



Jurisprudence on LGBTIQ applicants in international protection

The information presented in this fact sheet is extracted from the [EUAA Case Law Database](#).

Asylum claims based on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) have increased in recent years, which has resulted in more cases being scrutinised by European courts (including the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)) and national courts (mainly, but not exclusively, upper courts).

Within the Common European Asylum System (CEAS), common standards for LGBTIQ asylum applicants are defined in the recast Qualification Directive, the recast Asylum Procedures Directive and the recast Reception Conditions Directive.





Main highlights extracted from the EUAA Case Law Database

- Many countries throughout the world still criminalise certain sexual orientations, and general provisions are used to prosecute and discriminate, on various grounds, against the LGBTIQ community.
- In certain parts of the world, the LGBTIQ community is at risk of persecution or serious harm from non-state actors, and the state may be unable or unwilling to provide the community with effective protection against persecution or serious harm.
- LGBTIQ applicants are generally granted international protection under the qualification of being a “member of a particular social group” in accordance with Article 10 of the recast Qualification Directive. The CJEU has interpreted this provision of the CEAS and provided detailed guidelines on the assessment of claims of persecution due to membership in the LGBTIQ community.
- Among the first in Europe, the Council of State in the Netherlands ruled in 1981 in [Applicant v State Secretary for Justice](#) that persecution based on membership of a particular social group may also include persecution on the grounds of sexual orientation.¹
- A credibility assessment plays a key role in determining whether to grant international protection to LGBTIQ applicants. The assessment may be done based on documentary evidence which is available in the file or, in the absence of documents, an overall credibility assessment is based on the core material facts of the application and the applicant’s statements.
- Some national courts have ruled that disclosing sexual orientation only after the initial application may have a negative impact on the applicant's credibility. In contrast, other courts have ruled that a credibility decision cannot be based solely on the fact that an applicant did not share their sexual orientation immediately, and there may be valid reasons why an applicant may be reluctant to reveal their sexual orientation.
- Country of origin information (COI) also plays a significant role in the assessment of LGBTIQ asylum applications, with EUAA country of origin reports being used as evidence in first and second instance procedures. Therefore, it is important to have updated, comprehensive and reliable COI.
- European and national courts have made several rulings on deportation, removal and the return of LGBTIQ applicants while considering the possibility of persecution, ill treatment and *refoulement*.



1. CJEU standard-setting jurisprudence

In November 2013, the CJEU interpreted in [X, Y, and Z](#) the concept of membership of a particular social group within the meaning of Article 10(1d) of the recast Qualification Directive 2004/83. The court observed that a person's sexual orientation is a characteristic so fundamental to identity that the person should not be forced to renounce it and that, depending on the conditions in a country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic.

The CJEU also held that the existence of criminal laws which specifically target homosexuals supports the finding that these persons must be regarded as forming a particular social group. However, the mere fact that homosexual acts are criminalised does not, in itself, constitute an act of persecution. Nonetheless, imprisonment provided for example as a sanction for homosexual acts which is applied in the country of origin constitutes an act of persecution.

The court further added that, when an applicant invokes the existence of legislation which criminalises homosexual acts in the country of origin, the national authorities have the obligation to examine all relevant facts concerning that country, including laws and regulations and the manner in which they are applied.

The CJEU added that applicants should not be expected to conceal their sexual orientation or reserve expression of their sexual orientation in their country of origin in order to avoid persecution. In that connection, requiring members of a social group, sharing the same sexual orientation, to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.²



2. Assessing the existence of persecution

2.1. Criminalisation and hostile environment towards LGBTIQ applicants

In [M.F. v French Office for the Protection of Refugees and Stateless Persons \(OFPRA\)](#), the National Court of Asylum (CDNA) in France granted refugee protection in November 2022 to a Turkish national who had a well-founded fear of persecution based on sexual orientation. The court noted that, although sexual relations between persons of the same sex are not expressly criminalised in Turkish legislation, general provisions are used to prosecute, on various grounds, homosexuals and more broadly members of the LGBTIQ community.³

The Council for Alien Law Litigation (CALL) in Belgium decided in April 2019 the case of [X v General Commissioner for Refugees and Stateless Persons](#), which concerned a Moroccan unaccompanied minor who claimed persecution due to this sexual orientation. The council determined that the applicant was credible and that considering the repressive legal environment and hostile social climate towards homosexuals in Morocco, the competent authorities should proceed with extreme caution when assessing applications for international protection based on sexual orientation from Morocco.⁴

In [*Mr Modesto v Spanish Public Administration \(Administracion General del Estado\)*](#), the Supreme Court of Spain ruled in July 2016 on the case of an applicant from Cameroon who applied for international protection due to persecution based on homosexuality. The court determined that homosexual acts were criminalised under Cameroonian law and effectively suppressed. As a result, the court upheld the appeal of the applicant.⁵

The Federal Administrative Court of Switzerland granted refugee protection in August 2020 in [*A v State Secretariat for Migration \(SEM\)*](#). It stated that homosexuality could be a reason for persecution in Syria, as legislation criminalised same-sex relations and the state did not provide protection. According to COI, homosexuals could not live openly in Syria, and thus, the court determined that concealing sexual orientation and a persistent fear of being exposed constituted unacceptable psychological pressure.⁶

2.2. Unwillingness or inability of state authorities to provide effective protection

CALL in Belgium granted refugee protection in June 2021 in [*X v Commissioner General for Refugees and Stateless Persons \(CGRS\)*](#) to an applicant from Colombia who claimed persecution due to being a homosexual. The Council ruled that it was not reasonable to assume that the applicant would be provided with effective protection from the Colombian authorities.⁷

CALL also ruled in June 2021 in [*X v Commissioner General for Refugees and Stateless Persons \(CGRS\)*](#) that LGBTIQ applicants in El Salvador were subjected to persecution by gang members. CALL concluded that there was no effective access to protection from the government for persecution on the grounds of sexual orientation and an internal protection alternative was not available.⁸

In France, in December 2021, the CNDA granted refugee protection in [*G. v French Office for the Protection of Refugees and Stateless Persons \(OFPRA\)*](#) to a Venezuelan national who was a victim of serious abuses by members of the national guard after his arrest in an opposition demonstration. The court noted that the abuse was amplified by the discovery of the applicant's sexual orientation.⁹

In October 2020 in [*M.H. v French Office for Refugees and Stateless Persons \(OFPRA\)*](#), the CNDA granted refugee protection to an Algerian national who was at risk of persecution due to his sexual orientation and gender identity. The court held that COI reports revealed that homosexuality constitutes a criminal offence punishable by imprisonment, and although the law may not be applied, LGBTIQ applicants were subjected to discrimination and homophobia. In addition, Algerian state actors did not protect the LGBTIQ community.¹⁰

The Regional Administrative Court of Leipzig in Germany overturned a negative decision in January 2023 in [*Applicant v Federal Office for Migration and Asylum \(BAMF\)*](#) and granted refugee protection to an Iraqi national who applied for international protection on the grounds of being homosexual. Based on updated COI, the court found that homosexuals in Iraq were subjected to human rights violations and discrimination which were tantamount to a serious violation of fundamental rights. The court noted that LGBTIQ applicants were at risk of physical or psychological violence and state authorities, or other organisations, were not willing to provide protection.¹¹

The Regional Administrative Court of Berlin provided refugee protection to an LGBTIQ applicant from Georgia in [*X v Federal Office for Migration and Refugees*](#), holding that Georgia was unwilling and unable to effectively protect LGBTIQ persons from inhuman and

degrading treatment by society or individuals. The court concluded that the LGBTIQ community continued to face degrading treatment in Georgia, with violent attacks being the most serious manifestations of a widespread homophobic and transphobic attitude in almost all areas of daily life.¹²

The Tribunal of Bologna in Italy in [Applicant v Territorial Commission for the Recognition of International Protection \(Bologna\)](#) granted refugee protection to a Senegalese applicant on grounds of sexual orientation in July 2021, ruling that the applicant's claim that he would face persecution from his family was credible and he would not be protected by the authorities in Senegal.¹³

The Civil Court of Florence in Italy ruled in January 2020 in [Applicant v Ministry of the Interior \(Prefettura di Firenze\)](#) that the region of Casamance in Senegal should not be considered a safe flight alternative as it was declared unsafe for members of the LGBTIQ community and there was also ongoing internal low-intensity conflict.¹⁴

In [Applicant v State Secretary for Justice and Security](#), the Council of State in the Netherlands ruled in July 2018 on the case of an LGBTIQ applicant from Cuba who contended that, while Cuba appeared to be a progressive country, in practice the LGBTIQ community was persecuted. The council ruled that the situation for LGBTIQ in Cuba did not amount to persecution of the group and the situation had improved compared to previous years.¹⁵

In June 2021, the Supreme Court of Slovenia granted refugee protection in [Ministry of the Interior v Applicant](#) to a Serbian applicant on grounds of persecution due to sexual orientation. Based on COI, the court determined that applicants who identified as LGBTIQ were not provided with adequate protection throughout the country and that they could be persecuted by non-state actors.¹⁶

In September 2022, the High Court of Spain ruled in [Jose Carlos v Minister of the Interior](#) that the Revolutionary Armed Forces of Colombia (FARC) were more likely to target members of the LGBTIQ community. However, LGBTIQ applicants from FARC regions must still demonstrate an individual risk of persecution.¹⁷

2.3. Persecution based on “membership of a particular social group”

Belgium

CALL granted refugee protection in July 2022 in [X and X v Commissioner-General for Refugees and Stateless Persons \(CGRS\)](#) to two applicants who fled Brazil due to their homosexuality. The applicants were diagnosed as HIV-positive after they arrived in Belgium and claimed that in Brazil they would experience discrimination and difficulties in accessing health care. CALL determined that the applicants had special procedural needs and had a well-founded fear of persecution due to their membership in the social group of homosexuals in Brazil.¹⁸

France

The CNDA has rendered various decisions on the grounds of membership of a particular social group based on sexual orientation for applicants from Algeria, Afghanistan, Benin, Brazil, Chad, Iraq, Iran, Lebanon, Tunisia and Tanzania.

In June 2022, in [*M.A. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) the CNDA granted refugee protection to an Afghan national due to his well-founded fear of persecution because he belonged to the social group of homosexual people in Afghanistan. The court cited the EUAA [Country of Origin Information Report Afghanistan Individuals targeted under societal and legal norms](#) (December 2017) and [Afghanistan Country focus. Country of Origin Information Report](#) (January 2022).¹⁹

In February 2021, in [*T. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) the CNDA concluded that homosexual people in Benin, particularly women, constitute a social group with characteristics essential to their identity who are not afforded adequate protection from the state.²⁰

In November 2021, in [*M.C. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) the CNDA granted refugee protection to a Brazilian national who was persecuted by his relatives and society because of his homosexuality, observing that homosexual people constituted a particular social group in Brazil who are likely to be exposed to a risk of persecution.²¹

In June 2022, in [*M.M.A. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) the CNDA granted refugee protection to a national of Chad due to his well-founded fear of persecution by the authorities and his family due to his sexual orientation. The court concluded that homosexual people in Chad constituted a social group within the meaning of the Geneva Convention whose members are victims of persecution, including criminal prosecution, intense social and professional discrimination, acts of violence, harassment, and bullying.²²

In July 2023, the CNDA granted refugee protection in [*M.A. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) to an Iranian national due to the risk of persecution by the national authorities and his father if returned to Iran due to his sexual orientation. The court recalled that homosexuality was criminalised in Iran and could be punished by flogging, detention and the death penalty. The court added that such persecution was not carried out solely by the national authorities but also by individuals (through honour crimes) and health institutions (with gender reassignment surgery and conversion therapy). The court concluded that homosexual persons in Iran constitute a particular social group within the meaning of Article 1(A2) of the 1951 Refugee Convention.²³

In November 2022, the CNDA granted refugee protection in [*M.T. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) to an Iraqi national who claimed persecution by his family due to his sexual orientation. The court pointed out that, although sexual relations between persons of the same sex were not expressly criminalised in Iraqi legislation, general provisions were used to prosecute members of the LGBTIQ community, who were also subjected to discrimination and violence, including torture and assassination. The court determined that the applicant had a well-founded fear of being persecuted since he belonged to the social group of homosexuals in Iraq.²⁴

In May 2020, the CNDA granted refugee protection in [*M.C. v French Office for the Protection of Refugees and Stateless Persons \(OFPPRA\)*](#) to a Lebanese national who claimed a risk of persecution due to his sexual orientation. The court noted that Lebanese legislation stipulated that homosexuality is a criminal offence punishable by imprisonment or a fine, although seldom enforced by the courts. Nevertheless, due to *de facto* discrimination, homosexuals in

Lebanon were a particular social group at risk of persecution, and there was a lack of effective protection from state actors for victims of violent homophobic acts.²⁵

In January 2022, the CNDA granted refugee protection in [M.S. v French Office for the Protection of Refugees and Stateless Persons \(OFPRA\)](#) to a Tanzanian national from Zanzibar due to the applicant's homosexual orientation, noting that it had previously determined that there was a social group of homosexual people in Tanzania. It also took note of the new Criminal Code of Zanzibar, which toughened the penalties for homosexual offences up to 30 years imprisonment.²⁶

In October 2022, the CNDA granted refugee protection in [M.R. v Office for the Protection of Refugees and Stateless Persons \(OFPRA\)](#) to a Tunisian national due to his well-founded fear of persecution as a result of his membership in the social group of homosexual persons in Tunisia. The court noted that Tunisia criminalised relations between persons of the same sex and observed that the applicant had been identified as a homosexual by his community, and he had a legitimate fear that he would be stigmatised and once again persecuted due to his sexual orientation.²⁷

Italy

The Court of Appeal of Venice granted refugee protection in April 2022 in [Applicant v Territorial Commission for the Recognition of International Protection \(Verona\)](#) to a Gambian national who had same-sex relations with a tourist. The court determined that the applicant was a member of a particular social group of homosexual people in The Gambia and noted that according to The Gambian Criminal Code homosexuality was a crime punishable by imprisonment.²⁸

In [Applicant v Ministry of the Interior](#), the Court of Cassation determined in November 2022 that sexual orientation was a ground to be considered as a member of a particular social group in Nigeria. The court determined that the applicant's sexual orientation constituted an individual factor of belonging to a particular social group that placed the applicant in a situation of persecution, as defined by the refugee law. The court acknowledged that persecution fell under international protection requirements when: a person was forced to break the state's criminal laws and risked being punished if freely expressing sexual orientation; or the person was exposed to serious threats by private agents and state protection was not available.²⁹



3. Credibility and evidence assessment

Evidence and credibility may be difficult to gather for applications from LGBTIQ persons because they involve a characteristic fundamental to the identity of the person, "inner" or "hidden" thoughts, outlooks and states of being.³⁰ The assessment of credibility of LGBTIQ applicants may be done based on documentary evidence available in the file or, in the absence of documents, based on the core material facts of the application. See more in the EUAA's [Judicial Analysis on Evidence and Credibility Assessment in the Context of the Common European Asylum System](#) (17 February 2023).

3.1. Credibility assessment

3.1.1. CJEU's guidance

In December 2014, in the case of [A., B., C. v Staatssecretaris van Veiligheid en Justitie](#), the CJEU ruled on the credibility assessment of the declared sexual orientation of three third-country nationals who each lodged an asylum application in the Netherlands and whose applications were rejected on the grounds that their sexual orientation had not been proven.³¹

The CJEU noted that the declarations made by an applicant asserting a particular sexual orientation are only the starting point in the assessment made by the authorities, which must then explore the assertion while respecting the applicant's dignity and private life.

The CJEU gave the following guidance on methods of assessment to be used by national authorities:

- 1) The assessment of applications for asylum on the basis solely of stereotyped notions associated with homosexuals does not allow authorities to take account of the individual situation and personal circumstances of the applicant. The inability of the applicant to answer such questions is not, in itself, a sufficient reason for concluding that the applicant lacks credibility.
- 2) While national authorities are entitled to carry out, where appropriate, interviews to determine the facts and circumstances on the declared sexual orientation of an applicant, questions on details of the applicant's sexual practices are contrary to the fundamental rights guaranteed by the EU Charter and, in particular, to the right to respect of private and family life.
- 3) The court clearly stated that submitting an applicant to 'tests' to demonstrate homosexuality or requiring them to produce evidence (e.g. films of their intimate acts) does not necessarily have probative value and would infringe human dignity as guaranteed by the EU Charter.
- 4) Considering the sensitive nature of information that relates to personal identity and a person's sexuality, the authorities cannot conclude that the person lacks credibility solely based on the fact that the person did not declare their homosexuality at the outset due to reticence in revealing intimate aspects.

3.1.2. National court rulings

Referring to the CJEU ruling in [A., B., C. v Staatssecretaris van Veiligheid en Justitie](#), the Appeals Authority in Greece in [Applicant v Asylum Office](#) granted refugee protection in February 2020 to an Iranian national on the grounds of homosexuality and ruled on the issue of respect for private and family life in the assessment of asylum applications. The court found that the procedure for assessing the credibility of the applicant's claim and the detailed questions concerning his sexual activities and motives were contrary to Articles 3 and 7 of the EU Charter as the nature and intrusiveness of the questions infringed on the integrity of the individual, violating the person's private and family life.³²

In Estonia, the Tallinn Court of Appeal ruled in November 2019 in [XX v Police and Border Guard Board](#) on the credibility of a Namibian applicant who claimed to be homosexual. The court noted that given that same-sex relationships were criminalised in Namibia, it was understandable why the applicant's statements were not very detailed. In addition, the applicant's lack of familiarity with LGBTIQ organisations did not diminish the applicant's credibility as not everyone wants their sexual orientation to be made public and the applicant had good reason to fear arrest in Namibia.³³

The Regional Administrative Court of Cottbus in Germany granted refugee protection in February 2023 in [Applicant v Federal Office for Migration and Refugees \(BAMF\)](#) to an Algerian national who claimed persecution due to his homosexuality. The court considered the applicant's statements to be credible, noting that the submissions on events in Algeria were comprehensive and the applicant was willing to correct any inconsistencies during the interview.³⁴

The High Court in Ireland held in [G.K. v International Protection Appeals Tribunal & Ors](#) (April 2022) that the evidence presented by a Georgian national lacked detail and specificity, and the applicant's failure to seek protection in a safe country, namely Austria, diminished the applicant's credibility about the claims of persecution based on sexual orientation.³⁵

The Supreme Court of Cassation in Italy delivered two significant judgments on credibility assessments and stereotypical concepts, notions and questions about homosexuality. In [Applicant v Territorial Commission for the Recognition of International Protection \(Bari\)](#) (October 2021) the Supreme Court of Cassation annulled the decision of the lower court, noting that the assessment of credibility provided by that court was based on secondary details and stereotyped notions connected to the sexual orientation of the applicant, and it did not consider the difficulties the applicant had in telling the intimate details of his story. Additionally, the lower court had made no reference to the situation of the LGBTIQ community in Nigeria.³⁶ In [Applicant v Ministry of the Interior](#) (January 2021), the Supreme Court of Cassation held that the assessment of credibility cannot be based on stereotypical notions associated with homosexuality and, in particular, on the failure of an applicant to answer stereotypical questions on homosexuality.³⁷

3.2. CJEU ruling on the use of expert reports

The CJEU ruled on 25 January 2018 in [F v Office for Immigration and Citizenship \(Bevándorlási és Állampolgársági Hivatal\)](#) that Article 4 of the recast Qualification Directive does not preclude the authorities from requesting an expert's report in first or second instances to assess facts and circumstances related to the declared sexual orientation of an applicant. The procedures for the report must be consistent with the EU Charter and the decision should not be solely based on the conclusions of the expert's report and not be bound by the conclusions when assessing the applicant's statements relating to sexual orientation. The court further held that Article 4 of the recast Qualification Directive, read with Article 7 of the EU Charter, precludes the preparation and use of a psychologist's expert report when the purpose is to provide an indication of the sexual orientation of an applicant on the basis of projective personality tests.³⁸

3.3. Use of social media as evidence

In the Netherlands, the Council of State ruled in June 2022 in [Applicant v State Secretary for Justice and Security](#) in the case of an Iranian national who claimed to be a lesbian and had fled Iran to escape being forced into marriage with a man. The applicant's request for asylum was rejected, but she appealed the decision and informed the Council of State that she had an Instagram account where she published about her sexual orientation and her apostasy to Islam. Because of this, she had received threats on social media.

The Council of the State sent the case back to the State Secretary for further investigation into the threats on social media. The Council of State noted that the Iran General Official Report of February 2021 mentioned that LGBTIQ people ran a disproportionate risk of being victims of reprisals from family, friends and others who consider homosexuality a violation of family honour.³⁹

3.4. Country of origin information (COI)

In November 2019, the High Court in Ireland ruled in [O v Minister for Justice and Equality and Others](#) on a case in which a Nigerian national claimed persecution against him and his housemates by alleged homophobic neighbours who thought they were homosexual. The High Court quashed the decision holding that the International Protection Appeals Tribunal, wrongly stated that “all the COI submitted relates to issues that homosexuals have in Nigeria”, as the COI also detailed the risks posed to men and women in Nigeria who were perceived, rightly or wrongly, to be homosexual. The High Court took the view that “[a]n adverse credibility finding must be founded on the evidence; conjecture (as opposed to inference) is of no legal value; there must be a logical nexus between findings of fact and the ensuing decision; and inferences too must reasonably be drawn”.⁴⁰

The Central Administrative Court in Portugal assessed a Russian national's asylum request based on sexual orientation in April 2018 in [V. v Ministry of Internal Affairs \(Ministério Da Administração Interna\)](#). The court stated that the responsible authorities must obtain COI on the situation for homosexuals and any potential persecution they may face from state and non-state actors. The court stated that the authorities should have carried out the necessary inquiries and analysed the relevant information, including COI obtained from sources such as the EUAA, UNHCR and relevant human rights organisations.⁴¹

In May 2022 in [T.B. v The Ministry of the Interior of the Republic of Lithuania](#), the Supreme Administrative Court of Lithuania upheld the appeal of an applicant who applied for international protection on the grounds of sexual orientation and highlighted the importance of using comprehensive COI. According to the court, COI confirmed that individuals who identify as homosexual are subjected to state violence, stigmatisation and exclusion from society. Thus, the department's examination of the asylum application was insufficient as it did not adequately evaluate all the legally-significant factors.⁴²

The importance of comprehensive COI was also highlighted in February 2023 by the Regional Administrative Court of Hamburg in Germany in [Applicant v Federal Office for Migration and Asylum \(BAMF\)](#). The court overturned a negative decision and granted refugee status to a national of Ghana who applied for international protection on the grounds of being homosexual. According to COI, the court determined that upon returning to Ghana, the applicant would be at risk of persecution from both state and non-state actors. It noted that male homosexuality is a crime punishable by imprisonment under Ghanaian law, and despite

there being no recent convictions, reports included police harassment and extortion attempts. It further highlighted that COI demonstrated that homosexual acts are highly condemned by society, violent attacks occur and the Ghanaian security forces are unwilling to protect the LGBTIQ community.⁴³

In July 2022 in [Applicant v Federal Office for Migration and Asylum \(BAMF\)](#), the Higher Administrative Court of Baden-Württemberg in Germany granted refugee protection to an applicant from The Gambia. Referring to the EUAA's [Country of Origin Information Report - The Gambia Country Focus](#) (2 December 2017), the court held that men in The Gambia for whom homosexuality is a significant part of their sexual identity were at risk of nationwide persecution in the form of a combination of different measures, such as threat of punishment by the Gambian state, discrimination, exclusion from social life, humiliation and violent attacks.⁴⁴

In [Applicant v Federal Office for Immigration and Asylum \(BFA\)](#) of May 2023, the Federal Administrative Court in Austria overturned a negative decision and granted refugee protection to an Afghan national who had applied for international protection on the grounds that his sexual orientation would not be tolerated in Afghanistan. The court consulted recent COI reports, including the [EUAA COI Focus Report on Afghanistan](#) (January 2022), to conclude that the LGBTIQ community in Afghanistan was already subjected to significant societal violence before the Taliban takeover and there had been reports of unlawful killings, physical attacks and sexual violence.⁴⁵

3.5. Standard of proof

The Supreme Administrative Court in Finland ruled in August 2019 in [A v Finnish Immigration Service](#) on the credibility of an Iraqi national who claimed international protection on the grounds of sexual orientation and gender identity. The Supreme Court overturned the negative decision, ruling that the applicant had consistently disclosed their relationship with the partner in the asylum interview, oral hearing and appeal before the court. In addition, the applicant repeatedly mentioned that they felt female, as well as provided medical reports. The court deemed that the applicant was credible with a legitimate fear of persecution.⁴⁶

In the Netherlands, the Council of State clarified in August 2021 in [Applicant v State Secretary for Justice and Security](#) that the credibility assessment for LGBTIQ applicants should include statements and factual information submitted by the applicant, including documents to support the allegations. A thorough credibility assessment should weigh the asylum applicant's claims, the supporting documentation and any opposing evidence. The competent authorities should be able to explain how the applicant's supporting documents were taken into consideration.⁴⁷

Also in the Netherlands, the Court of The Hague overturned a negative decision in July 2021 in [Applicant v State Secretary for Justice and Security](#) for a Ugandan national due to concerns about the credibility assessment based on sexual orientation. The court found that the State Secretary erred in basing its credibility assessment on the way the applicant chose his words and the fact that the applicant, being highly educated, should have described his feelings and experiences in more detail. In addition, the court noted that, when assessing claims, the determining authority should not compare the way one applicant describes sexual orientation with similar applicants. The court further found that the determining authority did not take into consideration the statements of the former partner along with those from the LGBT Asylum Support.⁴⁸

3.6. Burden of proof and the importance of oral hearings

The Supreme Court of Estonia ruled in two judgments on the burden of proof between the applicant and the authorities and on the importance of providing an oral hearing during which an LGBTIQ applicant may prove their credibility:

- ✚ In May 2020, in [Police and Border Guard Board v X.](#), the court ruled on the credibility of a Ugandan national who claimed persecution based on their sexual orientation. The court determined that the burden of establishing the relevant facts lies with the administrative authority and the applicant's credibility cannot be questioned simply because they did not elaborate on issues when the determining authority failed to ask them to do so. The court further observed that, in international protection cases, when the decision largely rests on the applicant's credibility and the explanations provided, the court should hold a hearing.⁴⁹
- ✚ In November 2020, in [X v Police and Border Guard Board](#), the court ruled on an application submitted by a Ugandan national who claimed to be homosexual. The court noted that the shared burden of proof was not respected by the administrative bodies in their assessment and stressed the importance of the oral hearing, which was not taken into consideration by the District Court.⁵⁰

The Supreme Administrative Court in Finland delivered two judgments on the necessity of an oral hearing for applicants who seek international protection on the grounds of sexual orientation:

- ✚ In [A v Finnish Immigration Service](#) (July 2017), the court held that, when assessing the credibility of a person's sexual orientation, the applicant's personal statements are the main and usually only form of evidence available, so it is necessary to hold an oral hearing to clarify information on the applicant's sexual identity, how the person raised this issue in the home country and what consequences the person may have suffered as a result.⁵¹
- ✚ In [A v Finnish Immigration Service](#) (June 2018), the court ruled in the case of an Iraqi national who requested an oral hearing on appeal before the Administrative Court to disclose his homosexuality. The appeal was dismissed without an oral hearing. The Supreme Administrative Court ruled that the Administrative Court should not have denied the applicant's request for an oral hearing, as doing so would have allowed for a more in-depth investigation of the applicant's alleged sexual orientation and would have allowed for the evaluation of the applicant's credibility.⁵²

The Supreme Court of Cassation in Italy ruled in July 2020 in [Applicant v Ministry of the Interior](#) that the judge has the obligation, *ex officio*, to verify, in practice, both the reliability of the applicant's statements about sexual orientation and the authenticity of the documents provided. The court highlighted that it is not possible to consider the applicant to be unreliable by assuming *a priori* that claiming persecution based on homosexuality was the result of a defensive choice aimed only at obtaining international protection. The court further noted that it is not possible to consider that documents submitted by the applicant were false from the mere fact that, in a certain territory, the use of false documents was increasing. To determine the credibility in this case, the court noted that the judge could have requested a medical-psychological expert report.⁵³

3.7. Late disclosure of sexual orientation in an asylum procedure

3.7.1. CJEU interpretation of the concept of new elements or facts in subsequent applications concerning sexual orientation

In [XY](#), an Iraqi national submitted a subsequent application for international protection in Austria on the grounds that he faced persecution due to his sexual orientation. The applicant appealed the decision and the Federal Administrative Court ruled that the applicant failed to disclose his homosexuality during the investigation of the first application for international protection and that the *res judicata* principle prohibits the authorities from considering the factual element.⁵⁴

In September 2021, the CJEU interpreted the concept of new elements or facts which have arisen or have been presented by the applicant in subsequent applications under Article 40 of the recast Asylum Procedures Directive (recast APD). The court ruled that Article 40(2) and (3) must be interpreted in the sense that the notion of ‘new elements or facts’ which “have appeared or have been presented by the applicant” includes elements or facts occurring after the definitive closure of the procedure having as its subject the previous application for international protection as well as the elements or facts which already existed before the closure of this procedure, but which were not invoked by the applicant.⁵⁵

The court also noted that the national provision which transposed Article 40 of the recast APD included an additional criterion which was not provided in the directive and that is a time limit of 2 weeks to submit the subsequent application, calculated from the moment that the person becomes aware of the new fact for reopening the case. The court held that Article 40 does not authorise the Member States to fix time limits for the lodging of a subsequent application.⁵⁶

Finally, Article 40(4) must be interpreted as meaning that it does not allow a Member State which did not transpose this provision to refuse to examine the substance of a subsequent request, when the new elements or facts relied on existed at the time of the previous proceedings and were not presented within the framework of this procedure due to a fault attributable to the applicant.⁵⁷

3.7.2. National court rulings

In April 2023 in [X v Commissioner General for Refugees and Stateless Persons \(CGRS\)](#), CALL in Belgium annulled an inadmissible decision which rejected a subsequent application lodged by an Iraqi national who claimed to be a homosexual only in his fifth request and submitted evidence for this claim in his ninth subsequent application. The council stated that it cannot be inferred that an applicant lacks credibility from the fact that he did not immediately declare that he was homosexual in his initial application and showed reluctance to disclose intimate details about his life. The council also pointed out that homosexual orientation should not be proved, but that it is sufficient that it is considered plausible.⁵⁸

In Ireland, the High Court assessed in December 2018 in [C. v International Protection Appeals Tribunal & Anor](#) the credibility of an applicant who claimed to be in a homosexual relationship, with the partner making that claim in their application for subsidiary protection and based on a different set of evidence. The applicant C., who had not stated that he was homosexual, sought to quash the decision rejecting subsidiary protection, but the tribunal rejected the appeal. The High Court ruled that the tribunal had validly reached its conclusion, considering

that the two applications were different, based on different evidence and thus yielding different outcomes.⁵⁹

The Administrative Court of Slovenia ruled in June 2018 in [A.A. v Republic of Slovenia](#) on a case where the applicant only disclosed same-sex orientation in his subsequent application, while in the first application other reasons were presented. The court rejected the application as the claim of same-sex orientation already existed at the time of the first procedure and the applicant had not explained why it was not disclosed earlier, although he had professional assistance at all times, was informed about his rights and duties, was repeatedly reminded that he had to state all the reasons for granting international protection, which must be true and precise, and he was aware of the confidentiality of proceedings.⁶⁰

The Migration Court of Appeal in Sweden ruled in [Applicant v Swedish Migration Agency \(Migrationsverket\)](#) (December 2013) on the credibility of a Nigerian national on persecution based on sexual orientation. The applicant's explanations were not deemed credible by the court given that homosexual acts had been criminalised in Nigeria for a long time and the applicant's delay in applying for asylum cast doubt on his claim of a well-founded fear of persecution.⁶¹

The Federal Administrative Court in Switzerland ruled in July 2019 in [A v State Secretariat for Migration \(SEM\)](#) that it should not be assumed that the facts about the homosexual orientation of an applicant from Eritrea were not credible as they were not declared at the first available opportunity to present the grounds of persecution. The court noted that the applicant's perceived fear of suffering significant disadvantages under refugee law due to his sexual orientation or to be arrested and detained again was understandable and justified.⁶²



4. Special procedural needs and safeguards

In June 2023 in [X v Police and Border Guard Board](#), the Tallinn Administrative Court of Estonia annulled a decision of the Police and Border Guard Service concerning a Russian transgender applicant from Crimea on the grounds of numerous procedural shortcomings. The court ordered the authorities to reconsider the applicant's case after it found that they had failed to: indicate the factual and legal basis for their decision, assess the special procedural needs of the applicant, present their reasoning and draw logical conclusions from COI, assess the risk of persecution by private individuals besides the risk of persecution by the state authorities, assess the grounds for the application cumulatively (transgender identity, citizenship and political opinion), and assess the risk of persecution upon a return without downplaying this factor on the basis that the applicant could conceal their political opinions.

The court also noted that the administrative authority has the obligation in the international protection procedure to assess the ability of a person to provide information on relevant circumstances and to comply with the principle of investigation prescribed by law. This includes an assessment of any special procedural needs. The court ruled that the mere fact of filling in a statement of vulnerability may not be sufficient to assess the special procedural needs of an LGBTIQ person diagnosed with depression.⁶³

The same court in Estonia annulled a PBGB decision due to procedural violations in May 2023 in [X v Police and Border Guard Board](#). The case concerned a Russian transgender man

diagnosed with autism and ADHD. The court highlighted that the systemic nature of the violations by the PBGB justified the annulment and the Estonian legal provision stating that administrative decisions cannot be annulled due to mere procedural violations did not apply in this case. The court noted that the PBGB had failed to conduct an appropriate assessment of the applicant's special needs and to provide him with the necessary support during the proceedings; violated his rights to information, representation and to be heard; acted against the principle of sound administration; and failed to draw logical conclusions based on the country of origin information it used, including by assessing every relevant circumstance separately rather than cumulatively and by focusing on the period prior to the applicant's departure from Russia rather than on the risks he faced upon return.⁶⁴

The Administrative Court of Slovenia annulled a negative decision in August 2021 in [Applicant v Ministry of the Interior](#) for procedural shortcomings in the assessment of fears of persecution based on the sexual orientation of an applicant from Algeria. The court reiterated that, while the applicant has the duty to make efforts to provide sufficient information and evidence, the determining authority has the obligation to conduct the procedure in such a way as to enable the applicant to exercise his rights efficiently, including in the personal interview.⁶⁵



5. Safe countries of origin

The notion of a 'safe country of origin', as described in the recast APD, is based on the presumption that certain countries can be designated, under specific circumstances, as generally safe for their nationals or stateless persons who were formerly habitual residents in that country, meaning that there is generally and consistently no persecution as defined in the Qualification Directive, no torture or inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. The designation of a country of origin as safe is not necessarily all-encompassing, as EU+ countries may define exceptions for specific geographical areas, profiles of asylum seekers or vulnerable people, including LGBTIQ persons. For further information please refer to EUAA's report on [Applying the Concept of Safe Countries in the Asylum Procedure](#) (7 December 2022). The EUAA [Who is Who in International Protection](#) platform also presents in an interactive way all EU+ countries which apply the concept of safe countries in the asylum procedure, including information on competent authorities and national lists of safe countries.

In June 2022, the Dutch Council of State noted in [State Secretary for Justice and Security v Applicant](#) that the State Secretary had reassessed the situation in Morocco and concluded that its designation as safe was still valid for the exception of LGBTIQ people and journalists, categories to which the applicant did not belong.⁶⁶

Similarly, in June 2022, the Dutch Court of The Hague noted that the State Secretary conducted a thorough reassessment of the situation in Georgia in [Applicant v State Secretary for Justice and Security](#). It concluded that the country was safe, except for LGBTIQ applicants, a category to which the applicant did not belong.⁶⁷

In July 2021, the French Council of State allowed an appeal in the case of [Associations des avocats ELENA and others](#) from several associations against an OFPRA decision to keep Ghana and Senegal on the list of designated safe countries of origin. The council noted that,

although Ghana and Senegal have democratic systems, they cannot be considered safe because homosexuality is criminalised by law.⁶⁸

The Dutch Council of State ruled in April 2021 in [Applicant v State Secretary for Justice and Security](#) on Mongolia as a safe country of origin for an LGBTIQ applicant and stated that a reassessment should be carried out based on a variety of sources and criteria used by the State Secretary. The council indicated that the reassessment can be done on the basis of the eight criteria used by the State Secretary, namely: democratic governance, protection of the right to freedom and security of the person, freedom of expression, freedom of religion and association, protection against discrimination and prosecution by third parties, access to independent investigations, access to an independent judiciary, and access to legal remedies.⁶⁹ Following the decision, the State Secretary [reassessed](#) Mongolia as a safe country of origin and considered Mongolia to be a safe country of origin except for LGBTIQ+ applicants.⁷⁰

The Federal Administrative Court in Switzerland ruled in June 2022 in [A., B. and their children C., D. v State Secretariat for Migration \(SEM\)](#) that Georgia was a safe country of origin for a bisexual man and his family. This was based on the decriminalisation of homosexuality and bisexuality, together with the availability of support by national authorities (despite a negative interaction with the police in this case, which was deemed insufficient), lawyers and human rights organisations.⁷¹



6. Minors and best interests of the child

In February 2022, CALL in Belgium stated in [Applicant v The Belgian State \(represented by the State Secretary for Asylum and Migration\)](#) that the best interests of the child must be protected when returning minors who sought international protection on the basis of their sexual orientation. The authorities must take into account the opinions of all nuclear family members who may have an impact on the minor's reintegration in the country of origin, as well as relevant COI.⁷²

In [Applicant v State Secretary for Justice and Security](#), the Court of the Hague in the Netherlands rejected in November 2022 the appeal of an Iranian minor who alleged persecution based on sexual orientation. The court found a lack of credibility and determined that the applicant, who was almost 18 years old at the time of the interview, was deemed mature enough to have a good representation of the facts but failed to respond to questions and provide sufficient information.⁷³

Children of LGBTIQ couples are also affected by the persecution of their parents, as shown by the UN Committee on the Rights of Child (UNCRC) in [A.B. v Finland](#), which was decided in February 2021. The UNCRC held that Finland failed to consider the best interests of the child of a lesbian couple when rejecting his asylum request, and to protect him against a real risk of irreparable harm when the family had no other choice but to return to Russia. The committee further noted that, when adopting the contested decision, the Finnish authorities failed to take account of the applicant's young age and the permanent impact that bullying and stigmatisation caused by his mother's sexual orientation would have on him. The Finnish government was ordered to take all necessary measures to prevent similar violations in the future, in particular by ensuring that the primacy of the best interests of the child will be taken

into account effectively and systematically in the asylum procedure and that children will systematically be heard.⁷⁴



7. Reception conditions

In August 2022, in [Applicant v Fedasil](#), the Brussels Labour Tribunal ordered Fedasil to provide suitable accommodation in a medium- or small-scale facility for an applicant who was assessed to be particularly vulnerable due to his sexual orientation and having endured multiple traumatic experiences. The tribunal noted that the applicant was at risk of living on the streets due to his experiences in reception centres and it was necessary to ensure that the applicant can live his life in a dignified manner.⁷⁵



8. Right to family life

The Immigration Appeals Board in Iceland ruled in November 2022 in [Applicant v Directorate of Immigration](#) that a Peruvian national who did not meet the criteria for international protection should be granted a residence permit based on Article 45(2) of the Foreign Nationals Act as it would not be possible for him and his partner to marry and exercise their right to family life in either Peru or Venezuela.⁷⁶



9. Consequences of a possible return to the country of origin

The ECtHR ruled in several cases related to claims of ill treatment of rejected LGBTIQ asylum applicants or relatives if expelled to the country of origin. In April 2015, in [M.E. v Sweden](#), the ECtHR held, by six votes to one, that implementing an expulsion order to Libya would not violate Article 3 of the Convention. The court found that there were no substantial grounds to believe that the applicant would be subjected to ill treatment on account of his sexual orientation if he was returned to apply for family reunion from Libya.⁷⁷

In the case of [B and C v Switzerland](#), in November 2020 the ECtHR highlighted that a fresh assessment of risks is required before expelling a homosexual applicant to The Gambia. The court noted that homosexual acts carry a criminal penalty in The Gambia but the mere existence of criminal laws in the country of destination do not render a removal contrary to Article 3 of the Convention. According to the court, the decisive factor is whether the laws are applied in practice, which was not the case in The Gambia. However, the court noted that, although there were no reports of individual acts of rogue officers, it may be due to under-reporting and fear of state discrimination. In addition, there were reports of widespread homophobia and discrimination against LGBTIQ persons by non-state actors. It further held that the Swiss authorities did not properly analyse the availability of state protection and there were indications of the unwillingness of the authorities to provide such protection. Therefore, the court considered that the applicant's deportation to the Gambia, without a fresh assessment of risks, would amount to a violation of Article 3 of the Convention.⁷⁸

In April 2023, the Administrative Court of Latvia, in [Applicant v Office of Citizenship and Migration Affairs](#), annulled an expulsion order against a homosexual applicant from Iran whose second subsequent application had been accepted for examination in substance. Based on COI, the court determined that the applicant's statements were credible and there was a real and objective risk of being exposed to acts contrary to Articles 2 and 3 of the ECHR if removed. Along with annulling the removal order, the court clarified that a removal should not be permitted when repeated asylum applications were accepted for an assessment on merits. The court referred to the EUAA's [Judicial Analysis Evidence and Credibility Assessment in the context of the Common European Asylum System](#) (2018), the EUAA [Country of Origin Information Report: Iraq, targeting individuals](#) (February 2022), the EUAA [Asylum Report 2022](#) (28 June 2022).⁷⁹

In Germany, the Administrative Court of Cologne ruled in [X v the Federal Republic of Germany](#) in February 2022 to prohibit the deportation to India of a transsexual victim of trafficking. Despite the fact that the applicant withdrew the appeal, the court concluded that the applicant faced a concrete risk to health if returned, including worsening the post-traumatic stress disorder and severe depression due to the violence experienced in India. Transsexuality would hinder access to medical care, namely to endocrinological treatment in the context of counter-sex hormone therapy. The court also noted that the applicant's reintegration into the family or the Hijra community would not constitute a safe environment, as this was where the applicant experienced sexual abuse and violence since childhood.⁸⁰

To read about developments in legislation, policies and practices related to LGBTIQ applicants, please refer to "LGBTIQ applicants in asylum systems", Fact Sheet No 20.

For more analysis, consult the Asylum Report 2023: <https://euaa.europa.eu/asylum-report-2023/54-seeking-protection-and-receiving-support-reception-applicants-diverse-sogiesc>

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