

Sexual orientation and gender identity: developments in EU law

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The amended version of the EU Qualification Directive, adopted in 2011, marks further progress in ensuring LGBTI applicants' rights by explicitly adding gender identity alongside sexual orientation as a cause of persecution.

The EU is in the process of setting up a Common European Asylum System (CEAS) which is being developed in two phases. During the first phase, the EU Qualification Directive was adopted (Directive 2004/83/EC of 29 April 2004) which established two distinct categories of protected persons: refugees and subsidiary protection beneficiaries. It set out rules for the definition of these categories as well as the rights that accrue to each category.

The Directive, in Article 10, retained the approach of the 1951 Refugee Convention that in order to be recognised as a refugee the individual must be persecuted for one or more of the following grounds: race, religion, nationality, membership of a particular social group or political opinion. Sexual orientation was therefore not explicitly included as a stand-alone ground for persecution. However, the Directive also set out some additional guidance by providing for more detailed definitions of these five grounds.

Article 10 (1)(d) of the Directive states that "depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. [...] Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". Although this wording was not particularly strong, the explicit mention of sexual orientation as a common characteristic defining a particular social group was in itself a step forward in the enhancement of LGBTI applicants' rights. Decision-makers at national level in the EU Member States were urged to take into consideration during the

assessment of claims the applicants' sexual orientation as well as gender-related aspects.

Despite this positive development, the provision also included some limitations. The concept of gender identity was not expressly mentioned. In addition, Article 10(1)(d) provided that applicants need both to possess an "immutable characteristic" and to be perceived by society as possessing that characteristic in order to be considered members of a particular social group. This is not consistent with a great part of national case-law, nor with UNHCR's position on the issue which is that "a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society".¹

In practice, on the one hand, if the persecutor perceives an individual as possessing a particular characteristic and decides to persecute them on that basis it matters little whether in fact the individual possesses this characteristic or not; thus social perception should suffice. On the other hand, as UNHCR stresses, there is no requirement that members of the social group associate with one another, or that they are socially visible, for the purposes of the refugee definition; thus possessing the immutable characteristic should suffice.² A study on the incorporation of the Directive into domestic law revealed that some Member States required that both conditions were fulfilled, while others did not.³

2011 Qualification Directive: pros and cons
The second stage of development of the CEAS aims more ambitiously to create a

common asylum procedure and a uniform status valid throughout the EU. Despite the developments on the definitional scope brought by the 2004 Qualification Directive, a study in 2011 on the treatment of asylum claims related to sexual orientation and gender identity found that there were still considerable differences in the way in which EU Member States treat LGBTI applications.⁴

EU Member States adopted an amended version of the Qualification Directive in 2011 and this version marked progress by making explicit reference to gender identity. The second part of the relevant text of Article 10(1)(d) of the Directive now reads as follows: “Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”

Not only does the Directive now explicitly include gender identity but it also entails an obligation for decision-makers to give consideration to gender-related aspects, including gender identity – reflected by the use of “shall” instead of “might”. Even with this strengthened wording, however, and the inclusion of gender identity, it does not unambiguously include intersex individuals, although the Directive does recognise in Article 9(2) that gender-specific acts and child-specific acts fall within the concept of persecution and both of these references can be relevant in cases of persecution of intersex people.⁵

Disappointingly, the 2011 Directive retained the word ‘and’ between the phrases referring to immutable characteristics and social perception; this could lead national decision-makers to require both these elements to be fulfilled if applicants are to be considered members of a particular social group, a practice which leaves certain applicants unprotected. Finally, both versions of the Directive put consideration of sexual orientation and

gender identity under the membership of particular social group ground. However, as UNHCR stressed in its recent Guidelines on claims based on sexual orientation or gender identity, “other grounds may though also be relevant depending on the political, religious and cultural context of the claim; for example advocacy by LGBTI activists may be seen as going against prevailing political or religious views and/or practices”.⁶

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1. UNHCR, *Guidelines On International Protection: “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*, 2002, para 11. www.unhcr.org/3d58de2da.html
2. UNHCR, *Guidelines On International Protection: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2012, para 42. www.unhcr.org/509136ca9.html
3. Odysseus Academic Network, *Directive 2004/83: Qualification Directive Synthesis Report, Done for DG JLS of the European Commission*, 2007, pp52-53.
4. See Spijkerboer, T & Jansen, S, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011, <http://tinyurl.com/Fleeing-Homophobia-report> See also article by Śledzińska-Simon & Śmiszek pp16-18.
5. ILGA-Europe, *Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers*, 2012, p9 <http://tinyurl.com/ILGA-Tsourdi-2012>
6. www.unhcr.org/509136ca9.html See also article by Turk pp5-8.

