

**Dossier:  
LGBTIQ Refugees from Iraq**

**Queer Base – Welcome & Support  
for LGBTIQ Refugees**

**November 2021**



## SUMMARY:

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### **LGBTIQ persons belong to particularly vulnerable social group of refugees.**

In the context of Iraq, persecution on the basis of sexual orientation or gender identity is recognized by renowned organizations such as UNHCR, EASO, as well as the Federal Office for Immigration and Asylum, the Austrian Constitutional Court, the German Administrative Courts and most judges at the Federal Administrative Court. Nevertheless, the former contact judge for Iraq at the BVwG in Linz tries to question the need for protection of queer refugees: **In doing so, he disregards case law of the VfGH and commissions a deposed „expert“ for unnecessary research. This creates massive legal uncertainty and artificially drags out proceedings.** In the following, we provide an overview of the legal development as well as the target group.



## A JUDGE AGAINST THE VfGH:

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In itself, the situation is clear: LGBTIQ persons are persecuted in Iraq and therefore need international protection. The Federal Office for Immigration and Asylum sees it this way,<sup>1</sup> the UNHCR sees it this way,<sup>2</sup> the European Asylum Support Office of the EU (EASO) sees it this way,<sup>3</sup> the Constitutional Court (VfGH) sees it this way,<sup>4</sup> the German administrative courts see it this way<sup>5</sup> and the vast majority of the judges at the BVwG see it this way.<sup>6</sup> Only the „ former contact judge for Iraq“, Judge Bracher sees it differently.

The Constitutional Court has ruled on the issue of LGBTIQ and Iraq a total of four times since 2017. Each of these four decisions has ruled in favor of the respective complainants and rectified the negative decision of the lower instance (BVwG). Three times of these involved findings by Judge Bracher (Judicial Division L502).

The core of the negative decisions of Judge Bracher is always the argumentation that homosexual persons in Iraq could live in secret or with certain restraint unmolested (the so-called „discretion requirement“). Only, according to clear case law of ECJ, VfGH and VwGH, this is inadmissible, as LGBTIQ persons cannot be expected to renounce such an important feature of their own identity in order to escape persecution. Judge Bracher therefore adapted his reasoning and subsequently argued that unmarried heterosexuals in a conservative society such as Iraq are also not allowed to openly show their affection (such as holding hands or kissing); if one were to expect that homosexuals must already be able to do this and would therefore receive asylum, this would be tantamount to privileging homosexuals over heterosexuals. The Constitutional Court found clear words to this argumentation and called it discriminatory.

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1 We are not aware of a single decision by the BFA in which a credibly queer person from Iraq was not granted asylum.

2 See UNHCR Considerations on Iraq, May 2019, and the Constitutional Court's references to these UNHCR considerations.

3 See EASO Country Guidance: Iraq, January 2021.

4 See most recently VfGH E3839/2020-9 of June 8, 2021

5 We have more than 20 positive decisions of German administrative courts, which often also use the country information sheet of the Austrian BFA and grant asylum on its basis.

6 At each of the four locations of the BVwG, LGBTIQ persons from Iraq are regularly granted asylum; one can therefore speak of a secure case law. Apart from Judge Bracher, we know of only two judges in Innsbruck who deviate from this line. All other judges who hear cases related to Iraq (approx. 10-15) grant asylum.

## A JUDGE AGAINST VfGH

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The judge overlooked several things, such as the fact that it is not just a matter of holding hands, but of professing one's sexual orientation in a fundamental way – which homosexuals in Iraq cannot do without risking their lives. Moreover, homosexuals in Iraq cannot marry, of course, so a comparison with „unmarried heterosexuals“ is misleading.

It is striking that Judge Bracher did not rule differently even after the VfGH had ruled on the matter. If the VfGH overturns a finding of a judge, the case goes back to the same judge, who has to decide anew. An affected homosexual man from Iraq had to go to the VfGH twice, got justice both times - and is still waiting for his decision. In the last „Bracher decision“ of the VfGH, even the highest court should have had enough, because it explicitly refers to a norm that orders the courts to implement the decision of the VfGH properly (§87 Abs2 VfGG). That was in February 2020, and there has been no new decision to date.

### Procedure A:

A homosexual man from Iraq has already been granted subsidiary protection by the BFA, but not asylum. Appeal against this is rejected by Judge Bracher. Reason primarily: he has lived out his sexual orientation secretly in Iraq so far and nothing has happened, so he can go back to that life. Moreover, there is a fatwa of a cleric in Iraq that says homosexuals are sick and should be avoided but not killed; therefore, the situation is better now.

**VfGH E3074/2016 of 21.06.2017** fixes because A just cannot be referred to keep his sexual orientation secret anymore (as we used to); moreover, there are no reports on this that a single fatwa has changed anything for the better; on the contrary, country reports paint a different picture.

Judge Bracher is hearing A's case again in 2018 and again decides negatively. Since A already has subsidiary protection and does not want to expose himself to this legal dispute anymore, he gives up and does not file a new appeal. Judge Bracher's decision therefore becomes final.

## Procedure B:

The second example also involves a homosexual man from Iraq, but who has not been granted asylum or subsidiary protection. His appeal is rejected in its entirety by Judge Bracher and can thus be deported. The reasoning is the same as in the case of A: B has also been able to live out his homosexuality in secret, so he can do so in the future.

**VfGH E291/2019 of 11.06.2019** rectifies with reference and citation of its decision of 2017, and emphasizes again that it is inadmissible to expect LGBTIQ persons to suppress their identity. The case therefore goes back to Judge Bracher.

Already in October 2019, a new negative decision is issued in the case of B. This time with the aforementioned argumentation that even unmarried heterosexuals could not publicly show affection and homosexuals would thus be privileged. At that time, by the way, B was already living in a registered partnership with an EEA citizen – so, strictly speaking, he was quasi-married.

**VfGH E4470/2019-9 of 25.02.2020** rectifies again and now makes it very clear that the BVwG discriminates with such an argumentation, because it is not about living out anything publicly as an LGBTIQ person. It is about being able to stand by one's own sexual orientation and to confess to a same-sex partner without being exposed to the danger of persecution. However, this is probably not possible in Iraq on the basis of the country reports. In addition, the VfGH points out that the BVwG is legally obliged to implement decisions of the VfGH. It leaves open whether Judge Bracher thus even broke the law in the present case, but puts it on the table. The matter goes back to Judge Bracher. Since then nothing has happened and B is still waiting.

All of this leads to legal uncertainty and to the fact that the chances for asylum depend solely on which judge or magistrate someone is assigned to – not on objective criteria. And it is obvious that a judge does not take the case law of the Constitutional Court seriously and is unwilling to follow the legal opinion of the Constitutional Court.

However, the legal uncertainty does not only affect the clients whose cases are before the Judge Bracher, but – and this is what we conclude from our data – other judges were waiting for the decision of the VfGH. Only with the above-mentioned decision

## THE PROCEDURES

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**VfGH E291/2019 of 11.06.2019** movement comes into the matter. Except for a positive finding from January 2019, all positive BVwG findings are after June 2019. And this despite the fact that the BFA has granted asylum to queer refugees 80 times in the cases known to us until May 2019.

However, this does not prevent Judge Bracher 2021 from again issuing a research assignment to an „expert“ who was deposed in May 2019, although it had already been established several times that he has neither the linguistic nor the methodological competences to prepare expert opinions, neither on the situation of LGBTIQ in Iraq nor on the situation in Afghanistan in general.

### **Consequently, the following questions arise:**

Why is a deposed „expert“ commissioned at the expense of taxpayers, especially in the context of a largely settled issue of persecution of homosexuality in Iraq? Furthermore, it is questionable to what extent the position as a contact judge for Iraq is justified and not to fear some bias in the area of sexual orientation and gender identity.

# QUEER BASE DATA ANALYSE

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## **LGBTIQ clients from Iraq:**

Queer Base has been supporting queer refugees from Iraq since 2015, and in no other group that we have served have the positive effects of LGBTIQ-specific social and legal counseling been so clearly evident. Those who made it to the Queer Base before the first interview at the BFA (Federal Office for Immigration and Asylum) were able (for the most part) to start their lives in Austria with a positive decision in hand. Others with less luck were confronted – directly or indirectly – with one judge in particular, who significantly influenced the legal course of events.

## **What data can we currently draw on?**

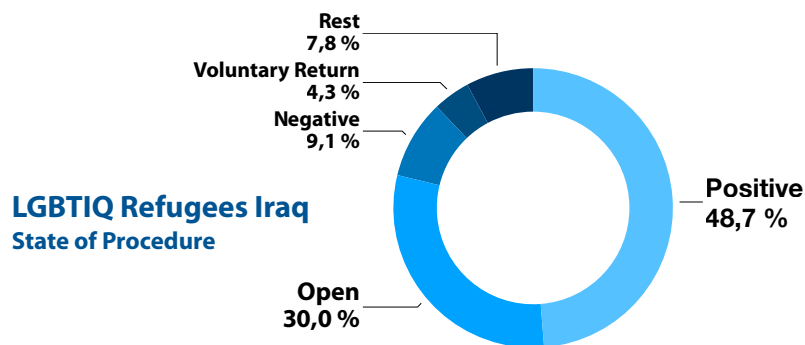
Iraqi LGBTIQ refugees make up a majority (30.4%) of Queer Base clients, almost exclusively homosexual or bisexual cis men (95.6%), only single clients can be found in the group of lesbian or bisexual cis women (0.9%), trans men (0.9%), trans women (1.7%) and inter persons (0.9%).



## STATE OF PROCEEDINGS:

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Of our 230 clients from Iraq, 112 (48.7%) received a status, of these positive decisions, 92.7% are considered Convention refugees, the rest are divided between beneficiaries of subsidiary protection and humanitarian residence permits. 68 (30%) are still in the open procedure, 21 (9.1%) have received a legally binding negative decision, 10 (4.3%) returned voluntarily, the rest are divided between appeals to supreme courts, suspensions and revocations.



Of the positive decisions, 79.5% were granted asylum by the BFA. So far, the BVwG issued a positive finding in 20.5% of the cases; this number will hopefully continue to increase in the near future, as 57 (83.8%) of the 68 open cases are currently pending before the courts.

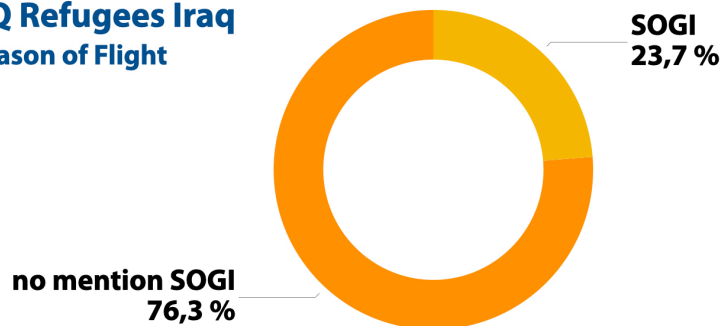
## STATED SOGI AS REASON OF FLIGHT

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### What role does early recognition as a member of a vulnerable group play in the course of the proceedings?

Here it is advisable to look at the beginning of each asylum procedure. The year 2015/16 was certainly challenging due to refugee movements. In 2015, according to the BMI's asylum statistics, 88,340 asylum applications were filed; in 2016, the number was still 42,285.7 There were some shortcomings that were reported to us: The situation of the asylum application was in itself unbearable for many, often applications were taken while there were many listeners (other refugees), the interpreters were (are) poorly trained or not trained at all and gave partly wrong information (e.g. it was reported to us that the question whether homosexuality was a reason for asylum was answered with no by the interpreter). The hurdle of coming out in front of the police, in front of an interpreter, in a crowd with other refugees, was too high for many. Of the 89 who received asylum in the first instance at the BFA, we have the corresponding data for 76. Of these, only 23.7% stated their sexual orientation and/or gender identity as a (further) reason for fleeing. 76.3% felt unable to state SOGI as a reason for asylum in the application situation.

#### LGBTIQ Refugees Iraq SOGI Reason of Flight



For this group, the Queer Base legal team – which at this point still consisted entirely of volunteers – wrote 38, or 65.5% of the cases, supplementary statements to the initial interview even before the first interview at the BFA to disclose homosexuality

## STATED SOGI AS REASON OF FLIGHT

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or bisexuality. Early disclosure supports the credibility of the applicant and contacting and accessing the LGBTIQ community strengthens self-confidence and one's own language in order to be able to recount one's own reasons for fleeing in as much detail as possible in the proceedings. A majority of these Iraqi LGBTIQ refugees could be accompanied to the interview with legal representation from the Queer Base Legal Advice Team and the procedure could be supplemented with current statements on the situation of homosexuals in Iraq. The majority of those who had already had contact with Queer Base from the beginning were thus granted asylum in the first instance.

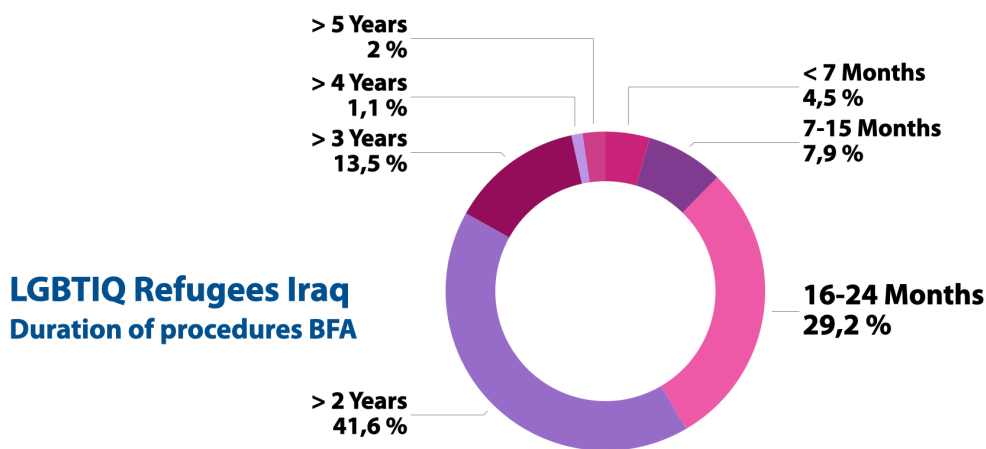
### **Who is dragging out procedures?**

This means a massive shortening of procedures, which was driven by the commitment of Queer Base. Nevertheless, the duration of proceedings at the BFA sometimes amounted to several years, of the legally prescribed deadlines (initially 6 months, increased to 15 months due to overload) mostly only wishful thinking remained. The duration of proceedings has a massive impact on the mental health of our clients, it is a robbery of their life time and income.

The evaluation of 89 applications that received a positive decision in the first instance showed that most of them (58.47%) took more than 2 years. Only 12.36% of the cases were completed within the legally stipulated period of 6 or 15 months.

## DURATION OF PROCEDURES

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The economic costs of these long procedures are immense<sup>7</sup> and, as already mentioned, these are exclusively positive procedures at the BFA. It is often claimed by right-wing politicians that NGOs use tricks to drag out the procedures, but it is the partisan legal representatives who keep access to a human rights-based asylum procedure free. As a reminder, 42% of the negative decisions of the BFA are overturned by the BVwG.<sup>8</sup>

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<sup>7</sup> Wolfgang Salm from Fairness Asyl has calculated costs for the negative and overturned BFA decisions. This does not take into account the „normal“ procedures that are positively decided in the first instance. „Costs of the 42% error rate of the BFA“. <https://www.fairness-asyl.at/kosten-der-42-fehlerquote-des-bfa/>

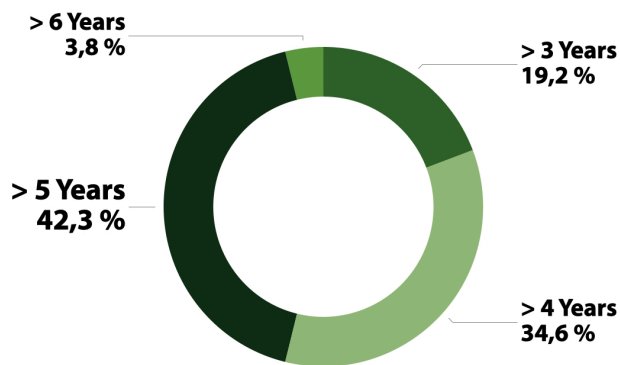
<sup>8</sup> <https://kurier.at/chronik/massenbetrieb-asylamt-wo-es-hakt/400019053>

## DURATION OF PROCEDURES

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In principle, however, it should be noted in the case of Iraq that the BFA demonstrates an official understanding of the need for protection of LGBTIQ refugees from Iraq in their country reports as well as in their adjudication practice. If credible, the BFA assumes that living as LGBTIQ in Iraq is not possible and that group persecution can be assumed. That this understanding prevailed also on the level of the BVwG needed and still needs the rectification by highest courts, such as the Administrative Court or the Constitutional Court.

### LGBTIQ Refugees Iraq Duration of Procedures BVwG



### **Queer Base – Welcome & Support for LGBTIQ Refugees**

Contact point for lesbian, gay, bisexual, inter\*, trans\*gender and queer refugees

ZVR - Number: 785753514

Linke Wienzeile 102/3  
1060 Vienna

Email: [office@queerbase.at](mailto:office@queerbase.at)  
Website: <https://queerbase.at>  
<https://friends.queerbase.at>