Ministers has emphasised the need for effective protection from hate crimes and other hate-motivated incidents.¹²⁴

When violence or cumulative harassment, assault or other forms of harm reach a particular severity and threshold, LGBT persons may decide to flee their home town or even their country. There are many countries outside Europe where LGBT persons face serious human rights violations and persecution, including those due to criminalisation of consensual same-sex acts. In approximately 76 countries worldwide laws are in force which prohibit consensual same-sex sexual acts between adults.¹²⁵ In seven countries the death penalty is applied to homosexuals (Iran, Mauritania, Nigeria, Saudi Arabia, Sudan, United Arab Emirates and Yemen). In this regard, a joint statement was delivered in December 2008 at the United Nations General Assembly condemning killings, torture and arbitrary arrests of LGBT persons and other human rights violations.¹²⁶ The statement was supported by 67 states, including 41 member states of the Council of Europe. Some 85 states sponsored a similar statement in March 2011 at the UN Human Rights Council, among which were 43 Council of Europe member states.¹²⁷

124. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, paragraphs 1-5.

125. ILGA, “State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults”, May 2010, p. 4.

126. General Assembly, Sixty-third session, Agenda item 64(b), 22 December 2008, A/63/635, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.

127. United Nations, Human Rights Council, 16th session, Agenda item 8, 22 March 2011, Follow-up and implementation of the Vienna Declaration and Program of Action.

3.2. Violence against LGBT persons

Hate-motivated violence and hate crimes against LGBT persons take place in all Council of Europe member states.¹²⁸ Expert reports conclude that “homophobic hate crimes and incidents often show a high degree of cruelty and brutality. ... They are also very likely to result in death. Transgender people seem to be even more vulnerable within this category.”¹²⁹ Such attacks often occur in public places and include attacks on LGBT venues, such as attacks on gay discos or on the premises of LGBT organisations. Attacks may also happen in the street when gay, bisexual or lesbian couples simply hold hands as a sign of affection for each other. Attacks which result in death, or outright murders, are not uncommon either.

National legislation in Council of Europe member states

The incitement of hatred, violence or discrimination on grounds of sexual orientation is considered as a criminal offence in only 18 member states (Andorra, Belgium, Croatia, Denmark, Estonia, France, Iceland, Ireland, Lithuania, Monaco, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom¹³⁰). Similarly, homophobic intent is accepted as an aggravating factor in common crimes in only 15 member states: Andorra, Belgium, Croatia, Denmark, France, Greece, Lithuania, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. In only two member states is gender identity or transphobic hate crime explicitly addressed in hate crime legislation (see Map 3.1).¹³¹

In the remaining member states sexual orientation and/or homophobic motivation are neither a criminal offence nor an aggravating factor. However, several of these states have provisions in the criminal law that could include hate crime or hate speech against LGBT persons under definitions such as “other population group” or “any social group”.¹³²

128. Poelman M. and Smits D., “Agressie tegen holebi’s in Brussel-Stad”, Apeldoorn, Antwerp, 2007; Tiby E., “Hatbrott? Homosexuella kvinnor och mäns berättelser om utsatthet för brott”, Stockholms universitet Kriminologiska institutionen, 1999; MANEO – the gay Anti-Violence-Project in Berlin; Buijs L., Duyvendak J. W. and Hekma G., “Als ze maar van me afblijven”, Amsterdam School for Social Science Research, Amsterdam, 2008; Abramowicz M. (ed.), “Situation of bisexual and homosexual persons in Poland”, Kampania Przeciw Homofobii and Lambda Warsaw, 2007.

129. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual report for 2006”, OSCE/ODIHR, Warsaw, 2007, p. 53.

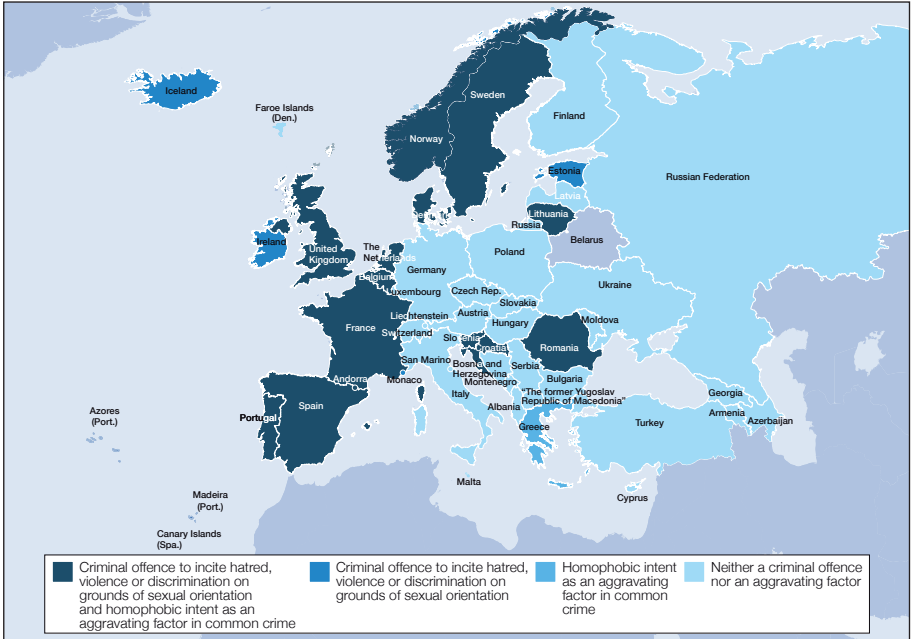
130. England and Wales have a specific incitement criminal offence on grounds of sexual orientation and gender identity. They also have a homophobic intent statutory aggravation. Scotland has no specific incitement criminal offence on grounds of sexual orientation or gender identity but has both homophobic and transphobic statutory aggravations for common crime.

131. This overview is based on European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010; OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010; national contributions (legal reports).

132. However, in four countries, provisions in the criminal law against incitement to hatred cannot be extended to LGBT persons as they are restricted to predefined groups only (Austria, Bulgaria, Italy and Malta). Source: European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, pp. 42-43.

Regarding gender identity only Sweden and part of the United Kingdom (Scotland) explicitly address gender identity, gender expression or transphobic hate crime or hate speech in the criminal law. In a few member states the prohibition of incitement to hatred, discrimination or violence on the ground of “sex” or “gender” may include violence against transgender persons. Transphobic hate crime or hate speech may also be considered to be categorised under the heading of homophobia, but this is not clear from the national legislative frameworks.

Map 3.1: Hate crime legislation inclusive of sexual orientation



Perpetrators of violence against LGBT persons

Visibility of LGBT persons in the public space is a common predictor for homophobic and transphobic attacks to take place – the more visible LGBT persons are, and the more they are recognised or perceived as LGBT, the more they run the risk of being exposed to aggression. Transgender persons may be attacked due to their physical appearance, which may not fully correspond to the gender in which they are living, making them more visible and thus a potential object for ridicule, hatred and the like. Research conducted for this report points to the fact that LGBT persons, to a large extent, conceal their identity in public settings throughout the member states in order to avoid possible violent reactions. A study in Slovenia found that “gays and lesbians resort to mimicry to adjust to the heteronormativity of public spaces. They outwardly redefine their partnership and re-contextualise it as ‘just a friendship’. Only in circumstances that appear sufficiently safe do some allow the expression of intimacies that point to their sexual status. Gays and lesbians

are, as a rule, aware of the environment in general and the heteronormativity determining this environment.”¹³³

Perpetrators of violent attacks against LGBT persons do so because of their rejection of what they label as “visible” homosexuality or transgressing traditional gender roles. It is important to note that violence also happens against persons who are perceived to be LGBT even when they are not. The perpetrators are often unknown to the victim, though in some cases relatives or colleagues are the perpetrators. Lesbian women are more likely to be assaulted by older perpetrators, often acting on their own, and often by somebody they know. In some instances, for example LGBT sex workers, the client could be the perpetrator.

The perpetrators of anti-LGBT violence are primarily men and often young men in organised groups. Several interlocutors during the study linked the occurrence of hate crime against LGBT persons with broader nationalist, xenophobic or racist tendencies in society who attack anyone perceived as an outsider.¹³⁴ In a few member states, among which the Netherlands and Germany, some public debate has taken place on alleged higher percentages of members of ethnic minority or migrant communities in committing hate-motivated incidents against LGBT persons. There is, however, no clear trend in this direction and research is scarce. However, these reports have contributed to understanding some of the motives of perpetrators.¹³⁵

Violence, harassment and the collection of sensitive private data by state actors

Interlocutors in some member states reported incidents of violence and harassment against LGBT persons perpetrated by state actors.¹³⁶ In Turkey harassment and violence towards LGB and especially transgender persons in Istanbul, Ankara, Mersin and Eskisehir was flagged as a major concern by several interlocutors, including in a report published by the Istanbul Provincial Human Rights Board.¹³⁷

133. Švab A. and Kuhar R., *The Unbearable Comfort of Privacy: Everyday Life of Gays and Lesbians*, Politike: Ljubljana, 2005, pp. 95-96, also quoted in European Union Agency for Fundamental Rights (FRA), “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation”, 2009, p. 35.

134. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 42; National contribution (sociological report) on Serbia, p. 7; National contribution (sociological report) on Russian Federation, pp. 25-26.

135. For example Buijs L., Duyvendak, J. W. and Hekma G., “Als ze maar van me afblijven”, Amsterdam: Universiteit van Amsterdam, Amsterdam School for Social Science Research, 2008.

136. FRA national contribution (sociological report) on Greece, pp. 5, 11; FRA national contribution (sociological report) on Romania, p. 5; national contribution (sociological report) on Albania, p. 8; national contribution (sociological report) on Armenia, pp. 3, 9-11; national contribution (sociological report) on Georgia, pp. 8-10; national contribution (sociological report) on “the former Yugoslav Republic of Macedonia”, pp. 8-9; national contribution (sociological report) on Moldova, pp. 8, 12-13; national contribution (sociological report) on Serbia, pp. 9-10; national contribution (sociological report) on Turkey, pp. 7, 9-12; national contribution (sociological report) on Ukraine, p. 16.

137. Report of TC Istanbul Valiliği, Sayı B054VLK4340300/521/3764; National contribution (sociological report) on Turkey, p. 11; Human Rights Watch, “We Need a Law for Liberation” – Gender, Sexuality, and Human Rights in Changing Turkey”, May 2008, p. 75.

In some member states NGOs reported that law-enforcement agencies have kept records on a person's sexual orientation. For example, in Austria and the United Kingdom police have kept databases of gay and bisexual men who were convicted in the past for consensual, although then illegal, same-sex acts. These records are still visible on criminal records and may show up, for example when employers check the credentials of job applicants. Whereas in the United Kingdom this has led to the introduction of legislation remedying this situation¹³⁸ some Austrian citizens have filed complaints at the European Court of Human Rights.¹³⁹

In Ukraine, NGO reports document experiences of Ukrainian gay men who were arrested in a park late at night, subsequently photographed by police and had their fingerprints taken.¹⁴⁰ In a pending case before the European Court of Human Rights an applicant from Romania claims he has been detained, questioned, photographed and fingerprinted because of his homosexuality.¹⁴¹ Again in Ukraine, during the investigation of a criminal case connected with the murder of a gay man, NGO reports refer to the police raiding the gay club "Androgin" in Kiev during the night of 10 to 11 April 2009. Over 80 people were allegedly detained and taken to a police station. Some people reported rude and abusive treatment by police officers and also claimed that the officers used force against them. At the police station, the officers took fingerprints and photos of those detained.¹⁴² These reports come six years after the Parliamentary Assembly of the Council of Europe invited the Ukrainian authorities "to investigate allegations of police harassment of the lesbian and gay community and to take disciplinary action as appropriate".¹⁴³

In Azerbaijan during 2009 police raided bars which LGBT persons visit and arrested almost 50 people. Police reportedly held the individuals and threatened to expose their sexual orientation publicly unless they paid a bribe.¹⁴⁴ A film documentary from Azerbaijan in which several people testify about their experiences also points to such incidents of blackmail.¹⁴⁵

UN treaty bodies and UN special rapporteurs have, in relation to Azerbaijan, the Russian Federation and Turkey, urged these states to end acts of violence

138. The UK Government has introduced the Protection of Freedoms Bill which, among other issues, will expunge convictions for now-legal consensual same-sex sex from criminal records.

139. European Court of Human Rights, *F.J. v. Austria*, Application No. 2362/08, case pending; *E.B. v. Austria*, Application No. 26271/08, case pending; *H.G. v. Austria*, Application No. 48098/07, case pending.

140. Nash Mir, "Overview of LGBT human rights situation in Ukraine in 2010", Kiev, Ukraine, p. 5.

141. European Court of Human Rights, *Adrian Costin Georgescu v. Romania*, Application No. 4867/03, case pending.

142. Ukraine national contribution (legal report) p. 40.

143. Resolution 1346 (2003), Honouring of obligations and commitments by Ukraine, adopted by the Assembly on 29 September 2003 (27th Sitting), paragraph 8, iii.

144. US Bureau of Democracy, Human Rights, and Labor, US Department of State "Human Rights Report: Azerbaijan", 2009, section 1, paragraph c.

145. ILGA-Europe and COC Netherlands, "Everyone has the right to life, liberty and security of person". Documentary.

and harassment by the police against LGBT persons.¹⁴⁶ In some instances LGBT human rights defenders have been a target of such harassment and violence. The UN Special Representative on the situation of human rights defenders pointed out in 2007 that “In numerous cases ... police or government officials are the alleged perpetrators of violence and threats against defenders of LGBTI rights. In several of these cases ... police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights.” The Special Representative reminded states of their responsibility for protecting defenders against violence and threats.¹⁴⁷

Violence in the family

While many LGBT persons meet acceptance and respect in the family, many others may have to hide their sexual orientation from family members because they are afraid of bad repercussions. Systematically collected data on the scale of the problem are unavailable, but NGOs report the following: in France, 16% of LGB persons reported they had been beaten at home by homophobic family members.¹⁴⁸ Homophobic violence in the family was also reported by lesbian and bisexual women in, among others, Georgia¹⁴⁹ and Azerbaijan.¹⁵⁰ Transgender people in Moldova reported¹⁵¹ beatings from their fathers in an attempt to “cure” them and similar reports came from other countries. A survey in Scotland (United Kingdom) found 73% of the respondents experiencing at least one type of transphobic emotionally abusive behaviour from a partner or ex-partner; 47% of respondents had experienced some form of sexual abuse from a partner or ex-partner; 17% threatening behaviour; 11% physical violence; and 4% sexual abuse.¹⁵² An NGO report on Azerbaijan in 2009 stated that the “most frank displays of violence against lesbian and bisexual women occur in the home, and include verbal and physical abuse, confinement indoors, compulsion, compulsory marriage” as well as the threat of crimes to avenge family honour.¹⁵³ The prevalence of domestic violence against LGBT persons is difficult to assess, but LGBT NGOs described family pressure, harassment, control and, in some cases, violence as invisible or under-reported. More research is needed to identify the level of violence or

146. See Concluding Observations on Azerbaijan, CCPR/C/AZE/CO/3, 13 August 2009, paragraph 19; Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Addendum: Summary of cases transmitted to Governments and replies received, A/HRC/10/12/ADD.1, 4 March 2009, paragraphs 2574-2577 (Turkey); Concluding Observations on Russian Federation, CCPR/C/RUS/CO/6, 29 October 2009, paragraph 27.

147. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, A/HRC/4/37, 24 January 2007, paragraph 96.

148. National contribution (sociological report) on France, p. 6.

149. National contribution (sociological report) on Georgia, p. 11.

150. “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, submitted to the UN Human Rights Committee, July 2009, p. 13.

151. National contribution (sociological report) on Moldova, p. 14.

152. Roch A., Ritchie G. and Morton J., “Out of Sight, Out of Mind? Transgender People’s Experience of Domestic Abuse”, Scotland: LGBT Youth Scotland, Equality Network, 2010, p. 5.

153. “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, submitted to the UN Human Rights Committee, July 2009, p. 13.

rejection LGBT people experience in their families. A positive recent development in this regard is the adopted Council of Europe Convention on preventing and combating violence against women and domestic violence, as it will also apply to lesbian, bisexual and transgender women.¹⁵⁴

Hate speech

Speech which is likely to incite, spread or promote hatred against LGBT persons may create a climate where hate-motivated violence against them becomes an accepted phenomenon. While Article 10 of the European Convention on Human Rights guarantees the freedom of expression, this right is not absolute. Restrictions are permitted on speech or other expressions which incite to xenophobia, anti-Semitism and the like¹⁵⁵ as such speech is incompatible with the values proclaimed and guaranteed by the Convention. Two Committee of Ministers' recommendations¹⁵⁶ as well as the Council of Europe's White Paper on Intercultural Dialogue¹⁵⁷ call on the member states to take steps to combat speech which are likely to produce the effect of inciting, spreading or promoting hatred or discrimination. In Recommendation CM/Rec(2010)5, the Committee of Ministers points to the fact that a "specific responsibility is vested with the public authorities and officials to refrain from statements that may be understood as legitimising hatred or discrimination and to promote tolerance and respect for their human rights".¹⁵⁸ The Commissioner for Human Rights has publicly spoken out against hate speech on numerous occasions.¹⁵⁹

During the research for this report numerous examples of often strong hate expressions were identified in Council of Europe member states. For example in relation to attempts to organise a Pride march in the Russian Federation a regional governor was quoted as saying: "Tolerance?! Like Hell! Faggots should be torn apart. And their pieces should be thrown in the wind."¹⁶⁰ In 2009, when organisers of a Gay Pride event in Serbia held a press conference, protestors outside were reportedly shouting: "Faggots, we will kill you."¹⁶¹ In Bosnia and

154. The convention was opened for signature in Istanbul on 11 May 2011.

155. See, for example, European Court of Human Rights, *Incal v. Turkey*, Application No. 22678/93, judgment of 8 June 1998.

156. Committee of Ministers Recommendation No. R (97) 20 on "hate speech", adopted on 30 October 1997; Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 6-8.

157. The Council of Europe White Paper on Intercultural Dialogue "Living Together As Equals in Dignity", section 5.1, 2008.

158. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 6-8.

159. Viewpoint, "Homophobic policies are slow to disappear", 16 May 2007; Viewpoint, "Gay Pride marches should be allowed – and protected", 24 July 2006.

160. Statement of Mr Betin, Governor of the Tambov Region, as quoted in ILGA-Europe, "Human Rights + Responsibility + Respect. A contribution to the Council of Europe conference: Human Rights in Culturally Diverse Societies: challenges and perspectives", p. 3; GayRussia.ru, 29 July 2008, "Activists intend to take the case to courts up to Strasbourg".

161. Human Rights Watch, Letter to the President of the Republic of Serbia, 16 November 2009.

Herzegovina, a YouTube clip was posted representing a direct death threat to one of the organisers of the Queer Sarajevo Festival in 2008, depicting her being beheaded. The latter situation led the Special Rapporteur on the Situation of Human Rights Defenders, together with the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, to send a communication to the Bosnian authorities.¹⁶² A communication was also sent by the Special Rapporteur to the Bulgarian authorities on 27 June 2008 regarding a Gay Pride Parade scheduled to take place in Sofia the day after, expressing her serious concerns for “speech which may incite hatred”.¹⁶³ Other examples of web-based hate groups were reported from Latvia and Portugal.¹⁶⁴

The European Court of Human Rights has shown little tolerance for hate statements, in particular when they are used by authorities as an argument for defending a ban on a Gay Pride march. In the landmark case *Alekseyev v. Russia*¹⁶⁵ the Court stated:

*As regards any statements calling for violence and inciting offences against the participants in a public event, such as those by a Muslim cleric from Nizhny Novgorod, who reportedly said that homosexuals must be stoned to death ..., as well as any isolated incidents of threats of violence being put into practice, they could have adequately been dealt with through the prosecution of those responsible. However, it does not appear that the authorities in the present case reacted to the cleric's call for violence in any other way than banning the event he condemned. By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order.*¹⁶⁶

Data on violence against LGBT persons

Official data on the scale and nature of police violence against LGBT persons and family violence is scarce. Official data on hate crimes and hate incidents are also scarce but data collected and published annually by the OSCE/ODIHR show that 15 Council of Europe member states collect data on crimes committed against LGBT persons (Andorra, Belgium, Croatia, Cyprus, France, Germany, Iceland, Ireland, Liechtenstein, the Netherlands, Norway, Serbia, Spain, Sweden and the United Kingdom).¹⁶⁷ However, not all these 15 member

162. Communication by the Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 27 November 2008, referred to in *Sexual Orientation and Gender Identity in Human Rights Law: Reference to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, p. 38.

163. *Ibid.*, p. 39.

164. The Latvian NoPride Association and the Portuguese Partido Nacional Renovador.

165. European Court of Human Rights, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

166. *Ibid.*, paragraph 76.

167. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, pp. 18, 77-81.

states actually provided data to ODIHR. In fact only four states (Germany, Norway, Sweden and the United Kingdom) submitted data on homophobic hate crimes to ODIHR and only two of those states, Sweden and the United Kingdom, submitted data figures on hate crimes committed against transgender persons. Some other member states provided information on incidents but did not have comprehensive data sets. Yet other member states, such as Finland, do collect data on hate crime but do not necessarily disaggregate according to the motive or target group,¹⁶⁸ which makes it hard to get a complete overview of the scale of homophobic and transphobic hate crimes and hate incidents.

It can be observed that the United Kingdom has the most comprehensive data collection system on hate crimes.¹⁶⁹ In 2007, 988 criminal court cases were initiated against suspects of LGBT hate crimes; 759 persons were convicted, while in 2009 these figures had risen to 1078 and 868 respectively.¹⁷⁰ Norway reported that in 2009 it recorded 36 crimes committed against LGBT persons based on bias motivation.¹⁷¹ Germany reported that in 2009 it recorded 164 crimes motivated by a bias against sexual orientation, 45 of which were violent crimes.¹⁷² In Sweden, in 2008, 1055 hate crimes against LGB persons were recorded of which 1046 had a homophobic motive. In the same year 14 crimes were recorded against transgender persons.¹⁷³ In 2009, Sweden recorded 1060 hate crimes against LGB persons of which 1040 were homophobic crimes. In the same year the police recorded 30 hate crimes targeting transgender persons.¹⁷⁴ Public authorities in Turkey counted seven murdered transgender persons in 2008 and 2009.¹⁷⁵

One should, however, keep in mind that these figures cannot be easily compared. As the OSCE/ODIHR observes: “there is still a paucity of clear, reliable and detailed data on the nature and scope of hate crimes in the OSCE area. ... Even where statistics exist, they are not always disaggregated according to bias motivation, type of crime or outcome of prosecution. ... Since different participating States keep statistics in different manners, it is also not possible to make comparative judgments on the extent of hate crimes.”¹⁷⁶ Indeed,

168. FRA national contribution (legal report) on Finland, p. 10.

169. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2007”, Warsaw, 2008.

170. FRA national contribution (legal report) for the United Kingdom, p. 100.

171. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 79.

172. *Ibid.*, p. 78.

173. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2008”, Warsaw, 2009, p. 56.

174. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 80.

175. Information provided by the Turkish authorities to the Office of the Commissioner for Human Rights. Three convictions were found by the courts.

176. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p.14.

some data refer to the number of court cases initiated, other data refer to the number of persons convicted, and yet other data refer to hate crimes or hate incidents recorded or police reports registered.

In addition to the data provided by member states additional information for this report has been identified in studies carried out by NGOs or expertise centres.¹⁷⁷ These studies argue that hate crimes and hate-motivated incidents against LGBT persons are experienced by significant numbers of people. ILGA-Europe lists examples of hate killings against LGBT persons in the period 2005-2008 in the Netherlands, Portugal, the Russian Federation, Turkey and the United Kingdom.¹⁷⁸ The Transgender Murder Monitoring Project of Transgender Europe recorded 36 hate killings in Council of Europe member states in the period 2008 to November 2010.¹⁷⁹ Italy and Turkey (thirteen cases each), Spain (three cases), Germany and the United Kingdom (two cases each), Albania, Portugal and Serbia (one case each). Most of these victims were transgender women, and a significant number of them worked as irregular migrants in the adult entertainment industry. In a 2008 report by London's Metropolitan Police¹⁸⁰ 65% of lesbian and transgender women surveyed experienced incidents that they considered as homophobic or transphobic in nature. Nearly two thirds (64%) of the women having experienced such incidents said they had a short-term or long-term impact on them. Of the incidents mentioned by these women, 83% went unreported to the police. Other studies in the United Kingdom¹⁸¹ provide similar accounts of experiences of harassment, physical or sexual abuse. In Sweden, a third of the transgender respondents in a survey reported that they had been the victim of violence, abuse or harassment at some point in their lives.¹⁸²

Obstacles in understanding data on hate crime

There are several obstacles regarding data on hate crime against LGBT persons: first of all, the lack of a legal basis recognising sexual orientation and gender identity in hate crime legislation in a majority of member states. As the previous section described, only less than half of the member states have relevant criminal law provisions. Regarding gender identity, the lack of recognition of gender identity in hate crime legislation is even more worrisome.

A second obstacle is the low number of victims who report a hate-motivated incident or a hate crime to the police. According to an NGO study in Poland,

177. For example "Geweld tegen homoseksuele mannen en lesbische vrouwen. Een literatuuronderzoek naar praktijk en bestrijding". Movisie, Netherlands, 2009.

178. Submission to the Council of Europe Expert Committee: ILGA-Europe, "The Preparation of a Recommendation on Discrimination Based on Sexual Orientation and Gender Identity", February 2009, paragraph 57-59.

179. Transgender Europe, Trans Murder Monitoring project.

180. Metropolitan Police, "Women's Experience of Homophobia and Transphobia: Survey Report", London, 2008, p. 16.

181. Dick S., "Homophobic Hate Crime – The Gay British Crime Survey 2008", Stonewall, 2008, p. 3; Turner L., Whittle S. and Combs R., "Transphobic Hate Crime in the European Union", Press for Change, London, 2009, p. 18.

182. Statens Folkhälsoinstitut, "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", FHI, Östersund, 2005, pp 41, 68.

15% of hate incidents against LGBT persons are reported.¹⁸³ In the United Kingdom this figure is 23% according to a NGO survey.¹⁸⁴ Research confirms that many victims of a hate crime do not report this because of fear of exposure of their sexual orientation or gender identity or because of a lack of trust in the judiciary.¹⁸⁵ Others are reluctant to go to the police because they have previously encountered police officers being reluctant to believe in the existence of a homophobic motive for a crime or incident. In France, Greece, Hungary and Italy, more than half of the transgender respondents in a NGO hate crimes study were not confident of the police.¹⁸⁶ Inactivity by the police in reply to transgender persons' calls has also been reported, for example in Croatia.¹⁸⁷

Anonymous reporting schemes have been initiated in the Netherlands, Denmark and Slovenia in an attempt to get a more realistic view of the scale of the problem.¹⁸⁸ Hate incidents and hate crimes can be reported anonymously on the Internet. Another tool is the "third party reporting system", where victims or witnesses of hate crime can report the incidents online or by phone. Examples of such initiatives were identified in France, Germany and the United Kingdom.

A third obstacle is the lack of skills and awareness as well as concrete tools among law-enforcement agencies to register cases of hate crime. The element of hatred is not always recognised by the police when a victim reports the incident. Hate crimes may be seen as an act of "hooliganism" or bodily injury. If not registered by the police as such, the hate motivation is likely not to be considered as an aggravating factor during the investigation with the result that the homophobic or transphobic motive becomes indistinguishable during the prosecution of hate crime cases. For example, a study in Sweden¹⁸⁹ and a NGO report on Turkey¹⁹⁰ show that the bias motivation is sometimes not taken into account in the trial and sentencing. However, regarding Turkey, in 2007 a court recognised for the first time an element of hate motivation and elements of prejudice in a relevant case.¹⁹¹ In another case in 2009 a Turkish

183. Abramowicz M. (ed.), "Situation of bisexual and homosexual persons in Poland", Kampania Przeciw Homofobii & Lambda Warsaw, 2007, p. 15.

184. Dick S., "Homophobic Hate Crime – The Gay British Crime Survey 2008", Stonewall, 2008.

185. European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, pp. 43-45; national contribution (sociological report) on Armenia, p. 11; national contribution (sociological report) on Croatia, p. 9; national contribution (sociological report) on Georgia, p. 11; national contribution (sociological report) on Moldova, pp. 11-12; national contribution (sociological report) on Serbia, p. 10.

186. Turner L., Whittle S. and Combs R., "Transphobic Hate Crime in the European Union", Press for Change, London, 2009, p. 55.

187. National contribution (legal report) on Croatia, p. 20.

188. Quoted in European Union Agency for Fundamental Human Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009, p. 43.

189. Tiby E., "En studie av homofoba hatbrott i Sverige", Forum för levande historia, Stockholm, 2006, p. 11.

190. Human Rights Watch, "We need a Law for Liberation, Gender, Sexuality and Human Rights in a Changing Turkey", 2008, pp. 24, 47.

191. Ankara 11th High Criminal Court, case number: 2007/250, decision number: 2008/246.

court acknowledged that the perpetrator committed the crime with a homophobic or transphobic motivation.¹⁹² It should be recalled that the European Court of Human Rights has held that there is a positive obligation under the Convention for authorities to take all reasonable steps to uncover and establish any bias motive in a crime as part of an effective investigation¹⁹³ and to investigate and punish bias-motivated criminal acts.

The OSCE/ODIHR designed the former Law Enforcement Officer Programme (LEOP) on combating hate crime, which has been piloted in Spain and Hungary, fully implemented in Croatia and in the process of full implementation in Poland and Bosnia and Herzegovina. The newly revised programme, Training Against Hate Crime for Law Enforcement (TAHCLE), is pending implementation in Bulgaria, pursuant to a signed agreement. A pilot project in nine European countries (Denmark, France, Germany, Ireland, Latvia, Portugal, Romania, Sweden and the United Kingdom) has been set up to focus on how the police handle hate crime cases. The project has developed a toolkit for handling hate crimes, including a database for reporting, a website with information about hate crime, training material for police and information material for LGBT people.¹⁹⁴

3.3. Asylum on the grounds of sexual orientation and gender identity

Violence and hatred directed at LGBT persons may be of such severity and/or framed by an absence of state protection that LGBT persons see no other solution than to flee their country of origin. While most LGBT asylum seekers in Council of Europe member states come from outside the Council of Europe geographical area, there have also been incidental reports of refugees who have fled from one Council of Europe member state to another.¹⁹⁵ While international and European human rights standards have been adopted in this field, this chapter demonstrates that the implementation of these standards still faces serious obstacles.

International standards

When the situation in the home country amounts to a risk for LGBT persons to be subjected to persecution, including torture or other cruel, inhuman or degrading treatment or punishment, they have the right to seek and enjoy

192. Ankara 6th High Criminal Court, decision of 15 October 2009.

193. These are positive obligations flowing from Articles 2 and 3 of the European Convention on Human Rights read in conjunction with Article 14. European Court of Human Rights, *Cobzaru v. Romania*, Application No. 48254/99, judgment of 26 July 2007; *Secic v. Croatia*, Application No. 40116/02, judgment of 31 May 2007, and *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, judgment of 26 July 2007.

194. The project website for Tracing and Tackling Hate Crimes against LGBT Persons: www.stophatecrime.eu.

195. For example, a refugee from the Russian Federation (Ingushetia) was granted asylum in Poland in 2007 on the ground of her sexual orientation (FRA national contribution (legal report) on Poland, p. 30). Another refugee from the same region was granted asylum in 2006 in France. In 2006 a citizen from Bosnia and Herzegovina was granted subsidiary protection in France (FRA national contribution (legal report) on France, p. 28).

asylum in another country. This is enshrined in Article 14 of the Universal Declaration of Human Rights and further elaborated in the 1951 Convention Relating to the Status of Refugees¹⁹⁶ (hereafter the 1951 Convention) and its Protocol of 1967.¹⁹⁷ States Parties to the 1951 Convention are prohibited from expelling or returning a refugee to a country (*non-refoulement*) where his or her life or freedom would be threatened. This is an obligation to ensure that asylum seekers are not returned or sent to a country where their life is threatened or where they face the risk of torture, inhuman or degrading treatment or punishment. Complementary to refugee status is the subsidiary protection in situations where the individual does not fulfil the requirements for obtaining refugee status but is in need of international protection. Subsidiary protection may be invoked notably on grounds relating to the rights and freedoms contained in the UN Convention against Torture and other Cruel Inhuman or Degrading Treatment, the UN Covenant on Civil and Political Rights or the European Convention on Human Rights.

Member states of the Council of Europe also have the positive obligation under the European Convention on Human Rights to provide protection in order to guarantee the right to life (Article 2) and to prohibit torture, inhuman or degrading treatment or punishment (Article 3). Protection against *refoulement* is further granted under the ground of Article 3 of the European Convention on Human Rights, which thus goes beyond the mere scope of the 1951 Convention. As a well-established principle, the prohibition of torture and inhuman or degrading treatment or punishment, includes an obligation for contracting states not to expel a person to a country where there are substantial grounds to believe that that person will face a real risk of being subjected to treatment contrary to Article 3.¹⁹⁸ Two cases in this regard are pending before the European Court of Human Rights.¹⁹⁹ They involve a lesbian woman from Zimbabwe and a homosexual man from Iran who fear that they run the risk of being subjected to ill-treatment if returned to their countries of origin.

The Committee of Ministers stressed the need for the member states bound by the 1951 Convention²⁰⁰ to recognise that a well-founded fear of persecu-

196. United Nations, Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429(V) of 14 December 1950.

197. United Nations, Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force 4 October 1967. Of the 47 member states of the Council of Europe, 44 are parties to both the 1951 Convention and to the 1967 Protocol. Andorra and San Marino are not parties to the Convention and Monaco is party to the 1951 Convention only.

198. European Court of Human Rights, *Soering v. United Kingdom*, Application No. 14038/88, judgment of 7 July 1989, Series A No. 161, p. 35, paragraph 88, and *Chahal v. United Kingdom*, Application No. 22414/93, judgment of 15 November 1996, paragraph 74.

199. European Court of Human Rights, *D. B. N. v. United Kingdom*, No. 26550/10, case pending; European Court of Human Rights, *K. N. v. France*, No. 47129/09, case pending.

200. United Nations, Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429(V) of 14 December 1950.

tion based on sexual orientation or gender identity may be a valid ground for granting refugee status and asylum.

Finally, for European Union Member States, Council Directive 2004/83/EC of 29 April 2004 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 (hereafter the Qualification Directive)²⁰¹ applies. This directive defines a “refugee” following the wording of the 1951 Convention, and provides for subsidiary protection.²⁰² The formulation “member of a particular social group” is spelled out in Article 10(1)(d) and explicitly mentions sexual orientation.²⁰³ Gender identity is not referred to in the Qualification Directive but may be included under the ground of “membership of a particular social group”, especially in light of the wording in Article 10(1)(d), which refers to “gender-related aspects”.

The UN Special Rapporteur on Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment²⁰⁴ and the UN Committee Against Torture²⁰⁵ have expressed concerns regarding the situation of LGBT asylum seekers. The UNHCR has released a Guidance Note on Refugee Claims Relating to Sexual Orientation or Gender Identity, which recognises that LGBT persons may fall within the refugee definition of the 1951 Convention if they have a well-founded fear of persecution, including serious abuse, discrimination and criminalisation.²⁰⁶ Whether or not a fear of persecution is well founded should be assessed by authorities taking into account the statements of the claimant in the context of background information concerning the situation in the country of origin.²⁰⁷ The concept of persecution involves serious human rights violations, including a threat to life or freedom, as well as other serious harm. A pattern of harassment and discrimination could, on cumulative grounds, also reach the threshold of persecution.²⁰⁸ While sexual orientation or gender identity are not explicitly addressed in the list of grounds of the 1951 Convention, the UNHCR Guidance Note maintains that these two grounds may be subsumed under the grounds of “political opinion”, “religion” or “membership of a particular social group”.²⁰⁹ For the purposes of granting refugee status to LGBT asylum

201. Council Directive 2004/83/EC of 29 April 2004.

202. Cf. Article 2(e) and Article 15.

203. Cf. Article 10(1)(d).

204. UN General Assembly, UN Doc. A/59/324, 1 September 2004, paragraph 39.

205. UN Committee against Torture, General Comment No. 2 on implementation of Article 2 by states parties, 2007, paragraph 21.

206. UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation or Gender Identity, 21 November 2008, paragraph 3.

207. UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (paragraphs 42-43), HCR/IP/4/Eng/REV.1. Reedited, Geneva, January 1992.

208. UNHCR, “Guidance Note on Refugee Claims Relating to Sexual Orientation or Gender Identity”, 21 November 2008, paragraph 10.

209. *Ibid.*, paragraphs 29-32.

seekers, it is particularly the ground of “membership of a particular social group” that is increasingly applied in cases.²¹⁰

National legislation and data on LGBT asylum and refugee cases

Twenty-six member states have explicitly recognised in their national legislation that sexual orientation is included in the notion of “membership of a particular social group” (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). In the other member states there is no explicit mention in their legislation. There are, however, at least seven other member states which, even in the absence of such explicit recognition, have had asylum claims in which sexual orientation has been recognised as a ground for persecution (Denmark, Greece, Norway, Switzerland, Turkey, Ukraine and the United Kingdom) evidenced by decisions of national competent bodies in these countries. In the other 12 member states which are parties to the 1951 Convention there is no explicit recognition of persecution on the basis of sexual orientation as a valid ground for asylum claims either in legislation or in actual successful cases filed by LGBT asylum seekers (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Estonia, Georgia, Liechtenstein, Monaco, Montenegro, the Russian Federation, Serbia and “the former Yugoslav Republic of Macedonia”).

Explicit recognition in national legislation of gender identity as a notion of “membership of a social group” is hard to find. The only member state explicitly mentioning gender identity as being encompassed in the notion of “membership of a particular social group” in its national asylum legislation is Iceland.²¹¹ Moreover, transgender persons have been granted asylum in a few other member states, including in Austria, Belgium, Cyprus, the Netherlands and Switzerland.²¹²

Regarding data collection, in two member states (Belgium and Norway) official statistics are collected in relation to LGBT asylum seekers. In Belgium²¹³ 116 cases were handled in 2006 of which 33 people were granted refugee status. For 2007 these figures were 188 (60 people granted refugee status) and in 2008 the figure increased to 226 (96 were granted refugee status or subsidiary protection). In 2009 the figure further increased to 362 (with 129 persons granted refugee or subsidiary protection status) and in 2010 the number of 522 was reached, out of which 156 received refugee protection.

210. Cf. UNHCR, “Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees” (HCR/GIP/02/02), 7 May 2002, paragraph 1.

211. National contribution (legal report) on Iceland, p. 20.

212. See for example (FRA) national contributions (legal reports) on Cyprus (p. 15) and Switzerland (pp. 17-18).

213. Information provided by the Commissariat Général aux Réfugiés et aux Apatrides (CGRS). The figures cover sexual orientation and gender identity asylum cases, but do not distinguish between the two.

In Norway, partial statistics suggest that in 2008-2009 11 people had claimed asylum on grounds of sexual orientation; a tentative overview from 2002 suggests that approximately 41 cases involved individuals seeking asylum for persecution or ill-treatment due to their sexual orientation.²¹⁴ In the other member states no official statistics are available. However, some member states provided estimates on the number of applications on the grounds of sexual orientation and gender identity. The Swedish Migration Board estimated in 2002 the number of applicants seeking asylum in Sweden on grounds of sexual orientation or gender identity to be approximately 300 per year.²¹⁵ In the Netherlands the applications of homosexual and transgender asylum seekers amount to approximately 200 per year.²¹⁶ In Italy, according to the Ministry of Internal Affairs, in the period from 2005 to the beginning of 2008, at least 54 cases were filed, of which at least 29 were granted refugee status or humanitarian protection.²¹⁷

Challenges and obstacles in and during the asylum procedure

LGBT asylum seekers are confronted with particular obstacles in making their claim and difficulties are faced by authorities in assessing asylum claims on the grounds of sexual orientation or gender identity.²¹⁸

First, criminalisation of consensual same-sex relations in the countries of origin of the applicants is interpreted and evaluated differently by the competent bodies in Council of Europe member states. The nature of the legislation and its potential impact on the safety and life of the applicant are evaluated in terms of a certain degree of gravity that the persecution has to attain in order to be considered as threatening to the asylum seeker. UNHCR has noted in this respect: "Criminal laws prohibiting same-sex consensual relations between adults have been found to be discriminatory and to constitute a violation of the right to privacy. The very existence of such laws, irrespective of whether they are enforced and the severity of penalties they impose, may have far-reaching effects on LGBT persons' enjoyment of their fundamental rights."²¹⁹

214. UNHCR, "Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia", Research Paper No. 181, 2009, p. 4.

215. European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010, p. 60.

216. IND Informatie- en Analysecentrum, "Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland", The Hague, Ministry of Justice, 2008.

217. FRA national contribution (legal report) on Italy, p. 15.

218. See, for example, UNHCR Expert Roundtable, *Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity*, November 2010; UNHCR Discussion Paper, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, 22 September 2010; Human Rights First, "Persistent Needs and Gaps: the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees: An Overview of UNHCR's Response to LGBTI Refugees and Recommendations to Enhance Protection", 2010, pp. 8-9.

219. UNHCR, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity", 2008, p. 10.

Decisions in asylum cases in the member states illustrate the different approaches to this end. In some member states the existence of criminal provisions prohibiting “homosexual conduct” in itself is not sufficient to justify the granting of refugee status. Examples of this line of thinking imply that applicants can avoid persecution in the country of origin by living discreetly, meaning to conceal their sexual orientation. UNHCR raised in this regard that Norwegian immigration authorities generally consider that LGBT persons must be required to keep their sexual orientation or gender identity hidden from their local community if spreading this knowledge could lead to persecution.²²⁰ It is of particular concern that in such case law there is an attempt to make distinctions between a mere “tendency” to be gay or lesbian, which the individual could hide or conceal, and “irreversible” homosexuality, which would lead to recognising the individual concerned as deserving of international protection.

In other member states, for example Belgium, the Netherlands and Sweden, the competent authorities have recognised the right of lesbian and gay refugees to live openly in their countries of origin. These countries have removed the inconsistency between asylum claims based on sexual orientation, and those based on other grounds, as members of ethnic or religious minorities, and political dissidents are also not expected to hide their ethnicity, religion, or political beliefs. A ruling in the United Kingdom in 2010 also reached such a conclusion, stressing that “to reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the [1951] Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution”.²²¹ In yet other member states, for example Germany,²²² different courts have adopted both positions. The German judiciary has in the context of this “discretion requirement” referred questions for a preliminary ruling concerning homosexual asylum seekers to the Court of Justice of the European Union to get clear guidance to the question whether a homosexual person can be expected to live with his or her sexual orientation in his or her home country in secret.²²³

A second obstacle is the assessment of the credibility of the asylum seeker, as LGBT asylum cases build on intimate private life issues. Under the threat of criminal laws, family or community violence, internalised homophobia, fear of dismissal from employment or discrimination LGBT asylum seekers may have concealed their sexual orientation or gender identity in the country of origin and may have no “proof” of their sexual orientation or gender identity.

220. UNHCR, “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia”, Research Paper No. 181, 2009, p. 13.

221. *H. J. (Iran) and H. T. (Cameroon) v. Secretary of State for the Home Department*, UKSC 31, 7 July 2010, UK Supreme Court, paragraph 82.

222. FRA national contribution (legal report) on Germany, pp. 20-23.

223. Court of Justice of the European Union, C-563/10, *Kashayar Khavand v. Federal Republic of Germany*, case pending.

UNHCR has noted: “Self-identification as LGBT should be taken as an indication of the individual’s sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity.”²²⁴ There are several accounts where asylum officers do not accept the asylum claims based on sexual orientation for example because an applicant is married in a heterosexual relationship or has children. How the applicant should “prove” his or her sexual orientation and/or gender identity has also been the subject of several court cases.²²⁵ A Swedish study on asylum procedures finds that “distrust is often based on stereotypical preconceptions of sexual orientation and gender expression”,²²⁶ and in Denmark similar conclusions were reached.²²⁷ Phallometric testing has been used in several cases in the Czech Republic in order to “test” whether the applicants were gay or not.²²⁸ The use of such tests, and their results, can infringe a person’s right to be free from inhuman or degrading treatment under Article 3 of the European Convention on Human Rights, as was also acknowledged in a decision by a regional administrative court in Germany²²⁹ ordering the stay of transfer under the Dublin II Regulation of an Iranian gay man because of the possible use of ‘phallometry’ in the Czech Republic. There is a strong need for using sensitive interview techniques and sensitisation of asylum officers in line with UNHCR guidelines.²³⁰

Third, LGBT asylum seekers in asylum centres face difficulties when their sexual orientation or gender identity is known. The reactions of other asylum seekers, especially if they come from the same region, could include harassment and ostracism among others. In some instances staff remedied the situation.²³¹ In others, asylum seekers are afraid to stay in the centres because of

224. Ibid., p. 15.

225. For example, *R v. Secretary of State for the Home Department ex parte Vraciu* (1995) Appeal No. HX/70517/94; *J v. Secretary of State for the Home Department* [2006] EWCA Civ 1238.

226. Borg H., Törner E. and Wolf-Watz O., “Norm-Critical Study of the Swedish Asylum Examination, produced for the Swedish Migration Board by Ramböll Management Consulting”, 2010, p. 4.

227. The Danish Refugee Appeals Board, “Formandskabet 13. Beretning 2004”, 2004, p. 146.

228. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, pp. 58-59; “Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings”, ORAM, 2010.

229. Schleswig-Holsteinisches Verwaltungsgericht, 6 B 32/09, 7 September 2009.

230. UNHCR, “Guidelines on International Protection No. 1: “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”, HCR/GIP/02/01, 7 May 2002.

231. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 101; European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, pp. 58-60; National contribution (legal report) on Switzerland, p. 17.

the risk of abuse,²³² marginalisation and harassment from other applicants. Another specific problem for transgender persons is access to trans-specific health care while being in an asylum centre or in the asylum procedure. There may not be any possibility of accessing hormonal treatment or other therapy. This may lead to grave health problems as interrupting hormonal treatment is detrimental for their health, which will put a further burden on a person already traumatised.

232. UNHCR, “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia”. Research Paper No. 181, 2009, p. 19; Helsinki Citizen’s Assembly – Turkey and ORAM – Organisation for Refuge, Asylum and Migration, “Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual, and Transgender Asylum Seekers and Refugees in Turkey”, 2009.

