Portuguese Refugee Law in the European Context: The Case of Sexuality-based Claims

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Abstract

Portugal's migration history has been extensively explored in academic literature, including in legal scholarship. Yet, very little attention has so far been directed towards Portuguese refugee law. This may be due to the relatively low number of asylum seekers that Portugal receives, but that does not justify neglecting the study of the Portuguese socio-legal framework applicable to asylum seekers and refugees. This article addresses this gap by analyzing the framework in a European context, enhancing the analysis with a case study of lesbian, gay, bisexual, transsexual, and intersex (LGBTI) asylum seekers. The analysis explores the evolution of the current legal framework, the procedures and remedies available to asylum seekers, the substantive standards applied in decision-making, and the broader socio-legal resources offered to asylum seekers. Several shortcomings and possible avenues of improvement are also identified.

1. INTRODUCTION

Portugal has historically been a country of emigration (up until the 1960s), then immigration (between the 1970s and 2000s), and now once again emigration primarily as a consequence of the economic crisis. This story of migration has been documented and researched, and that has allowed the identification and understanding of the origins of the immigrants arriving in Portugal (mostly from African and Eastern European countries, as well as Brazil),¹ as well as the legal framework applicable to them. The concern showed by Portuguese Government agencies and society more generally with

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¹ J Peixoto, 'Strong Market, Weak State: The Case of Recent Foreign Immigration in Portugal' (2002) 20 *Journal of Ethnic and Migration Studies* 483-97.

regard to the treatment accorded to immigrants is reflected in the fact that Portugal was placed second in the Migration Integration Policy Index,² a guide and tool developed to assess, compare, and improve migrant integration policies. Yet, it is unclear whether asylum seekers are equally beneficiaries of the Portuguese Government policy.

Despite its long coastal border and proximity to Africa, Portugal receives a surprisingly low number of asylum requests. In 2012, the Portuguese authorities recorded 299 asylum requests, 108 of which were in national territory and 191 at the border.³ Since 1999, the number of asylum requests has varied between 113 and 307, thus always remaining comparatively very low for a country of the geographical, population, and economic size of Portugal.⁴ Possible reasons suggested for these figures relate to the history of Portugal as a refugee-producing country, the relatively recent economic development in Portugal, and the practice of occasionally regularizing the status of workers without documents (thus offering affected migrants an alternative route to asylum procedures).⁵ How the (relatively few) existing asylum seekers are treated in Portugal is rarely discussed. Indeed, very little has been written about Portuguese refugee law, in Portuguese or other languages, in Portugal or elsewhere. As will be explored throughout this article, academics and NGOs in Portugal are increasingly turning their attention to the issues raised by asylum seekers' experiences, including those whose claims are based on sexual orientation and gender identity, but this is clearly still a niche area of research.

This article aims to overcome this gap in refugee studies, by analyzing the Portuguese refugee legal framework. This analysis will be carried out from a European perspective, thereby situating Portuguese norms and instruments within the context of European Union (EU) asylum law and policy, as well as European Convention on Human Rights (ECHR) law. Furthermore, the analysis will use as a case study sexuality-based asylum claims, which will facilitate the identification of the most and least positive aspects of the Portuguese refugee legal framework, particularly in relation to its compatibility with EU and ECHR law. The use of sexuality-based claims as a case study relies on field work carried out in 2011, which entailed semi-structured interviews with representatives of the SEF,⁶ the CPR,⁷ ILGA Portugal,⁸ GIS,⁹ as well as other smaller NGOs and some academics. The analysis covers all (only nine) decisions produced by the Portuguese administrative authorities over a period of ten years (2000-2010) on claims with a reference to the claimant's sexuality (eight cases of gay men, one case of a lesbian, and no cases of bisexuals).¹⁰ The focus will, therefore, be on lesbian,

² T Huddleston and J Niessen, *Migration Integration Policy Index III* <http://www.mipex.eu/sites/default/files/downloads/migrant_integration_policy_index_mipexiii_2011.pdf> accessed 8 May 2015.

³ Serviço de Estrangeiros e Fronteiras, *Relatório de Imigração, Fronteiras e Asilo* (2012) 47.

⁴ See, eg, data discussed on CNN, *Which countries are most 'welcoming' to asylum seekers?* <<http://edition.cnn.com/interactive/2010/10/world/interactive.asylum.seekers/>> accessed 8 May 2015.

⁵ M Fullerton, 'Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal' (2005) 17 *International Journal of Refugee Law* 659-87, fn 6, and J Peixoto, C Sabino and A Abreu, 'Immigration Policies in Portugal: Limits and Compromise in the Quest for Regulation' (2009) 11 *European Journal of Migration and Law* 179-97.

⁶ Asylum and Refugees Department of the Aliens and Borders Service (Gabinete de Asilo e Refugiados, Serviço de Estrangeiros e Fronteiras).

⁷ Portuguese Council for Refugees (Conselho Português para os Refugiados).

⁸ Associação ILGA Portugal - Intervenção Lésbica, Gay, Bissexual e Transgénero.

⁹ Grupo Imigração e Saúde (Immigration and Health Group).

¹⁰ According to SEF, neither the Portuguese authorities nor any NGO produce statistics on the grounds of asylum claims, success rates per ground, grounds/countries of origin ratios, etc. Still, it has been established that in the period between 2000 and 2010, there were eleven asylum claims presented to the Portuguese authorities based on persecution on grounds of sexual orientation. Two of these were directed to other EU Member States' authorities within the framework of the Dublin Regulation (discussed further in section 2). The nine LGB asylum claims dealt with by the Portuguese authorities represent 0.5% of the overall number of asylum claims received by these authorities during the same period (1,856 claims in total). This percentage is considerably lower than in Belgium, but higher than in Norway (S Jansen and T Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Vrije Universiteit Amsterdam,

gay, and bisexual (LGB) claimants. Although the authorities have not reported any claim or decision on grounds of gender identity during the relevant period of time, some consideration will, nevertheless, be given to gender identity (namely to claims by transsexual and intersex individuals) due to the close relationship to sexual orientation issues, namely the non-conformity with gender and heterosexual norms.¹¹

It has been pointed out by one of the interviewees that what characterizes LGBTI asylum seekers in Portugal is their invisibility. Practically no one is aware of gender or sexuality matters surrounding asylum seekers in Portugal, not even those who deal with asylum seekers on a daily basis as part of their work. Even if the actual number of LGBTI asylum seekers in Portugal is low, there is most likely to be a certain number of asylum seekers who choose not to raise the issue of their sexuality or gender identity, as well as related persecution, probably fearing that it will not benefit (or may even harm) their asylum claim or social integration. By using LGBTI claims as a case study, this article also aims to raise awareness of the types of issues involved in such cases, as well as how the refugee legal and administrative systems need to react to these claims in order to comply with EU and ECHR standards.

Section 2 discusses the evolution and current state of affairs of Portuguese refugee law and policy, particularly in the context of international and EU obligations. Section 3 focuses on procedural and remedial tools whilst Section 4 sheds light on how substantive requisites and decision-making are dealt with by Portuguese authorities. Finally, Section 5 discusses key elements of the broader socio-legal framework for asylum seekers and refugees.

2. PORTUGUESE REFUGEE LAW: AN INTERNATIONAL, EUROPEAN AND DOMESTIC PRODUCT

The Portuguese legal framework regarding asylum seekers can be considered a generous one. Besides having acceded to the 1951 Refugee Convention in 1960 and the 1967 Protocol in 1976,¹² the 1976 Constitution also enshrined the right to protection of political refugees. Inspired by the Portuguese revolution in 1974 against dictatorship and the subsequent process of decolonization, the Portuguese Constitution established that '[t]he right of asylum is guaranteed to foreigners and stateless persons who are the object, or are under grave threat, of persecution as a result of their activities in favor of democracy, social and national liberation, peace among peoples, freedom or the rights of the human

2011), 15). The nine LGB asylum claims related to individuals who originated from Africa (three from Senegal, one from Guinea Conakry, and one from Angola) and Europe (three from Macedonia (FYROM), and one from Moldova), the lesbian claimant originating from Senegal. Out of the nine LGB asylum decisions analyzed, only two – those of two gay men, one from Senegal and another from Guinea-Conakry – were offered international protection (only subsidiary protection, not refugee status). There were no known asylum claims based on persecution for reasons of gender identity in Portugal during this period. Similarly, there were no court judgments regarding appeals against administrative decisions on asylum claims based on sexual orientation or gender identity.

¹¹ JD Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence' (1996-1997) 60 Albany Law Review 989-1050.

¹² In 1960 with effects limited to those persons displaced by events occurring in Europe before 1 Jan 1951, but extended in 1976 to those displaced by events occurring in Europe or elsewhere, in the light of the 1967 Protocol removing the 1951 Convention's temporal and geographical limitations.

person'.¹³ This effectively creates a 'public subjective right', a justiciable right vis-à-vis public authorities, with both substantive and procedural dimensions.¹⁴ This also places the Portuguese Constitution amongst those that 'assume the republican rationale for the protection of "freedom fighters"', seen by some as a legacy of the 1793 French Constitution and the vision of France as the land of asylum for freedom fighters.¹⁵ Unlike in many other jurisdictions, no distinction is drawn between asylum and refugee status in the Portuguese Constitution, this being left to the ordinary legislation.¹⁶ The Constitution also determines that the law defines the status of political refugee.¹⁷

The first time that Portuguese ordinary law defined the status of refugee came in 1980, with Asylum Act 38/80.¹⁸ In this statute, the Portuguese legislature adopted a broad definition of asylum, including refugee status and humanitarian protection on a broad range of grounds, reflecting a 'nation emerging from dictatorship [that] vowed to protect those fighting for democracy, human rights, and national liberation'.¹⁹ A succession of other statutes offered in turn a legal framework to asylum claims adjudication,²⁰ adapting Portuguese law to the Schengen agreement,²¹ the Dublin Convention (now Regulation (EU) No 604/2013), and all relevant EU instruments. This culminated in the current Asylum Act 27/2008, approved in 2008 and amended in 2014.²² The 2008 Asylum Act is supplemented by the 2007 Aliens Act.²³ The current law considers the Geneva Convention status and subsidiary protection status, but not humanitarian protection, as an autonomous legal status. Indeed, article 7 Asylum Act is entitled 'subsidiary protection' (and that is the expression used in the authorities' decisions), and establishes the granting of a residence permit on grounds of subsidiary protection both in the circumstances stated in article 15 Council Directive 2004/83/EC (Qualification Directive) on subsidiary protection (death penalty or execution, torture or inhuman or degrading treatment, and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict), and in instances of 'systematic violation of human rights', which goes beyond the legal (EU) notion of subsidiary protection and strays onto the scope of the notion of humanitarian protection. This reflects some degree of lack of

¹³ This is the current version of art 33(8), as amended by the 1982 constitutional amendment (Lei Constitucional n.º 1/82, de 30 de Setembro). The original version can be found in art 22 CRP.

¹⁴ ASP Oliveira, *O Direito de Asilo na Constituição Portuguesa: Âmbito de Protecção de um Direito Fundamental* (Coimbra Editora, 2009) 102 ff., and J Leitão, 'Avanços e Recuos na Política Portuguesa sobre Refugiados' (2002) 66 Boletim da Faculdade de Direito 23-29, 23.

¹⁵ G Katrougalos, 'Comparative Perspectives of Constitutional Asylum: A Short Commentary to Federico Lenzerini's Paper' (2009) 19 The Italian Yearbook of International Law Online 163-69, 167.

¹⁶ MSD Martins, 'O Refugiado no Direito Internacional e no Direito Português' in J Miranda (ed.), *Estudos em Homenagem ao Prof. Doutor Martim De Albuquerque - 2* (Faculdade de Direito da Universidade de Lisboa, 2010) 263-75, 274.

¹⁷ Art 33(9), introduced by the 1982 constitutional amendment.

¹⁸ Lei n.º 38/80, de 1 de Agosto.

¹⁹ Fullerton, 'Inadmissible in Iberia', above n 5, 674.

²⁰ The 1980 Asylum Act 38/80 was replaced by the Asylum Act 70/93 (Lei n.º 70/93, de 29 de Setembro), subsequently replaced by the Asylum Act 15/98 (Lei n.º 15/98 de 26 de Março) and Act 20/2006 (Lei n.º 20/2006, de 23 de Junho, which transposed into domestic law Directive 2003/9/CE, 27 January). On this legislative history, see Leitão, 'Avanços e Recuos', above n 14.

²¹ The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp. 13-18.

²² Lei n.º 27/08, de 30 de Junho (Act 27/2008, 30 June 2008, establishing the conditions and procedures for granting asylum or subsidiary protection, and the status of asylum seeker, refugee and subsidiary protection, implementing into the national legal order Council Directives 2004/83/EC, 29 April, and 2005/85/EC, 1 December), amended by Lei n.º 26/2014, 5 May (transposing European Parliament and Council Directives 2011/95/UE of 13 December, 2013/32/UE of 26 June, and 2013/33/UE of 26 June).

²³ Lei n.º 23/2007, de 4 de Julho (Act 23/2007, 4 July), which approves the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory, amended by Lei n.º 29/2012, de 9 de agosto (Act 29/2012, 9 Aug 2012).

normative clarity, as the two legal notions – subsidiary protection and humanitarian protection – are generally considered to be distinct and to entail entitlement to different rights.²⁴

Adherence (intended, at least) to the EU instruments is obvious from the express references to the EU directives in the preambles to the Portuguese statutes. Despite some academic reluctance to fully accept the need for, advantage, or even legitimacy of, a comprehensive EU asylum policy,²⁵ the 2008 Asylum Act transposed into domestic law Council Directives 2004/83/EC (Qualification Directive) and 2005/85/EC (Procedures Directive), and consolidated the transposition of Directive 2003/9/EC (Reception Conditions Directive) (which had been transposed initially by Act 20/2006).²⁶ Finally, Act 67/2003²⁷ transposed Directive 2001/55/EC (Temporary Protection Directive). Within the context of its participation in the European Common Asylum System, Portugal also makes use of the Dublin system²⁸ (although the obligations it entails have been criticized in Portugal as excessively discretionary),²⁹ and participates in the relocation of individuals granted protection by an EU Member State.³⁰ The transposition of EU asylum instruments seems to be, for the most part, rather literal. For example, article 20(3) Qualification Directive on the notion of ‘vulnerable individuals’ has been almost literally translated and transposed by article 2(1)(y) Asylum Act; also, article 10(1)(d) Qualification Directive on the notion of Particular Social Group has been literally transposed by article 2(1)(n)(iv) Asylum Act. In the context of the ongoing replacement and transposition of the EU asylum directives³¹ the Portuguese legislature has also chosen, for the most part, to adhere closely to the wording of the new EU instruments when amending the current domestic legal framework. An exception to this are the provisions regarding the possibility to limit asylum seekers’ freedom of movement and to detain them,³² since these are optional and the current Portuguese legal framework has opted to make a limited transposition of them.³³ Asylum seekers have, however, since the approval of the Asylum Act in 2008, already been subjected to ‘retention’ in border zones and in transit zones in airports for up to 15 days, which for all purposes amounts to detention.³⁴

Despite a history of a relatively generous legal framework, asylum claims have consistently remained low in Portugal over time, as mentioned in the Introduction. As for countries of origin, the origin of asylum seekers varies from year to year, depending on the occurrence of war or conflicts, political and socio-economic instability, and natural disasters. In 2012, the majority of claims were made by African nationals (especially from Guinea-Conakry, Nigeria, Guinea-Bissau, and Democratic Republic of Congo), followed by nationals from Asia (namely from Syria and Sri Lanka), America (in

²⁴ Instead of referring to ‘grounds of subsidiary protection’, the original wording of art 7 referred to ‘humanitarian grounds’, which worsened this lack of normative clarity.

²⁵ N Piçarra, ‘Migration and Asylum Law and Policy – Questionnaire: Portuguese Report. Relatório Apresentado ao Congresso FIDE, 21, Dublin, 2004’ in *Estudos de Direito Europeu: Congressos da FIDE – Relatórios Portugueses 1990-2008* (Principia, 2009) 645-73, 666-67.

²⁶ Act 20/2006, of 23 June.

²⁷ Act 67/2003, of 23 Aug 2003.

²⁸ Besides the Dublin Regulation, the Dublin System includes Eurodac, regulated by Regulation (EU) No 603/2013. In 2012, Portugal addressed 44 requests to other EU Member States, carried out 22 transfers, and received 155 requests from other Member States: Serviço de Estrangeiros e Fronteiras, *Relatório de Imigração*, above n 4.

²⁹ Piçarra, ‘Migration and Asylum’, above n 25, 659-60.

³⁰ Within the context of the Eurema project, Portugal received six individuals granted protection by Malta, on grounds of solidarity towards this Member State: Serviço de Estrangeiros e Fronteiras, *Relatório de Imigração*, above n 4.

³¹ Council Directive 2004/83/EC has been replaced by Directive 2011/95/EU; Council Directive 2005/85/EC has been repealed by Directive 2013/32/EU; Council Directive 2003/9/EC has been replaced by Directive 2013/33/EU. Unless otherwise expressly mentioned in the text, ‘Qualification Directive’, ‘Procedures Directive’ and ‘Reception Conditions Directive’ refer to the new directives.

³² Arts 8-11 Reception Conditions Directive.

³³ Arts 35-A and 35-B Asylum Act, introduced in 2014.

³⁴ *Amuur v France*, European Court of Human Rights, Application No 19776/92, Judgment of 25 June 1996.

particular from Colombia), and Europe (almost exclusively from Belarus).³⁵ As for the reaction of the Portuguese authorities to the asylum claims they receive, the success rate in 2011 (at first instance) was around 56.5 per cent.³⁶ Although this may at first seem quite a low success rate, it is in fact much higher than the EU average of 25 per cent.³⁷ To these successful claimants one should also add 17 refugees under the protection of the UNHCR (mostly from Eritrea and Iraq), who relocated to Portugal under a resettlement agreement.³⁸ Yet, according to the latest figures released, the success rate at appeal level is 0 per cent. Indeed, the administrative courts' reported asylum decisions are generally negative, usually denying sufficient persecution, instability, conflict, or human rights violations in the country of origin to warrant refugee status or subsidiary protection.³⁹ This either denotes impeccable decision-making at first instance, which is doubtful, or a certain lack of sensitivity to the issues entailed by asylum claims, which is more likely. At any rate, this raises issues within the context of article 13 ECHR on the right to an effective remedy.⁴⁰

The number of LGBTI asylum claims is equally surprisingly low, especially if one considers that Portuguese law decriminalized homosexual intercourse in 1982,⁴¹ offers same-sex partners legal protection since 2001⁴² and the possibility to marry since 2010,⁴³ and protects transsexuals with a very liberal legal framework since 2011.⁴⁴ In comparison with the overall number of asylum claims, the nine lesbian and gay asylum claimants identified have come exclusively from Africa (three from Senegal, one from Guinea Conakry, and one from Angola) and Europe (three from Macedonia (FYROM), and one from Moldova). Although such low figures do not allow for the calculation of a reliable success rate, it is worth stating that only two out of the nine claims in question (that is, 22 per cent of the claims) received a positive decision, which is considerably lower than the overall 56.5 per cent success rate. Also, the only two positive decisions merely granted subsidiary protection, not refugee status. These elements may indicate some reluctance in offering protection to asylum seekers who base their claims on sexuality-related grounds or may, more simply, be a reflection of weaker, insufficiently substantiated claims.

One may therefore conclude that, despite an apparently generous (or at least adequate) legal framework, LGB claimants seem to be disproportionately denied any benefit from it, which may indeed reflect negatively on the actual degree of generosity or adequacy of that legal framework. At any rate, with a clearer picture of the overall legal framework and key statistics concerning refugees in Portugal, we are now in a better position to analyze procedural and substantive aspects of asylum claims there. Focus will again be placed on the degree of compatibility with EU and ECHR law, using LGB applicants as a case study.

³⁵ Serviço de Estrangeiros e Fronteiras, *Relatório de Imigração*, above n 4.

³⁶ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 8 May 2015.

³⁷ *ibid.*

³⁸ Resolução do Conselho de Ministros n.º 110/2007, de 21 de Agosto, which establishes the obligation to resettle at least 30 refugees every year.

³⁹ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 8 May 2015. See, eg, Supremo Tribunal Administrativo (Administrative Supreme Court, STA), Processes No 01397/04 (Decision of 9 Feb 2005, Albania) and No 0996/03 (1 July 2004, Sri Lanka), and Tribunal Central Administrativo Sul (South Central Administrative Court, TCAS), Processes No 09098/12 (4 Oct 2012, Democratic Republic of Congo), and No 02543/07 (24 May 2007, Colombia).

⁴⁰ *M.S.S. v Belgium and Greece*, European Court of Human Rights, Application No 30696/09, Judgment of 21 Jan 2011, para 394.

⁴¹ Penal Code 1982, Decree-Law 400/82, of 23 Sept 1982.

⁴² Acts 6/2001 and 7/2001, of 11 May.

⁴³ Act 9/2010, of 31 May.

⁴⁴ Act 7/2011, of 15 Mar 2011, which allows one to change one's gender and first name at the civil registry. Portugal is now considered to have the world's most liberal gender identity legal framework: NM Ropio, 'Portugal com a Lei para Transexuais mais Liberal do Mundo' *Jornal de Notícias* (18 Nov 2011).

3. PROCEDURES AND REMEDIES

The arrival in the country where individuals will present their asylum claims represents a crucial moment in asylum-seekers' lives. Having access to the relevant legal information is essential to allow asylum seekers to prepare a claim with any likelihood of success. Article 49 Asylum Act establishes that asylum seekers are to be informed, in a language that they understand or are reasonably supposed to understand, of their rights and duties in relation to legal procedures, deadlines, legal advice from refugee organizations (UNHCR and CPR), legal aid, accommodation and medical support, interpretation services, and so forth. This information should be supplied by SEF to all asylum seekers in a written brochure.⁴⁵ Although the majority of asylum seekers in Portugal report having received written information material regarding the asylum procedure,⁴⁶ it has been shown that the required information is not always available at airports in Portugal.⁴⁷ This may call into question compliance with article 12(1)(a) Asylum Procedures Directive. Also, the relevant information is reported as available in only five languages, which places Portugal at the bottom of the EU ranking in this regard and very far, for example, from the 59 languages in which materials are available in Germany.⁴⁸ Besides engaging article 13 ECHR,⁴⁹ this also contravenes article 49(2) Asylum Act, which guarantees asylum seekers the right to receive written or oral information in a language they understand. This inevitably leads to situations of questionable legality, such as the case of the Georgian asylum seeker who was only offered information in Portuguese and Russian, both languages that she did not understand.⁵⁰ All this warrants an urgent review of the information tools and procedures in the context of asylum practice in Portugal, something that apparently has never occurred.⁵¹

Worryingly for LGBTI claimants, the written brochure offered to asylum seekers explains the different grounds for an asylum request (persecution on grounds of religion, political opinion, belonging to a social group, and so forth), but does not mention that 'social group' may apply to sexual orientation or gender identity. However, those LGBTI potential asylum seekers who contact ILGA Portugal are informed by this NGO of the possibility of requesting asylum on sexuality or gender identity related grounds, and directed to the CPR.

Indeed, the bulk of legal advice to asylum seekers is offered by the CPR, which, since the UNHCR office in Portugal closed down in 1998 due to the low number of asylum seekers, is the only Portuguese NGO which is specialized in supporting asylum seekers and refugees. The CPR is undoubtedly praiseworthy in many regards. However, due to the close links between the CPR and the Portuguese Government (namely the fact that the CPR depends for the most part on public – EU and State – funding and works closely with the authorities), the independence and trustworthiness of the CPR has been questioned by asylum seekers.⁵² This leads asylum seekers to consider Portuguese public authorities as the most useful source of information available.⁵³ Nonetheless, both the CPR and

⁴⁵ For a Portuguese version of this leaflet: *Guia do Requerente de Asilo* <http://www.sef.pt/documentos/56/Guia_Asilo.pdf#1> accessed 8 May 2015.

⁴⁶ European Union Agency for Fundamental Rights, *The Duty to Inform Applicants about Asylum Procedures: The Asylum-Seeker Perspective* (2010) 21.

⁴⁷ *ibid.*, 15.

⁴⁸ *ibid.*, 14.

⁴⁹ *M.S.S. v Belgium and Greece*, above n 40, para 304.

⁵⁰ European Union Agency for Fundamental Rights, *The Duty to Inform*, above n 46, 24.

⁵¹ European Union Agency for Fundamental Rights, *Country Factsheet Portugal* (2010) 3.

⁵² European Union Agency for Fundamental Rights, *The Duty to Inform*, above n 46, 18 and 30.

⁵³ *ibid.*, 31.

UNHCR stand as the two entities entitled to offer legal advice to asylum seekers at any stage of the procedure (articles 13(3) and 49 Asylum Act).

The CPR provides free legal advice to asylum seekers from the moment they present their request, but are not the asylum seekers' legal representatives unless the asylum seekers consent to such legal representation.⁵⁴ Until SEF takes a decision (that is, during the administrative procedure), asylum seekers do not have the right to legal aid, so, unless they are represented by the CPR, they need to pay for a lawyer themselves if they wish to be legally represented throughout the procedure. Asylum seekers only have the right to legal aid when/if the judicial procedure starts (that is, if SEF denies asylum seekers' claims and they appeal to an administrative court).⁵⁵ This is a reflection of the principle of equality (or, more precisely, equalization),⁵⁶ which will be discussed further below (Section 5): asylum seekers are 'equalized' to Portuguese citizens with regard to the protection of their rights. Thus the Constitutional Court recognizes their entitlement to legal aid when they wish to resort to the courts (even if the asylum seekers are in the country illegally, for example, after the deadline to leave the country following a negative decision).⁵⁷ Even so, asylum seekers in Portugal have apparently expressed concern with regard to the dedication of their legal representatives or how quickly they have been assigned to them,⁵⁸ which may again raise issues within the context of article 13 ECHR.⁵⁹ Language barriers have also been pointed out as a serious impediment to effective communication with legal representatives, namely at the stage of appeal.⁶⁰

That brings us to the issue of interpretation and translation. The lack of interpreters is a recurrent complaint of asylum seekers in Portugal,⁶¹ despite the fact that article 49(1)(d) Asylum Act guarantees asylum seekers the services of an interpreter to assist them with the filing of the application and during the procedure, something also required by article 13 ECHR.⁶² Also, worryingly, some asylum seekers in Portugal have reported having been asked to sign for the receipt of written documents, despite not realizing that they were in fact receiving a negative asylum decision.⁶³ Authorities should at the very least guarantee that the asylum seekers are fully aware of the decision being taken with regard to their claims and on what grounds, so as to ensure full respect for article 12(1)(e) Procedures Directive and ECHR rights and principles.⁶⁴

Language plays a particularly important role in the personal interview, and the interview is a particularly delicate moment for LGBTI claimants, due to the intimate nature of the events often experienced by them. According to the authorities, asylum seekers may express a preference for an interviewer and/or interpreter of a certain sexual orientation/gender identity or not of their ethnic community. In the absence of a particular request, SEF matches the claimant's gender with that of the interviewer. If during or after a first interview the asylum seeker expresses a preference for an interviewer of a different gender or reveals a degree of embarrassment due to the interviewer's

⁵⁴ See, eg, arts 13(3), 17(3), 20(5), 24(5), 28(4), 29(6), and 37(2) Asylum Act, in the wording introduced by the 2014 amendments.

⁵⁵ Art 49(1)(f) Asylum Act; Decision No 962/96 of the Constitutional Court.

⁵⁶ Decision No 400/91 of the Constitutional Court.

⁵⁷ Decision No 962/96 of the Constitutional Court. Similarly, asylum seekers are not entitled to legal aid when dealing with the administrative authorities, as Portuguese citizens do not possess that entitlement either.

⁵⁸ European Union Agency for Fundamental Rights, *Access to Effective Remedies: The Asylum-Seeker Perspective* (2010) 29.

⁵⁹ *M.S.S. v Belgium and Greece*, above n 40, paras 319 and 392.

⁶⁰ European Union Agency for Fundamental Rights, *Access to Effective Remedies*, above n 58, 30.

⁶¹ European Union Agency for Fundamental Rights, *The Duty to Inform*, above n 46.

⁶² *Hirsi Jamaa and Others v Italy*, European Court of Human Rights, Application No 27765/09, Judgment of 23 Feb 2012, para 202.

⁶³ European Union Agency for Fundamental Rights, *Access to Effective Remedies*, above n 58, 14.

⁶⁴ *Čonka v Belgium*, European Court of Human Rights, Application No 51564/99, Judgment of 5 Feb 2002, para 41.

gender, then in a second interview the interviewer will be of a different gender. Similarly, in relation to the interpreter, if the claimant expresses dissatisfaction with the interpreter (usually on ethnic grounds), then SEF tries to arrange for an interpreter with the characteristics preferred by the claimant, as long as it is reasonable and feasible. However, information concerning the possibility of expressing any preference with regard to the interviewer's or interpreter's characteristics is not provided to asylum seekers in written form or verbally, which reduces considerably the likelihood of any request. Also, taking statements from asylum seekers is regulated by article 16 Asylum Act, and this provision does not make any reference to the possibility of asylum seekers asking for an interviewer or interpreter of a particular sexual orientation/gender identity. This state of affairs, combined with the lack of training of officers dealing with LGBTI claims (discussed below in Section 5), does not fulfil the requirements set out in article 15(3)(a) Procedures Directive, which requires Member States to 'take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner', by ensuring 'that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability'. In fact, this Procedures Directive norm does not seem to have been transposed at all into the Portuguese legal order.

Decisions are taken in the first instance by SEF, which is a department of the Ministry of Home Affairs. Once an asylum claim is submitted, the first procedural step taken by SEF is the initial summary assessment which is called the 'admissibility phase' ('fase de admissibilidade'). In this procedural phase, SEF determines whether to accept to look further into the claim, in other words, whether to 'admit' the claim or not. At this stage, and throughout the whole asylum procedure, asylum seekers carry the burden of proof with regard to the facts they allege;⁶⁵ however, the 'inquisitorial principle' imposes on the administration the 'burden of inquiry'.⁶⁶ So, the burden of proof is effectively shared and there is even room to offer the 'benefit of the doubt' to asylum seekers (article 18(4) Asylum Act), which follows the guidance offered in paragraphs 196-197 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.⁶⁷ If SEF makes a decision of admissibility, it will look further into whether the asylum seeker should be offered international protection or not, thus entering the inquiry phase ('fase de instrução'). On the other hand, if at the admissibility phase SEF makes a decision of inadmissibility or unfoundedness, then the claim is not analyzed any further.

Although the asylum seeker may appeal against a decision of inadmissibility, this procedure has been heavily criticized for making the fate of an asylum seeker depend on an 'admissibility' decision taken in a very short period of time, without enough time to analyze the veracity of the accounts of asylum seekers or their legal entitlement to international protection.⁶⁸ This may undoubtedly run contrary to article 13 ECHR, as explored in *M.S.S.*⁶⁹ Also, the complexity of the evidence that needs to be presented and the need to produce culture, class, gender, and socio-economic unbiased decisions, require a different approach. Indeed, Fullerton has argued that, even if the claim may seem to be unfounded or if false, implausible, or outdated information has been supplied, an asylum seeker's claim should be dealt with by the refugee status determination

⁶⁵ Arts 15(2) and 18(4) Asylum Act, and TCAS, Processes No 09098/12 (4 Oct 2012) and No 02543/07 (24 May 2007, Colombia).

⁶⁶ STA, Process No 045142 (15 Feb 2000).

⁶⁷ STA, Process No 047969 (4 June 2002); TCAS, Process No 0362/04 (4 Nov 2004, Armenia). See, on the latter decision, ASP Oliveira, 'Quem faz o que pode, a mais não é obrigado? Sobre a Medida e o Ónus da Prova nos Processos de Asilo – Acórdão do Tribunal Central Administrativo Sul (1.ª Secção) de 4.11.2004, P. 362/04' (2008) 70 *Justiça Administrativa*.

⁶⁸ Fullerton, 'Inadmissible in Iberia', above n 5.

⁶⁹ *M.S.S. v Belgium and Greece*, above n 40, para 387.

procedure, including a full hearing, to ensure that a just decision is reached.⁷⁰ This way, the risk of refoulement of an asylum seeker to persecution, torture, and inhuman or degrading treatment would be reduced. The Portuguese Asylum Act and administrative procedures should thus be amended so as to make clear that, when dealing with substantive matters regarding the asylum claim, an accelerated procedure may be adopted, but the asylum seeker should still have access to the procedure itself (including the inquiry phase, and in conformity with the guarantees enshrined in chapter II Procedures Directive), and not be limited to the admissibility phase. It should, however, be recognized that, from the ‘sexual orientation decisions’ analyzed, those that come from the ‘admissibility phase’ do go into considerable detail about the substance of the claim. Also, the 2014 amendments had the positive effect of rendering the original version of the Asylum Act more compatible with the Procedures Directive and, especially, with article 13 ECHR, by renaming article 19 ‘decisions of inadmissibility’ as ‘unfounded decisions’ (as they are in fact decisions mostly on the substance of the claim taken in an expedited manner) and reserving the expression ‘decision of inadmissibility’ for those decisions pertaining exclusively to determining state responsibility for dealing with the claim or other matters imminently procedural (new article 19-A).⁷¹

With regard to the accelerated procedure mentioned in the previous paragraph, article 19 Asylum Act foresees an accelerated procedure for, among others, cases of ‘safe countries of origin’, ‘safe third countries’, or subsequent applications. The notion of ‘safe country’ (of origin or third countries) has been severely criticized by NGOs and scholars alike;⁷² perhaps due to this, the Portuguese authorities insist upon not using lists of ‘safe countries’, but recognise the employing of the notion on a case-by-case basis. Article 19 Asylum Act makes no exception for LGBTI asylum seekers, so the accelerated procedure may apply to them.

No matter whether a decision is reached through an ordinary or accelerated procedure, the Asylum Act establishes the possibility to appeal and request a judicial review by an administrative court against a negative decision, in accordance with articles 11(2) and 12(1)(f) Procedures Directive. Deadlines vary depending on the type of procedure, with 15 days being the time limit for appeal in ordinary procedures (article 30 Asylum Act). This is not a particularly generous time limit, considering that the (simple) average in the EU is 35 days, and 10 other EU Member States offer more than 15 days.⁷³ Similarly, in relation to the accelerated procedure, the time limit for appeal is fairly short (8 days: article 22 Asylum Act), which does not compare well with the EU (simple) average (29 days) or with the 14 EU Member States that allow longer time limits to appeal in such procedures.⁷⁴ These time limits come dangerously close to (if not actually) violating article 13 ECHR.⁷⁵ Furthermore, it has been reported that in Portugal information regarding the right to appeal is sometimes insufficient and the relevant timeline can be confusing.⁷⁶ Even more worryingly, both the lack of attendance of the legal representative at the appeal hearing and the lack of interpretation during the hearing have been highlighted by several asylum seekers in Portugal.⁷⁷ Such elements surely contribute towards the (lack of) success rate at the stage of appeal – an astonishing 0 per cent.⁷⁸ All these matters contribute to a scenario far from fully compliant with the Procedures Directive’s

⁷⁰ *ibid.*

⁷¹ UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (2001) para 7.

⁷² See, in the Portuguese context, Oliveira, *O Direito de Asilo*, above n 14, 226 ff.

⁷³ European Union Agency for Fundamental Rights, *Access to Effective Remedies*, above n 58, 21.

⁷⁴ *ibid.*, 23.

⁷⁵ *Jabari v Turkey*, European Court of Human Rights, Application No 40035/98, Judgment of 11 July 2000, para 36.

⁷⁶ European Union Agency for Fundamental Rights, *Access to Effective Remedies*, above n 58, 19.

⁷⁷ *ibid.*, 32.

⁷⁸ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 8 May 2015.

provisions safeguarding the respect for the right to appeal. On a more positive note, asylum seekers in Portugal have reported the possibility to submit supporting documents in languages other than Portuguese,⁷⁹ which renders the procedure more appellant-friendly.

A range of other procedural rights are enshrined in the law, such as the right of legal representatives to visit asylum seekers in places of detention or transit areas (article 49(6) Asylum Act), or to consult the relevant information on file (article 49(5) Asylum Act). More generally, the Code of Administrative Procedure guarantees the principle of equality of arms (article 5 CPA) and the right to be heard by the court (in writing or orally) before a decision is taken on the merits of the case (articles 100-105 CPA).⁸⁰ Also, article 17-A Asylum Act is of particular interest to LGBTI asylum seekers: following from Recital 29 and article 24 Procedures Directive, it states that authorities may promote special procedural guarantees (including extra support and extended deadlines) for those asylum seekers whose capacity to exercise their rights or fulfil their obligations may be limited due to their personal circumstances, including due to one's sexual identity or sexual orientation.

Finally, it is important to discuss the use of country of origin information (COI) reports or researchers, in the light of how important the quality and quantity of information obtained and used by decision makers is for the justice of the decision reached. In the light of the small number of asylum seekers in Portugal, SEF does not produce its own COI reports. Instead, it relies on COI reports produced by other entities and available on-line, such as the US State Department, UK Home Office, UNHCR, Portuguese embassies and consulates, and media (and European Asylum Support Office (EASO), according to the wording adopted in 2014 by article 18(2)(a) Asylum Act). In the case of LGBTI asylum seekers, SEF also relies on more specific information produced and/or made available by specialized entities, such as the International Gay and Lesbian Human Rights Commission. Only two decisions from those identified made a reference to LGBTI-specific COI, which seems to denote an insufficient degree of research by decision makers. In these two decisions, the information was used to characterize the possible dangers facing the asylum seekers in question if they were to return to their home countries. In one of the cases, this information strengthened the case for granting subsidiary protection; in the other case, the information did not strengthen the case for granting subsidiary protection, but such protection was granted anyway on the basis of (non-LGBTI related) human rights abuses in the country of origin. Also, in several of the cases identified, SEF refers to COI which is not directly relevant to LGBTI individuals, in order to assess the general risk of persecution and danger, with the purpose of determining whether subsidiary protection should be granted or not. Yet, when doing this, there was no particular evidence of use of irrelevant or inapplicable information. Finally, legal representatives of asylum seekers may consult and instruct an independent COI expert and request the production of a report, but such experts have to be paid by the asylum seeker. None of the decisions in the cases identified makes reference to an expert report. Yet, if an asylum seeker provides an expert report amongst the evidence submitted, SEF would presumably consider it on the same terms as other COI collected from other origins (that is, without giving it less or more weight than the weight given to the other COI gathered).

There is, therefore, still much room for improvement with regard to the procedural dimensions of Portuguese refugee law, namely in relation to the quality and availability of legal information, translation and interpretation, and legal representation, as well as the default use of an 'admissibility phase' and relatively short appeal deadlines. The improvement of these aspects,

⁷⁹ European Union Agency for Fundamental Rights, *Access to Effective Remedies*, above n 58, 25. The legality of such submission (or its actual relevance) has, however, not been ascertained by the Agency or by this author.

⁸⁰ Decreto-Lei n.º 442/91, de 15 de Novembro, amended by Decreto-Lei n.º 6/96, de 31 de Janeiro.

however, cannot solve all relevant issues, as the content of decision-making suffers from its own problematic aspects which are discussed in the next section.

4. SUBSTANTIVE REQUISITES AND DECISION-MAKING

Portuguese asylum decision-making authorities are faced with the usual range of issues that their counterparts in other domestic jurisdictions also have to deal with, in particular the notion of persecution, the assessment of claimants' credibility, and the passage through a 'safe third country'. LGBTI claims tend frequently to raise a range of other issues, especially: (lack of) contact with, and (lack of) intervention by, police and/or public authorities; the assertion of 'homosexuals' as a social group in the country of origin; and the possibility of internal relocation. These key issues will be analyzed in turn below.

As widely explored in academic literature, persecution of LGBTI claimants is characterized by a set of particular elements that distinguishes it from the type of persecution generally suffered by other asylum seekers, including the role of private actors, the intense social prejudice against these claimants, and the role of legislation (namely criminalization) in sanctioning that prejudice.⁸¹ The claims identified in this study confirm the recurrence of these issues in LGBTI claims, as the types of persecution and/or serious harm in question related to: coercion and threats by relatives, hostility by neighbors, harassment by police officers, lack of protection from public authorities (including police and courts), mistreatment by strangers in public, attacks and threats by mobs, sexual violence, destruction of personal property, and, more generally, discriminatory treatment. Worryingly – and seemingly unjustifiably – none of the treatment experienced by the asylum seekers in the cases identified was recognized as amounting to (individual) persecution or serious harm. This begs the question: how much does an LGBTI individual need to suffer in order for the 'persecution threshold' to be reached? This is all the more worrying if one considers that the UNHCR Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity expressly mention that such types of persecution (and the cumulative effect of individual episodes) may undoubtedly amount to persecution for asylum purposes.⁸² This is not a problem afflicting Portuguese decision-making exclusively, as decision makers in other EU Member States equally apply unreasonably stringent thresholds.⁸³ This is not any sort of consolation, though, simply a similarly disappointing trend across Europe.

So, in all the decisions in question, the treatment alleged by the asylum seekers was described as insufficient to fulfil the legal criteria required to grant the status of refugee. In most of these negative decisions (five out of seven), authorities quote paragraph 54 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status to justify the decision taken that the

⁸¹ Jansenand and Spijkerboer, *Fleeing Homophobia*, above n 10; J Weßels, 'Sexual Orientation in Refugee Status Determination' (2011) *Refugee Studies Centre Working Paper Series* 73; B O'Leary, "'We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...': The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity' (2008) 16 *Feminist Legal Studies* 87-95.

⁸² UN High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 Oct 2012, HCR/GIP/12/01 <<http://www.refworld.org/docid/50348afc2.html>> accessed 8 May 2015, points 23-25 in particular.

⁸³ See, eg, in the UK, *Ahmed v SSHD* [2000] INLR 1, and the subsequent line of case law.

circumstances alleged by the asylum seeker in question do not amount to persecution,⁸⁴ but merely discrimination (even if this provision is apparently used as an element of the overall reasoning used to justify not granting protection, not the central element of it). Although the harm suffered by a claimant is classed as discrimination, and not persecution, the Portuguese authorities overlook paragraph 55 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which states that, '[w]here measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his [sic] future existence. (...) A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved'.⁸⁵ Also, article 9(2) Qualification Directive explicitly includes discriminatory measures within the scope of 'acts of persecution'.

When subsidiary protection was granted (in only two of the nine cases identified), the decisions were based on discriminatory treatment and human rights abuses publicly reported, without any connection to the individual facts alleged by the asylum seekers in question, further reinforcing the lack of normative clarity in the Asylum Act and in decision-making as to the distinction between subsidiary protection and humanitarian protection. Importantly, LGBTI claimants seem to be granted asylum if in their countries of origin homosexual conduct is criminalized. Indeed, one of the positive decisions is based on the fact that homosexuality is punished as a criminal offence in Senegal. The decision does not discuss whether the law is enforced or not, which seems to indicate that whether the norms in question are actually enforced or not is irrelevant.⁸⁶ Yet, another decision also concerning a homosexual man from Senegal denied the asylum request without even mentioning that homosexuality is punished as a criminal offence in Senegal. The negative decision was based on other elements (lack of persecution, lack of contact with public authorities, the existence of a 'safe third country'), which indicates that criminal law provisions are only relevant if other requisites are fulfilled. This seems to disregard the position adopted by the UNHCR with regard to the persecutory character of mere criminalization of same-sex consensual relations.⁸⁷

As mentioned above, persecutory and discriminatory acts carried out by private actors take on a particular importance in LGBTI claims time and time again. In most cases of LGBTI asylum claims identified, harm was indeed inflicted, at least partially, by non-state actors, including threats (by relatives as well) and violent acts (also of sexual nature). From the decisions analyzed, it can be deduced that Portuguese authorities accept that cases of persecution or serious harm inflicted by non-state actors warrant protection. Nevertheless, those who suffer persecution or harm inflicted by non-state actors are required to have sought protection from police or other authorities before fleeing their countries of origin in order to prove that the authorities were unable or unwilling to provide such protection.⁸⁸ Also, asylum claimants were expected to seek such protection from the police or other authorities even when, in the country of origin, homosexual conduct is punished as a criminal offence.

⁸⁴ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Dec 2011, HCR/IP/4/ENG/REV. 3 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 8 May 2015.

⁸⁵ *ibid.*

⁸⁶ This is more generous than the approach adopted by the CJEU: para 50 of the Opinion (11 July 2013) and para 55 of the decision (7 Nov 2013) in Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*. For a critique of this decision, see ICJ – International Commission of Jurists, 'X, Y and Z: a glass half full for "rainbow refugees"?' <<http://www.icj.org/x-y-and-z-a-glass-half-full-for-rainbow-refugees/>> accessed 8 May 2015.

⁸⁷ UN High Commissioner for Refugees, *Guidelines on International Protection No. 9*, above n 82, points 26 ff.

⁸⁸ One exception was identified, with regard to one of the positive decisions: subsidiary protection was granted despite the lack of contact with the authorities. Albeit positive to this particular claimant, this seems to highlight some degree of inconsistency in decision-making.

This expectation is inconsistent with the UNHCR Guidelines⁸⁹ and clearly unreasonable (besides going against the basic criminal law right of non-self-incrimination), as contacting authorities in those countries would have subjected the claimants to further danger, including physical and sexual violence. Moreover, although it does not unequivocally derive from the decisions analyzed or the interviews carried out, it seems safe to conclude that, if LGBTI asylum seekers are expected to seek protection from police when homosexuality is punished as a criminal offence, then they are also expected to seek protection from police even if the police have a reputation for being homophobic or transphobic. In sum, the requirement to seek protection is not dependent on showing that protection would generally be available to LGBTIs. The decisions identified indicate that seeking protection from police is always a requirement, independent of the country of origin, and information on whether that protection would be available to LGBTIs or not does not seem to be sought by the authorities or play any role in decision-making. This seems to fall short of the standards of protection required by the Court of Justice of the European Union (CJEU).⁹⁰

In compliance with international and EU law, the Asylum Act also establishes the protection of ‘particular social groups’ (PSG). Article 10(1)(d) Qualification Directive has been transposed by article 2(1)(n)(iv) Asylum Act so as to require both elements mentioned in the Directive’s provision. In other words, to prove the existence of a PSG, an asylum seeker needs to establish that:

(i) ‘[t]he members of that group share an inborn characteristic or a common history which cannot be changed, or share a characteristic or belief deemed to be so critical for the group members’ identity or conscience that they cannot be asked to give it up’; and that

(ii) ‘that group has a different identity in the country in question, because it is considered to be different by the society that surrounds it’.

The cumulative application of these elements makes the task of asylum seekers particularly arduous. Although the ‘cumulative test’ thesis has been defended by both the CJEU’s Advocate General Sharpston and the CJEU itself,⁹¹ the UNHCR has already strongly condemned this approach.⁹² A ‘cumulative test’ should thus not be pursued by any state or international organization, unless a much more persuasive reason is expounded in its defense. Crucially for LGBTI claimants, the notion of PSG ‘may include a group based on gender identity or a common characteristic of sexual orientation, although this may not be understood as including acts typified as crime according to the law, as well as consider aspects related to gender, although gender itself should not be susceptible to create a presumption for the qualification as a group’.⁹³ It is also worth pointing out that the last part of the provision relating to gender has slightly misimplemented/misinterpreted the Directive’s wording: while the relevant Directive refers to ‘gender related aspects’, the Portuguese law refers to gender itself. It is not clear yet whether this difference in wording will have an impact in legal practice.

⁸⁹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 9*, above n 82, point 36.

⁹⁰ See, eg, CJEU Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 (*Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08), Dier Jamal (C-179/08) v Bundesrepublik Deutschland*), [2010] ECR I-01493.

⁹¹ Para 35 of the Opinion (11 July 2013) and para 45 of the decision (7 Nov 2013) in CJEU Joined Cases C-199/12, C-200/12 and C-201/12, above n 86.

⁹² UN High Commissioner for Refugees, *UNHCR Annotated Comments on the EC 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 (OJ L 304/12 of 30.9.2004)*, 28 Jan 2005 <<http://www.refworld.org/docid/4200d8354.html>> accessed 8 May 2015, 23.

⁹³ Art 2(2) Asylum Act, implementing art 10(1)(d) Qualification Directive.

The decisions identified do not concern themselves expressly with the notion of PSG, thus not asserting whether or not the asylum seekers in question belong to a PSG. This seems to be far from being the recognition of LGBTI as a PSG, although Portuguese academics do recognize LGBTI as a PSG.⁹⁴ Indeed, all decisions identified use wording to the effect that the asylum seeker in question ‘did not invoke any fear of persecution by virtue of (...) belonging to a particular social group’. It is generally difficult to ascertain whether the meaning of this sentence is that a ‘fear of (individual) persecution’ was not proven, that ‘belonging to a social group’ was not proven, or that the persecution suffered was not ‘by virtue of’ belonging to a PSG. On the one hand, in the cases where the asylum seeker alleges treatment that can be reasonably recognized as seriously harmful, this wording only makes sense if meaning that ‘belonging to a social group’ was not proven, or that the persecution suffered was not ‘by virtue of’ belonging to a PSG. On the other hand, in the cases where the asylum seeker alleges treatment that has only been possible ‘by virtue of’ the claimant’s sexual orientation, this wording only makes sense if meaning that a ‘fear of (individual) persecution’ was not proven, or that ‘belonging to a social group’ was not proven. In any case, the exact sense of the assertion remains unclear and detrimental for claimants.

At any rate, LGBTI are not considered a ‘vulnerable group’ or a ‘group having special needs’, as article 2(1)(y) Asylum Act has transposed article 20(3) Qualification Directive. Indeed, although these norms offer an extra layer of protection to children, individuals with disabilities, the elderly, and so forth, they do not afford any special status to individuals on grounds of their sexual orientation or gender identity. Also, there is no reference in these decisions to the UNHCR Guidance Note on Refugee Claims Related to Sexual Orientation and Gender Identity,⁹⁵ the Yogyakarta Principles,⁹⁶ or more generally to non-conformity with heterosexual gender roles. This state of affairs does not protect LGBTI claimants particularly well and may denote some lack of awareness of the particular issues that affect these claimants and the principles that should guide any decision-making regarding their claims.

On a positive note, in the decisions made available by SEF regarding LGBTI asylum seekers, sexual orientation was always determined by self-identification of the asylum seeker in question and not questioned (at least expressly) in the decision.⁹⁷ Unlike in several other EU Member States,⁹⁸ no medical, psychological, psychiatric, or sexological evidence regarding sexual orientation is required, and no questions are explicitly asked about one’s sexual activities, stereotypical LGB conduct, familiarity with the ‘gay scene’, or membership of LGBTI organizations in the country of origin or in Portugal.⁹⁹ As a consequence, credibility assessment seems to play a much less important role in Portugal than in several other jurisdictions.¹⁰⁰ This is surely positive, as it avoids the use of

⁹⁴ Oliveira, *O Direito de Asilo*, above n 14, 302-03.

⁹⁵ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 Nov 2008 <<http://www.refworld.org/docid/48abd5660.html>> accessed 8 May 2015, in the meantime replaced by UN High Commissioner for Refugees, *Guidelines on International Protection No. 9*, above n 82.

⁹⁶ --, *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* <http://www.yogyakartaprinciples.org/principles_en.pdf> accessed 8 May 2015.

⁹⁷ None of the cases identified had instances of claimants only ‘coming out’ after leaving their countries of origin or of not speaking about their sexual orientation when the claim was first presented, so it is not possible to ascertain how the Portuguese authorities would react to such cases.

⁹⁸ Jansenand and Spijkerboer, *Fleeing Homophobia*, above n 10, 47.

⁹⁹ This is in line with the decision in CJEU Joined Cases C-148/13 to C-150/13 (*A, B and C v Staatssecretaris van Veiligheid en Justitie*), Judgment of 2 Dec 2014 (nyp).

(*Aydin Salahadin Abdulla (C-175/08)*, *Kamil Hasan (C-176/08)*, *Ahmed Adem, Hamrin Mosa Rashi (C-178/08)*, *Dler Jamal (C-179/08) v Bundesrepublik Deutschland*), [2010] ECR I-01493.

¹⁰⁰ See, eg, with regard to Australia, UK, Canada, and New Zealand, J Millbank, ‘The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1-33.

inappropriate LGB stereotypes, reduces the risk of cultural bias as to what it means to be LGB, and prevents an unreasonable burden of proof from being placed on the claimant. Still, the complete absence of any reference to a claimant's sexuality or even an attempt to elicit from the claimant a narrative regarding their sexuality, may in fact reveal some moral prudishness in discussing those issues in official legal proceedings. Also, the outcome of decisions is most frequently negative on another ground, not related to the credibility of the claimant's sexual self-identification (for example on grounds of lack of persecution, lack of contact with public authorities, or passage through a 'third safe country'), which raises the suspicion that questioning the claimant's sexuality is unnecessary in the light of other means of reaching a negative outcome. This is far from being a Portuguese phenomenon, as similar trends have been registered in other EU Member States.¹⁰¹

Also particularly worrying in LGB asylum adjudication in several EU Member States is the use of the 'discretion requirement', that is, the idea that LGB individuals can return to their countries of origin and live safely provided they do not make their sexuality visible or known to anyone else and practice it in a way that does not attract the attention of others, in particular the authorities. How this can be done (if at all) without questioning claimants' right to international protection and their human rights to privacy, family life, association, expression, and so forth, has been justifiably questioned,¹⁰² and has led to the abolition of such a 'requirement' in several jurisdictions.¹⁰³ The decisions from the Portuguese authorities on LGB claims do not suggest any 'discretion requirement', which tips the balance in favor of the quality of the decision-making. Still, despite the absence of a 'discretion requirement', Portuguese decision makers reach negative decisions in the majority of LGB asylum cases on grounds other than those related to discretion regarding sexuality.

Yet another matter of particular interest in LGBTI claims is internal relocation. Although of general relevance in asylum claims, this issue has particular characteristics when the case possesses a sexuality or gender dimension.¹⁰⁴ Although there is no direct reference to internal relocation in any of the decisions identified, the issue is implicit in two of them. In a case regarding an Angolan gay man, the claimant was asked if the attacks he suffered would end if he moved to another part of the city or to another region within the country of origin. The claimant is reported as stating that, at the time, he thought he was being followed and that one of his aggressors had threatened to kill him, so he was not able to think clearly and only wished to leave the country. Although this statement or the possibility of internal relocation is not expressly raised again in the decision in question, it is highly likely that it informed the negative outcome in the procedure. Similarly, in a case regarding a Senegalese lesbian, the claimant is reported as stating that she did not opt for relocation within Senegal to a region where she was not known, due to her lack of family support or economic resources. This was brought up again later in the decision to argue that the claimant's circumstances did not fulfil the requirements for her to be granted international protection. It is therefore clear that there is a lack of awareness of the difficulties surrounding the internal relocation of LGB individuals, since relocation will rarely protect the claimant from further persecution due to the usual pervasive social vigilance and prejudice throughout a country.¹⁰⁵ The absence of any allusion to the UNHCR Guidelines on International Protection with Regard to Internal Flight or Relocation Alternative or the UNHCR Guidelines on

¹⁰¹ Jansenand and Spijkerboer, *Fleeing Homophobia*, above n 10, 47.

¹⁰² *ibid.*, 33; J Millbank, 'The Role of Rights in Asylum Claims Based on Sexual Orientation' (2004) 4 Human Rights Law Review 193-228; S Steendam, 'M.E. v. Sweden: Back to The Closet' <<http://strasbourgothers.com/2014/07/28/m-e-v-sweden-back-to-the-closet/>> accessed 8 May 2015, criticizing the decision in *M.E. v. Sweden*, European Court of Human Rights, Application no. 71398/12, Judgment of 26 June 2014.

¹⁰³ See, eg, in the UK, *HJ (Iran) v Secretary of State for the Home Department* (Rev 1) [2010] UKSC 31.

¹⁰⁴ C Bennett, *Relocation, Relocation: The Impact of Internal Relocation on Women Asylum Seekers* (Asylum Aid, 2008).

¹⁰⁵ *ibid.*

Claims to Refugee Status based on Sexual Orientation and/or Gender Identity seems to reinforce this conclusion.¹⁰⁶

The possibility of internal relocation is usually the last logical step before reaching a final decision on the claim. Yet, other aspects of the conditions offered to asylum seekers in Portugal should be appraised, and these refer to aspects not strictly related to the asylum adjudication process, as discussed in Section 5.

5. BROADER SOCIAL AND LEGAL FRAMEWORK FOR ASYLUM SEEKERS AND REFUGEES

Perhaps facilitated by the low number of asylum seekers it has to deal with, the Portuguese socio-legal framework is characterized by some very positive aspects, which promote the dignity and human rights of asylum seekers. Housing is definitely one of them. All asylum seekers are initially housed in the official accommodation center, the ‘Centro de Acolhimento da Bobadela’, located in the greater Lisbon area.¹⁰⁷ The Centre is generally held to possess good material facilities and to offer services of a high standard to asylum seekers, including in comparison with other European countries.¹⁰⁸ Furthermore, a new accommodation center exclusively for unaccompanied children was opened in 2012, housing about 14 children and offering them a playground, a library, and Portuguese language lessons.¹⁰⁹ LGBTI asylum seekers do not seem to face problems due to their sexual orientation during their stay in these accommodation centers. It is possible for them, upon request, to be placed in separate accommodation from people of the same country and/or religious background, although asylum seekers are not necessarily informed of this possibility. Issues of separate accommodation for LGBTI asylum seekers in the official accommodation center have not arisen in practice, but should they arise, it is arguably unlikely that it would be easy to address them fully, considering past experiences with the limited availability of a preferred type of accommodation.¹¹⁰ Article 2(1)(ag) Asylum Act (introduced by the 2014 amendments) has introduced the notion of ‘claimant with special accommodation needs’, which includes, amongst others, people who have been subject to acts of torture, rape, or other serious forms of psychological, physical, or sexual violence – this notion may thus well include LGBTI claimants, but that will not necessarily always be the case. At any rate, article 59(1)(e) imposes on the authorities the obligation to prevent instances of assault and violence, including of sexual character, in the accommodation centers, which can be of benefit to LGBTI individuals. Asylum seekers can remain in the official accommodation centre for a maximum period of three to six months (except for unaccompanied children, who may remain for as long as their asylum request is assessed and, if the outcome is positive, afterwards until the age of 18). After this period of time, asylum seekers become benefit recipients: they are entitled to the same ‘social

¹⁰⁶ UN High Commissioner for Refugees, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04 <<http://www.refworld.org/docid/3f2791a44.html>> accessed 8 May 2015; UN High Commissioner for Refugees, *Guidelines on International Protection No. 9*, above n 82, points 51 ff.

¹⁰⁷ *Centro de Acolhimento para Refugiados (C.A.R.)* <c/> accessed 8 May 2015.

¹⁰⁸ Amnistia Internacional Portugal, (2009) 4 *Notícias* 16, and C Santinho, ‘Refugiados e Requerentes de Asilo: Abordagens Antropológicas no Campo da Saúde Física e Mental’ in C Pussetti et al. (eds.), *Migrantes e Saúde Mental: A Construção da Competência Cultural* (Observatório da Imigração, 2009) 177-96, 183.

¹⁰⁹ *Centro de Acolhimento para Crianças Refugiadas (C.A.C.R.)* <<http://www.cpr.pt/>> accessed 8 May 2015.

¹¹⁰ Associação Salpísign-GIS/Grupo Imigração e Saúde, *Quando não Existe uma Segunda Casa: Estudo sobre a Saúde dos Refugiados numa Perspectiva de Vulnerabilidade* (2009), 54.

allowance’ (‘rendimento social de inserção’, literally translated as ‘social income of insertion’) as national citizens and residents, as well as an ‘accommodation subsidy’. Asylum seekers thus have to arrange for their own private accommodation, which they pay for with the benefits they receive. Although this may put some pressure on asylum seekers, it also stimulates their resourcefulness, allows them much freedom of movement, and promotes their integration into society.

Besides this, once an asylum claim has been recorded by SEF, asylum seekers receive a document attesting the right to remain in Portuguese territory until a final decision has been reached (article 14 Asylum Act). When the procedure enters the inquiry phase, asylum seekers are granted a provisional residence permit (article 27 Asylum Act). Whilst holding a resident permit, asylum seekers are generally treated the same as other legally resident individuals in Portugal, including for legal aid (as discussed above, Section 3), access to public services and courts, health care, education and professional training, social benefits, and, most importantly, the right to work.¹¹¹ This equal treatment continues until the authorities reach a final decision on the asylum request, something which cannot be taken for granted by asylum seekers in other EU Member States.¹¹² Being entitled to this range of rights may not address all the needs of asylum seekers, as their needs may require targeted and tailored services which have yet to be created (namely with regard to health care, social integration, and education/training);¹¹³ nonetheless, it is surely a positive (initial) approach to the treatment of asylum seekers.

So, the overruling principle is equality, or equalization between Portuguese citizens and foreigners, as imposed by the democratic rule of law and recognized by the Constitutional Court.¹¹⁴ Indeed, article 15 of the Portuguese Constitution establishes that ‘[f]oreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens’.

Finally, if the final decision is positive, Portuguese law offers claimants the possibility of family reunification. Article 68 Asylum Act entitles the ‘beneficiaries of the refugee or subsidiary protection status (...) to family regrouping with the members of their families as stated in article 2(1)(k)(i), according to the terms defined in the legal framework ruling the entrance, stay, exit and removal of foreigners in the national territory’, and extends the ‘effects of the asylum or subsidiary protection (...) to the members of the family’, unless ‘the member of the family is excluded from the status of refugee or of subsidiary protection or loses it under the terms of this law’. Article 2(1)(k)(i) Asylum Act expressly includes within the notion of ‘family’ those in ‘common law’ marriages. Also, the legal framework of entry, permanence, exit, and removal of foreigners into and out of national territory is laid out in Act 23/2007, and its article 98 regulates the right to family reunion by establishing that ‘[a] citizen with valid residence permit has the right to family reunion with the family members who are out of national territory, and who lived with him [sic] in another country, or that depend on him [sic], or who live with him [sic] in cohabitation, independently from the family ties having been created before or after the resident entered Portugal’. ‘Family members’ for the purpose of this provision include spouses, children, and ascendants, and siblings under certain

¹¹¹ Arts 51 ff Asylum Act. See, also, J Vasconcelos, *Resource Project: Refugees’ Contribution to Europe – Country Report: Portugal* (CPR – Conselho Português para os Refugiados 2004); PM Tavares, *Os Direitos Sócio-Económicos dos Refugiados: Trabalho e Educação* (Conselho Português para os Refugiados, 1998).

¹¹² See, eg, on the debate about the right to work of asylum seekers in the UK, C O’Sullivan and M Gower, *Right to Work* (Asylum Aid, 2008).

¹¹³ GIS, *Quando não Existe uma Segunda Casa*, above n 109; Santinho, ‘Refugiados e Requerentes de Asilo’, above n 107; M Battaglini, ‘Country Report: Portugal’ in A Nonchev and N Tagarov (eds.), *Integrating Refugee and Asylum-seeking Children in the Educational Systems of EU Member States* (Center for the Study of Democracy, 2012).

¹¹⁴ Decisions No 365/2000, 423/2001 and 433/2003 of the Constitutional Court.

circumstances (article 99). Article 100 refers expressly to ‘common law’ marriage and establishes that family reunion may be authorized to a partner who maintains, either in national territory or abroad, a de facto union duly acknowledged in the terms of the law with a foreign citizen. Article 104 accepts as proof of family ties and/or de facto union the existence of common children, previous cohabitation, the registration of the life partnership, or any other ‘trustworthy means of proof’. Although the submission of proof of family ties and/or de facto union with a same sex partner may be difficult for most LGBTI refugees, the law does create the necessary conditions for such proof to be produced and for the right to family reunion to be exercised, which should be praised.

On other fronts, however, the socio-legal framework available to asylum seekers and refugees is less praiseworthy. Particularly with regard to the range of NGOs supporting LGBTI asylum seekers, the Portuguese situation is rather depressing. As mentioned above, the independence and trustworthiness of the CPR has been questioned by asylum seekers, and this makes the existence of other relevant NGOs (or lack thereof) a crucial issue. Only three other NGOs seem to be approached by, or have some degree of contact with asylum seekers, particularly LGBTI. These are ILGA Portugal, GIS (an NGO that promotes research and offers services in the area of health and immigration), and CAVITOP (Centro de Apoio a Vítimas de Tortura Portugal, an NGO that provides support to victims of torture).¹¹⁵ None of these NGOs has sufficient staff (if any), possesses expertise in the field of refugee law and policy, or works with lawyers or with UNHCR on LGBTI issues, so they direct any enquiries to CPR and liaise with it when in need of advice in this field. In sum, Portuguese NGOs are faced with lack of knowledge of the legal framework applicable to asylum seekers (particularly LGBTI), lack of access to other institutions and organizations that might offer more specialized support to LGBTI asylum seekers (as there is none), and lack of material resources to provide accommodation or financial support to potential/prospective asylum seekers. No special training on LGBTI asylum claims has been identified in the context of general refugee NGOs, LGBTI NGOs or, even more worryingly, for officers who carry out interviews and make decisions, or interpreters, thus disregarding the UNHCR Guidelines¹¹⁶ and denying decision makers and all those who come into contact with LGBTI asylum seekers the opportunity to reflect on their decisional practices, socio-cultural biases and advisory skills. Finally, there are no lawyers, let alone lawyer networks, with expertise in LGBTI asylum cases. This situation may be a reflection of the low number of LGBTI asylum seekers in particular and asylum seekers more generally, but nevertheless places asylum seekers, especially LGBTI, in a fragile position, as they will most likely fail to obtain the good quality socio-legal advice and support that would facilitate a successful claim.

6. CONCLUSION

Portugal is apparently a good host country for foreigners, including asylum seekers. A young Indian man has been reported as saying that Portugal is a country which is good for refugees, because authorities are not as strict as in other countries and there are plenty of opportunities and places to socialize with people from the same country of origin.¹¹⁷ Indeed, there is a range of positive elements about the way Portuguese law and authorities treat asylum seekers, including the offer of good quality

¹¹⁵ <www.ilga-portugal.pt>, <<http://gisassociacao.blogspot.co.uk/>> and <<http://www.cavitop.net/>> accessed 8 May 2015.

¹¹⁶ UN High Commissioner for Refugees, *Guidelines on International Protection No. 9*, above n 82, point 60(iv).

¹¹⁷ E Mestheneos and E Ioannidi, ‘Obstacles to Refugee Integration in the European Union Member States’ (2002) 15 *Journal of Refugee Studies* 304-20, 313-14.

housing and related services, the generous family reunification norms, and, perhaps most importantly, the ‘legal equalization’ between asylum seekers in the inquiry phase and Portuguese citizens. However, there are also several worrying aspects, including the total lack of success on appeal, the lack of information tools and procedures, the general use of an admissibility phase, the short appeal deadlines, and the shortcomings in legal representation and interpretation. With regard to LGBTI claimants specifically, there are both positive and negative aspects that should be recorded as well. The recognition of the relevance of persecution by private actors, the acceptance of sexual self-identification, and the absence of a ‘discretion requirement’, stand out amongst the positive aspects discussed above. Yet, many aspects raise concern, including the particularly low success rate of LGB claims at first instance, the limited use of COI, the adoption of an unreasonably high persecution threshold, the lack of consistency regarding the relevance of criminalization of homosexual conduct, the unreasonable requirement to seek protection from police forces even when homosexual conduct is a criminal offence, and the assertion of the possibility of relocation. Also, by not expressly recognizing LGBTI claimants as a PSG and not discussing to any extent the sexuality and sexual identity of claimants, decision makers may actually be contributing towards the erasure of the identity of these asylum seekers, thus simultaneously disempowering them. Should these negative aspects not be urgently corrected, Portugal may find itself as a defendant in the not too distant future, both before the CJEU and the ECtHR.

Still, at least from the perspective of Portuguese authorities, the most pressing issue in Portuguese refugee law has been that of implementing the new EU asylum directives, discussed above (Section 2). Past experience would suggest that transposal would be consensual and adhere closely to the language of the directives. Yet, the amendments to the Asylum Act suggested by the Government and subsequently approved by the parliament in 2014 were met with severe criticism from the CPR and the Portuguese Data Protection Authority, for trying to reduce the level of protection afforded by the Asylum Act. The main criticism has been directed towards the removal of the obligation imposed on SEF to consult the CPR before issuing an asylum decision.¹¹⁸ Other problematic amendments regard the introduction of expert exams to determine the age of child asylum seekers (thereby raising issues of free and informed consent by child asylum seekers),¹¹⁹ and the broadening of the range of situations where asylum seekers can be detained.¹²⁰ Although these amendments may all be compatible with the EU directives, the directives do allow for more favorable domestic standards, so the Portuguese Asylum Act could have retained its traditional positive stance towards asylum seekers. At any rate, many other challenges await Portuguese refugee law and policy, in order to improve the state of affairs explored in this article. Unless litigation forces authorities to deal with the issues raised above, improvements may take many years and considerable human and material resources, which may be far from the current priorities of Portuguese authorities and society more generally. Nevertheless, it is a struggle that needs to be undertaken and deserves our attention.

¹¹⁸ A Henriques, ‘Nova lei do asilo ameaça direitos dos refugiados’ <<http://www.publico.pt/portugal/jornal/nova-lei-do-asilo-ameaca-direitos-dos-refugiados-27176106>> accessed 8 May 2015. This has translated into the deletion of art 29(3) Asylum Act.

¹¹⁹ *ibid.* See, also, art 79(6) Asylum Act, introduced in 2014.

¹²⁰ Amnistia Internacional Portugal, *Amnistia Internacional assinala progressos alcançados na versão final da nova lei de asilo mas questiona alargamento da detenção* <http://www.amnistia-internacional.pt/index.php?option=com_content&view=article&id=1660:ai-assinala-progressos-na-nova-lei-de-asilo&catid=35:noticias&Itemid=23> accessed 8 May 2015; arts 35-A and 35-B, introduced in 2014.