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(IN)CREDIBLE LESBIAN AND GAY ASYLUM SEEKERS:  
CREDIBILITY ASSESSMENT PRACTICES IN SEXUAL ORIENTATION-  
BASED ASYLUM CLAIMS IN EUROPE

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**Abstract for Master's Thesis**

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Abstract:  This thesis examines credibility assessment practices of sexual orientation asylum claims in Europe and their compatibility with human rights standards. The Court of Justice of the European Union (CJEU) rejected the credibility assessment practices of medical and psychiatric tests, experts' reports, sexually explicit documentation, and intrusive questioning as contrary to human rights. The CJEU did not detail which aspects of these practices are problematic and their relapse in recent practice calls for their re-examination. Aiming to articulate which aspects of these credibility assessment practices are breaching human rights, this thesis discusses tests and experts' reports, documentation and questioning in relation to the right to private life as well as the prohibition of degrading treatment for medical tests and examinations from a European Court of Human Rights standpoint. In doing so, an overview of the CJEU relevant rulings will be made for each of the three areas of credibility assessment practices, followed by an analysis of the relevant right(s) drawing from the precedents of the European Court for Human Rights as well as a discussion on recent developments of each area of credibility assessment.	
Key words: asylum, credibility assessment, sexual orientation, Court of justice of the European Union, European Court of Human Rights, membership of a particular social group, right to private life, prohibition of degrading treatment, persecution ground, lesbian, gay, evidence, questioning.	
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## **ABBREVIATIONS**

**CoE: Council of Europe**

**CJEU: Court of Justice of the European Union**

**DSSH: Difference, stigma, shame and harm**

**EASO: European Asylum Support Office**

**ECtHR: European Court of Human Rights**

**ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)**

**EU: European Union**

**EU Charter: Charter of Fundamental Rights of the European Union**

**FRA: European Union Agency for Fundamental Rights**

**OFPRA: French Office for the Protection of Refugees and Stateless (Office français de protection des réfugiés et apatrides)**

**MPSG: Membership of a particular social group**

**ORAM: Organisation for Refugee, Asylum and Migration**

**SOGI: Sexual orientation and gender identity**

**UNHCR: United Nations High Commissioner for Refugees**



# 1. INTRODUCTION

## 1.1 Background

International protection, stipulated in the 1951 Geneva Convention relating to the Status of Refugees (hereinafter ‘Refugee Convention’) in conjunction with its 1967 New York Protocol (hereinafter ‘Protocol’), has been translated in complex and multi-layered national determination procedures. Since the first sexual orientation-based asylum claim in the 1980s,<sup>1</sup> the ‘umbrella’ persecution ground ‘membership in a particular social group’ has come to encompass sexual orientation.<sup>2</sup> The said trend, along with the reported increase of refugee claims based on sexual orientation,<sup>3</sup> has given rise to the determination of many claims by lesbian and gay persons.<sup>4</sup> States in the Americas, Oceania, Europe as well as South Africa have provided safe haven to persecuted lesbian and gay persons over the past decades.

Lesbian and gay persons face distinct challenges in the refugee status determination procedure.<sup>5</sup> Refugee law involves the most narrative mode of legal adjudication and credibility assessment has been a heavyweight issue with increasing significance.<sup>6</sup> The assessment of credibility is based on documentary evidence, the interview of the applicant and country of origin information.<sup>7</sup> International and regional instruments, case law, guidelines and publications of human rights organisations indicate that contested practices permeate all three aspects of credibility assessment. Asylum authorities have predicated queer refugee status determination on tests, medical reports, explicit documentation and intrusive questioning. ‘Transnational judicial dialogue’<sup>8</sup> and academic research have fruited significant advancements in the area of sexual

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<sup>1</sup> See in: Fullerton (1990), pp. 383-387. Millbank (2009b) locates the broader acceptance of sexual orientation as persecution ground in the mid-1990’s. LaViolette (2010) reports the first adjudicated sexual orientation asylum claim in Canada in 1991. Choi (2010) submits that the first sexual orientation-based asylum was granted in Australia in 1994.

<sup>2</sup> For instance, from the 47 member-States of the CoE (2011), ‘[t]wenty-six member states have explicitly recognised in their national legislation that sexual orientation is included in the notion of *membership of a particular social group*’. See also: UNHCR SOGI Guidelines (2012), para. 1; ICJ (2016), p. 1; Dauvergne and Millbank (2003a), pp. 300-301; LaViolette (2010), pp. 174-175 and 189.

<sup>3</sup> Kahn and Alessi (2017), p. 23.

<sup>4</sup> Dauvergne and Millbank (2003a), pp. 300-301; Berg and Millbank (2009), p. 195.

<sup>5</sup> Choi (2010), pp. 241-242.

<sup>6</sup> Millbank (2009a), p. 2.

<sup>7</sup> FRA (2017), p. 5.

<sup>8</sup> Hathaway and Foster (2014), pp. 4-5. See also the discussion on its outcome in: Dauvergne and Millbank (2003b).



orientation-based asylum claims.<sup>9</sup> Nonetheless, while these gains are toiled, many queer asylum seekers potentially qualifying for the refugee status are being rejected.<sup>10</sup>

The discretion requirement,<sup>11</sup> which was employed in reasonings across many jurisdictions as the basis to reject sexual orientation-based asylum claims, basically misplaced States' responsibility to protect asylum seekers from persecution to asylum seekers themselves by requiring them to conceal their sexual orientation and suppress expressing it upon return to the country of origin.<sup>12</sup> The concealment requirement was rejected in two of the highest-level judicial determinations of queer asylum claims in Australia in 2003 and in the UK in 2010.<sup>13</sup> In the UK the 'reasonably tolerable' bother that queer asylum seekers had to endure by concealing their sexual orientation upon return to the country of origin was rejected in the landmark case *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* (hereinafter '*HJ and HT*').<sup>14</sup> Following this major shift, a trend of disbelieving the very persecution ground, i.e. sexual orientation, grew across jurisdictions which had rejected the discretion reasoning.<sup>15</sup> This development exacerbated contested credibility practices already used and gave impetus to the employment and acceptance of exorbitant credibility assessment trends.

Following the rejection of the discretion requirement and its impact on the adjudication of sexual orientation-based asylum claims, three regional rulings dealt with significant areas in the determination of sexual orientation-based asylum claims. In 2013 the Court of Justice of the European Union (hereinafter 'CJEU') provided a preliminary ruling on the joined cases *C-199/12, C 200/12 and C 201/12*, resulting in the judgement *X and Y and Z v Minister voor Immigratie en Asiel* (hereinafter '*X, Y and Z*'). The judgement shed light on the questions whether gay asylum seekers are members of a particular social group, whether they are to conceal their sexual orientation in the country of origin to avoid persecution and to which extent the criminalisation of non-heterosexual acts

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<sup>9</sup> Such as the explicit forsaking of the discretion requirement. See in: Wessels (2013), p. 75; Briddock (2016), p. 156.

<sup>10</sup> Millbank (2012), p. 499.

<sup>11</sup> Otherwise known as 'concealment requirement'.

<sup>12</sup> See further: Kendal (2003); Choi (2010); Wessels (2013).

<sup>13</sup> For the Australian case see: Dauvergne and Millbank (2003b).

<sup>14</sup> *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. For commentaries on this decision see: Anker and Andralan (2012); Goodman (2012); Hathaway and Popjoy (2012); Millbank (2012) and Wessels (2012).

<sup>15</sup> See further: Millbank (2009b); Gray and McDowall (2013); Briddock (2016); Wessels (2017).

amounts to persecution. In 2014 the joined cases *C-148/13*, *C-149/13* and *C-150/13* resulted in the preliminary ruling *A, B and C v Staatssecretaris van Veiligheid en Justitie* (herein after ‘*A, B and C*’). The CJEU examined restrictions imposed by the EU *aquis* to the assessment of credibility of sexual orientation-based asylum claims, and specifically sexualised evidence and questioning, stereotyped assessments, and late disclosure of the sexual orientation in relation to applicants’ credibility. The third and most recent case *C-473/16* yielded the ruling *F v Bevándorlási és Állampolgársági Hivatal* (hereinafter ‘*F*’). The *F* case dealt with the means of applicable evidence to sexual orientation cases, focusing on the evidentiary means of psychologist experts’ opinions. These rulings have influenced relevant decision-making, litigation, policy, research, and advocacy work.<sup>16</sup> Nevertheless, practices with questionable compatibility with human rights standards continue to resurface in the refugee status determinations.

## 1.2 Research Question and Structure

Against this backdrop, the present thesis will examine credibility assessment practices of sexual orientation-based claims and their development before and after the relevant CJEU rulings, paying particular regard to their compatibility with human rights standards. While tests, experts’ reports, sexually explicit documentation, and intrusive questioning have already been pronounced by the CJEU to violate human rights, the respective analyses have not detailed the intricacies of these practices with the rights they found to violate. Hence, this thesis will take the direction to consider them through a European Court of Human Rights (hereinafter ‘ECtHR’) analysis, which offers a solid analytical framework and has not addressed any of these practices to date. Particularly, the aim is to examine the said credibility assessment practices to better understand which of their aspects are incompatible with human rights and identify them in recent respective practice.

In doing so, the main question to be answered is how an ECtHR outlook would have analysed these practices. The analysis will also shed light on the caveats of CJEU rulings and how relevant credibility assessment trends have developed following CJEU precedent. Despite medical tests and experts’ reports, sexually explicit documentation and intrusive questioning having been pronounced in violation of human rights they

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<sup>16</sup> This is evident also from a series of articles on each ruling as well as relevant publications on the aftermath of these judgements. For ruling-specific articles see: ICJ (2014), Ferreira and Venturi (2017) and (2018); for publications see: CJEU (2017) and Jansen (2019).

still nuance in the determination of asylum seekers' claims, thus challenging the deployment of international refugee and human rights law for lesbian and gay asylum seekers. Therefore, recent issues and trends will be emphasised, to provide a contemporary conclusion on their compatibility with relevant human rights standards.

For the above purposes, a chapter dissecting sexual orientation as a persecution ground, as well as the concept of credibility assessment will follow. After establishing the premises of the credibility assessment of sexual orientation asylum claims, chapter 3, unfolding the main analysis, will ensue. Chapter 3 will comprise the subchapters of testing and experts' reports, sexually explicit documentation, and intrusive questioning. Drawing insights from the ECtHR precedents and rights analysis, the CJEU rulings on credibility assessment practices will be examined. All credibility assessment practices will be analysed in relation to the right to private life, and only the practice of tests will be analysed also in relation to the prohibition of ill-treatment, given the additional challenges it poses. Each subchapter will provide an overview of the practices prior to the CJEU relevant ruling(s), an analysis of the pertinent substantive right(s) and a discussion on the evolution of the relevant issues. The last chapter will synthesise the conclusions of the substantive chapters.

### **1.3 Scope, Sources and Limitations**

Being one of the regions where persons have been entitled to refugee status on the grounds of their sexual orientation over the past decades, the examination will involve the European Union (hereinafter 'the EU') Member States. No case study of a particular country will be attempted, albeit it should be born in mind that the endeavour of a symmetrical reference of the said countries has some inherent obstacles. Decision making procedures vary overwhelmingly across EU countries and the same applies for relevant resources.<sup>17</sup> Moreover, some countries have more advanced jurisprudence on specific practices and, hence, more examples to showcase and developed research than others.<sup>18</sup> Therefore, this thesis will involve mainly EU countries in which the determination of asylum seekers' credibility has been questionable and have extensive representation in relevant resources and publications.

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<sup>17</sup> Ferreira (2018), p. 36.

<sup>18</sup> For instance, Portugal for the period 2000-2010 determined only nine sexual orientation-based claims. See in: Ferreira (2015), p. 2.

By the same token, two countries currently not belonging to the EU, namely the UK and Norway, will be included in this analysis as well. Despite having formally left the EU, the United Kingdom (hereinafter ‘the UK’) was an EU Member State until 2020. Moreover, case law and research regarding the UK have been pivotal for the development of the doctrine in relation to sexual orientation-based asylum claims. For these reasons the UK will be under this scope for the period until the Withdrawal Agreement entered into force.<sup>19</sup>

Even if not a Member State, Norway not only has adapted the New Norwegian Immigration Act aligned with the EU’s asylum policy, but also participates in the Schengen area and cooperation,<sup>20</sup> the European Asylum Support Office,<sup>21</sup> the Dublin III Regulation,<sup>22</sup> and has an observer status in the European Migration Network. Norway has undertaken migration policies consistent with those of the EU for the past two decades.<sup>23</sup> On these bases, Norway’s credibility assessment practices on sexual orientation-based asylum claims are largely intertwined with those developed in EU countries. Given the above, Norway will be mentioned in relation to the development of certain practices common with EU countries, bearing in mind that it does not abide by some of the instruments of the Common European Asylum System.<sup>24</sup>

All countries under this scope are parties to the Refugee Convention and its Protocol, as well as to the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as European Convention on Human Rights; hereinafter ‘ECHR’). The EU has incorporated relevant international instruments in its regional hard and soft law. Directives 2013/32/EU (hereinafter ‘recast Asylum Procedures Directive’) and 2011/95/EU (hereinafter ‘recast Qualification Directive’) will also be central to the analysis for the part of EU countries. Notably, the CJEU rulings under consideration interpreted the provisions of Directives 2005/85/EC (hereinafter Asylum Procedures Directive) and 2004/83/EC (hereinafter Qualification Directive), each of

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<sup>19</sup> Namely, 31.01.2020. See: Brexit: EU-UK relationship.

<sup>20</sup> See: Schengen Agreement and Schengen Convention.

<sup>21</sup> EASO Regulation, Recital 24, Article 49.

<sup>22</sup> Regulation No 604/2013.

<sup>23</sup> Janmyr (2014), p. 182; Brekke and Staver (2010), pp. 2163-2164.

<sup>24</sup> While Norway participates in the Dublin III Regulation and the European Asylum support Office, it does not abide by the three main instruments of CEAS, namely the recast Asylum Procedures Directive, the recast Qualification Directive and the Reception Conditions Directive.

these has been repealed by its respective recast version.<sup>25</sup> Nevertheless, since the provisions at stake in the rulings correspond to those of the recast Directives currently in force, during the discussion there will be interplay between the repealed version of the Directives and the recast ones without further reference. In the context of the Common European Asylum System Reform, aiming to harmonise the standards regarding the recognition of persons in need of international protection across the EU, a Regulation has been proposed by the European Commission to replace both the recast Qualification and Asylum Procedures Directives.<sup>26</sup> The Commission's and the relevant European Parliament's proposals will also be enmeshed in the analysis.<sup>27</sup>

The jurisprudence of two regional judicial human rights bodies, namely the ECtHR and the CJEU, which have decided a number of cases of queer asylum seekers and established significant precedent, will be in the spotlight of this analysis. While the focus will be on the regional court's rulings for EU Member-States, if relevant, national case law will be referenced in the event it has been instrumental for the development of norms and the doctrine. Subsidiary sources will also include interpretative guidance of primary sources, having regard to their relevance with the subject-matter. States-parties to the Refugee Convention have an explicit obligation to comply with the supervisory functions of the United Nations High Commissioner for Refugees (hereinafter 'UNHCR').<sup>28</sup> As the 'guardian' of the Refugee Convention,<sup>29</sup> the UNHCR has elucidated the interpretation and application of the Refugee Convention, not excluding the procedural issues of sexual orientation-based asylum claims. The views of the agency are highly regarded by judicial institutions, proof of which is the inclusion of its publications in decisions' reasoning and its participation as intervening party in asylum-related proceedings.<sup>30</sup> Academic literature is chosen with regard to its contribution in the clarification and development of the legal issues in point.

This thesis will examine asylum claims based solely on sexual orientation made by lesbian and gay individuals, abating the additional legal and factual impediments faced

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<sup>25</sup> Namely, the Asylum Procedures Directive was repealed by the recast Asylum Procedures Directive (2013/32/EU), while the Qualification Directive was repealed by the recast Qualification Directive (2011/95/EU).

<sup>26</sup> European Commission (2016).

<sup>27</sup> European Parliament (2017).

<sup>28</sup> Refugee Convention, art. 35 (1).

<sup>29</sup> UNHCR Statute, Chapter I (1) and (8) (a).

<sup>30</sup> See for instance: *M.S.S. v. Belgium and Greece*, 2011, paras. 7 and 56.

by bisexual persons and asylum claimants on the basis of gender identity.<sup>31</sup> Statistics, where available, show that in sexual orientation-based asylum claims the percentage of lesbian women is by far lower than that of gay men.<sup>32</sup> This disproportion, in conjunction with the overall invisibility of lesbians, ranging from their persecution in the country of origin to the refugee status determination,<sup>33</sup> has shaped the asylum body of law in relation to sexual orientation claims to adopt a rather male-orientated perspective, which will not be entirely avoided in this thesis.

The scope of this thesis is not exhaustive of the issues arising in the credibility assessment of sexual orientation-based asylum claims. Even though tests, experts' reports, sexually explicit documentation, and intrusive questioning have been explicitly rejected, their relapse in practice thereafter calls for their revisiting. It is worth noting, that the credibility assessment practices under examination may also concern asylum claims on the basis of gender identity.

#### **1.4 Definitions**

'Credibility' is defined in ordinary use as 'the quality of being convincing or believable'<sup>34</sup> or as 'the fact that someone can be believed or trusted'.<sup>35</sup> In the context of refugee law, UNHCR defines 'credibility assessment' as:

'the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status.'<sup>36</sup>

Credibility will be examined herein both in relation to the eligibility of the testimony as evidence in the refugee status determination as well as to other elements of the application's eligibility or the asylum claim as a whole.<sup>37</sup>

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<sup>31</sup> UNHCR Guidance Note (2008), par. 16. For instance: Briddock (2016), fn. 7; Wessels (2011), pp. 7-8.

<sup>32</sup> Akin (2018), pp. 33-34; Akin (2016), p. 5.

<sup>33</sup> See: Lewis (2014); Dawson and Gerber (2017).

<sup>34</sup> The Concise Oxford Dictionary (1995), 'credibility'.

<sup>35</sup> Cambridge Dictionary online, 'credibility'.

<sup>36</sup> UNHCR Beyond Proof (2013), p. 27.

<sup>37</sup> The term credibility has variably been referred to either to the procedural stage of assessing the applicants' testimonies or as to the credibility of the well-founded fear. See: Kagan (2003), pp. 369-370.

The Yogyakarta Principles, a set of international legal principles dealing with human rights violations on the basis of sexual orientation and gender identity,<sup>38</sup> term sexual orientation as ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender’<sup>39</sup> otherwise referred to as same-sex ‘enduring physical, romantic, and emotional attractions’.<sup>40</sup> The present thesis prefers the terms of self-description ‘lesbian’ and ‘gay’. The capacious term ‘queer’, despite encompassing more sexualities and identities under its rubric, in this thesis will capture only lesbian and gay individuals.<sup>41</sup> The term ‘homosexual’, given its historical utilisation in civil jurisdictions as a medical categorisation associated with wrongfulness,<sup>42</sup> will only be cited from original sources.

For analytical ease ‘asylum application’ and ‘claim’ will interchangeably refer to national procedures on behalf of persons fleeing persecution, who seek ‘asylum’ or ‘international protection’. ‘Decision makers’ will include judges, public officials, interviewers and employees in judicial and quasi-judicial asylum and refugee status determination authorities, who are involved in the collection of corroborative material and testimonies, as well as, the procedural stage of the credibility assessment. ‘Statement’ and ‘testimony’ will invariably refer to either the written reports of the interviews or to the asylum seekers’ oral or written statements.

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<sup>38</sup> See discussion in O’Flaherty and Fisher (2008); O’Flaherty (2015).

<sup>39</sup> Yogyakarta Principles, p. 6; fn.1.

<sup>40</sup> UNHCR Guidance Note (2008), para. 10.

<sup>41</sup> The acronym LGBTQI+ is intentionally left out because in some cases outside the present scope it is used in a confining sense, homogenously categorising otherwise fluid identities.

<sup>42</sup> Foucault (1978), pp. 38-43 and 100-102.

## 2. UNDERSTANDING THE CREDIBILITY ASSESSMENT OF SEXUAL ORIENTATION

### 2.1 Sexual Orientation as a Persecution Ground

The Refugee Convention and its Protocol stipulate the term refugee as:

‘any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’<sup>43</sup>

The intention of the drafters of the Convention, that persons who could not claim persecution on the grounds ‘race, religion, nationality [...] or political opinion’ are entitled to asylum too, was crystallised in the inclusion of the catch-all persecution ground ‘membership of a particular social group’.<sup>44</sup>

Sexual orientation is not explicitly enumerated as a persecution ground in the Refugee Convention. Nevertheless, depending on the circumstances, sexual orientation-based asylum claims can be made under any of the grounds laid down therein. As ‘Convention grounds are not mutually exclusive’, a person might be eligible for international protection under more than one persecution ground.<sup>45</sup> Despite the potential overlap of membership of a particular social group with other persecution grounds,<sup>46</sup> sexual orientation has traditionally fallen under the persecution ground ‘membership of a particular social group’ in EU countries.<sup>47</sup> The first admissible asylum claims on the basis of sexual orientation in the EU have been reported from mid-1980’s onwards, in

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<sup>43</sup> Refugee Convention, Article 1 A (2) and 1967 Protocol Article 1 (2).

<sup>44</sup> Henes (1994), pp. 381-382. The suggestion that a provision covering refugees persecuted for belonging in a particular social group should be included, which resulted in the umbrella persecution ground ‘membership in a particular social group’ was made by the Swedish delegate to the Conference of Plenipotentiaries discussing the draft Convention for the Status of Refugees. Conference of Plenipotentiaries (1951), p. 14.

<sup>45</sup> UNHCR MPSG (2002), para. 4; UNHCR Handbook (2011), para. 77.

<sup>46</sup> UNHCR Handbook (2011), para. 77.

<sup>47</sup> Ferreira (2018), p. 38; Dustin and Held (2018), p. 75; UNHCR Guidelines (2002), paras. 1 and 6-7; UNHCR Guidance Note (2008), paras. 8 and 29; UNHCR SOGI Guidelines (2012), paras. 44-49; UNHCR (2010), paras. 27 and 55 (F); Aleinikoff (2001), p. 288; Wessels (2011), pp. 8-9.



diverging degrees across the countries concerned.<sup>48</sup> For instance, while the first successful sexual orientation-based claim is reported in Germany as early as 1983,<sup>49</sup> eligibility of sexual orientation as membership of a particular social group was finally accepted in the UK in 1999.<sup>50</sup> Currently there are no statistics available on sexual orientation-based asylum claims across the majority of EU countries, but those producing relevant data report a gradual increase in claims.<sup>51</sup>

The Yogyakarta Principles point out every person's 'right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity'. The same Principle also emphasises States' duty to undertake legislative measures to 'ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum.'<sup>52</sup>

Regionally, the Charter of Fundamental Rights of the European Union (hereinafter 'EU Charter') envisages the right to seek asylum by virtue of the Refugee Convention and its Protocol to which right any person is equally entitled and no one should be discriminated against on the basis of their sexual orientation among other grounds.<sup>53</sup> The term refugee is defined in the recast Qualification Directive in almost identical wording as the Refugee Convention, envisaging 'race, religion, nationality, political opinion or membership of a particular social group' as potential persecution grounds.<sup>54</sup> The recast Qualification Directive provides the EU definition of the particular social group as follows:

'a group shall be considered to form a social group *where in particular*:

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<sup>48</sup> While the first successful sexual orientation-based claim is reported in Germany as early as 1983, eligibility of sexual orientation as membership of a particular social group was finally accepted in the UK in 1999, following the case *Shah and Islam*, concerning gender and particular social group. See Millbank (2005), p. 116.

<sup>49</sup> *Verwaltungsgericht Wiesbaden*, paras. 13-14, cited in Fullerton (1990), pp. 408-410.

<sup>50</sup> In the decision: *Shah and Islam* [1999] UKHL 20, dealing with gender and membership of a particular social group. See: Millbank (2005), p. 116; Dustin (2018), p. 6. Nevertheless, McGhee (2000) reports a positive refugee status determination of a gay man in 1998, fn. 14.

<sup>51</sup> FRA (2017), p. 3; EMN (2016).

<sup>52</sup> Yogyakarta Principles, Principle 23 (a).

<sup>53</sup> EU Charter, Articles 18, 20 and 21.

<sup>54</sup> Recast Qualification Directive, Article 2 (d).

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation<sup>55</sup>

A discussion on the EU *lex lata* regarding ‘membership to a particular social group’ invites an overview of the development of the doctrine on this persecution ground.

### ***2.1.1 The immutable characteristics and social perception approaches***

Membership of a particular social group has been interpreted through two main approaches primarily developed in common law countries’ jurisprudence.<sup>56</sup> Over the years several cases have ruled on the matter of membership of a particular social group, establishing the ‘protected characteristics’ and the ‘social perception’ approaches. Civil law jurisdictions, like the majority of the ones under this scope, have mentioned both approaches but developed and emphasised them to a lesser extent.<sup>57</sup>

In the case *Matter of Acosta* the Board of Immigration Appeals in the United States of America in interpreting the membership of a particular social group employed the doctrine *ejusdem generis*, i.e. ‘of the same kind’, according to which ‘general words used in an enumeration with specific words should be construed consistently with the specific words’.<sup>58</sup> According to the court’s reasoning, the express persecution grounds involve a characteristic that ‘either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed’.<sup>59</sup> The court held that membership of particular social group should be

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<sup>55</sup> [emphasis added] The provision further reads: ‘Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.’ Recast Qualification Directive, Article 10 (1) (d).

<sup>56</sup> Wessels (2011), p. 10; UNHCR MSPG (2002), para. 5. Nevertheless, Aleinikoff (2001) finds that common law jurisprudence has mostly adopted the ‘protected characteristics’ approach. Marouf (2008) holds that the United States, Canada, New Zealand, and the United Kingdom follow the protected characteristics approach, while Australia mostly applies a social perception approach, paying regard to immutable characteristics too, pp. 48-49.

<sup>57</sup> UNHCR MSPG (2002), para. 8.

<sup>58</sup> Henes (1994), p. 390.

<sup>59</sup> *Matter of Acosta* (1985), para. 53.

‘directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.’<sup>60</sup>

The case *Matter of Acosta* was initially adopted the protected characteristics test,<sup>61</sup> which was then advanced in the case *Canada (Attorney-General) v. Ward* further specifying three categories of particular social groups:<sup>62</sup>

‘(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence’<sup>63</sup>

In Australia the 1997 case *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another* stood out for adopting what has become known as the ‘social perception approach’:<sup>64</sup>

A particular social group [...] is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society. [...] However, one important limitation [...] is that the characteristic or element which unites the group cannot be a common fear of persecution.<sup>65</sup>

A group defined under a ‘protected characteristics’ approach is possibly perceived as such by society as well. Nevertheless, a social perception approach recognises the significance of potential external factors for the circumscription of a social group, thus taking the ‘protected characteristics’ approach a step forward.<sup>66</sup> The realities of queer asylum seekers may reflect either of these

An exclusive application of either of the tests has shortcomings though. For instance, the protected characteristics approach has been labelled as insensitive toward cultural differences and sexual identity development. On the other hand, it has been argued that the social perception approach poses difficulties to assess the context-dependent

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<sup>60</sup> *Ibid*, para. 54. The ‘protected characteristics’ approach is otherwise mentioned as ‘immutability approach’ or *ejusdem generis* approach.

<sup>61</sup> La Violette (2010), fn. 112.

<sup>62</sup> Wessels (2011), p. 10.

<sup>63</sup> *Canada (Attorney General) v. Ward* (1993), pp. 7-8.

<sup>64</sup> Wessels (2011), p. 10.

<sup>65</sup> *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another* (1997), pp. 8-9.

<sup>66</sup> Aleinikoff (2001), p. 297.

society's perceptions as well as to be proved with traditional types of evidence.<sup>67</sup> Moreover, the social perception test, emphasising on external factors to establish the membership of a particular social group, raises the burden of proof of asylum seekers as well as expects them to be visible in a normative way.<sup>68</sup> This is particularly evident in queer asylum claims, as sexual orientation provides limited external or objective indicators of the membership of a particular social group, especially in the frequent case that an asylum seeker had little externalised – if at all – their sexual orientation in the country of origin.<sup>69</sup> The paradox of the matter is that while non-heterosexual individuals are often forced to conceal their sexual orientation for numerous reasons,<sup>70</sup> sexual orientation is a characteristic that has to be revealed.<sup>71</sup>

### **2.1.2 The UNHCR approach**

Aiming to bridge the protection gaps resulting from either of the above-mentioned approaches, the UNHCR has defined the particular social group as:

‘a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will *often* be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.’<sup>72</sup>

Aside from the alternative definition of a particular social group, the approach adopted by UNHCR accommodates flexibly the protected characteristic notion. The latter is further interpreted in the UNHCR Guidelines on asylum claims on the basis of sexual orientation and gender identity which read:

‘The two approaches – “protected characteristics” and “social perception” - to identifying “particular social groups” reflected in this definition are *alternative*, not cumulative tests. The “protected characteristics” approach examines whether a group is united *either* by an innate or immutable characteristic *or* by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The “social perception” approach, on the other hand, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large.’<sup>73</sup>

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<sup>67</sup> Marouf involved the social perceptions as part of her argument on the ‘social visibility’ test, which emerged in the US jurisprudence in 2007, in addition to the protected characteristics approach traditionally applied. ‘Social visibility’ is different than the social perception approach in focusing on the visibility of group members rather than on the cognisability of the group by society. See in: Marouf (2008), pp. 49 and 71-77.

<sup>68</sup> Begazo (2019), p. 170.

<sup>69</sup> Millbank (2009b), p. 399.

<sup>70</sup> Marouf (2008), p. 79.

<sup>71</sup> Wessels (2011), p. 29.

<sup>72</sup> [emphasis added] UNHCR MPSG (2002), para. 11; UNHCR SOGI Guidelines (2012), para. 44.

<sup>73</sup> [emphasis in the original] UNHCR SOGI Guidelines (2012), para. 45.

Furthermore, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status maintains that ‘[a] “particular social group” normally comprises persons of similar background, habits or social status.’<sup>74</sup> The word ‘normally’ before the qualifier ‘similar background’ indicates that the definition of characteristics of a particular social group is not exhaustive.<sup>75</sup> Specifically, UNHCR guidance purports an suggests and open-ended interpretation of a particular social group. The discourse over whether sexual orientation is a ‘innate’ characteristic or an identity developed by multiple parameters is futile, since relevant scientific disciplines, such as psychology and social sciences have not reached a common ground.<sup>76</sup> In other words, given the very nature of sexual orientation as part of a person’s identity, an attempt to strictly fit it under either the innate characteristic or the characteristic fundamental for a person’s identity categories, is immaterial in relation to refugee status determination.

A ground in the interpretations of the particular social group, common across different jurisdictions, is that members thereof should have in common something other than the mere persecution against it and that the group need not be a ‘cohesive’ in the sense of visibility and/or voluntary association amongst the members, to qualify as a particular social group.<sup>77</sup> Cohesiveness and association amongst group members were considered redundant tests also by a German Court which established persons with same-sex sexual orientation as a particular social group in 1983,<sup>78</sup> in perhaps the earliest decision granting asylum on the basis of sexual orientation in one of the countries under the present scope. The decision adopted the standpoint of an objective observer of the society to examine whether a group is undesirable therein, and rendered the viewpoint of the general population toward a group as the key to determine whether the said group is acceptable in a society.<sup>79</sup>

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<sup>74</sup> [emphasis added] UNHCR Handbook, para. 77.

<sup>75</sup> The wording has been adopted identically in the current 2011 version from the 1979 version of the UNHCR Handbook. See in: Henes (1994), p. 382.

<sup>76</sup> ICJ (2016), p. 30. See: American Psychological Association (2008).

<sup>77</sup> Aleinikoff (2001), p. 310.

<sup>78</sup> Judgment of Apr. 26, 1983, No. IV/I E 06244/81, *Verwaltungsgericht Wiesbaden* [VGW], paras. 13-14, cited in Fullerton (1990), pp. 408-410.

<sup>79</sup>

*Ibid.*

An integrated approach of the two tests has rather viewed the ‘protected characteristics’ as the quintessence of the ‘social perception’ analysis, than as two separate competing approaches, asserting that ‘immutable characteristics generally produce social perceptions, particularly when those characteristics have been used as reasons for the imposition of harms.’<sup>80</sup> Even though the early German decision was welcomed by commentators for its pragmatic and flexible approach,<sup>81</sup> recent EU practice has moved afar from an amalgamated interpretation of the two tests.

### **2.1.3 The EU approach**

Unless otherwise dictated in domestic legislation, EU Member States, in considering membership of a particular social group of queer asylum seekers, apply the cumulative approach suggested by Article 10 (d) of the recast Qualification Directive mentioned earlier. Namely, queer asylum seekers have to establish both that they share an innate or fundamental characteristic and that they are perceived as a distinct group by society. Hence, the EU framework creates both an internal and an external test for queer asylum seekers to pass for their persecution ground to be established.

The CJEU had the opportunity to clarify how the particular social group tests should be interpreted in the preliminary ruling *X, Y and Z* requested by the Dutch Council of State. This ruling originated from three asylum cases, domestically rejected, due to disbelief of the well-founded fear of persecution upon return to their countries of origin and not disbelief of the applicants’ claimed sexual orientation.<sup>82</sup> Nevertheless, among the three main questions the Dutch Council of State addressed to the CJEU was whether individuals with same-sex sexual orientation form a ‘particular social group’ in the sense of Article 10 of the Qualification Directive.<sup>83</sup> The Court having recourse to the definition of refugee, affirmed that depending on individual circumstances in the country of origin a person can claim asylum on the basis of their membership of a particular social group.<sup>84</sup> The Court made explicit that ‘a group is regarded as a

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<sup>80</sup> Aleinikoff (2001), p. 300.

<sup>81</sup> Fullerton (1990) p. 410; Henes (1994), p. 385.

<sup>82</sup> *X, Y and Z*, para. 28.

<sup>83</sup> *Ibid.*, para. 37 (1). The ruling made reference to Article 10 (1) (d) of the Directive 2004/83/EC, the content of which is found identical in the recast Qualification Directive currently in force.

<sup>84</sup> *Ibid.*, paras. 42-43.

‘particular social group’ where [...] two conditions are met’,<sup>85</sup> thus necessitating both the innate/fundamental characteristic and the social perception for qualifying as a member of a particular social group.

The wording of the Court did not imply that the innate/fundamental characteristic and social perception criteria may be applied on the alternative. Even though such approach can be justified as per a literal reading of the norm,<sup>86</sup> it is the very wording introducing the two tests, i.e. ‘a group shall be considered to form a social group where in particular’, that indicates that the enumeration of the two tests is not exhaustive. In any event, the recital of the recast Qualification Directive clearly sets forth ‘the full and inclusive application’ of the Refugee Convention and its Protocol, which is to permeate the entire instrument.<sup>87</sup> The latter implies that the views of UNHCR, as the ‘guardian’ of the Refugee Convention,<sup>88</sup> shall be highly regarded in the interpretation and application of refugee law.<sup>89</sup> The latter is also suggested in the text of the recast Qualification Directive, which deems the Refugee Convention and its Protocol as ‘the cornerstone of the international legal regime for the protection of refugees’.<sup>90</sup>

Nevertheless, the *X, Y and Z* affirmed a cumulative application of the protected characteristics and social perception tests for the establishment of membership of the social group of queer persons. This interpretation of the rule is starkly at odds with UNHCR alternative approach on membership to a particular social group, providing for a sequential examination of the fundamental characteristics and social perception tests. Furthermore, the ruling is also inconsistent with UNHCR’s specific guidelines for

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<sup>85</sup> *Ibid.*, para. 45. The Court concluded that the existence of legislation in the country of origin criminalizing gay persons substantiates that such individuals form a particular social group. This conclusion was reached by holding that for a group to be considered as a particular social group both the fundamental characteristic and the social perception test should be fulfilled. In relation to the other questions the Court found that the existence of laws criminalising same-sex sexual orientation, despite framing gay persons as a particular social group, does not in itself constitute an act of persecution, unless it ensues punishment that constitutes persecution. The ruling also rejected the requirement that queer persons should be returned to their country of origin and conceal their sexual orientation and live ‘discreetly’. *Ibid.*, paras. 45, 49, 79 (2) and (3).

<sup>86</sup> Ferreira, (2018), p. 30.

<sup>87</sup> See recast Qualification Directive, Recital paras. 3, 4, 22, 23 and 24.

<sup>88</sup> UNHCR Statute, Chapter I (1) and par. 8 (a).

<sup>89</sup> States-parties to the Refugee Convention have an explicit obligation to comply with the supervisory functions of the UNHCR. States are not bound by UNHCR’s interpretation of the Refugee Convention, albeit, given their treaty-based undertakings, they are expected to commit themselves with the agency’s views. See in: Refugee Convention, Article 35 (1); Hathaway and Foster (2014), p. 10.

<sup>90</sup> Recast Qualification Directive, Recital para. 4.

sexual orientation-based asylum claims, according to which, under either of the approaches ‘there is broad acknowledgment that under a correct application of either of these approaches, lesbians, gay men [...] are members of “particular social groups” within the meaning of the refugee definition.’<sup>91</sup>

In any event, the *X, Y and Z* ruling provided a strict interpretation of the norm,<sup>92</sup> which is inconsistent with the low standard of proof in refugee status determinations.<sup>93</sup> An application of Article 10 (1) (d) of the Qualification Directive as read in *X, Y and Z*, authorises rejections of sexual orientation-based asylum claims on the basis that an applicant is not perceived queer in their country of origin, despite their sexual orientation being otherwise believed by the decision makers.<sup>94</sup> Drawing from decision-makers’ observations, the International Commission of Jurists has flagged that this takes place ‘either because the group of LGBTI persons are not visible within a given society or because the individuals themselves are not ‘out’ enough to be perceived as part of that group by society.’<sup>95</sup> On a positive note, Article 10 (2) provides a safety net for a reverse reasoning as a basis for rejection,<sup>96</sup> i.e. the characteristic being attributed to the individual by society without the person actually possessing it.

On another note, the recast Qualification Directive among its few remarks on sexual orientation, in Recital 30 includes a terminological conflation of sexual orientation with gender.<sup>97</sup> The wording of the Commission’s proposal of a replacing Regulation, simply reiterates the same wording.<sup>98</sup> In the stead of proposing a distinction thereof,<sup>99</sup> the EU

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<sup>91</sup> [footnotes omitted] UNHCR SOGI Guidelines (2012), para. 46.

<sup>92</sup> Ferreira (2018), p. 30.

<sup>93</sup> To be discussed in the following subchapter. See: Kagan (2003), p. 282; Dustin (2018), p. 19.

<sup>94</sup> Dustin (2018), p. 18.

<sup>95</sup> [footnote omitted] ICJ (2016), p. 201.

<sup>96</sup> Article 10 (2) of the recast Qualification Directive reads: ‘When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution’.

<sup>97</sup> Recital 30 of the Directive reads: ‘It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, *issues arising from an applicant’s gender, including gender identity and sexual orientation*, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.’ [emphasis added].

<sup>98</sup> European Commission (2016), Recital 28.

<sup>99</sup> As suggested by Ferreira (2018) who advocated for the exclusion of ‘including’, i.e., ‘issues arising from an applicant’s gender, gender identity and sexual orientation’, thus enumerating sexual orientation individually and not as part of gender issues.



Parliament has recommended an amendment with alternative wording,<sup>100</sup> simply reproducing the same wording and only included additional elements as aspects of gender. Taken together, the current and proposed text of the EU norms channel a minimal understanding with regard to sexual orientation as a persecution ground.

By the same token, the Commission's proposal leaves the definition of the membership of a particular social group almost intact.<sup>101</sup> Nevertheless, the Draft European Parliament Legislative Resolution has counter-proposed the substitution of the word 'and' with 'or'.<sup>102</sup> Specifically, the European Parliament has advocated for a formulation of the two criteria rather on an alternative than on a cumulative basis. The Parliament proposal, suggesting an alternative approach to the particular social group test, has been welcomed by scholars.<sup>103</sup> A potential intention of the EU Parliament to resolve the issues rising in sexual orientation claims inclusion to membership in a particular social group is also evidenced by its proposed Amendment of the definition of refugee found in Article 2 (d) of the recast Qualification Directive. The proposed Amendment has explicitly added sexual orientation in the enumeration of persecution grounds.<sup>104</sup>

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<sup>100</sup> Reading: [emphasis on the amendment] 'Issues arising from an applicant's gender, including gender identity, *gender expression, sex characteristics and sexual orientation*, and the fact of having been a victim of trafficking for sexual exploitation'. European Parliament (2017), Amendment 24.

<sup>101</sup> European Commission (2016), Article 10 (1) (d).

<sup>102</sup> European Parliament (2017), Amendment 85.

<sup>103</sup> Ferreira (2018), p. 39.

<sup>104</sup> The proposed amendment reads: [emphasis on the addition] 'Refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, *gender, sexual orientation, gender identity, disability* or membership of a particular social group', Amendment 51.

## 2.2 Credibility Assessment

As positive the expansion of the refugee definition to cover sexual orientation as a persecution ground may be, reliable credibility assessments are in the heart of an appropriate application of the Refugee Convention.<sup>105</sup> Credibility is a procedural stage of the refugee status determination, albeit governed by the content of the applicable refugee law framework. Credibility assessment refers to the examination of the information gathered by the applicant against information available to the decision maker and the determination of whether the applicant's statements can be accepted or not to substantiate the material elements of the claim.<sup>106</sup> In any event, credibility is defined 'in terms of being believable rather than being believed',<sup>107</sup> a standard set by the UNHCR just so.<sup>108</sup> In other words, credibility assessment can be defined as the determination on which statements and evidence submitted by the applicant are accepted. Therefore, credibility is not a prerequisite of a successful asylum claim, but merely determines whether a testimony will qualify as quantum of proof.<sup>109</sup>

Credibility is not an explicit requirement neither of the refugee definition nor of the refugee status *per se*.<sup>110</sup> Interestingly, neither the Refugee Convention, nor the Statute of the UNHCR enclose the term credibility.<sup>111</sup> By the same token, the term credibility is not mentioned in the EU framework either. The recast Qualification Directive foresees that the elements necessary for the substantiation of an application for international protection 'consist of the applicant's statements and all the documentation at the applicant's disposal'.<sup>112</sup> With the exception of the latter generic standards, clear rules on credibility assessment are absent from the EU framework,<sup>113</sup> including the New Pact on Migration and Asylum.<sup>114</sup> In absence of specific provisions, the position generally accepted is that each Member State may determine procedural aspects of EU

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<sup>105</sup> Kagan (2003), p. 368.

<sup>106</sup> UNHCR Beyond Proof (2013), p. 27.

<sup>107</sup> Kagan (2003), pp. 281-282.

<sup>108</sup> UNHCR Note (1998), par. 11.

<sup>109</sup> Kagan (2003), pp. 370-371. See also fn. 9

<sup>110</sup> Hathaway and Hicks (2005), p. 533.

<sup>111</sup> Kagan (2003), p. 368; UNHCR Handbook (2011), par. 197.

<sup>112</sup> The provision continues: 'regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.' Recast Qualification Directive, Article 4 (2).

<sup>113</sup> Mrazova (2018), pp. 185-186.

<sup>114</sup> New Pact on Migration and Asylum (2020).

law implementation within its own legal system.<sup>115</sup> In other words, each Member State may determine the rules and conditions governing the credibility assessment in refugee status determinations on its own discretion.

The assessment of sexual orientation-based asylum claims in EU Member States has been outlined in establishing the applicant's sexual orientation,<sup>116</sup> determine whether it is criminalised or condemnable in the country of origin, and upon establishment of the latter, decide whether the asylum seeker individualised the risk of harm upon return.<sup>117</sup>

### **2.2.1 Burden of proof**

In refugee status determinations the burden of proof lays on the applicants and 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.<sup>118</sup> This is reflected also in Article 4 of the recast Qualification Directive, according to which:

'Member States *may* consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.'<sup>119</sup>

The wording indicates that the duty to provide evidence and submit documentary or other evidence rests on each Member State's discretion. The latter is also hinted at paragraph 5 of this provision, which lays down the conditions to accept merely applicants' statements '[w]here Member States apply the principle according to which it is the duty of the applicant to substantiate the application'.<sup>120</sup> A literal reading of the provision indicates that the duty of the applicant to substantiate their claim may be given divergent weight - if any - from one Member State to another. Taken together, each Member State has much leeway to adjust the evidentiary burden of asylum seekers.

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<sup>115</sup> Opinion of Advocate General Sharpston, para. 50.

<sup>116</sup> Depending on the eligibility of the statements to substantiate the sexual orientation and the existence of any documentary evidence.

<sup>117</sup> FRA (2017), p. 5.

<sup>118</sup> UNHCR Handbook (2011), para. 196.

<sup>119</sup> [emphasis added] Recast Qualification Directive, Article 4 (1).

<sup>120</sup> [emphasis added] Recast Qualification Directive, Article 4 (5).

Notably, the majority of EU countries have a civil law model in place,<sup>121</sup> where decision makers have a leading role in evidence gathering, as opposed to the adversarial system of common law traditions, where decision makers are less engaged in fact-finding and evidentiary matters.<sup>122</sup> This means that in theory it is decision makers who have the principal role to collect evidence. Notwithstanding the influence this could potentially have toward the alleviation of asylum seekers from the burden of proof, UNHCR has found that in the majority of EU countries it is solely the applicant that is burdened by the requirement to substantiate the application.<sup>123</sup>

Taking into account the inquisitorial systems of EU countries and the discretionary burden of proof stipulated by the recast Qualification Directive, it seems that Member States have translated the margin the recast Qualification Directive has left to them to a rather stringent fashion. The UNHCR interpretative guidance, envisaging that ‘in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application’,<sup>124</sup> appears disregarded.

On another note on the burden of proof, the content of the elements necessary to substantiate an application for international protection is specified as ‘the applicant’s statements and all the documentation *at the applicant’s disposal*’.<sup>125</sup> Research suggests that this requirement has been interpreted in a fashion that it entails more than documentation that the applicants actually have in their possession.<sup>126</sup> UNHCR interpretative guidance on the other hand also holds that asylum seekers have to make an effort to substantiate their statements with ‘*available* evidence’.<sup>127</sup> The stipulation of the recast Qualification Directive though is practically applied in terms of asylum seekers being expected to ‘do everything in their power’ to gather evidence in support of the application, in addition to submitting evidence in their possession.<sup>128</sup> In the event

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<sup>121</sup> Countries with the civil law model embrace an inquisitorial system.

<sup>122</sup> Dustin and Held (2018), p. 77; Ferreira (2018), p. 36.

<sup>123</sup> UNHCR Beyond Proof (2013), pp. 86-87.

<sup>124</sup> UNHCR Handbook (2011), para. 196.

<sup>125</sup> [emphasis added] and continues: ‘regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.’ Recast Qualification Directive, Article 4 (2).

<sup>126</sup> UNHCR Beyond Proof (2013), p. 93.

<sup>127</sup> [emphasis added] UNHCR Handbook (2011), para. 205 (a) (II).

<sup>128</sup> UNHCR Beyond Proof (2013), p. 93.

an effort to the best of asylum seekers' capacity to obtain evidence cannot be demonstrated, this can prejudice the credibility of an asylum application.

The same provision stipulates that,<sup>129</sup> in order for the statements to be considered in absence of any evidence, 'a satisfactory explanation has [to be] given regarding any lack of other relevant elements'.<sup>130</sup> Relevant research across EU countries has nevertheless indicated that, despite asylum seekers rarely being asked to prove the efforts they have made to substantiate their application, in the event they do submit evidence for a certain aspect of the claim they are expected to corroborate further aspects too.<sup>131</sup>

### *2.2.2 Evidentiary issues*

In sexual orientation-based asylum claims, the establishment of the membership of a particular social group is characterised by paucity of legal documentation.<sup>132</sup> An emphasis on the object and purpose of the Refugee Convention shall consider that the potential beneficiaries of international protection are victims of flagrant human rights violations, usually deprived of the documentation and evidence substantiating their status.<sup>133</sup> The first preambular paragraph of the Refugee Convention explicitly refers to '[t]he principle that all human beings should enjoy human rights without discrimination',<sup>134</sup> which lays down that the instrument should be interpreted with a view to safeguard human rights. In the context of credibility assessment, equal enjoyment of human rights may take an equitable application of adjusting standards of proof closer to the realities of the alleged victims of human rights violations, who are asylum seekers fleeing persecution.<sup>135</sup>

UNHCR publications consider that documentary proof of the statements is not a requisite for refugee claims to succeed and suggest that, in absence of corroborative evidence, decision-makers shall rest their assessment on the testimony alone.<sup>136</sup> Asylum

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<sup>129</sup> Recast Qualification Directive, Article 4 (2).

<sup>130</sup> Recast Qualification Directive, Article 4 (5) (b). See also in: UNHCR Handbook (2011), para. 205 (a) (II).

<sup>131</sup> UNHCR Beyond Proof (2013), p. 93.

<sup>132</sup> Wessels (2011), p. 28.

<sup>133</sup> UNHCR Handbook (2011), par. 197.

<sup>134</sup> Refugee Convention, 1<sup>st</sup> preambular paragraph.

<sup>135</sup> Kagan (2003), p. 372.

<sup>136</sup> UNHCR Guidelines (2002), para. 37; UNHCR SOGI Guidelines (2012), para. 66.; UNHCR Guidance Note (2008), para. 35, UNHCR SOGI Guidelines (2012), para. 64.

seekers' testimonies are considered central to the inquiry of asylum claims and suffice for refugee status determinations even when evidentiary corroboration is not otherwise available.<sup>137</sup> Article 4 of the recast Qualification Directive also pays regard to the potential lack of evidence in support of asylum seekers' statements and implicitly accepts asylum seekers' stand-alone testimonies as long as the following specific conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.<sup>138</sup>

The provision does not further clarify what 'general credibility' means, but its wording infers that refugee status determination largely depends on the applicant's general credibility.<sup>139</sup> As mentioned earlier, credibility consists of the determination of which elements can support the material facts of a claim, and thus the success or rejection of an asylum application. In other words, credibility findings are the first step of decision making in refugee status determination.<sup>140</sup> In absence of any other corroborative evidence, the statements of the applicant take over the major part in the assessment of credibility. Therefore, whether the facts submitted by the applicant during the interview are believable or not, becomes critical, particularly when other evidence is lacking. Notably, the EU Parliament's proposal on the amendment of the recast Qualification Directive has excluded the requirement of paragraph (b) that the applicant should provide explanation in absence of relevant elements submitted to support their application.<sup>141</sup>

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<sup>137</sup> Hathaway and Hicks (2005), p. 560.

<sup>138</sup> Recast Qualification Directive, Article 4.

<sup>139</sup> Mrazova (2018), pp. 187-188.

<sup>140</sup> UNHCR Beyond Proof (2013), p. 28.

<sup>141</sup> Parliament (2017), Amendment 66. Though, the said wording was maintained in the Commission (2016) recommendation.

Article 4 of the recast Qualification Directive lists the factors to be considered by the Member States in the credibility assessment of asylum applicants, namely:

- ‘(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
- (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
- (d) whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;
- (e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.’<sup>142</sup>

In the context of Member States’ duty to ensure that ‘applications are examined and decisions are taken individually, objectively and impartially’,<sup>143</sup> EU jurisdictions have employed credibility indicators, in light of which, statements and evidence submitted by asylum seekers are examined.<sup>144</sup> UNHCR suggests the following credibility indicators as guidance in which material facts should be accepted or not:

- ‘(i) sufficiency of detail and specificity;
- (ii) internal consistency of the oral and/or written material facts asserted by the applicant (including the applicant’s statements and any documentary or other evidence submitted by the applicant);
- (iii) consistency of the applicant’s statements with information provided by any family members and/or other witnesses;
- (iv) consistency of the applicant’s statements with available specific and general information, including COI, relevant to the applicant’s case; and
- (v) plausibility.’<sup>145</sup>

The credibility indicator of demeanour, employed by many States, has not been included in UNHCR’s recommendation, since it is based on assumptions and is found inherently flawed.<sup>146</sup> These credibility indicators are further dissected in internal, external and plausibility, with former three indicators comprising internal credibility.<sup>147</sup>

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<sup>142</sup> Recast Qualification Directive, Article 4 (3).

<sup>143</sup> Asylum Procedures Directive, Article 10 (3) (a).

<sup>144</sup> UNHCR Beyond Proof (2013), p. 137.

<sup>145</sup> UNHCR Beyond Proof (2013), p. 191. The credibility indicator of demeanour, common in many States, has been omitted, since it is based on assumptions and is found inherently flawed. See in pp. 185-190.

<sup>146</sup> UNHCR Beyond Proof (2013), pp. 185-190.

<sup>147</sup> UNHCR Beyond Proof (2013), p. 191.

### *2.2.3 Alleviation form the duty to present evidence*

The UNHCR Handbook, while allocating the onus of proof on the asylum seekers, grants them the benefit of doubt and, depending on the circumstances, considers lack of evidence not prejudicing an asylum claim if the general credibility is satisfactory.<sup>148</sup> Nevertheless the Handbook requires ‘all available evidence [to have] been obtained and checked and [...] the examiner [to be] satisfied as to the applicant’s general credibility’.<sup>149</sup> This requirement corresponds to two of the five conditions set out by Article 4 (5) of the recast Qualification Directive cited above, namely the submission of evidence at the applicant’s disposal and the general credibility.<sup>150</sup> All in all, the recast Qualification Directive sets a higher threshold for the benefit of doubt.

The UNHCR Handbook finds testimonies, in particular, to qualify for the benefit of doubt if asylum seekers’ statements are ‘coherent and plausible’.<sup>151</sup> Nevertheless, scholarship indicates that refugee status determination authorities have been more eager to emphasise on coherency and plausibility, ignoring the main requisite of the benefit of doubt.<sup>152</sup> Hence, the limited guidance on the benefit of doubt in the context of credibility assessment results in the principle being applied in cases decision makers are already satisfied with the general credibility.<sup>153</sup> The absence of specific guidance in the recast Qualification Directive makes the general credibility to largely count for credibility assessments.<sup>154</sup> For this reason, the requirement that States shall ‘ensure 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 [...] sexual orientation’ should be duly observed.<sup>155</sup>

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<sup>148</sup> UNHCR Handbook (2011), paras. 196-197 and paras. 203-204; UNHCR Beyond Proof (2013), pp. 49-50.

<sup>149</sup> UNHCR Handbook (2011), para. 204.

<sup>150</sup> Recast Qualification Directive, Article 4 (5) (b) and (e).

<sup>151</sup> UNHCR Handbook (2011), para. 204.

<sup>152</sup> Millbank (2009a), pp. 5-6.

<sup>153</sup> Kagan (2003), p. 272.

<sup>154</sup> Mrazova (2018), pp. 187-188.

<sup>155</sup> Recast Asylum Procedures Directive, Article 15 (3) (a).



In its proposal for the Regulation to substitute the recast Qualification Directive, the EU Parliament has made explicit the general legal principle of the benefit of doubt,<sup>156</sup> specifying that it ‘reflects the recognition of the considerable difficulties that applicants face in obtaining and providing evidence to support their claim’.<sup>157</sup> The latter has been proposed as a freestanding input to be included in the Recital, which perhaps reflects the significance attributed to highlighting applicants’ benefit of doubt where their statements are not backed by evidence. The latter is further built on, in the proposed Amendment to paragraph 5 of Article 4, where the benefit of doubt is made explicit in light of lack of evidence to support applicants’ statements.<sup>158</sup>

Be it as it may, the benefit of doubt may serve as the yardstick in two areas in the credibility assessment as Kagan has argued. The former is that negative credibility findings should not inextricably lead to rejections of sexual orientation asylum claims, founded on the mere suspicion that the declared sexual orientation is fraudulent. The rationale behind the benefit of doubt rule is to protect honest applicants from assessments, which are based on the generalised assumption that some claimants may misrepresent their statements and unfairly challenge any asylum seeker’s claims.<sup>159</sup> In other words, the possibility that some applicants may claim asylum for a sexual orientation which they do not have, should not prejudice the sexual orientation asylum applications of any asylum seeker whose credibility is not established.

The latter point is that the refugee status determination should commence with the rebuttable presumption of truthfulness of the applicants’ statements and declared sexual orientation. Rejections based on doubts regarding the applicants’ statements place asylum seekers outside the protection afforded by the letter and the spirit of the Refugee Convention.<sup>160</sup> Thus, unsubstantiated testimonies should be accepted as true if they

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<sup>156</sup> Berlit (2015) argues that the principle of the benefit of doubt differs from the duty to alleviate form evidentiary submissions of Article 4 of the recast Qualification Directive, since the benefit of doubt is a criminal law principle placing the duty to demonstrate that there is no residual doubt on the guilt of the accused entirely on the state, while Article 4 (5) alleviates applicant form presenting evidence but does not shift the burden of proof from the applicant to the state.

<sup>157</sup> Parliament, Amendment 37.

<sup>158</sup> The proposed text of Amendment 64 reads: [emphasis on the addition] ‘Where aspects of the applicant’s statements are not supported by documentary or other evidence, no additional evidence shall be required in respect of those aspects *and the applicant shall be granted the benefit of the doubt* where the following conditions are met [...]’.

<sup>159</sup> Kagan (2003), pp. 372-373.

<sup>160</sup> *Ibid.*, pp. 373-374.

meet the standard of consistency with the rest of the statements.<sup>161</sup> Self-identification is further discussed in the ensuing subchapter.

#### ***2.2.4 Self-identification***

The updated version of the Yogyakarta principles highlights that decision making authorities should ‘[a]ccept the self-identification of a person seeking asylum on the basis of sexual orientation [...] as the starting point for consideration of their asylum claim’.<sup>162</sup> UNHCR relevant publications have stressed that the applicants’ testimonies are ‘the primary and often the only source of evidence’, and recommend that statements and self-identification should be relied upon.<sup>163</sup> In sum, UNHCR sees self-identification in sexual orientation-based asylum claims as ‘an indication of the applicant’s sexual orientation’, and any such declaration should be entitled to a presumption of veracity.<sup>164</sup>

In the 2014 ruling *A, B and C* the CJEU made clear that self-identification of same-sex sexual orientation does not preclude decision makers from evaluating the credibility of statements in sexual orientation-based asylum claims.<sup>165</sup> The CJEU maintained that a declared sexual orientation should not be considered an established fact and that it merely constitutes the ‘starting point in the process of assessment of the facts and circumstances’ relevant to their claim.<sup>166</sup> The CJEU reiterated both positions in the later *F* ruling, making concrete reference to the *A, B and C*.<sup>167</sup> The dismissal of self-identification as a determinative element as a determinative basis of sexual orientation-based asylum claims is not in itself inconsistent with the EU framework. Nevertheless, the reduced weight given to self-identification is inconsistent with the interpretative guidance mentioned above as well as of the practice certain Member-States have adopted.<sup>168</sup> Taken together, the CJEU has attributed limited significance to self-identification as a statement to be considered in credibility assessment.

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<sup>161</sup> UNHCR Handbook (2011), para. 197.

<sup>162</sup> Yogyakarta Principles plus 10, Principle 23 (G).

<sup>163</sup> UNHCR SOGI Guidelines (2012), para. 64; UNHCR Guidance Note (2008), para. 35; UNHCR Discussion Paper (2010), para. 32.

<sup>164</sup> UNHCR Guidance Note (2008), para. 35; UNHCR SOGI Guidelines (2012), para. 63 (i); Wessels (2011), p. 29.

<sup>165</sup> *A, B and C*, para. 52.

<sup>166</sup> *A, B and C*, para. 49; *F*, para. 28.

<sup>167</sup> *F*, paras. 28-29.

<sup>168</sup> Ferreira (2018), p. 30.

The above mentioned evidentiary complications in sexual orientation-based asylum claims frequently render the applicants' testimonies of self-identity the only element of a sexual orientation-based claim to be weighed against available country of origin information.<sup>169</sup> Refugee law is exceptional in the sense that personal narratives are the bases of claims and the underpinning of almost all evidence.<sup>170</sup> Even though not explicitly mentioned in the Refugee Convention or the Statute of the UNHCR, in many cases credibility might be the unique determinant of success in the refugee status determinations.<sup>171</sup> Research has indicated that even when documentary evidence is available, it is often perceived as self-serving or staged'.<sup>172</sup>

Disbelief in the membership of a particular social group, as opposed to other persecution grounds, virtually always leads to rejection of a claim and has been identified as a major reason for negative asylum determinations.<sup>173</sup> Disregarding queer asylum seekers' self-identification translates to high possibility of negative decisions in sexual orientation asylum claims. By the same token, absence of credibility regarding the 'well-founded fear of persecution' in the country of origin equally threatens the determination of asylum applications of lesbian and gay individuals. Research supports that in the EU majority on negative asylum decisions is made on credibility grounds and that the application of the criteria of the relevant EU Directive are absent from the assessments.<sup>174</sup> Remarkably, the credibility aspects of the decisions are the most neglected in the review procedures, if recourse thereof is at all undertaken.<sup>175</sup> Taken together, rejections of sexual orientation-based asylum applications may be based on cursory or insufficient credibility assessments, which are highly improbable to be remedied in the second instance.

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<sup>169</sup> Wessels (2011), p. 31.

<sup>170</sup> Millbank (2002), p. 154; Berg and Millbank (2009), p. 198.

<sup>171</sup> Kagan (2003), p. 368; UNHCR Handbook (2011), par. 197.

<sup>172</sup> Berg and Millbank (2009), p. 198.

<sup>173</sup> Wessels (2011), p. 28-29; Millbank (2009a), p. 4. See also fn. 10.

<sup>174</sup> UNHCR Beyond Proof (2013), p. 29.

<sup>175</sup> *Ibid.*; Millbank (2009a), p. 2.

### 3. CREDIBILITY ASSESSMENT PRACTICES

#### 3.1 Testing and Experts' Reports

##### 3.1.1 'What medical evidence is there that your client is gay?'<sup>176</sup>

Decision makers have looked to establish the credibility of sexual orientation in refugee status determinations through physical and mental assessments. Persons seeking a safe haven in the EU have been subject to anal examinations, phallometry, as well as assessments by sexologists, psychiatrists and psychologists. Such practices have been identified in at least nine Member States, namely Austria, Bulgaria, the Czech Republic, Germany, Hungary, Poland, Romania, Slovakia and the UK.<sup>177</sup> The practices aiming to provide experts' evidence for sexual orientation asylum claims discussed below will be categorised to medical, including anal and phallogometric tests,<sup>178</sup> as well as psychological assessments conducted by psychiatrists, psychologists and sexologists.

Anal examinations have been identified as a practice in the UK. In 1995 anal examination requested from a Romanian gay man by the Home Office as a way of proving his sexual orientation.<sup>179</sup> The same year, an asylum seeker had to choose between anal examination, as proposed by the Home Office to the Immigration Appeals Tribunal reviewing the case, and psychiatric evaluation to evidence his sexual orientation.<sup>180</sup> The application of anal tests has been very sparse in the refugee status determination context and research indicates that they have been limited in the 90's. It is worth mentioning that in anal examinations the production of evidence on a person's sexual orientation lays on traces and hallmarks of rectal tissue surrounding the anus.

'Penile phallometry', also called 'penile plethysmography', and its equivalent test for women, 'vaginal photoplethysmography', are methods to quantify sexual arousal by measuring physiological responses to visual stimuli through attachment of electrodes to the genitalia.<sup>181</sup> Clinical psychology explains phallometry as a 'procedure for

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<sup>176</sup> Immigration Judge (2006), dealing with whether a gay Iranian asylum seeker could prove the role he had undertaken in gay sex, cited in: O'Leary (2008), p. 89.

<sup>177</sup> The former eight countries have been reported in: Jansen and Spijkerboer (2011), p. 49.

<sup>178</sup> Phallometry even though is conducted by sexologists will be examined under medical component of the present discussion, since despite its assessment by sexologists, psychiatrists or psychologists it largely involves the physical sphere.

<sup>179</sup> *Appeal No. HX/70517/94 Special Adjudicator M.W. Rapinet, 28 April 1995*, mentioned in LaViolette (1996), p.13. See particularly fn. 5.

<sup>180</sup> *R. v. Secretary of State for the Home Department ex parte Vraciu* (1995), Special Adjudicator's report, Appeal no. HX/70517/94, 28 April 1995, commented in McGhee (2000), pp. 37-42.

<sup>181</sup> ORAM (2011), p.5.

determining the sexual preferences of males by measuring penile erection responses to stimuli depicting various sexual behaviors with different partners [...].<sup>182</sup> Phallometric testing has been relied upon in the refugee status determination context to ascertain applicants' sexual orientation primarily by the Czech Republic for the period between 2008 to 2010,<sup>183</sup> however the practice has also been reported for Slovakia in at least two cases.<sup>184</sup>

Reportedly, phallometry was introduced in the refugee status determination by a legal representative of an asylum seeker.<sup>185</sup> The Czech Ministry of Interior has held that when the applicants' statements were inconsistent and challenged the credibility of their sexual orientation,<sup>186</sup> a complex 'sexodiagnostic examination' was requested, comprising an interview with a professional sexologist and phallometric testing.<sup>187</sup> The examination is subject to the applicant's written consent, following relevant information provided to them.<sup>188</sup> The testing assesses the applicants' physical reaction to heterosexual, gay, lesbian, adolescent and child pornographic material,<sup>189</sup> and if the person shows no reaction to heterosexual representations, their alleged sexual orientation is considered proven.<sup>190</sup>

Psychiatric assessments and psychological tests, such as exploratory examinations, personality tests and projective tests have been used to establish applicants' sexual orientation through experts' reports. The examinations are often limited to simple discussions between the experts and the applicants.<sup>191</sup> The assessments of the assigned experts frequently employ the Rorschach psychological tests, which are considered outdated and focus on the postures preferred by claimants.<sup>192</sup> The practice was common in Germany, where psychiatric reports served as a basis to rule out the discretion reasoning due to the 'irreversibility' of the sexual orientation, often invoked with the

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<sup>182</sup> Marshall and Fernandez (2000), p. 807.

<sup>183</sup> Śledzińska-Simon and Śmiszek (2013), p. 17.

<sup>184</sup> Reference is made for one case in Slovakia in 2005 in Jansen and Spijkerboer (2011); another case is referred to 2012 in Jansen (2014), p. 52. Mrazova (2018) and FRA (2010) hold that the Czech Republic has been the only EU state having used phallometry, in p. 188 and p. 60 respectively.

<sup>185</sup> Jansen and Spijkerboer (2011), p. 52.

<sup>186</sup> FRA (2010), p. 59.

<sup>187</sup> Jansen and Spijkerboer (2011), p. 52.

<sup>188</sup> FRA (2010), p. 59.

<sup>189</sup> Jansen and Spijkerboer (2011), p. 52.

<sup>190</sup> FRA (2010), p. 59.

<sup>191</sup> Jansen and Spijkerboer (2011), p. 50.

<sup>192</sup> FRA (2017), p. 6.

applicant's initiative and similar practices have been reported also for Austria and Romania.<sup>193</sup> In Hungary and Bulgaria the refugee status determination authorities requested psychiatric or forensic expert opinions on claimants' sexual orientation. Hungarian asylum authorities have reportedly applied such examinations even in cases when a claimant's sexual orientation can be established factually (e.g. cohabitation with partner) and only refrain from these practices in cases where the applicants conform with stereotypical demeanor.<sup>194</sup> In Poland claimants have been prompted by the authorities to provide psychological or sexologist's reports.<sup>195</sup>

With reference to the entire chapter 3, it is worth mentioning that two most common obstacles that queer asylum seekers face and are not covered by the present examination. Namely, negative decisions have repeatedly been reasoned on the grounds of stereotypes or the point of disclosure of the sexual identity rather questionably. It should be born in mind that both stereotypes and late disclosure may overlap with and even exacerbate the credibility assessment practices under examination in this chapter.

Stereotypes are persistently reproduced in the assessment of sexual orientation-based asylum claims and often result in disbelieving the claim as a whole.<sup>196</sup> They have been flagged in all stages of credibility assessment, and they constitute one of the bases of intrusive questioning.<sup>197</sup> Some common pre-conceptions of the queer social identity involve assumed knowledge and behaviour, such as cultural tastes, previous heterosexual relationships and parenthood, lifestyle, queer activism, demeanour, appearance, genetics.<sup>198</sup> Other stereotypical expectations echo assumptions, such as gender non-conformity,<sup>199</sup> promiscuity or linear identity development of queer asylum seekers.<sup>200</sup>

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<sup>193</sup> E.g., VG Neustadt/Weinstraße, 8 September 2008, Case no 3 K 753/07. NW, commented in Wessels (2017), pp. 366-367.

<sup>194</sup> Jansen and Spijkerboer (2011), p. 50; FRA (2010), pp. 58-59.

<sup>195</sup> Jansen and Spijkerboer (2011), p. 51.

<sup>196</sup> UNHCR Discussion Paper (2010), par. 31; Briddock (2016), p. 151.

<sup>197</sup> Jansen and Spijkerboer (2011), p. 56.

<sup>198</sup> See examples in: Briddock (2016), p. 139 and pp. 151-152; Wessels (2011), pp. 31-33; Jansen and Spijkerboer (2011), pp. 57-61; Choi (2010), pp. 255-258; Millbank (2009a), pp. 6-11; Berg and Millbank (2009), pp. 208-211.

<sup>199</sup> Llewellyn (2017), pp. 3-4; Jansen and Spijkerboer (2011), p. 62.

<sup>200</sup> Wessels (2011), p. 32, referring to: Berg and Millbank (2009), pp. 206-207.

By and large, stereotypes have repeatedly been invoked to establish or exclude the veracity of applicants' sexual orientation, reflecting homophobia, limited cultural understanding or ignorance of sexuality-related issues, and being heavily influenced by a western middle-class male experience and perspective.<sup>201</sup> The requirements of an individual, impartial and objective assessment as well as of the competency of the interviewers are of particular relevance.<sup>202</sup> In *A, B and C* the CJEU rejected stereotypes as the only grounds on which the assessment of a claim can be founded, but worryingly framed them as useful elements in the credibility assessment.<sup>203</sup>

Delay in applying for asylum or in disclosing the sexual orientation in a pending claim is perceived as inconsistency and those claims have been confronted with suspicion.<sup>204</sup> Persons in repressive societies have in their majority learned to experience their sexual orientation in secrecy, isolation and potentially with internalised shame, which opens the possibility that asylum seekers oppressed by persecution have not disclosed their sexual identity until they apply from asylum.<sup>205</sup> Some asylum seekers might be in the process of 'coming out' or become aware that sexual orientation is a valid basis for an asylum claim, only while their application is pending. Depending on their past experiences, others might be particularly reluctant to disclose their sexual orientation to a state actor or hesitate due to the risk of it becoming known to their community.

Given the duty of applicants to disclose as soon as possible the elements of their application, late disclosure can have a bearing on the standard of proof requested for an asylum claim and to the consideration of the additional submissions.<sup>206</sup> Whereas the latter may be justified by procedural effectiveness,<sup>207</sup> it should be juxtaposed to the stipulation that applicants on the basis of their sexual orientation are entitled to procedural guarantees.<sup>208</sup> The *A, B and C* ruling held that late disclosure cannot be the sole reason for rejecting an applicant's credibility.<sup>209</sup>

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<sup>201</sup> Millbank (2009b), p. 400; Dustin and Held (2018), p. 80.

<sup>202</sup> Recast Asylum Procedures Directive, Articles 10 (3) (a) and 15 (3) (a).

<sup>203</sup> *A, B and C*, paras. 59-63.

<sup>204</sup> Millbank (2009a), p. 13-16; Jansen and Spijkerboer (2011), p. 67.

<sup>205</sup> Berg and Millbank (2009), p. 198.

<sup>206</sup> Recast Qualification Directive, Article 4 (1) and (5) (d); Recast Asylum Procedures Directive, Article 40 (4).

<sup>207</sup> Ferreira (2018), pp. 37-38.

<sup>208</sup> Recast Asylum Procedure Directive, Recital 29 and Article 24 (3). See relevantly: Berlit (2015).

<sup>209</sup> *A, B and C*, paras. 69-71.

### **3.1.2 Framework**

The prohibition of degrading treatment is well-established internationally and applicable to all EU Member States,<sup>210</sup> which are under the obligation to prevent ‘degrading treatment [...], when such acts are committed by or at the instigation of [...] a public official or other person acting in an official capacity.’<sup>211</sup> The EU Charter explicitly enshrines the respect for human dignity, which is implicitly guaranteed in the prohibition of degrading treatment of the ECHR.<sup>212</sup> The obligation of States to protect from ‘unlawful interference’ with one’s privacy binds all EU countries,<sup>213</sup> where ‘[e]veryone has the right to respect for his or her private and family life’.<sup>214</sup> According to the Asylum Procedures Directive, medical examinations can be conducted in refugee status determination only with the aim to ‘indicate past persecution or serious harm’.<sup>215</sup> The exclusive wording of the provision rules out alternative purposes of medical examinations, such as the establishment of a person’s sexual orientation.

The Yogyakarta principles, a set of international legal principles dealing with human rights violations on the basis of sexual orientation and gender identity, have emphasised States’ obligations in relation to protection from medical abuses and the right to bodily and mental integrity. The Principles specifically foresee that ‘[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing [...] based on sexual orientation or gender identity’ and that States shall ensure ‘that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.’<sup>216</sup>

The updated version of the principles acknowledges that ‘[e]veryone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual

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<sup>210</sup> ICCPR, Article 7.

<sup>211</sup> CAT, art. 16.

<sup>212</sup> EU Charter, Article 1 (human dignity), Article 3 (physical and mental integrity, with regard to free and informed consent in par. 2) and Article 4 (prohibition of degrading treatment); ECHR, Article 3.

<sup>213</sup> ICCPR, art. 17.

<sup>214</sup> EU Charter, Article 7; Almost identical wording in ECHR, Article 8.

<sup>215</sup> Recast Asylum Procedures Directive, Article 18 (1).

<sup>216</sup> Yogyakarta Principles, Principle 18 (a).



orientation [...]’ as well as ‘the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation’. The principle particularly prohibits ‘inappropriate, invasive, unnecessary or coercive medical or psychological testing or evidence [from being] utilised to assess a person’s self-declared sexual orientation, gender identity, gender expression or sex characteristics when seeking asylum’.<sup>217</sup> The same Principle moreover prohibits ‘anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.’<sup>218</sup>

Free and informed consent of the person concerned in the fields of medicine is a particular aspect of the right to the integrity of the person.<sup>219</sup> With regard to any intervention in the health field the Council of Europe Convention on Human Rights and Biomedicine, signed and ratified by a majority of EU countries,<sup>220</sup> stipulates that the person concerned must have provided their free and informed consent, which they may freely withdraw at any time.<sup>221</sup> The issue of informed consent, which is regulated domestically in varying degrees,<sup>222</sup> has been overlooked in the Directive 2011/24/EU on patients’ rights in cross-border healthcare.<sup>223</sup>

### ***3.1.3 Previous Jurisprudence and Developments***

Until September 2009 the utilisation of phallometry in refugee status determinations fell beyond judicial scrutiny. On 9 September 2009 the German Administrative Court in Schleswig Holstein flagged the practice,<sup>224</sup> granting an interim measure and ordering the stay of transfer under Dublin II Regulation for an Iranian gay man, in order for him not to be subject to phallometry in the examination of his asylum claim upon his return to the Czech Republic.<sup>225</sup>

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<sup>217</sup> Yogyakarta Principles plus 10, Principle 23 (L).

<sup>218</sup> *Ibid*, principle 32 (G).

<sup>219</sup> EU Charter, Article 3.

<sup>220</sup> Out of twenty-seven EU-Member States the ten countries not having signed and/or ratified the Convention include Austria, Belgium, Germany, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland and Sweden.

<sup>221</sup> Convention on Biology and Biomedicine, Article 5.

<sup>222</sup> FRA (2020), p. 54

<sup>223</sup> Patients’ rights in cross-border healthcare Directive. See in: European Commission Patients’ Rights Report (2016), p. 27.

<sup>224</sup> *Schleswig-Holsteinisches Verwaltungsgericht, Az.: 6 B 32/09, 7 September 2009.*

<sup>225</sup> Council Regulation No. 343/2003.

The German Court found the potential refusal of an applicant to be subject to phallometry possibly leading to the termination of the entire asylum proceedings, to hinder the applicant's access to the asylum procedure. Moreover, the said court stressed that the absence of details regarding the manner in which such test demonstrates the sexual orientation of the applicant questionable. In this decision, the German Administrative Court challenged the reliability as well as the conformity with human rights of the phallometric test applied in the Czech Republic and considered it impeding the individual's access to the asylum system. Taking into account the role of phallometry as a means to establish an applicant's sexual orientation in the asylum proceedings and the possible rejection of the claim upon an applicant's denial to be subject to the said practice, the German Administrative Court pronounced that 'the compliance with human rights appears at least very doubtful'. Phallometry had already been rejected by the United States and Canadian jurisdictions as non-credible evidence in the 90's, on the basis of lacking scientific soundness and reliability.<sup>226</sup>

Following, in 2010 the European Commission addressed a letter to the Czech authorities finding phallometry 'a strong interference with the person's private sphere and sense of dignity' and expressing their concerns for its compliance with the prohibition of torture and inhuman or degrading treatment and respect for private and family life.<sup>227</sup> Following, ORAM published a study condemning the use of phallometry in asylum proceedings and finding the practice breaching the prohibition of degrading treatment and the right to private life among other rights.<sup>228</sup> In 2011 the UNHCR expressed their concerns over the use of phallometry in refugee status determination procedures and the compatibility with the right to private life and the prohibition of degrading treatment.<sup>229</sup>

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<sup>226</sup> E.g.: *United States. v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995); *Children's Aid Society of the Region of Peel v. S.R.-T*, [2003] OJ No 6141 (Can.). Both cases contrasted its possible utility for treatment with the unreliability for diagnosis or proof of culpability. See in: ORAM (2011), fn. 20 and pp. 6-7.

<sup>227</sup> European Commission (2011).

<sup>228</sup> ORAM (2011).

<sup>229</sup> See: UNHCR Comments on Phallometry (2011).

Nonetheless, it was not until 2014 when the CJEU ruled on the issue of tests in the *A, B and C* case. Answering whether there are limits to credibility assessment methods of sexual orientation, in order for them to be in line with human rights standards, the CJEU rejected the asylum authorities' discretion to allow the applicant to submit to 'tests' with a view to establishing their homosexuality.<sup>230</sup> The CJEU explicitly ruled out the utilisation of such tests by national authorities, even with the applicants' initiative, as non-reliable and found them to infringe human dignity.<sup>231</sup>

In her opinion on the case, Advocate General Sharpston acknowledged that practices seeking to determine definitively a person's sexual orientation should be excluded from credibility assessment.<sup>232</sup> The Advocate General also found phallometry to fail the proportionality requirement due to its unsuitability for the objective of establishing a person's sexual orientation,<sup>233</sup> concurring with concerns expressed earlier by the European Commission regarding the intrusive nature of phallometry and the principle of proportionality.<sup>234</sup>

In Germany a 2008 decision rejected psychiatric reports as evidence for the establishment of an applicant's sexual orientation.<sup>235</sup> Following the *A, B and C* ruling, the Hungarian Administrative and Labour Court requested a preliminary ruling regarding expert reports' eligibility, in absence of medical tests and sexually explicit documentation. The 2018 *F* case originated from a negative decision on a sexual orientation-based asylum application.<sup>236</sup> The applicant had consented to undergo psychological tests to verify his sexual orientation and was rejected on the basis that his claimed sexual orientation was not credible according to a psychologist's report.<sup>237</sup> The referring court inquired over whether forensic psychologists' expert opinions based on projective personality tests are eligible as evidence to establish the sexual orientation of asylum seekers, as well as, in the event the latter type of evidence is rejected, whether

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<sup>230</sup> *A, B and C*, para. 59.

<sup>231</sup> *A, B and C*, para. 73.

<sup>232</sup> Opinion of Advocate General Sharpston, para. 69.

<sup>233</sup> Opinion of Advocate General Sharpston, para. 61.

<sup>234</sup> European Commission (2011).

<sup>235</sup> VG Chemnitz, 11 July 2008, Case no A 2 K 304/06, commented in Wessels (2017), fn 107.

<sup>236</sup> *F*, para. 24.

<sup>237</sup> *F*, para. 22: 'That expert's report entailed an exploratory examination, an examination of personality and several personality tests, namely the *Draw-A-Person-In-The-Rain* test and the *Rorschach and Szondi* tests'.

experts' opinions are entirely precluded from the assessment of the veracity of a stated sexual orientation.<sup>238</sup>

Despite maintaining that experts' reports are not in principle excluded from credibility assessment, the CJEU found respect to human dignity and to the right to private life to set the limits in the use of certain credibility assessment practices.<sup>239</sup> The CJEU found experts' reports eligible for assessing the credibility of sexual orientation, as long as they respect the applicants' fundamental rights and decision making authorities do not base their decisions primarily on these reports and, even more so are bound by them.<sup>240</sup> The CJEU, endorsing the opportunity for experts' reports to be ordered by Member States in the context of refugee status determinations, rejected the order of psychologist experts' report as a means to establish asylum seekers sexual orientation.<sup>241</sup> The *F* ruling condemned more dynamically the employment of tests and experts' reports in sexual orientation-based asylum claims than the Advocate General Wahl's opinion on the case.<sup>242</sup> While the Advocate General ruled out the adequacy of such tests for determining sexual orientation,<sup>243</sup> he nevertheless provided a set of conditions under which such tests can be authorised,<sup>244</sup> thus accepting them in effect.<sup>245</sup>

Medical tests and examinations will be discussed both in relation to the prohibition of degrading treatment and the right to private life. The reason that medical tests and examinations are the only credibility assessment practice examined under ECHR Article 3 in this thesis, is that they better accommodate the threshold of severity required to be considered under ECHR Article 3. In many cases psychiatric and psychological assessments may also breach ECHR Article 3 but reaching Article 3 required level of severity is case-dependent. For this reason, psychiatric and psychological assessments will be considered only in the private life analysis.

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<sup>238</sup> *F*, para. 26.

<sup>239</sup> EU Charter, Article 1 and 7; *F*, paras. 34-35.

<sup>240</sup> *F* paras. 42 and 46.

<sup>241</sup> *F*, para. 72 (1) and (2).

<sup>242</sup> Ferreira and Venturi (2018).

<sup>243</sup> Opinion of Advocate general Wahl, para. 36.

<sup>244</sup> The conditions Advocate General Wahl laid down were the applicant's informed consent, the scientific value of the methods employed and the freedom of courts to depart from the experts' opinions in relation to the right to an effective remedy (paras. 39-46, 47-49 and 50-55 respectively).

<sup>245</sup> Ferreira and Venturi (2017); Ferreira (2018), pp. 31-32.

### ***3.1.4 Medical tests and the prohibition of degrading treatment***

The premise for reflecting Article 1 of the EU Charter on human dignity on Article 3 of the ECHR on the prohibition of ill-treatment is the interpretative framework developed by the ECtHR in respect of the different forms of treatment prohibited by Article 3. Depending on the circumstances, interferences with human dignity have been found to amount to degrading treatment.<sup>246</sup> The ECtHR has recognised that ‘the very essence of the Convention is respect for human dignity and human freedom’,<sup>247</sup> and that ‘[t]he notion of personal autonomy is an important principle underlying the interpretation of [Convention] guarantees’.<sup>248</sup>

In *Toomey v. the UK* ECtHR found phallometry to raise questions under the prohibition of ill-treatment, since the practice is not a measure of therapeutic necessity.<sup>249</sup> Detecting sexual arousal for the determination of a person’s eligibility for corrective treatment in the context of incarceration raised complex issues of fact and law in relation to the prohibition of degrading treatment.<sup>250</sup> Even though asylum proceedings *per se* do not deprive individuals of their liberty, they still exert severe strain to the subjects undergoing the procedure.<sup>251</sup> This ruling, involving the determination of a person’s eligibility for corrective treatment, did not find a violation of the prohibition. Nevertheless, the ECtHR argued against a violation within the factual context of incarceration, a situation where dignity is compromised by default, unlike refugee status determinations, where the framework is principled by human rights.<sup>252</sup> In any event, clinical psychology has found phallometric testing to sexual offenders adequate to rather inform their disposition, than determine their actual deeds.<sup>253</sup> Comparing disposition to corrective treatment to the establishment of sexual orientation, strongly suggests that the use of phallometric tests in refugee status determinations constitutes a breach of the prohibition of degrading treatment.

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<sup>246</sup> *Moldovan and others v. Romania* (no. 2), nos. 41138/98 and 64320/01, 12 July 2005, ECHR 2005-VII (extracts), para. 113.

<sup>247</sup> *Pretty v. the UK*, para. 65.

<sup>248</sup> *Goodwin v. the UK*, para. 90 and *I v. the UK*, para. 70.

<sup>249</sup> *Toomey v. United Kingdom*, 1999, under “THE LAW”; See also comment in Jansen and Spijkerboer (2011), p. 50.

<sup>250</sup> *Toomey v. United Kingdom* (1998), under “THE LAW”, para. 2.

<sup>251</sup> Jansen and Spijkerboer (2011), p. 49.

<sup>252</sup> ‘The principle that human beings enjoy fundamental rights and freedoms without discrimination’ is articulated in the Refugee Convention, 1<sup>st</sup> preambular paragraph.

<sup>253</sup> Lalumiere and Harris (1996), p. 228.

The conduct of medical examinations involves exposure of innermost sexual feelings on the one hand and denudation of intimate bodily parts on the other. These conditions, coupled with the intrusiveness of such examinations, may give rise to feelings of shame, distress and suffering. Considerable mental suffering has been found to diminish human dignity and to arise feelings of humiliation and debasement.<sup>254</sup> The latter feelings are reasonably exacerbated for persons typically nurtured within cultures with constrained norms or having suffered previous abuse due to their sexual orientation, which is the case for a majority of queer asylum seekers. The pornographic scenes comprising the visual stimuli of phallometry, depending on the circumstances, may exacerbate the negative feelings experienced. A pertinent issue falling outside the scope of the present discussion, is the right to not be exposed to pornographic and appalling material.<sup>255</sup> Hence, even though no explicit intention of humiliation is traced on behalf of the authorities, it is the mere examination process which entails the element of humiliation and debasement.

Despite medical examinations and phallometric testing being only a part of the assessment, they bore a decisive weight in the establishment of the credibility of an applicant's sexual orientation.<sup>256</sup> The dependence of the determination on the asylum application upon the individual's 'performance' during the examination is likely to trigger fear, pressure and anxiety.<sup>257</sup> Treatment has been considered as degrading 'when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'<sup>258</sup> The public or private character of such tests is irrelevant, since it may suffice for a victim to feel humiliated in their own eyes.<sup>259</sup>

If a person passes the test by demonstrating the desirable reactions, their alleged sexual orientation is considered proven. Conversely, a refusal to undergo the test is presumed as indication of non-credible sexual orientation. In this context, it is hard to sustain that consent is given freely since absence thereof implies refusal of international protection and possible exposure to the country-of-origin persecution. The case of one of the

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<sup>254</sup> *Moldovan and others v. Romania*, para. 110.

<sup>255</sup> Johnson (2014), pp. 331-332.

<sup>256</sup> Jansen and Spijkerboer (2011), p. 52.

<sup>257</sup> See the report of ORAM (2011).

<sup>258</sup> *Jalloh v. Germany* (2006), par. 68.

<sup>259</sup> *Tyrer v. the United Kingdom*, para. 32.

applicants in the landmark ruling *A, B and C* is indicative; upon the rejection of his initial asylum claim he lodged a second application, stating that he was prepared to even take part in a ‘test’ that would prove his homosexuality.<sup>260</sup> Depending on the circumstances, treatment capable of driving an individual to act against their will or conscience can give rise to a breach of the prohibition of degrading treatment.<sup>261</sup> Given that phallometry is not a medical intervention of therapeutic necessity coupled with the non-recognition of sexual orientation as a medical, psychiatric and psychological issue renders this kind of consent highly disputable.

The absolute prohibition of degrading treatment attributes a special weight to any conduct giving rise to a potential violation, the assessment of which shall take into account the individual circumstances as a whole. Phallometry and medical tests give rise to feelings of shame, distress and suffering as well as fear, pressure and anxiety. Such feelings may qualify as humiliation and debasement, despite the absence of inflicted pain. The present finds the mental and emotional onus induced by phallometry and other medical tests to reach a level of severity qualifying as degrading treatment pursuant to human rights standards.

### ***3.1.5 Medical tests, psychiatrist and psychologist experts’ reports and the right to private life***

ECtHR has interpreted the right to privacy to cover a person’s physical and psychological integrity.<sup>262</sup> The choice to disclose or not information regarding a person’s sexual orientation as well as decisions and choices regarding one’s own body have also been read to constitute private life.<sup>263</sup> Medical tests and psychological examinations extend to both the physical and mental spheres, touching upon the very personal experience of the self and, thus, interfering with privacy.

In the context of collecting evidence in criminal proceedings, the taking of a blood and saliva sample against a suspect’s will constitutes a compulsory medical procedure which, even of minor importance, is consequently considered as an interference with

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<sup>260</sup> *A, B, C* (2014), para. 24.

<sup>261</sup> *Keenan v. the UK* (2001), para. 110. See also: Jacobs, White and Ovey (2014), pp. 175-176.

<sup>262</sup> For instance, see the bioethics issue of informed consent, which has been found to interfere both with private life and with degrading treatment, in: Jacobs, White and Ovey (2014), p. 366.

<sup>263</sup> Yogyakarta Principles, Principle 6.

his private life protected by Article 8 of ECHR.<sup>264</sup> In any case, recourse to such a procedure is not *a priori* prohibited in order to obtain evidence in relation to a criminal offence.<sup>265</sup> Nevertheless, compulsory medical interventions, even of minor importance have been found to breach the right to private life.<sup>266</sup> Ordering a psychiatric report in the context of criminal proceedings, ‘the State authorities are required to make sure such a measure does not upset the fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life and the concern to ensure the proper administration of justice.’<sup>267</sup> Despite the different context, a similar balance should be sought in ordering psychiatric assessments in the context of refugee status determinations too.

The reliance of authorities on these tests and examinations for the outcome of an asylum application, suggests that a denial on behalf of applicants to undergo these tests will impact decision makers’ view on whether the applicant has sufficiently substantiated their application.<sup>268</sup> Even authorising or accepting such tests would prompt other applicants to provide them too, thus rendering this type of evidence to a *de facto* requirement.<sup>269</sup> Hence, taking into account the imperative of such test to positively influence the refugee status determination, informed consent is highly contested, even if granted.<sup>270</sup> Given the circumstances in which asylum seekers find themselves, any claimed consent is not immune from at least implicit coercion and cannot be held to be given with the free will of the individual,<sup>271</sup> thus rendering it void.

Among other requirements, psycho-medical assessments shall qualify as ‘necessary in a democratic society’ for the interference to be compatible with the right to private life.<sup>272</sup> In examining the latter in the context of sexual orientation asylum claims, the questions to answer are whether the reasons justifying the measures of medical and psychiatric examinations for the credibility assessment of asylum claims are relevant

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<sup>264</sup> *Jalloh v. Germany*, para. 70.

<sup>265</sup> *Ibid.*

<sup>266</sup> *YF v. Turkey* (2003), para. 33.

<sup>267</sup> *Worwa v. Poland*, para. 82.

<sup>268</sup> *F*, para. 52

<sup>269</sup> *A, B, C*, para. 66.

<sup>270</sup> See for instance the example of a lesbian asked by the Home Office “whether she is prepared to take a DNA test to prove she is a lesbian” mentioned, in: Briddock (2016), p. 152.

<sup>271</sup> UNHCR Oral Submissions CJEU (2014), para. 19; *F*, para. 52.

<sup>272</sup> ECHR, Article 8 (2).



and sufficient as well as whether these practices are proportionate to the legitimate aim of duly examining asylum applications.<sup>273</sup>

With regard to the former question, the reasons justifying the measures of medical and psychiatric examinations for the credibility assessment of asylum claims have to be both relevant to and sufficient for the pressing social need of fair examinations of asylum applications. As for the relevance of such practices with the need of establishing an applicant's credibility, it is underscored that sexual orientation does not constitute a medical, psychiatric or psychological condition.<sup>274</sup> Treating sexual orientation as a medical condition is a remnant of the medicalisation and psychiatrisation of same-sex affection.<sup>275</sup> Such approach is inconsistent with the official depsychiatrisation of 'homosexuality' by WHO in 1990,<sup>276</sup> when it was excluded as a medical category in the ICD-10,<sup>277</sup> as well as, with the absence of empirical evidence sustaining the pathologising and medicalisation of same-sex sexual orientation.<sup>278</sup> Furthermore, there is neither consensus in the scientific community on which factors shape a person's sexual orientation, nor evidence of a reliable method to verify it.<sup>279</sup> In other words, there is no acceptable medical or psychological methodology for establishing a person's sexual orientation.<sup>280</sup> Therefore, medical and psychiatric examinations are not relevant with establishing a condition which is neither medical nor psychiatric.

By the same token, scholarship purports paucity of studies on the reliability of phallometry, despite its widespread use to sex offenders for decades.<sup>281</sup> Phallometric assessments of sex offenders continue, even though, due to the inherent issues of the practice, scientific interest is declining.<sup>282</sup> Similarly, the limited scope of anal

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<sup>273</sup> *Z v. Finland*, para. 94

<sup>274</sup> Yogyakarta Principles, Principle 18; Wessels (2011), p. 31; *A, B and C v Staatssecretaris van Veiligheid en Justitie* (2014), para. 61.

<sup>275</sup> Foucault (1978), pp 38-43 and 100-102.

<sup>276</sup> The depsychiatrisation of homosexuality only affirms the broad acknowledgment, at least within the EU countries, that same-sex attraction is not a pathology. This remark aims to underscore the broader acceptance of sexual orientation not being regarded a pathology and does not embrace the opinion that gender identity issues included in the 11th version of ICD, such as 'Gender incongruence of adolescence or adulthood' should be considered therein. See: WHO (2018).

<sup>277</sup> See: WHO (2014), pp. 672-673, mentioning that "[s]exual orientation alone is not to be regarded as a disorder" in "Table 1.", fn. a.

<sup>278</sup> WHO (2014), p. 672.

<sup>279</sup> Opinion of Advocate General Sharpston, para. 60; LaViolette (1997), p. 36.

<sup>280</sup> HuHeCo (2015), p. 72.

<sup>281</sup> Marshall and Fernandez (2000), p. 808 and pp. 812-813.

<sup>282</sup> Among the issues challenging the scientific value of phallometry absence of standardisation of various aspects, inconsistent interpretation of arousal and threshold to compare the results, subjects found to

examinations as well as their questionable findings, render forced anal examinations bereft of scientific and medical value.<sup>283</sup> Similarly, exploratory and personality examinations, as well as personality tests,<sup>284</sup> are also scientifically contested and no valid link has been shown between the outcome of such tests and the establishment of sexual orientation. On this basis, it is rather questionable whether the unclear conclusions of these practice can serve the interests of justice in asylum or further judicial proceedings. Moreover, anal examinations reduce gay sexual orientation to the single sexual act of sodomy and takes for granted that the individual will enjoy the sexual conduct of intercourse, and if so, only ‘passively’.<sup>285</sup> Accordingly, it cannot be sustained that medical examinations are a sufficient means to verify a person’s sexual orientation.

Examining whether these tests are necessary in a democratic society as required by the ECtHR analysis, the latter question to answer is whether psycho-medical examinations are proportionate to the legitimate aim of establishing credibility in a fair asylum system. ‘Necessary’ has been interpreted to imply the existence of a pressing social need, which should be addressed by the State with measures interfering proportionately with individuals’ right to privacy.<sup>286</sup> The existence of evidence outside the applicants’ statements is not an essential requisite for the procedural stage of credibility,<sup>287</sup> thus psycho-medical examinations are not a necessary means to achieve the aim of establishing the credibility of an applicant. Any interference with the individuals’ privacy has to be proportionate with the legitimate aim of pursuing fair asylum proceedings. Irrespective of the legal basis of the credibility assessment practices under consideration, in order for the interference with the right to private life to qualify as necessary in a democratic society it has to be proportionate with the legitimate aim pursued.<sup>288</sup>

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inhibit or generate arousal upon preference of the stimuli, as well as absence of an agreed threshold of the results, to which experts may have recourse to. See in: Marshall (2014), p. 427; Marshall and Fernandez (2000), pp. 810-811; Marshall (2000), p. 428.

<sup>283</sup> IFEG (2016), pp. 86-91.

<sup>284</sup> Such as the ‘Draw-A-Person-In-The-Rain’ test, and the Rorschach and Szondi tests employed by the Hungarian authorities. See in: F, para. 22.

<sup>285</sup> See eloquently elaborated in McGhee (2000), fn. 8.

<sup>286</sup> *Dudgeon v. the United Kingdom*, paras. 51-53

<sup>287</sup> UNHCR Handbook (2011), para. 196; UNHCR SOGI Guidelines (2012), para. 64; UNHCR Beyond Proof (2013), pp. 32-33.

<sup>288</sup> *Mozer v. the Republic of Moldova and Russia*, paras. 194-196

Sexual orientation being ‘a most intimate part of an individual’s private life’, interferences thereof may be justified by ‘particularly serious reasons’.<sup>289</sup> Taking into account the intrusive nature of such tests, it is held that the exposure of the applicant’s privacy overrides the public interests, which can be served by less intrusive means. Particularly, there are alternative means of establishing an applicant’s credibility of less intrusive nature,<sup>290</sup> such as their self-identification and statements in the asylum interview. Another less intrusive means of assessing the credibility of sexual of a sexual orientation asylum claim may comprise an expert’s report on queer persons’ situation in the country of origin.<sup>291</sup> Thus, intrusive tests are rendered disproportionate to the aim of establishing an applicant’s credibility. Consequently, psycho-medical tests are not found to be in line with the proportionality requirement.

Taken together, phallometry, medical, psychological and psychiatric examinations interfere unduly with the physical and mental integrity of asylum seekers and such interference is not justified by particularly serious reasons as it should, since it involves sexual orientation. The use of psycho-medical examinations to establish asylum seekers’ sexual orientation remains unjustified; the means are neither relevant to the social need of a fair asylum system because sexual orientation is not a medical condition, nor sufficient for the establishment of a person’s sexual orientation since they lack scientific soundness and reliability. Moreover, such practices are not proportionate with the legitimate aim of establishing the credibility of an applicant, due to its intrusiveness comparing to other means available to this end.

### ***3.1.6 Recent jurisprudence and developments***

Following the explicit rejection of medical tests assessing sexual orientation by the CJEU a case of an asylum seeker who underwent phallometry to establish his sexual orientation was detected in the Czech Republic more than a year after the *A, B and C* ruling.<sup>292</sup> In this case the second instance court used phallometry to verify the applicant’s declared sexual orientation, on which basis it rejected his asylum application without examining other evidence.<sup>293</sup> Only under the Supreme

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<sup>289</sup> *Smith and Grady v. the United Kingdom*, para. 89; *Dudgeon v. the United Kingdom*, para. 52.

<sup>290</sup> Recast Qualification Directive, Article 4 (5) (a)-(e).

<sup>291</sup> *F*, paras. 37-38.

<sup>292</sup> *N.E.E. v. Ministerstvo vnitra*.

<sup>293</sup> Mrazova (2018), p. 191.

Administrative Court's scrutiny, the binding CJEU jurisprudence rejecting such tests was asserted, thus annulling the second instance court's judgement and ordering new proceedings.<sup>294</sup>

Anal tests and any other kind of medical assessment aiming to establish the sexual orientation of applicants in the refugee status determination fall within the discussions above. Forcibly or otherwise conducted anal tests aiming to establish male individuals' same-sex orientation in the context of criminal proceedings or incarceration have also been found to contravene the prohibition of torture and other inhumane or degrading treatment as well as the right to private life.<sup>295</sup> Their application to LGBTI individuals has also been condemned by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>296</sup>

Research indicates that for the period between *A, B and C* and *F* rulings the use of psychiatrist and psychologists' expert reports was still widespread. Despite the use of psychiatric reports having relatively declined after their exclusion by CJEU in 2014, research indicates that the practice was still employed thereafter.<sup>297</sup> As of 2016, the tools most Member States had been utilising comprise Directives, guidelines and models devised by the Refugee Convention, the UNHCR, the EU and international and national experts. Aside from these tools and practices, Hungarian authorities affirmed the possibility of requesting a medical or psychologist expert opinion.<sup>298</sup> The practice of assigning psychiatrists and medical doctors to assess asylum seekers' sexual orientation was further confirmed by Hungarian civil society organisations.<sup>299</sup>

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<sup>294</sup> *Ibid.*

<sup>295</sup> IFEG (2016), pp. 86-91.

<sup>296</sup> HRC Report (2013), par. 79.

<sup>297</sup> See: Berlit (2015), p. 665, mentioning German Administrative Court of Bayreuth, Judgment of 9 February 2015 - B 3 K 13.30328.

<sup>298</sup> EMN (2016), p. 3.

<sup>299</sup> FRA (2017), p. 6.

## 3.2 Sexually Explicit Documentation

### 3.2.1 'What can the asylum seeker do – is it possible to 'prove' sexual identity?'<sup>300</sup>

Sexual orientation credibility assessments have also brought footage, photographs, testimonies of family and partners, certificates of NGO membership or even copies of online dating profiles in the arena of refugee status determination. Reportedly, in some Member States sexually explicit documentation was requested in order to establish an applicant's sexual orientation. In 2014 the *A, B and C* landmark judgement the CJEU ruled out the use of sexually explicit material as infringing human dignity. Prompted by the tension between such practices and private life, as pinpointed by jurists and organisations, this subchapter will examine sexually explicit submissions in relation to Article 8 of ECHR. It will moreover look into the blanket ban of sexually explicit evidence pronounced in *A, B and C* and will discuss the absence of positive guidelines regarding documentary evidence in light of latest trends in evidentiary submissions.

The Asylum Procedures Directive foresees an individual, impartial and objective credibility assessment.<sup>301</sup> To the end of achieving such assessment, the absence of other credibility findings necessitates documentary or witness evidence support.<sup>302</sup> Nevertheless, such requirements have to be considered hand in hand with the non-obligatory nature of documentary or other evidence under certain conditions when it is not possible for the applicant to substantiate their statements, as set out in the recast Qualification Directive.<sup>303</sup> The ECtHR in holding that in the asylum context credibility assessment should rely on the applicants' oral and documentary submissions, has asserted that statements should be questioned in light of inconsistencies arising and that,

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<sup>300</sup> O'Leary (2008), p. 89.

<sup>301</sup> 'Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that [...] applications are examined, and decisions are taken individually, objectively and impartially'. Recast Asylum Procedures Directive, Article 10 (3) (a).

<sup>302</sup> 'Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.' *Ibid.*, Article 11 (2); UNHCR Beyond Proof (2013), p. 41.

<sup>303</sup> The conditions are: the applicant has made a genuine effort to substantiate his application; all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and the general credibility of the applicant has been established. Recast Qualification Directive, Article 4 (5) (a)-(e).

even in these instances, asylum seekers should be given the benefit of doubt as well as the opportunity to provide a satisfactory explanation.<sup>304</sup>

UNHCR interpretative guidance further elucidates these rules and provides more specific advice. As mentioned earlier under **2.2.3**, the UNHCR Handbook allocates the onus of proof on the asylum seekers, but provides them with the benefit of doubt and allows for the lack of evidence in cases the circumstances call for such an approach, as the majority of asylum claims calls, and the general credibility is satisfactory.<sup>305</sup> Moreover, the applicants' testimonies are considered 'the primary and often the only source of evidence',<sup>306</sup> pointing reliance on the statements and self-identification.<sup>307</sup> In sum, documentary proof of the statements is not a requisite for a refugee claim to succeed and in lack of corroborative evidence decision-makers shall rest the assessment on the testimony alone.<sup>308</sup>

With particular regard to evidence related with asylum seekers' sexual orientation, UNHCR has articulated that while some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, documenting activities in the country of origin indicating their different sexual orientation or gender identity is not a requirement for asylum seekers.<sup>309</sup> Furthermore, any obligatory or voluntary submission of documentary or photographic evidence of intimate acts has explicitly been excluded.<sup>310</sup>

### ***3.2.2 Previous jurisprudence and developments***

As mentioned in the introductory chapter, following the 2010 decision *HJ and HT* rejecting the discretion requirement in the UK, a trend of disbelieving asylum claims grew.<sup>311</sup> The discretion reasoning which was prevalent for decades premised an excessive focus on a queer public identity and on the sexual acts of asylum seekers.<sup>312</sup>

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<sup>304</sup> *F.H. v. Sweden*, para. 95.

<sup>305</sup> UNHCR Handbook (2011), paras. 196-197 and 203-204; UNHCR Beyond Proof (2013), pp. 49-50.

<sup>306</sup> UNHCR SOGI Guidelines (2012), para. 64.

<sup>307</sup> UNHCR Guidance Note (2008), para. 35. UNHCR Discussion Paper (2010), para. 32.

<sup>308</sup> UNHCR MPSG (2002), para. 37; UNHCR Guidance Note (2008), para. 35; UNHCR SOGI Guidelines (2012), paras. 64 and 66.

<sup>309</sup> UNHCR Guidance Note (2008), para. 35.

<sup>310</sup> UNHCR Guidance Note (2008), para. 64.

<sup>311</sup> CJEU study (2017), p. 38.

<sup>312</sup> Lewis (2014), p. 962.

*HJ and HT* gave impetus to the forsaking of the discretion ruling more broadly in the EU and in other Anglo-Saxon jurisdictions. A 2014 investigation by the Independent Chief Inspector of Borders and Immigration brought to light that even though sexually explicit documentary evidence was not requested by the Home Office, it was endorsed and legitimised upon submission or implicitly solicited even in second instance proceedings.<sup>313</sup> Thereupon, in the Netherlands, a similar shift was noted in relation of disbelieving the sexual orientation of asylum claimants.<sup>314</sup> As surfaced through the *A, B and C* judgement, sexually explicit material was also accepted in the Dutch asylum system.

In 2014 the Dutch Council of State addressed a request for preliminary ruling to the CJEU in relation to the interpretation of Article 4 of the Qualification Directive, in relation to the limits of the credibility assessment of a stated sexual orientation. The request originated from three cases of gay asylum seekers challenging in second instance proceedings the decisions not finding their sexual orientation credible. Applicant C had submitted footage including him performing sexual acts with another man and applicant A agreed to perform sexual acts with another man to attest his claimed sexual orientation.<sup>315</sup> Among other issues the CJEU addressed the compatibility of documentation or performances with intimate or sexual content with Article 4 of the Qualification Directive read through the EU Charter. The CJEU rejected submissions of sexually explicit evidence and performances of this kind on grounds that its probative value is doubtful and as infringing human dignity.<sup>316</sup>

Even though the *A, B and C* ruling found sexually explicit documentation submissions and performances to contradict human dignity, Advocate General Sharpston stressed that such practices are ‘clearly contrary’ to the right to private life too.<sup>317</sup> Moreover, UNCHR in their written observations to the CJEU on *A, B and C* stressed that being expected or asked to produce documentary or other evidence of intimate acts to

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<sup>313</sup> Vine Report (2014), para. 4 (51).

<sup>314</sup> Jansen (2014), EDAL Conference.

<sup>315</sup> *A, B, C*, paras. 28 and 24 respectively.

<sup>316</sup> *Ibid.*, para. 65.

<sup>317</sup> Opinion of Advocate General Sharpston, para. 66.

demonstrate one's sexual orientation is under all circumstances incompatible with the right to private life.<sup>318</sup>

### ***3.2.3 Sexually explicit documentation and the right to private life***

According to the ECtHR, private life in Article 8 of the ECHR is an overarching term 'not susceptible to exhaustive definition', covering the physical and psychological integrity of a person and capable of embracing multiple facets of a person's identity, including sexual orientation.<sup>319</sup> Indeed, claims on sexual orientation touch upon a core identity of a person, which necessarily involves their private life. Sexual orientation, the key element of these claims, is an important element of the personal sphere protected by the right to private life.<sup>320</sup> Intimate acts and sexual life comprise private life and pertain to 'aspects of an individual's physical and social identity', all of which notions have been interpreted to comprise private life.<sup>321</sup> Taken together, sexually explicit content of evidentiary submissions in asylum proceedings falls under the scope of the notion of private life.

Reading sexually explicit evidentiary submissions in relation to the right to private life through an ECHR lens, invites the circumscription of submissions of sexually explicit documentary evidence and performances as an interference with this right. In a case concerning the taking and evaluation by courts of evidence establishing the applicant's gender identity, the ECtHR drew a line between the interests safeguarded by procedural rights and these protected by the right to private life.<sup>322</sup> It has been acknowledged that while the issues arising in case law regarding sexual orientation and gender identity vary, ECtHR's interpretation of Article 8 guarantees in relation to gender identity issues provides valuable guidance on sexual orientation issues as well.<sup>323</sup> In sum, submissions of evidence the content of which falls under the scope of private life qualifies as an interference with this right.

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<sup>318</sup> UNHCR Written Observations (2013), paras. 3 (6) and 3 (17).

<sup>319</sup> *Axel Springer AG v. Germany*, para. 83; *Van Kuck v. Germany*, para. 69.

<sup>320</sup> *Peck v. The United Kingdom* (2003), para. 57.

<sup>321</sup> *Dudgeon v. the UK*, para. 87; *Pretty v. the UK*, para. 61; *Van Kuck v. Germany*, para. 69.

<sup>322</sup> *Van Kuck v. Germany*, para. 74.

<sup>323</sup> Opinion of Advocate General Sharpston, para. 39.



Among other requirements, evidentiary submissions shall qualify as necessary in a democratic society for the interference they constitute to be compatible with Article 8 of ECHR private life.<sup>324</sup> Specifically, to affirm the requirement of a permissible interference with a person's private life, such interference has to be necessary in a democratic society. In the context of documentary evidence, the question is whether submissions of sexually explicit documentation and performances are justified by relevant and sufficient reasons for establishing a person's sexual orientation in asylum proceedings. In examining whether these practices are necessary in a democratic society, one of the questions to answer is whether the reasons justifying the measures of sexually explicit submissions and performances are relevant to and sufficient for the credibility assessment of asylum claims.<sup>325</sup>

First off, the probative value of this type of evidence is debatable. Both a genuine and a bogus applicant could record intimate sexual acts or perform them in live. Advocate General Sharpston has acknowledged the latter, stressing the disposition of such evidence to fabrication.<sup>326</sup> Even the voluntary nature of these evidentiary submissions, cannot remedy their absence of probative value. Taking into consideration the gravity sexually explicit evidence has had, it is easy to imagine straight individuals deciding to deliver a one-off 'show' in order to positively influence their asylum determination, if they have the opportunity to do so. Hence, the proneness to fabricate this type of evidence cannot render this type of evidence relevant to the assessment of credibility of sexual orientation.

By the same token, sexual activity is only one in a myriad of possible expressions a person's sexual orientation may translate to. Inside and outside asylum proceedings, there is the tendency to strictly sexualise any same-sex sexual orientation and reduce it to preconceived sexual activities. Circumventing discussions as to the reasons why such approaches persist, the lack of efficiency of mere sexual activity to label a person's sexual orientation is rather stressed. Similarly, a sexual footage 'simply establishes the mechanics of the acts in question',<sup>327</sup> and cannot hold testament for sexual orientation as a whole. In other words, evidence of this type can simply confirm the capability to

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<sup>324</sup> ECHR, Article 8 (2).

<sup>325</sup> *Z v. Finland*, para. 94

<sup>326</sup> Opinion of AG Sharpston, para. 66.

<sup>327</sup> ICJ (2016), p. 41.

move certain bodily parts in certain ways and cannot encapsulate the full spectrum of the expressions of one's sexual orientation. Therefore, the sufficiency of sexually explicit evidence or performances for proving sexual orientation cannot be concluded.

The voluntary or obligatory nature of such submissions should be considered critically, inasmuch as it is another dimension of informed consent discussed in the previous subchapter. In the International Commission of Jurists' guide on claims based on sexual orientation and gender identity practitioners have flagged that the pressure exerted on applicants to produce sexually explicit documentation clearly and flagrantly breaches their right to privacy.<sup>328</sup> This position not only excludes voluntary submissions from being a form of consent, but *a fortiori* considers them a *per se* breach to the right to private life.

Even if not arguing for such a strong position, admittedly, persons applying for refugee status find themselves in vulnerable positions, due to inherent dependency from such procedures as well as to the concomitant rights limitations posed to this status by the very structure of legal and policy implications. Practitioners and scholars have held that when such material is being submitted it is usually crucial for a positive outcome.<sup>329</sup> In this context, asylum claimants seeking to back their applications are implicitly compelled to produce sexually explicit material to prove their sexual orientation. The structural weakness of asylum seekers has been emphasised by Advocate General Sharpston in counter arguing against their valid consent in this context.<sup>330</sup>

### ***3.2.4 Trends following the prohibition of sexually explicit evidence***

Perhaps with the latter in mind the CJEU pronounced that the mere acceptance of evidence would incite other applicants to provide it as well, since, even if voluntary in nature, submissions of this type of evidence creates a *de facto* situation which would undercut applicants who would refrain from such submissions.<sup>331</sup> Even if the decision to disclose this type of evidence is discretionary, it is triggered from a fear of rejection of the asylum claim and especially the determinative role these submissions play in the

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<sup>328</sup> ICJ (2016), p. 42.

<sup>329</sup> Giametta (2018), p. 8; ICJ (2016), p. 41.

<sup>330</sup> Opinion of Advocate General Sharpston, para. 67.

<sup>331</sup> *A, B, C*, para. 66.

success of an application.<sup>332</sup> In many cases asylum seekers have felt compelled to produce sexually explicit material in order to present a more advantageous claim.<sup>333</sup> A collateral effect of the latter is raising the threshold other asylum seekers have to meet to satisfy the burden of proof of their membership to the particular social group of queer persons, as well aggravating credibility issues for queer asylum claims in general.<sup>334</sup> Even though the CJEU's pronouncement in *A, B and C* in relation to sexually explicit documentation is welcome, two points of the judgements invite further discussion; the former being the blanket ban on sexually explicit documentation and the latter being the silence with regard to submissions of documentary evidence not including intimate acts.

Implicit in the reasoning of the case is the blacklisting of sexually explicit evidence, overtly advocated by UNHCR in their written observations on the case.<sup>335</sup> Despite not wording it as such, the CJEU found sexually explicit documentation to be 'precluded' by the Article 4 of Directive 2004/83 read through human dignity.<sup>336</sup> Two examples below will indicate occasions which have not been captured in the *A, B and C* ruling. An asylum seeker in the UK has been cited explaining how her support organisation and network urged her to provide evidence her sexual orientation in her country of origin. The photos of herself in the country of origin, being consistent with her self-representation in the country of asylum strongly influenced her case.<sup>337</sup> The asylum authorities in the UK possibly gave weight to the pre-flight evidence in this case due to the fact that it could not have been fabricated and hence had significant probative value. Another substantive element in this case is that having such evidence at one's disposal is a matter of happenstance and not a product of coerced attempt to influence an asylum case.

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<sup>332</sup> ICJ (2016), p. 41.

<sup>333</sup> Briddock (2016), p. 152.

<sup>334</sup> Lewis (2014), p. 962; Dawson and Gerber (2017), pp. 298-299.

<sup>335</sup> UNHCR in their written submissions on *A, B and C* included sexually explicit documentation in methods incompatible with the EU Charter under all circumstances. In her opinion, Advocate General Sharpston did not embrace the division between blacklisted and greylisted practices, viewing it a prescriptive task laying on the legislature and for purposes of clarity and legal certainty, due to the limitation of the CJEU to the material before it. See in: UNHCR Written Observations (2013), paras. 3 (6)-(23); Opinion of Advocate General Sharpston, para. 58.

<sup>336</sup> *A, B, C*, paras. 72-73: 'Article 4 of Directive 2004/83/EC, read in the light of Article 1 of the Charter, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts [...] or, yet, the production by him of films of such acts.'

<sup>337</sup> See in: Giametta (2018), p. 8.

In another case a female fled to Greece after explicit footage of hers was leaked online, putting her in risk of persecution.<sup>338</sup> The relevant footage was considered by the asylum authorities and its existence also corroborated her framing as in need of specific reception conditions, thus benefiting her situation. Deductively, a similar factual situation cannot be excluded for a person who would have fled due to documentation related to their sexual orientation. The latter analogy showcases that the *A, B and C* blanket ban on the submission of documentary evidence should not be interpreted as excluding documentation created before the asylum application.

The above examples demonstrate the significance of the consideration of pre-flight evidence. Therefore, an expansive application of the CJEU's blanket ban on the submission of sexually explicit evidence would result to the exclusion too of documentation created pre-flight without aiming to support an asylum claim.<sup>339</sup> The conclusion to be drawn is not advocating for the acceptance of sexually explicit documentation, but instead, supporting the acceptance of substantive pre-flight evidence *even if* they are sexually explicit. In any event, any such approach should be applied very cautiously; documenting activities in the country of origin is not a requirement but a coincidence and having such material in one's possession post-flight is dependent upon a multitude of factors. For instance, persons persecuted by non-state actors have heightened difficulties in documenting their plight, often staged in the privacy of the family close relations sphere.<sup>340</sup> It should, therefore, be born in mind that only few applicants will be able to provide proof of their sexual orientation in the country of origin and any such evidence should be sceptically examined.<sup>341</sup>

The latter point to be raised in relation to the CJEU judgement on documentary evidence aiming to establish asylum seekers' credibility is the absence of any guidance regarding non-explicit documentation. A practice demonstrating an extreme interpretation of the ban of sexually explicit documentation is that in the Netherlands, aside from sexually explicit documentation, non-explicit personal documentation is not

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<sup>338</sup> The example is drawn from field work in 2016.

<sup>339</sup> ICJ (2016), pp. 41-42; Jansen (2019), p. 112.

<sup>340</sup> Akin (2018), p. 31.

<sup>341</sup> UNHCR has emphasised that '[w]hile some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity' in: UNHCR Guidance Note (2008), para. 35.

considered either, even if not excluded in the very text of the relevant guidelines.<sup>342</sup> When in 2008 O’Leary flagged that there are no membership cards and organisations to prove queer asylum seekers’ sexual orientation,<sup>343</sup> he had not foreseen developments to follow. By the time sexually explicit evidence was rejected in EU case law, another trend had developed. Thereupon, research has indicated that sexually explicit documentary evidence has been seceded by evidence proving queer asylum seekers’ affiliation with LGBTI+ community and organisations. For instance, in Norway asylum seekers put into the play any potentially helpful resource, such as participating in queer organisations and pride parades or otherwise publicising a westernised queer lifestyle, in order to translate and communicate their sexual orientation in the asylum context.<sup>344</sup>

Socio-legal publications illustrate the pressure exerted to asylum seekers to produce this type of evidence in Canada, in which jurisdiction queer NGO letters were the ‘gold standard’ for successful sexual orientation-based claims.<sup>345</sup> Overlooking the stress caused to their clients, queer NGOs urge asylum seekers to engage in social activities in order to document their affiliation with the queer community to end of strengthening their asylum claims.<sup>346</sup> Indicative is the citation of an attorney from a refugee assisting organisation, describing how he pressed his client, an otherwise closeted asylum seeker, to stage a snapshot in a pride parade, despite his embarrassment and anxiety, in order to corroborate his claim with the ‘legally very important’ evidence.<sup>347</sup> Murray has demonstrated in detail such reality in the context of a queer refugee supporting NGO, resulting in lawyer- and peer-coaching sessions on documentation production amid a NGO letter-writing frenzy of guidelines and regulations aiming to uphold the status of such letters.<sup>348</sup>

The above context reflects trends being mainstreamed in the EU as well. Disbelief on behalf of asylum decision making authorities translates to asylum seekers’ attempts produce evidence outside the box.<sup>349</sup> Strategies employed to optimise asylum claims,

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<sup>342</sup> Jansen (2019), p. 102.

<sup>343</sup> O’Leary (2008), p. 89.

<sup>344</sup> Akin (2016), pp. 12-13.

<sup>345</sup> Murray (2016), p. 475.

<sup>346</sup> *Ibid.*

<sup>347</sup> Kahn and Alessi (2017), p. 30.

<sup>348</sup> Murray (2016) pp. 473-475.

<sup>349</sup> Akin (2016), p. 10 et seq.

may undercut those asylum seekers who cannot or do not intend to embrace queer community visibility and the linear repetition of these strategies possibly closes the door to alternative notions and facets of translating sexuality.<sup>350</sup> The trend of asylum seekers being undercut by the paucity of evidence expands even beyond the actual asylum procedure. As showcased by Giametta, paucity of evidence is largely prejudicing queer asylum seekers' qualification for legal aid by refugee assisting organisations in the UK.<sup>351</sup> The significance attributed to queer-social-affiliation documentation by the asylum authorities, may have adverse outcomes unless one complies with their norm, in a fashion similar to the voluntary submission of sexually explicit documentation few years ago.

In any event, evidence of affiliation with queer networks and relevant social visibility are not inextricably linked with sexual orientation. The significance frequently attributed to this type of evidence does not necessarily reflect its efficacy to prove a person's sexual orientation. This documentation can be submitted even by persons who are not actually queer, insofar as this could be the case with sexually explicit documentation. Given its proneness to fabrication, documentation of queer networks' affiliation cannot sufficiently establish sexual orientation, without the latter excluding that it may be an element to consider. Hence, the absence or existence of this type of documentation is not sufficient to majorly impact the determination of an asylum application. The limited probative value renders queer network affiliation evidence an insufficient means to establish alone the credibility of a person's sexual orientation. Therefore, any consideration of this type of evidence as a major indicator in the credibility assessment, does not sufficiently serve the purpose of a fair status determination and is thus not compatible with the right to private life.

Membership to queer organisations and social networks in Cyprus is accepted and examined, albeit on discretionary basis; depending on the country or the organisation it may be dismissed or deemed irrelevant to the stated sexual orientation.<sup>352</sup> To remedy similar asymmetries, the Dutch Council of State in 2016 inquired the State Secretary over the value of a membership card for an LGBTI organisation, (ex) partner's

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<sup>350</sup> Akin (2016), pp. 12-13.

<sup>351</sup> Giametta (2018), pp. 10-11.

<sup>352</sup> Jansen and Spijkerboer (2011), p. 53.

statements, or photographs from queer events, albeit without having received a response.<sup>353</sup> It is evident that disbelief in relation to applicants' membership to a particular social group has prevailed even in light of documentary or other evidence submitted.

Berg and Millbank have found that in Australia and Canada witness testimonies and queer NGO membership attestations were rejected as 'self-serving or staged'.<sup>354</sup> On the other hand, UNHCR has highlighted that even 'self-serving' activities do not exclude the existence of a well-founded fear of persecution; weight should be rather given to a comprehensive assessment of the circumstances in both the country of origin and the country of asylum, as well as to the 'ensuing risk of persecution' if the applicant's sexual orientation becomes known in the country of origin.<sup>355</sup> In sum, the focus should rather be on whether the applicant has a well-founded fear of being persecuted on account of their actual or perceived membership to a particular social group, than on the veracity of social activities embraced in the country of refuge.

Practice in relation to witness submissions also presents inconsistencies in queer asylum cases. Reportedly, in the UK asylum authorities have argued against the credibility of an applicant's sexual orientation because according to their testimonies none of them had had sex with her. Interestingly, the witnesses had been asked whether they had been 'intimate' with the applicant. This line of questioning, in addition to being intrusive, missed the point of establishing credibility,<sup>356</sup> which will be the topic of the next subchapter. Indeed, statements on an applicant's participation in queer organisations and events or by persons who have had personal relations with the asylum seeker may hold testament of one's sexual orientation. Nevertheless, witness statements should be evaluated in the broader context of the case and,<sup>357</sup> in any event, an absence thereof should not prejudice an asylum claim. Particularly, the evaluation of witnesses' submissions should be streamlined with the standards for asylum seekers' respective submissions. By the same token, it is underscored that if the trend of giving particular weight to queer NGO certificates expands to witness testimonies too, it is highly

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<sup>353</sup> Jansen (2019), p. 101.

<sup>354</sup> Berg and Millbank (2009), p. 198.

<sup>355</sup> UNHCR Guidance Note (2008), para. 40.

<sup>356</sup> Briddock (2016), p. 155.

<sup>357</sup> Jansen and Spijkerboer (2011), p. 54.

probable that pressure to produce such documentation will burden witnesses too. The case of an asylum seeker in Canada who coached her grandmother in the country of origin on the information to be included in the letter,<sup>358</sup> is indicative in this regard.

Nevertheless, following the *A, B and C* judgement, positive developments have taken place too. In 2016 it was reported that the Home Office would no longer accept sexually explicit documentation in sexual orientation-based asylum claims in the UK.<sup>359</sup> The Swedish Migration Agency has issued internal guidelines according to which sexually explicit evidence should not be admitted.<sup>360</sup> Perhaps on the latter basis, the offer of asylum seeker to perform sexual acts with his partner in live was turned down by a judge.<sup>361</sup> In the Netherlands, where the landmark case originated from, the Working Guidelines on ‘Interviewing and decision-making in cases in which LGBT orientation has been put forward as an asylum motive’ came forward on 2015,<sup>362</sup> according to which no sexually explicit documentary evidence is requested and even if submitted voluntarily is not considered.<sup>363</sup> Moreover, presenting membership documentation from organisations in the country of origin is welcomed by the Dutch authorities.<sup>364</sup>

The positive developments do not mean that the practice of sexually explicit documentation has entirely been eradicated, though. Despite the relevant guidelines of the Swedish Migration Agency, even following the *A, B and C* judgement, asylum case workers have reportedly challenged absence of footage or photographs of previous partners during interviews.<sup>365</sup> A recent publication reveals that in the UK the Home Office is probing asylum seekers to submit personal photos.<sup>366</sup> This practice revitalises the issue of additional evidence submitted by some asylum seekers, thus undercutting those who do not. Such cases remain undetected unless they receive an adverse outcome so that the applicants can potentially move the case forward to higher instances. In jurisdictions where malpractices, on the submission of documentary evidence have not been flagged, such as in France,<sup>367</sup> decision makers take for granted the fact that asylum

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<sup>358</sup> Murray (2016), p. 474.

<sup>359</sup> Briddock (2016), p. 155.

<sup>360</sup> CJEU study (2017), p. 41.

<sup>361</sup> Berit (2015), p. 665.

<sup>362</sup> Jansen (2018).

<sup>363</sup> See in: Jansen (2019), pp. 25-26 and 102-103.

<sup>364</sup> Jansen (2019), p. 104.

<sup>365</sup> Citing an asylum seeker referring to their 2015 interview, in: Lukac and Eriksson (2017), pp. 19-20.

<sup>366</sup> Struthers (2020), p. 15.

<sup>367</sup> Jansen and Spijkerboer (2011), p. 51.



seekers are not in position to produce evidence on their sexual orientation, which ultimately shows the ‘impossibility of evidence’ inherent in the majority of asylum claims.<sup>368</sup>

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<sup>368</sup> Kobelinsky (2015), p. 349.

### 3.3 Intrusive Questioning

#### 3.3.1 'How many sexual encounters have you had with your partner?'<sup>369</sup>

In 2010 UNHCR along with a range of NGOs, academics and legal practitioners stressed intrusive questioning and incidents of bias in asylum interviews as protection gaps for queer asylum seekers.<sup>370</sup> According to a Home Office document leaked to the media in 2014, questions addressed by the UK authorities to persons seeking asylum on the basis of their sexual orientation included a series of lurid questions.<sup>371</sup> Such practice had already been flagged by a qualitative research which had bought to light transcripts with worrisome examples of questioning.<sup>372</sup> In the Netherlands invasive questioning was also applied in asylum interviews, involving even questions affording stigma to alleged survivors of sexual violence.<sup>373</sup> At the same period intrusive questioning inquiring over applicants' sexual acts was employed in Sweden and Belgium as well.<sup>374</sup> Said questions could become exceptionally inimical and abusive,<sup>375</sup> often reflecting a strictly construed heterosexual binary.<sup>376</sup>

The practice of intrusive and sexually explicit questioning in asylum interviews across EU countries, reached the CJEU in 2013 as a referral for a preliminary ruling by the Dutch Council of State. The question over the limits of national authorities in assessing the credibility of sexual orientation-based asylum claims, also included the issue of

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<sup>369</sup> Anonymous question reported in UKLIG (2013), p. 20.

<sup>370</sup> UNHCR Discussion Paper (2010), par. 30.

<sup>371</sup> 'Did you put your penis into x's backside?'; 'When x was penetrating you, did you have an erection?'; 'Did x ejaculate inside you?'; 'Why did you use a condom?'; 'What is it about the way men walk that turns you on?' cited by the Guardian (2014).

<sup>372</sup> 'Was it loving sex or rough?'; 'What have you found is the most successful way of pulling men?'; 'So you had intercourse with him and not just blow jobs?'; 'So you had intercourse with him and not just blow jobs?'; 'Can I ask you why you did not have penetrative sex at any time in Nigeria up until December 2009?'; 'Since you have been with X have you had any other partners or one night stands or sexual encounters with any other man?'; 'But you say you love each other so why are you cheating on him?'; 'But you love X and want to get married, yet you have not had sexual intercourse with him but have had sexual intercourse with other men in the sauna, why is this?'; 'I am struggling to understand why you have sex with other men but not your partner who you say you love and want to marry. What do you have to say?'. Transcripts cited in: UKLIG (2013), p. 20.

<sup>373</sup> 'Can you explain to me why the policemen raped you, although they are against homosexuals and there is a taboo on gays?', question asked in 2010, cited in: Jansen (2019), p. 51.

<sup>374</sup> CJEU study (2017), p. 37.

<sup>375</sup> 'Was it loving sex or rough?'; 'So you had intercourse with him and not just blow jobs?'; 'How many sexual encounters have you had with your partner?', anonymous questions reported in UKLIG (2013), p. 20.

<sup>376</sup> Berg and Millbank (2009), p. 204. For example, in one Australian case, a witness giving evidence that he believed the applicant to be gay was suddenly asked by the tribunal, 'When did you have sex with him last?' and in the same hearing the applicant himself was asked 'Did you adopt a male or female role in those relationships?', *ibid.*, citing RRT Reference 060403696 [2006] (not publicly available).

questions posed during the interviews, which the applicants in the respective cases held that breached their right to respect for private life.<sup>377</sup> The joined cases originated from three asylum applications having been rejected on the basis they were lacking credibility. Acknowledging the national authorities' role in carrying out interviews to establish the credibility of sexual orientation-based asylum applications, the CJEU went on finding detailed questions on sexual practices contrary to the right to respect for private and family life.<sup>378</sup> In the analysis restricted to the Qualification Directive, the Asylum Procedures Directive and the EU Charter, the CJEU found that questions pertinent to details of sexual practices of asylum seekers are contrary to the respect for private and family life. The same position had also been advocated by UNHCR in their respective oral submissions, in line with their previous written observations on the case, which blacklisted sexually explicit questioning.<sup>379</sup>

### ***3.3.2 Intrusive and explicit questioning and the right to private life***

So far, the ECtHR has not dealt with the practice of intrusive and sexually explicit questioning in interviews of asylum seekers claiming to be persecuted on the basis of their sexual orientation. In providing an ECHR reading on whether intrusive questioning is a permissible interference with an individual's right to private life,<sup>380</sup> the question to ask in the outset is whether this practice involves an aspect of private life. The main topic of questioning in the asylum interviews under consideration is the establishment of an applicant's sexual orientation, which is considered 'a most intimate aspect of an individual's private life'.<sup>381</sup> The specific subject matter of sexual conduct and practices has been found to form part of private life and that private, consensual acts to clearly fall within the sphere of private life.<sup>382</sup>

In order for intrusive questioning to constitute an interference with private life, being questioned over intimate acts has to be established as an interference with asylum

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<sup>377</sup> *A, B, C*, paras. 35 and 43.

<sup>378</sup> *Ibid*, para. 64.

<sup>379</sup> UNHCR Written Observations (2013), paras. 3 (8)-(11); UNHCR Oral Submissions (2014), para. 18.

<sup>380</sup> Article 8 of ECHR reads: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>381</sup> *Smith and Grady v. the UK*, para. 90.

<sup>382</sup> *P.G. and J.H. v. the United Kingdom*, 2001, para. 56; *Dudgeon v. the UK*, paras. 87 and 88.

seekers' privacy. In a case concerning intrusive investigations and questioning on armed forces personnel's sexual orientation resulting to their discharge, the investigations to the applicants' sexual orientation 'which included detailed interviews with each of them [...] on matters relating to their sexual orientation and practices, together with the preparation of a final report [...] on the investigations, [...] [were found to constitute] a direct interference with the applicants' right to respect for their private lives.'<sup>383</sup>

Despite the different contexts, one cannot overlook parallels between being eligible to join the armed forces and to become an international protection beneficiary. Policy against non-heterosexual persons in the armed forces results in excluding persons if their same-sex sexual orientation is established. Credibility assessment in refugee status determination on the other hand, if not affirmed, results in the rejection of asylum seekers' claims for international protection. Specifically, in either of the previously mentioned contexts, establishing or not individuals' sexual orientation may produce adverse legal consequences. Acceding either context is voluntary, but nevertheless imposes limitations, and is a translation of state sovereignty over the individuals concerned. Hence, the analogy between the two contexts showcases that intrusive questioning over sexual orientation and sexual acts in the context of refugee status determination can be grounded as an interference with asylum seekers' private life inasmuch as it has been established a direct interference thereof when addressed to armed forces personnel with similar purpose.

The duty of the applicant to submit all relevant information, including their statements, is prescribed by the recast Qualification Directive, upon which each Member State bases its respective domestic legislation.<sup>384</sup> On the one hand decision makers have a legitimate interest in drawing out information sufficient enough to make a fair status determination and on the other, the asylum seekers have a duty to cooperate with the authorities, which in the interview stage translates to disclosing relevant information. Hence, in principle questioning is an interference with the asylum seekers private life, which is prescribed by law and serves a legitimate aim. Their necessity in a democratic

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<sup>383</sup> *Smith and Grady v. the UK*, para. 71.

<sup>384</sup> Article 4 (1) of the recast Qualification Directive reads: 'Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.'

society is to be examined in relation to the relevance and sufficiency of the information elicited in intrusive and sexually explicit questioning. In any case, authorities' legitimate interest of eliciting information and the applicants' duty to cooperate to this end have to be balanced with the applicants' interest to protect their private life.

Any interference with 'a most intimate aspect of an individual's private life', such as the topic of sexual acts in asylum interviews, requires particularly serious reasons to be justified.<sup>385</sup> In the above referenced case involving invasive questioning of armed forces personnel, being 'interviewed and asked detailed questions of an intimate nature about their particular sexual practices and preferences', were among the reasons for which the interference was found to be particularly grave. The Court particularly stressed that '[c]ertain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive [...]'.<sup>386</sup> Drawing a parallel to the similar approach in asylum interviews, sexually explicit and intrusive questioning can be framed as a grave interference with asylum seekers' private life, necessitating particularly serious reasons to be justified.

The interests served by fair refugee status determinations have to be balanced with the interests of the applicants in keeping their sexual orientation and sexual life private. For intrusive questioning to be labelled as a permissible interference, the legitimacy of the authorities' interest in international protection applicants' private and sexual life has to be necessary in a democratic society. Inquiring over with asylum seekers' sexual acts aims to a fair refugee status determination, which more broadly serves interests of a democratic society, such as national security or the economic well-being of the country.<sup>387</sup> The extent to which invasive questioning in particular is justified in a democratic society will determine whether such interference to qualify or not compatible with the right to private life.

To qualify as necessary in a democratic society, the reasons justifying the interference with sexual orientation and sexual life of asylum seekers should be relevant to and sufficient for a fair refugee status determination. Discussing these considerations, the main issues to be raised in relation to intrusive and sexually explicit questioning are

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<sup>385</sup> *Smith and Grady v. the UK*, para. 90.

<sup>386</sup> [emphasis added] *Smith and Grady v. the UK*, para. 91.

<sup>387</sup> ECHR, Article 8 (2).

their pertinence to establishing a person's sexual orientation, their probative value, the reactions they trigger to the interviewees and the efficacy of sexual acts to account for a person's sexual orientation.

In some cases, the content of intrusive questions has become so lurid that the point of linking them to the establishment of sexual orientation is missed. For instance, the question '[h]ow many sexual encounters have you had with your partner?',<sup>388</sup> is irrelevant to verifying sexual orientation, as not any known sexual identity qualifies from the frequency of sexual encounters. Similarly, a reply to the question '[b]ut you say you love each other so why are you cheating on him?'<sup>389</sup> cannot somehow be linked to the establishment of any sexual orientation. By the same token, persons embracing any sexual orientation may equally struggle to answer the question '[y]ou have never had a relationship with a man. How do you know you are a lesbian?'<sup>390</sup>, if the question would respectively be addressed to them. The above examples indicate that, in cases, the content of intrusive questions is impertinent, if not absurd, to the extent of rendering them irrelevant to the establishment of sexual orientation.

With regard to sufficiency, a sexually explicit approach in questioning a person's sexual orientation disregards the fact that the latter is more complicated and sophisticated than mere sexual activity,<sup>391</sup> and that sexual life is not an indispensable expression of sexual orientation. Sexual orientation may translate in infinite ways, such as the mere attraction to a person of the same or any other sex or gender. Whether and how sexual orientation is manifested through acts varies from one individual to another,<sup>392</sup> even for persons coming from similar backgrounds. Particularly in persecutory environments sexual orientation may be communicated very differently, if at all. Fear of persecution in the country of origin is a good reason for which an applicant may either have refrained from having previous relationships with a person of the same sex,<sup>393</sup> or be unable to recall details of sexual activities.<sup>394</sup> As myopic as rendering sexual activities an intrinsic aspect of sexual orientation in tolerant societies is, all the more so it appears

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<sup>388</sup> Transcript quoted in: UKLIG (2013), p. 20.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*

<sup>391</sup> Briddock (2016), p. 152.

<sup>392</sup> UNHCR Oral Submissions in: *A, B, C*, para. 18.

<sup>393</sup> UNHCR Written Observations (2013), para. 3 (8).

<sup>394</sup> UNHCR Written Observations (2013), para. 3 (10).

for societies which are intolerant at their best and persecutory at their worst. Taken together, it is impractical to expect by default asylum seekers to have had previous sexual relations. Hence, a line of questioning focusing on details of sexual activities can prove insufficient in a number of claims on the basis of sexual orientation.

An intrusive and sexually explicit approach in questioning a person's sexual orientation raises doubts as to its efficacy to yield insightful answers, bearing the aim to attest a person's sexual orientation in mind. As deeply as decision-makers may attempt to go by sexually explicit questioning, they seem to disregard the existence of 'statements that are not susceptible of truth'.<sup>395</sup> Given its association with a *forum internum*,<sup>396</sup> sexual orientation can be considered as one of these latter statements. Sexually explicit questions often lead to evasive responses, since the approach and formulation of questioning play a substantive role to the answers of the interviewees and their overall credibility.<sup>397</sup> In this regard, it is indicative that even the use of neutral or scientific language may further reserve some applicants, due to potential derogatory use of the terms in their countries of origin.<sup>398</sup>

Such adversarial questioning technique tends to exacerbate the already vulnerable position of queer asylum seekers.<sup>399</sup> The applicants in *A, B and C* case flagged the cultural reservations and the shame preventing an asylum seeker from providing an account of their sexual orientation freely in face of intrusive questions on their sexual orientation.<sup>400</sup> This line of questioning would be challenging even for persons entirely confident with and accepted for their sexual orientation, which is *a fortiori* more challenging for persons having developed their sexuality in persecutory and intolerant environments.<sup>401</sup> Advocate General Sharpston in her opinion on the case stressed that such line of questioning 'may alienate certain individuals (including genuine applicants)' from cooperating with the authorities.<sup>402</sup> Millbank has flagged that sexually explicit questions impede asylum seekers from responding since they exacerbate the

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<sup>395</sup> UNHCR Handbook (2011), par. 196.

<sup>396</sup> Berg and Millbank (2009), p. 196.

<sup>397</sup> Jansen and Spijkerboer (2011), p. 54-55.

<sup>398</sup> UNHCR SOGI Guidelines (2012), para. 60 (v).

<sup>399</sup> Kagan (2003), pp. 394-395.

<sup>400</sup> *A, B, C*, para. 35; UNHCR Written Observations (2013), para. 3 (10).

<sup>401</sup> Berg and Millbank (2009), pp. 204-205.

<sup>402</sup> Opinion of Advocate General Sharpston, para. 63.

‘feelings of shame and self-hatred or internalized homophobia’ often experienced by queer asylum seekers, particularly if such questions are addressed by the authorities.<sup>403</sup> In sum, sexually explicit questions do not seem to sufficiently serve the purpose of establishing credibility through the asylum interview.

In any event, questions over details of sexual acts invite considerations as to their probative value as well. Sexual details can be invented by anyone, which frames the statements elicited through sexually explicit questioning of dubious probative value.<sup>404</sup> As UNHCR has also underscored the limited probative value of statements elicited through intrusive and sexually explicit questions, arguing that an account of sexual activities with a person of the same sex could easily be fabricated by anyone.<sup>405</sup> Recounting details of sexual activities might reflect previous experience or may simply involve made-up mechanics of sexual acts. In a context where the outcome of sexual orientation-based asylum applications is largely based on personal narratives, one can reasonably imagine a person producing non-existent sexual details in order for them to navigate through the practice of intrusive questioning. In sum, given their proneness to made-up responses, intrusive and sexually explicit questions are not a sufficient means to establish a person’s sexual orientation.

The intimate content of intrusive and sexually explicit questions is an aspect of private life. Questions over these intimate areas constitute an interference with private life, which requires particularly serious reasons for their justification. Balancing states’ interests of fair refugee status determinations with the applicants interests to protect elements of their private life the interference of intrusive questioning has not been shown to be relevant and sufficient with the legitimate aim of fair status determinations as it should in the democratic societies of EU Members-States. Particularly, examples of invasive questions are often impertinent to the aim of verifying a person’s sexual orientation as well as insufficient to the establishment thereof, due to potentially lacking previous sexual relations, reservations to respond to this kind of questions and their susceptibility to fabricated responses. Overall, such type of questioning is irrelevant

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<sup>403</sup> Millbank (2009a), p. 8.

<sup>404</sup> Opinion of Advocate General Sharpston, para. 63.

<sup>405</sup> UNHCR Written Observations (2013), para. 3 (9).



and insufficient, since it lacks a nexus between the performance of the sexual acts and the verification of a person's sexual orientation.

### ***3.3.3 Recent trends in questioning and expected narratives***

The *A, B and C* ruling gave impetus to policy amendments in several EU countries, aiming to improve the refugee status determination. In a majority of EU countries, whether they used to employ invasive questioning or not, relevant guidelines and trainings have prohibited sexually explicit questioning in asylum interviews on the basis of the *A, B and C* judgement.<sup>406</sup> This is the case also of France, where, despite intrusive questioning not being reported prior to *A, B and C*, as per the French Office for the Protection of Refugees and Stateless (OFPRA) guidelines, intrusive or explicit questions to asylum seekers are prohibited.<sup>407</sup>

An approach adopted by some countries was to instruct interviewers to disclaim details of sexual acts in the outset and to discontinue such accounts when offered by the applicants. In the UK the Home Office issued relevant guidance, which included a script for the event decision makers would be presented with sexually explicit accounts.<sup>408</sup> In a follow up legal position issued for its personnel, the Swedish Migration Agency explicitly ruled out questions on sexual acts and experiences, while accounts of sexual acts have come to be interrupted.<sup>409</sup> In the Netherlands, pursuant to the Working Guidelines 2015/09,<sup>410</sup> sexually explicit questions have also been forsaken and decision makers explicitly inform the applicants that details of sexual acts are not to be included in the assessment.<sup>411</sup>

Noticeably, in some countries the amendments in the guidelines on credibility assessment of sexual orientation-based claims had already been underway. For instance, in France in order to adopt a more vulnerability-friendly approach in the assessment of asylum claims.<sup>412</sup> Similarly, the Home Office had already undertaken the

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<sup>406</sup> CJEU (2017), pp. 50-51.

<sup>407</sup> CJEU (2017), p. 46.

<sup>408</sup> The relevant guidance reads: 'Stop please. I am not going to ask you any detailed questions about sex', in: UK Home Office (2016), p. 29.

<sup>409</sup> CJEU study (2017), p. 41; Jansen (2019), fn. 170.

<sup>410</sup> Cited in Jansen (2019), fn. 82 (original source inaccessible).

<sup>411</sup> Jansen (2019), p. 48. See particularly fns.

<sup>412</sup> CJEU study (2017), p. 43.

amendment of the relevant guidance in the UK,<sup>413</sup> following the 2014 press revelations mentioned above.<sup>414</sup> Likewise the Dutch State Secretary, triggered by the preliminary questions submitted to the CJEU for *A, B and C*, and after the Dutch follow up judgement on the case from which the *A, B and C* originated from was released in 2015, publicised guidelines which were being devised since 2014.<sup>415</sup> The fact that the *A, B and C* ruling overlapped with ongoing amendments is indicative on pre-existing scrutiny over the practice of intrusive questioning in some Member States even prior to the *A, B and C* judgement.

Even though the practice has arguably changed, in several Member States, such as Belgium, Italy and Germany, ‘intrusive probing’ of details over asylum seekers’ sexual life persists.<sup>416</sup> In a recent study on the assessment of queer asylum applications in the Netherlands, Jansen has cited questions inferring sexual details despite not explicitly being asked. Questions such as ‘how did you feel when you had intercourse with men’,<sup>417</sup> may not inquire over details of sexual acts *per se*, but in essence are as irrelevant and insufficient for the establishment of a person’s sexual orientation as their sexually explicit counterparts. According to a recent study in the UK, questions on being open about their sexual orientation and around personal relationships in the country origin - often intrusive and relentless ones - are being emphasised in asylum interviews, with asylum seekers noting persistence of interviewers on the said topics, even when they do not have something relevant to contend.<sup>418</sup> This practice reflects a lack of cultural and contextual understanding and triggers shame, confusion and reservation to the applicants. Paying regard to the above-analysed ECtHR private life reading, intrusive probing to details of sexual life is equally irrelevant to and insufficient for the establishment of sexual orientation. All in all, questions on sexual details cloaked under inquiries over emotions during sexual acts, also interfere with private life as analysed above. Hence, intrusive probing of details of sexual acts is seen intrusive and impertinent, as much as sexually explicit questions.

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<sup>413</sup> Published in 2015 and further amended in 2016. See: UK Home Office (2016).

<sup>414</sup> Dawson and Gerber (2017), p. 299.

<sup>415</sup> Jansen (2019), p. 24.

<sup>416</sup> CJEU (2017), pp. 50-51.

<sup>417</sup> Cited in Jansen (2019), p. 51.

<sup>418</sup> Struthers (2020), p. 14.

With particular regard to Germany, Tschalaer reports that according to a recent study on queer asylum, sexually explicit questions, for instance on sexual positions and sex, are mainstream in asylum interviews.<sup>419</sup> Examples of cases demonstrate intrusive questioning, either addressed directly by courts or the tolerance thereof in the event intrusive questioning is flagged to have taken place at lower instances, some of which in addition to being invasive reflect heteronormative stereotypical assumptions.<sup>420</sup> In 2017 the UK Chief Inspector of Borders and Immigration flagged the need for the monitoring of the Country Policy and Information Notes implementation on sexual orientation and gender identity-based claims.<sup>421</sup> According to a 2020 study,<sup>422</sup> the percentage of asylum seekers considering that their interviewers indeed listened to their story and asked the right questions was almost equal to those not thinking so.<sup>423</sup> Taken together, despite policy amendments and new guidelines streamlined across EU countries, invasive questioning continues to take place either overtly or in an implicit fashion.

Even though the *A, B and C* judgement rejected sexually explicit questions, it did not provide positive guidance on how asylum interviews should be conducted. In 2011 the model of difference, stigma, shame and harm (hereinafter ‘DSSH’), developed by the UK barrister Chelvan, had appeared in an informal meeting of experts on sexual orientation and gender identity asylum claims, attended by judges, legal practitioners and international organisations primarily from EU countries.<sup>424</sup> DSSH model facilitates eliciting detailed narratives of past experiences focusing on asylum seekers’ non-conformity with the heterosexual archetype of potential prosecutors, i.e. with not being ‘straight enough’.<sup>425</sup> In its initial form the DSSH model aimed to facilitate practitioners and decision makers in assessing credibility through a sexual identity checklist

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<sup>419</sup> Tschalaer (2020), p. 1272. The original report was not accessible.

<sup>420</sup> Tschalaer (2020) cites that ‘[i]n some instances, the mostly gay male asylum applicants were unlawfully asked about who was acting more female or male during sex, who was more active during the act, and whether or not anal penetration was painful’, p. 1272; See also: CJEU (2017), pp. 50-51.

<sup>421</sup> Asylum Aid (2017), p. 7.

<sup>422</sup> Majority of the respondents (asylum seekers and service providers) claim asylum or work in Germany, Italy and the UK, albeit the study involved respondents from Austria, Belgium, Cyprus, Denmark, France, Greece, Hungary, Ireland, Malta, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the Netherlands. SOGICA (2020), p. 5 and fn. 7.

<sup>423</sup> ‘Forty per cent of respondents considered that the official(s) who interviewed them listened to their story and asked the right questions, while 37% did not think so, and 17% were not sure.’ SOGICA (2020), p. 18.

<sup>424</sup> UNHCR Informal meeting (2011), fn. 1; Chelvan (2013), para. 17.

<sup>425</sup> Chelvan (2013), para. 19.

comprising experiences arising in a majority of sexual orientation and gender identity asylum claims.<sup>426</sup>

The model was further embodied in the UNHCR Guidelines on sexual orientation and gender identity claims,<sup>427</sup> and has come to be included in UNHCR training modules on sexual orientation and gender identity asylum claims. UNHCR has endorsed DSSH, mainstreaming a non-adversarial approach in the assessment of credibility through open-ended questions to be asked in a non-judgemental way.<sup>428</sup> The latest respective training workbook provides interview basics guidance with sample questions to ask and sample questions to avoid.<sup>429</sup> The most developed version of the DSSH model has been incorporated in the Hungarian Helsinki Committee's interdisciplinary training manual on credibility assessment in asylum procedures to provide guidance to decision makers and asylum professionals on understanding queer asylum seekers' journeys to self-identification.<sup>430</sup> Thereupon, the DSSH model has been mainstreamed and incorporated in the relevant domestic guidelines of various EU jurisdictions, including Cyprus, Finland, Sweden, Norway and the United Kingdom<sup>431</sup>

Be it as it may, the risk of asylum seekers' misunderstanding the questions and decision makers' misinterpreting the responses provided looms large in questioning over personal milestones. Centring on the asylum seekers' perspective in this regard, Jansen has pinpointed that '[a] great deal is demanded from the asylum seeker: [they are] supposed to understand these abstract concepts, recognise [themselves] in these, and also speak about it in detail, perhaps for the first time in [their] life.'<sup>432</sup> For instance, the question 'when did you first know (or become aware) that you were gay/lesbian?' may invariably be perceived to entail different conceptualisations of sexuality, such as the first feeling of attraction, the first sexual encounter, first relationship with a person or the first time a person came out regarding the above to a person from their

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<sup>426</sup> UNHCR Informal Meeting (2011), pp. 10-11.

<sup>427</sup> UNHCR SOGI Guidelines (2012), paras. 62-63 (i)-(ix).

<sup>428</sup> IOM-UNHCR training module 2 (2016), facilitation guide, p. 2.

<sup>429</sup> IOM-UNHCR participant workbook (2016), pp. 8-11.

<sup>430</sup> HuHeCo (2015), p. 74 et seq.

<sup>431</sup> Grønningsæter (2017), p. 11; EMN (2016), p. 3; HuHeCo (2015), p. 77.

<sup>432</sup> Jansen (2019), p. 67.

environment.<sup>433</sup> Reportedly, in their attempt to avoid sexually explicit questions French decision making authorities tend to ask rather abstract questions, which asylum seekers often fail to understand.<sup>434</sup>

By the same token, educational background may also be an obstacle for concise, detailed and to the point responses on behalf of asylum seekers. Research indicates that persons with low educational level when inquired over feelings and internal processes, often respond mentioning concrete events and actions.<sup>435</sup> In other words, for many asylum seekers reference to sexual acts might provide a solid means to flag their difference from heterosexual individuals as well as experiences of shame stigma and harm due to their sexual orientation. Vague and abstract questions fail to elicit detailed responses, either due to the inadequacy of the questions themselves or due to their inappropriateness for an asylum seeker's specific background. This often results in applicants' narratives which are not consistent and plausible, and hence credible. Thus, unclear questions also fail to sufficiently serve the purpose of establishment of credibility assessment and, hence of a fair refugee status determination.

Taken together, decision makers have come to focus more on asylum seekers' reflections on being queer. Nevertheless, research indicates that in some countries the shift of focus from sexual conduct has been misinterpreted. In the Netherlands physical desire has been labelled as 'vague and superficial' whilst the deeper the emotions described are, the more believable a statement is perceived to be.<sup>436</sup> Similarly, in Norway sexual activity has come to be judged as misleading and irrelevant to assess a person's sexual orientation.<sup>437</sup> Sexual acts continue to play a major, albeit implicit, role in queer asylum seekers' narratives, and ever since feelings and processes have taken over sexual details, talking 'too much about sex and too little about emotions' has come to prejudice queer asylum claims.<sup>438</sup>

In Norway a tendency of straightforward narratives to be rejected as too risky to be true has been demonstrated; as credible identities are read those outlining vulnerability and

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<sup>433</sup> Berg and Millbank (2009), p. 204.

<sup>434</sup> FRA (2017), p. 5.

<sup>435</sup> Jansen (2019), pp. 67, 74-75, fns. 262, 264-265 and 269.

<sup>436</sup> Jansen (2019), p. 78.

<sup>437</sup> Akin (2015), pp. 33-34.

<sup>438</sup> Jansen (2019), p. 74 and 78.

employing internalised shame for the sexual identity or reserve in expressing it.<sup>439</sup> Inner experiences, such as stigmatisation and vulnerability have come to be given weight, albeit in inflexible fashion; there is a ‘shift of focus from conduct to the so-called right kind of identity’.<sup>440</sup> In providing accounts of their country-of-origin experiences, ‘legitimate’ asylum seekers are expected to express distress and comport themselves as victims.<sup>441</sup> In France, the personalisation and uniqueness of a narrative has emerged as credibility indicator.<sup>442</sup>

In countries such as Sweden and France, the stronger an image of an asylum seeker as a victim is throughout their narrative, the more plausible their claim is.<sup>443</sup> Expectations of victimhood performance, have been observed also in Norway, where the streamlining of the DSSH model in refugee status determination has been interpreted by decision makers as to challenge the credibility of persons who do not present narratives of fear, shame and internal conflict.<sup>444</sup> Hence, despite avoiding sexually explicit questions by focusing on feelings and emotions, narratives still need to meet decision makers pre-conceptions of identity discovery and development.

In relation to the Canadian context, Murray has identified a ‘rescue narrative’, involving ‘a requisite statement of gratitude toward the host nation for “rescuing” them from persecution and “allowing” them to be free as an LGBT-identified member of society’, trending amongst queer asylum seekers.<sup>445</sup> The portrayal of states where asylum seekers originate from as places of cruelty and violence, partially underpins the European asylum system.<sup>446</sup> In the context of the asylum procedures, in the event a narrative manages to channel the ‘barbarity’ of a country of origin, this will translate to a credible well-founded fear of persecution and, hence, successful asylum claims. Decision makers often presume a causal link between coming from homophobic society and internalised stigma or homophobia.<sup>447</sup> Therefore, the present thesis observes a tendency

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<sup>439</sup> Akin (2015), pp. 33-34.

<sup>440</sup> Akin (2018), p. 36-37.

<sup>441</sup> Kobelinsky (2015), p. 343.

<sup>442</sup> Giametta (2018), p. 4.

<sup>443</sup> Kobelinsky (2015), p. 343.

<sup>444</sup> Grønningsæter (2017), pp. 11-12.

<sup>445</sup> Murray (2014), p. 28.

<sup>446</sup> Spijkerboer (2018), p. 223; Tschalaer (2020), p. 1274-1275.

<sup>447</sup> Jansen (2019), p. 73.

of EU decision makers to expect asylum seekers' narratives to channel a 'rescue narrative', in order for asylum claims on sexual orientation to be believed.

The UNHCR Guidelines on sexual orientation and gender identity read that '[e]xploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are *usually more likely* to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.'<sup>448</sup> The latter remark does not exclude reference of sexual acts to be included in statements in corroboration of asylum seekers' claimed sexual orientation on their own motion. By the same token, the pronouncements in *A, B, and C* judgement referred to sexually explicit questioning rather as a mode employed by authorities and expectations of narratives thereof, than in relation to the applicants' opportunity to state their previous experiences. Latest trends look as if UNHCR guidance and the CJEU precedent elaborated above have been misinterpreted. The rejection of intrusive, sexually explicit and invasive questioning conducted by the authorities has in essence been misconstrued as prohibiting any assertion pertinent to asylum seekers' sexual life.

The above-mentioned approaches overlook that, despite the rejection of intrusive questioning, sexual acts may still nuance in an asylum seeker's narrative on their sexual orientation. Depending on the past experiences and individual realities of a person, sexual life can be a substantive element within their narrative. As much as someone may not have had the opportunity to have any relationship in the country of persecution, regard should equally be paid to persons for whom sexual relations and acts were a major expression of their sexuality. UNHCR relevant Guidelines, while acknowledging that not any asylum seeker may have previous relationships, has flagged that sexual orientation-based asylum narratives may often comprise romantic or sexual relationships.<sup>449</sup> As otherwise put by the UNHCR 'there is no magic formula of questions to ask and no set of "right" answers in response.'<sup>450</sup>

Taken together, these trends, even if developed operationally, influence legal procedures and concomitant legal status. They are mainstreamed and trend broadly,

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<sup>448</sup> [emphasis added] UNHCR Guidelines (2012), para. 62.

<sup>449</sup> UNHCR Written Observations (2013), para. 3 (8).

<sup>450</sup> UNHCR SOGI Guidelines (2012), para. 63.

albeit without any legal basis. The gravity of their effects calls for a better circumscription in law is not foreseen In a DSSH precursor model of questioning claimants about their sexual orientation addressed to the Canadian Immigration and Refugee Board, LaViolette had underscored the futility of seeking ‘true answers’ to questions over so intimate and subjective areas and has emphasised that the significance of such questions is rather the consistency and plausibility to be enabled in the responses elicited than the accuracy of the answers itself.<sup>451</sup>

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<sup>451</sup> LaViolette (2004), p. 12.



## 4. CONCLUSIONS

The practice of phallometry and other kind of medical tests and examinations, despite concerning only a handful of Member-States has been found contrary to asylum-seekers' right not to be subject to degrading treatment and right to private life. The CJEU has formally precluded medical tests assessing sexual orientation as a practice in the asylum proceedings. Phallometry has been particularly condemned by the UNHCR, the European Commission and NGOs. And even though in 2013 available sources reported that phallometry had been abandoned by 2010,<sup>452</sup> following condemnation in different fora,<sup>453</sup> recent research has sadly brought it to the limelight.<sup>454</sup> Employing medical tests and examinations in the refugee status determination context is contrary to international human rights standards,<sup>455</sup> the EU *aquis* and CJEU jurisprudence. The practice has been found to contravene ECtHR judicial precedent in relation to Article 3 of ECHR prohibition of degrading treatment and Article 8 of ECHR right to private life.

Psychological tests and experts' reports have also been found contrary to Article 8 of the ECtHR. The Advocate General's Opinion on *F* case left much leeway to the Hungarian courts to continue employing psychological tests to establish asylum seekers' sexual orientation.<sup>456</sup> In a largely praiseworthy decision, the CJEU rejected the use of such tests on the basis of EU law and on the Yogyakarta principles,<sup>457</sup> thus legitimising the Principles for the first time. Nevertheless, the CJEU missed the opportunity of giving more weight to self-identification of asylum seekers' sexual orientation, simply reiterating its previous position the latter constitutes 'merely the starting point' in the credibility assessment of an applicant's sexual orientation.<sup>458</sup> Moreover, for a third time, the CJEU shied away from providing positive guidance on the credibility assessment of sexual orientation asylum claims. In sum, medical and psychological tests and examinations, as well as relevant experts' reports do not find

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<sup>452</sup> Śledzińska-Simon and Śmiszek (2013), p. 17; Jansen and Spijkerboer (2011) contend that the practice was abandoned in 2009.

<sup>453</sup> Jansen and Spijkerboer (2011), p. 52.

<sup>454</sup> Mrazova (2018).

<sup>455</sup> ECHR, art. 3 and 8; EU Charter, art. 3, 4 and 7; CAT, art. 16; ICCPR, art. 7 and 17.

<sup>456</sup> Opinion of Advocate general Walh, paras. 49, 54-55 and 56.

<sup>457</sup> Ferreira (2018), pp. 31-32.

<sup>458</sup> *F*, para. 28.

place in credibility assessments of sexual orientation asylum claims which are streamlined with human rights.

Until clear guidance will be provided by an authoritative source, documentary evidence submitted should be taken into account in asylum claims, subject to its compatibility with human rights standards. Though, it should not be considered an essential standard of a credible sexual orientation. This finds no basis in law and could not be justified by the factual circumstances underlying the different realities of seeking asylum and would lead to massive queer evidence production trends. In relation to the latter, the relevance of overall disbelief rates of sexual orientation-based claims cannot be negated. In sum, documentary evidence may corroborate the credibility of an asylum claim, but in no case should be considered the quintessence of a credible membership to the particular social group of a queer person in the country of origin.

This thesis welcomes the rejection of sexually explicit documentary evidence, which has been found contrary to Article 8 of the ECHR, however indicating that a blanket ban would better be temporally limited to submissions of this kind created post-flight. Evidence of queer NGO membership and socialisation as well as witnesses' statements, while providing indication of a person's sexual orientation, should not be necessitated to prove a person's membership to a particular social group, and in any case the absence thereof should not be conclusive on negative asylum decisions. Pre-flight evidence, if available, is of more substantive value and should be accepted and given weight whether it concerns previous activism or even if it is sexually explicit.

The difficulties of translating sexuality in evidence illustrate the prevalence of a culture of disbelief in the EU asylum system, covering the persecution ground of sexual orientation as well. Self-identification as lesbian or gay is indication of the individual's sexual orientation seems persistently overlooked. The *A, B and C* and *F* rulings have missed the opportunity to render self-identification an important element in the credibility assessment. It is evident that disbelief in relation to applicants' membership to a particular social group has prevailed even in light of documentary or other evidence submitted. The futile pursuit of practices complementing or even substituting self-declaration of a person's sexual orientation lies at the heart of this category of credibility assessment practices. Even with sexually explicit documentation outside the

arena of permissible evidentiary submissions, the heightened burden of proof for queer asylum seekers persists. Recent evidentiary practices of NGO certificates and implicit requirements of personal photos perpetuate the vicious circle of disparate standards of proof. Given the paucity of recent studies on documentary evidence in sexual orientation-based asylum claims in the EU, one can only expect future publications to further elucidate the matter.

In the bottom line, evidence, whether it concerns activists in the country of origin or closeted persons coerced to participate in queer events, little has to say about the way a person may experience their sexual orientation. Expressions of intimate matters, such as sexual orientation, are very subjective and depend on incalculable factors. Overly valuing the ‘social footprint’ of queerness reproduces the approach embedded in the practice of sexually explicit documentation, simply with the different means of NGO certifications and witness’ statements. The only difference is that in the stead of sexual acts it is the social visibility labelling a person as lesbian or gay. Whether expecting sexual acts or social affiliation and networking to prove sexual orientation, reflect pre-conceived images of genuine queerness, echoing homonormativity and homonationalism.

The practice of invasive, sexually explicit and intrusive questioning of sexual orientation, was rejected by the CJEU as violating the right to private life. An ECtHR reading of the practice has also concluded that this line of questioning breaches the right to private life enshrined in Article 8 of the ECHR, as irrelevant and insufficient with the aim of establishing a credible sexual orientation. Invasive questioning in addition to involving impertinent questions in some instances, is also insufficient to establish an asylum seeker’s sexual orientation, due to focusing on a very narrow aspect of sexual identity, the reservations triggered to the respondents blocking articulate answers, as well as the limited probative value of responses elicited in this way.

Questioning in interviews of persons seeking asylum on the basis of their sexual orientation has fluctuated significantly the past decade. Following the *A, B and C* ruling, States across the EU, particularly those employing the said practice, proceeded in policy changes and banned intrusive questioning. Research indicates, though, that in some countries intrusive questioning continues to be employed, thus perpetuating the

compromise of asylum seekers' right to private life. Moreover, explicit questions on sexual practices *per se* have given their place to questions over the feelings experienced during sexual practices.

After the CJEU rejection of invasive questioning, internal elements have surfaced as indicative of a person's sexual orientation. The DSSH model, mainstreamed in asylum interview guidelines, has encapsulated an approach in questioning, viewing difference, stigma, shame and harm as common experiences for a majority of persons with non-heterosexual sexual orientation. In the stead of authorities eliciting details on sexual acts and conducting intrusive questioning, feelings, processes and identities have come to weigh in asylum interviews. This substitution has been taken to the other extreme though, with decision makers disbelieving a claimed sexual orientation in the event the applicant themselves focus on sexual relations in their narratives.

On the parallel, publications indicate a trend toward the 'right identity' that a queer asylum seeker has to demonstrate in order to be credible, which is often premised on expectations of victimhood narratives and preconceived ideas of genuine queer asylum seekers. The 'right identity' pursuit often lends itself to a 'rescue narrative' of asylum seekers, expected to present themselves as victimised others having fled to the safety of the EU from their countries of origin, otherwise depicted as places of cruelty. Developments in the area of questioning only underscore that guidelines are simply a framework the implementation of which depends on decision makers. Their effect will remain limited in as much as the decision makers applying them hold stereotypes and prejudice against queer asylum seekers.<sup>459</sup>

The updated version of Yogyakarta Principles underscores the need of guidelines on credibility assessment of sexual orientation-based asylum claims and stress States' duty to 'ensure such assessments are determined in an objective and sensitive manner, unhindered by stereotyping and cultural bias.'<sup>460</sup> Nonetheless, amendments aiming to clarify the framework on credibility assessments are absent from the EU Council's and the Parliament's recommendations for the new Regulation proposal to substitute the recast Qualification Directive.<sup>461</sup> The EU reluctance to establish a clear framework on

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<sup>459</sup> Struthers (2020), p. 15.

<sup>460</sup> Yogyakarta Principles plus 10 (2017), Principle 23 (K).

<sup>461</sup> European Parliament (2017); Mrazova (2018), p. 185-186.

credibility assessment, particularly in queer asylum claims is also evidenced by the CJEU three relevant rulings, which have shied away from providing substantial positive guidance on the matter.<sup>462</sup>

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<sup>462</sup> I.e. *X, Y and Z*; *A, B and C* and *F*.

## **BIBLIOGRAPHY**

### **Treaties, Declarations and Recommendations**

(CAT) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly, concluded 10 December 1984, UNTS 1465, entered into force 26 June 1987.

(Convention on Biology and Biomedicine) European Treaty Series - No. 164 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 04 April 1997.

(Asylum Procedures Directive) Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Council of the European Union, concluded 1 December 2005, OJ L 326, entered into force 2 January 2006.

(Recast Qualification Directive) Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, (recast), 20 December 2011.

(Council Regulation No. 343/2003) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

(Recast Asylum Procedures Directive) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

(ECHR) European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, Council of Europe, concluded 4 November 1950, ETS 5, entered into force 3 September 1953.

(EU Charter) Charter of Fundamental Rights of the European Union, Council of the European Union, concluded 12 December 2007, 2012/C 326/02, entered into force 1 December 2009.

(ICCPR) International Covenant on Civil and Political Rights, United Nations General Assembly, concluded 16 December 1966, UNTS 171, entered into force 23 March 1976.

(New Pact on Migration and Asylum) COM/2020/609 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the regions on a New Pact on Migration and Asylum.

(Patients' rights in cross-border healthcare Directive, 2011) Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

(Qualification Directive) 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, Council of the European Union, signed 29 April 2004, OJ L. 304/12-304/23, entered into force 30 September 2004.

(Refugee Convention) Convention relating to the Status of Refugees, concluded 28 July 1951, 189 UNTS 137, entered into force 22 April 1954.

(1967 Protocol) Protocol Relating to the Status of Refugees, 606 UNTS 267, entered into force 4 October 1967.

(EASO Regulation) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Recital 24.

(Regulation No 604/2013) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

(UNHCR Statute) Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428(v), Annex, UN Doc A/1775, adopted 14 December 1950.

(Yogyakarta Principles plus 10) International Service for Human Rights and ARC International, The Yogyakarta Principles plus 10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Gender expression and Sex characteristics to Complement the Yogyakarta Principles, 10 November 2017, Geneva.

(Yogyakarta Principles) International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, Yogyakarta.

(Schengen Agreement) 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.

(Schengen Convention) Convention implementing the Schengen Agreement of 14 June 1985 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.

## **Case law**

### ***CJEU***

*(A, B and C) A, B and C v. Staatssecretaris van Veiligheid en Justitie*, C-148/13 – C-150/13, 24 February 1997.

*(F) F v. Bevándorlási és Állampolgársági Hivatal*, C-473/16, 25 January 2018.

(Opinion of Advocate General Sharpston) *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, C-148/13 – C-150/13, Opinion of Advocate General Sharpston delivered on 17 July 2014.

*(X, Y and Z) X, Y, Z v. Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, 7 November 2013.



(Opinion of Advocate General Walh) *F v Bevándorlási és Menekültügyi Hivatal* (formerly *Bevándorlási és Állampolgársági Hivatal*), C-473/16, Opinion of Advocate General Walh delivered on 5 October 2017.

### **ECtHR**

*Axel Springer v. Germany*, No. 39954/08, 7 February 2012.

*Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981.

*F.H. v. Sweden*, No. 32621/06 (Judgment), 20 January 2009.

*Goodwin v. the United Kingdom*, No. 28957/95, 11 July 2002.

*Jalloh v. Germany*, No. 54810/00, Judgment, 11 July 2006.

*Keenan v. the United Kingdom*, No. 27229/95, 3 April 2001.

*M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment, 21 January 2011.

*Moldovan and Others v. Romania*, Nos. 41138/98 and 64320/01, 12 July 2005.

*Mozer v. the Republic of Moldova and Russia*, No. 11138/10, 23 February 2016.

*P.G. and J.H. v. the United Kingdom*, No. 44787/98, Judgment, 25 September 2001.

*Peck v. the United Kingdom*, no. 44647/98, Judgment, 28 January 2003.

*Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002.

*Smith and Grady v. the United Kingdom*, Nos. 33985/96 and 33986/96, 27 September 1999.

*T.I. v. the United Kingdom*, No. 43844/98, Decision as to the Admissibility, 7 March 2000.

*Toomey v. United Kingdom*, Application No. 37231/97, Final decision on the admissibility, 14 September 1999.

*Toomey v. United Kingdom*, No. 37231/97, Decision on admissibility, 10 September 1998.

*Tyrer v. the United Kingdom*, No. 5856/72, 25 April 1978.

*Van Kück v. Germany*, No. 35968/9712, June 2003.

*Worwa v. Poland*, No. 26624/95, Judgement, 27 November 2003.

*Y.F. v. Turkey*, No. 24209/92, July 2003.

*Y.F. v. Turkey*, no. 24209/94, Judgment, 22 July 2003.

*Z. v. Finland*, No. 9/1996/627/811, 25 February 1997.

### **Other**

*Chemnitz Verwaltungsgericht*, No. A 2 K 304/0611, Germany, July 2008

*Children's Aid Society of the Region of Peel v. S.R.-T*, OJ No 6141, Canada, 2003.

*Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, House of Lords (Judicial Committee), Session 1998-1999, United Kingdom, 25 March 1999.

*Toonen v. Australia*, Communication No. 488/1992, Human Rights Committee, U.N. Doc CCPR/C/50/D/488/1992, 1994.

*N.E.E. v. Ministerstvo vnitra*, Ruling 5, No. 53/2016-26, Czech Republic, 11 August 2016.

*N97/15882* [1997] RRTA 3396, Refugee Review Tribunal of Australia, 5 September 1997.

*Matter of Acosta*, Interim Decision No. 2986, 1 March 1985.

*Neustadt/Weinstraße Verwaltungsgericht*, No 3 K 753/07. NW, Germany, 8 September 2008

*R v. the Secretary of the Home Department ex parte Varciu*, Special Adjudicator's Report, Appeal No. HX/70517/94, 28 April 1995.

*RRT Reference 060635653* (23 October 2006), decision not publicly available, cited from Berg and Millbank (2009).

*Schleswig-Holsteinisches Verwaltungsgericht*, Az. 6 B 32/09, Germany 7 September 2009.

Supreme Court, *Attorney General v. Ward*, 2 S.C.R. 689, Canada, 30 June 1993.

Supreme Court, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UKSC 31, United Kingdom, 7 July 2010.

*United States. v. Powers*, 59 F.3d 1460, 1471, 4th Cir., 1995.

*Verwaltungsgericht Wiesbaden* [VGW]. Judgment of Apr. 26, 1983, No. IV/IE 06244/81.

### **Monographs and Articles**

Akin, Deniz (2015), 'Assessing Sexual Orientation-Based Persecution, A Closer Look at the Norwegian Practices of Asylum Evaluation of Gay and Lesbian Claimants', *Lambda Nordica*, 20:1, pp. 17-42.

Akin, Deniz (2016), 'Queer asylum seekers: translating sexuality in Norway', *Journal of Ethnic and Migration Studies*, 43:3, pp. 458-474.

Akin, Deniz (2019), 'Discursive Construction of Genuine LGBT Refugees', *Lambda Nordica*, 23:3-4, pp. 21-46.

Aleinikoff, Thomas Alexander (2001), 'Protected characteristics and social perceptions: An analysis of the meaning of 'membership of a particular social group'', in: E. Feller, V. Turk and F. Nicholson (eds.), 'Refugee Protection in International Law: UNHCR's Global Consultations on International Protection', Cambridge University Press, pp. 263-312.

Anker, Deborah and Ardalan, Sadi (2012). 'Escalating Persecution of Gays and Refugee Protection: Comment on Queer Refugees Make Bad Law', *International Law and Politics*, Vol. 44:529, pp. 529-557.

Begazo, Maria Guadalupe (2019), 'The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?', in: A. Güler et al. (eds.), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective*, Springer Nature Switzerland AG, pp. 165- 184.

Berg, Laurie and Millbank, Jenni (2009), 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants', *Journal of Refugee Studies*, Vol. 22:2, pp. 195-223.

Berlit, Uwe and Doerig, Harald and Storey, Hugo (2015), 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach', *International Journal of Refugee Law*, Vol. 27:4, pp. 649–666.

Briddock, Allan (2016), 'The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure', *Birkbeck Law Review*, Vol. 4:1, pp. 123-157.

Chelvan, S. (2013), 'From Silence to Safety: Protecting the Gay Refugee', *Council*, May 2013, pp. 26–28.

Choi, Venice (2010), 'Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation', *Brooklyn Journal of International Law*, Vol. 36:1, pp. 241-240-263.

Dawson, Jasmine and Gerber, Paula (2017), 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation' *International Journal of Refugee Law*, Vol. 29:2, pp. 292–322.

Dauvergne, Catherine and Millbank, Jenni (2003b), 'Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh', *Sydney Law Review*, Vol. 25:97, pp. 97-124.

Dustin, Moira (2018), 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK', *International Journal of Refugee Law*, Vol. 20:20, pp. 1–24.

Dustin, Moira and Held, Nina (2018), 'In or out? A queer intersectional approach to 'particular social group' membership and credibility in SOGI asylum claims in Germany and the UK', *Genius*, Vol. 5:2, pp. 74-87.

Ferreira, Nuno (2018), 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?', *Genius*, Vol. 5:2, pp. 25-42.

Ferreira, Nuno and Venturi, Denise (2017), 'Tell Me What You See and I'll Tell You If You're Gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási És Állampolgársági Hivatal', *EU Immigration and Asylum Law and Policy*, 16 October 2018.

Ferreira, Nuno and Venturi, Denise (2018), 'Testing the untestable: The CJEU's decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal', European Database of Asylum Law, retrieved from: Testing the untestable: The CJEU's decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal | European Database of Asylum Law (asylumlawdatabase.eu), accessed in 18/04/2021.

Fullerton, Maryellen (1990), 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany', *Georgetown Immigration Law Journal*, Vol. 4: 381, pp 381-444.

Giametta, Calogero (2018), 'New asylum protection categories and elusive filtering devices: The case of 'Queer asylum' in France and the UK', *Journal of Ethnic and Migration Studies*, Vol. 46:1, pp. 142-157.

Goodman, Ryan (2012), "Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line", *New York University Journal of International Law and Politics*, Vol. 44:2, pp. 407-436.

Gray, Amanda and McDowall, Alexandra (2013). 'LGBT refugee protection in the UK: from discretion to belief?', *Forced Migration Review*, Vol. 42: 22, pp. 22-25.

Grønningsæter, Andrea Gustafsson (2017). 'Establishing a sexual identity: The Norwegian immigration authorities practice in sexuality-based asylum cases, paper for the conference 'Out & Proud? LGBTI asylum in Europe Conference', COC Netherlands, 5-6 October 2017.

Hathaway, James and Hicks, William S. (2005), 'Is there a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?', *Michigan Journal of International Law*, Vol. 26:2, pp. 505-562.

Hathaway, James C., and Pobjoy, Jason, (2012), "Queer Cases Make Bad Law", *New York University Journal of International Law and Politics*, Vol. 44: 2, pp. 315-389.

Hathaway, James C. and Foster, Michelle. (2014), (2nd ed.), "The Law of Refugee Status", Cambridge: Cambridge University Press.

Henes, Brian F., (1994), "The Origin and Consequences of Recognizing Homosexuals as a Particular Social Group for Refugee Purposes", *Temple International and Comparative Law Journal*, Vol. 8: 2, pp. 377-402.

Jacobs, Francis; White, Robin; Ovey, Clare (Eds.). (2014), 6th Edition, "The European Convention on Human Rights", Hampshire: Oxford University Press.

Janmyr, M. (2014). 'Norway's Readmission Agreements: Spellbound by European Union Policies or Free Spirits on the International Field?', *European Journal of Migration and Law*, Vol. 16:2, pp. 181-208.

Jansen, Sabine and Spijkerboer, Thomas. (2011), "Fleeing Homophobia, Asylum Claims Related with Sexual Orientation and Gender Identity in Europe", COC Netherlands and Vrije Universiteit of Amsterdam.

Jansen, Sabine (2019) 'Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments', COC Netherlands: Amsterdam.

Johnson, Paul (2012). *Homosexuality and the European Court of Human Rights*, Taylor & Francis Group.

Johnson, Paul. (2014) "Pornography and the European Convention on Human Rights", *Porn Studies*, Vol. 1:3, pp. 35-336.

Kagan, Michael. (2003), "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination", University of Nevada, Las Vegas, Scholarly Works, Paper 633, Vol. 17: 367, pp. 367-414.

Kahn, Sarilee and Alessi, Edward J. (2017), "Coming Out Under the Gun: Exploring the Psychological Dimensions of Seeking Refugee Status for LGBT Claimants in Canada", *Journal of Refugee Studies*, Vol. 31: 1, pp. 22-41.

Kendall, Christopher N. (2003), "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?", *International Journal of Refugee Law*, Vol. 15: 4, pp. 715-749.

Kobelinsky (2015), 'Judging Intimacies at the French Court of Asylum', *Political and Legal Anthropology Review*, Vol. 38: 2, pp. 338-355.

LaViolette, Nicole (2004) 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group' Training Manual for Immigration and Refugee Board (IRB) Members, last updated: May 2004, online: Social Science Research Network.

LaViolette, Nicole (1997), 'The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward', *University of Toronto Faculty of Law Review*, Vol. 55:1, pp. 1-41.

LaViolette, Nicole (2010), 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary', *International Journal of Refugee Law*, Vol. 22: 2, pp. 173-208.

Lewis, Rachel A. (2014), 'Gay? Prove it: The politics of queer anti-deportation activism', *Sexualities*, Vol. 17: 8, pp. 958–975.

Llewellyn, Cheryl (2016), 'Homonationalism and sexual orientation-based asylum cases in the United States', *Sexualities*, Vol. 20:5-6, pp. 682-698.

Lalumiere, Martin L. and Harris, Grant T. (1998), 'Common Questions Regarding the Use of Phallometric Testing with Sexual Offenders', *Sexual Abuse: A Journal of Research and Treatment*, Vol. 10:3, pp. 227-237.

Murray, David (2014), 'Real Queer: 'Authentic' LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System', *Anthropologica*, Vol. 56: 1, pp. 21-32.

Murray, David (2016), 'Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases', *Anthropological Quarterly*, Vol. 89:2, pp. 465-484.

McGhee, Derek (2000), "Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu", *Body and Society*, Vol. 6:1, pp. 29-50.

Marshall, Williams L. and Fernandez, Yolanda M. (2000), Phallometric Testing with Sexual Offenders: Limits to its Value, *Clinical Psychology Review*, Vol. 20: 7, pp. 807–822.

Marshall, Williams L. (2014), 'Phallometric Assessments of Sexual Interests: An Update', *Current Psychiatry Reports*, Vol. 16:1.

Marouf, Fatma E. (2008), 'The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender', *Yale Law and Policy Review*. Vol. 27:47, pp. 47-106.

Millbank, Jenni (2002), 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia', *Melbourne University Law Review*, Vol. 26:1, pp. 144-177.

Millbank, Jenni (2005), 'A Preoccupation with Perversion: The British Response to Refugee Claims on the basis of Sexual Orientation, 1989–2003', *Social and Legal Studies*, Vol. 14:1, pp. 115–138.

Millbank, Jenni (2009a), 'The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', *International Journal of Refugee Law*, Vol. 21:1, pp. 1-33.

Millbank, Jenni (2009b), 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom', *The International Journal of Human Rights*, Vol. 13: 2-3, pp. 391-414.

Millbank, Jenni, (2012), 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy', *New York University Journal of International Law and Politics*, Vol. 44: 2, pp. 497-527.

Mrazova, Andrea (2018), 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law', in: Güler, Arzu and Shevtsova, Maryna and Venturi, Denise (Eds.), 'LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective', Springer, pp. 185-207.

O'Flaherty, Michael and Fisher, John (2008), 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', *Human Rights Law Review*, Vol. 8:2, pp. 207-248.

O'Flaherty, Michael (2015), 'The Yogyakarta Principles at Ten', *Nordic Journal of Human Rights*, Vol. 33:4, pp. 280-298.

O'Leary, Barry (2008). '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', *Feminist Legal Studies*, Vol. 16: 1, pp. 87-95.



Sledzinska-Simon, Anna, & Smiszek, Krzysztof (2013), 'LGBTI asylum claims: The Central and Eastern European perspective', *Forced Migration Review*, 42: 16, pp. 16–18.

Spijkerboer, Thomas (2018). *Gender, Sexuality, Asylum and European Human Rights*. *Law Critique*, Vol. 29: 3, pp. 221–239.

Tschalaer, Mengia (2020), 'Between queer liberalisms and Muslim masculinities: LGBTQI+ Muslim asylum assessment in Germany', *Ethnic and Racial Studies*, Vol. 43:7, 1265-1283.

Wessels, Janna, (2011), "Sexual orientation in Refugee Status Determination", *Refugee Studies Centre, Oxford Department of International Development, University of Oxford*.

Wessels, Janna (2012), 'HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain', *International Journal of Refugee Law*, Vol. 24: 4 pp. 815–839.

Wessels, Janna, (2013), 'Discretion in sexuality-based asylum cases: An adaptive phenomenon', in T.P. Spijkerboer (ed.), 'Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum', Routledge, pp. 55-81.

Wessels, Janna (2017). 'Publicly Manifested—Fatefully Determined—Invariably "Discreet": The Assessment of Sexuality-Based Asylum Claims in Germany and France', *Canadian Journal of Women and the Law*, Volume 29: 2, pp. 343-374.

### **UNHCR Publications**

(UNHCR Note, 1998) United Nations High Commissioner for Refugees, Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998.

(UNHCR MPSG, 2002) United Nations High Commissioner for Refugees, "Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention, and/or Its 1967 Protocol Relating to the Status of Refugees", HCR/GIP/02/02, Geneva, 7 May 2002.

(UNHCR Guidance Note, 2008) United Nations High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, United Nations High Commissioner for Refugees (UNHCR) Protection Policy and

Legal Advice Section Division of International Protection Services, Geneva, 21 November 2008.

(UNHCR Discussion Paper, 2010) United Nations High Commissioner for Refugees, Discussion Paper on the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees, Geneva, 22 September 2010.

(UNHCR Handbook, 2011) United Nations 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, Geneva 1979, Reissued December 2011, HCR/1P/4/ENG/REV. 3.

(UNHCR Informal meeting 2011), United Nations High Commissioner on Refugees, Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity, 10 September 2011, pp. 10-11.

(UNHCR Comments on Phallometry, 2011) United Nations High Commissioner on Refugees, UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation, April 2011.

(UNHCR SOGI Guidelines, 2012) United Nations High Commissioner of Refugees, Guidelines in 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, Geneva, 23 October 2012, HCR/GIP/12/09.

(UNHCR Beyond Proof, 2013) United Nations High Commissioner of Refugees, Beyond Proof, Credibility Assessment in EU Asylum Systems, Brussels: European Refugee Fund of the European Commission, May 2013.

(UNHCR Written Observations in CJEU, 2013) UN High Commissioner for Refugees (UNHCR), Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13), 21 August 2013, C-148/13, C-149/13 & C-150/13

(UNHCR Oral Submissions CJEU, 2014) United Nations High Commissioner for Refugees, UNHCR's Oral Submissions at the Court of Justice of the European Union:

Hearing of the case of Minister voor Immigratie en Asiel v A, B and C, 25 February 2014, C-148/13, C-149/13 & C-150/13.

(UNHCR Comments ,2018) UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, February 2018, retrieved from: <https://www.refworld.org/docid/5a7835f24.html>, accessed in: 18/04/2021.

(IOM and UNHCR Training Module 2, 2016) International Organisation for Migration and UN High Commissioner for Refugees, Training Module 3, Facilitation Guide, Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement, retrieved from: [https://lgbti.iom.int/sites/default/files/Module%202%20Conducting%20interviews/Module%2002\\_Facilitation%20Guide\\_Nov2016.pdf](https://lgbti.iom.int/sites/default/files/Module%202%20Conducting%20interviews/Module%2002_Facilitation%20Guide_Nov2016.pdf), accessed in: 18/04/2021.

### **Other Documents and Publications**

(CJEU Study, 2017) Sheridan, Caoimhe; Taylor, Amanda; van Krimpen, Isa; Zelvenska, Julia. European Council on Refugees and Exiles, “Preliminary Deference? The impact of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights”, March 2017.

(CoE, 2011) Council of Europe, ‘Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe’, Council of Europe Publishing, September 2011.

(European Commission Patients’ Rights Report, 2016) European Commission, ‘Patients’ Rights in the European Union Mapping eXercise – Final Report’, Publications Office of the European Union, March 2016.

(European Commission 2016) COM/2016/0466 final, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

(European Parliament 2017) COM(2016)0466, Report on the Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2017.

(FRA, 2010) Fundamental Rights Agency, 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity', Publications Office of the European Union, 2010.

(FRA, 2017) European Union Agency for Fundamental Rights, "Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers", Luxembourg: Publications Office of the European Union, March 2017.

(FRA, 2020) Fundamental Rights Agency, 'Handbook on European law relating to asylum, borders and immigration', Publications Office of the European Union, December 2020.

(Conference of Plenipotentiaries 1951) Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the 3rd meeting, held at the Palais des Nations, Geneva, on Tuesday, 3 July 1951. UN Doc. A/CONF.2/SR.3, 19 November 1951.

(HRC Report, 2013) General Assembly Resolution, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez to the Human Rights Council, UN Doc. A/HRC/22/53, February 2013.

(HuHeCo, 2015) Gyulai, Gábor (Ed.) and Singer, Debora and Chelvan, S. and Given-Wilson, Zoe. 'Credibility Assessment in Asylum Procedures. A Multi-disciplinary Training Manual. Vol. 2', Hungarian Helsinki Committee, 2015.

(ICJ, 2014) 'X, Y and Z: a glass half full for "rainbow refugees"? The ICJ's observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel of 7 November 2013', International Commission of Jurists, June 2014.

(ICJ, 2016) Hooper, Louise and Zilli, Lavió, “Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioner’s Guide”, Geneva: International Commission of Jurists, February 2016.

(IFEG, 2016) Independent Forensic Expert Group, (2016) Statement on Anal Examinations in Cases of Alleged Homosexuality, Torture, Vol. 26: 2, pp. 85-91.

(ORAM, 2011) Organisation for Refugee, Asylum and Migration, “Testing Sexual Orientation: a Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings”, ORAM, December 2011.

(UKLIG, 2013) United Kingdom Lesbian and Gay Immigration Group, ‘Missing the Mark, Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims’, UNISON, September 2013.

(Vine Report (2014) ) Vine, John (2014). An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation. Report of the Independent Chief Inspector of Borders and Immigration. UK: Williams Lea Group on behalf of the Controller of Her Majesty’s Stationery Office, March-June 2014.

(WHO, 2014) Bulletin of the World Health Organisation, (2014), Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11), 2014:92, pp. 672-679.

Jansen, Sabine (2014), ‘Good practices related to LGBTI asylum applicants in Europe’, International Lesbian and Gay Association Europe, Le Déroff, Joël (ed.).

Lukac, Enes and Eriksson, Hjalmar (2017). LGBT Asylum Seekers in Sweden Conceptualising Queer Migration Beyond the Concept of “Safe Third Country”. Oxford Research Report.

SOGICA (2020) Sexual Orientation and Gender Identity Claims of Asylum, ‘Queering Asylum in Europe: A Survey Report’, July 2020.

Struthers, Katrina (2020). ‘LGBTI Refugee Protection in a Culture of Disbelief: The impact of integration’, Refugee Law Initiative Working Paper No. 50.

UK Home Office (2016) UK Home Office, ‘Asylum Policy instruction: Sexual orientation in asylum claims. Version 6.0’, August 2014.

## Other Sources

American Psychological Association, (2008), ‘Answers to your questions: For a better understanding of sexual orientation and homosexuality’, retrieved from: [www.apa.org/topics/lgbt/orientation.pdf](http://www.apa.org/topics/lgbt/orientation.pdf), accessed on 13/05/2021.

(Asylum Aid (2017)) Consonant (formerly Asylum Aid), ‘Inspection of Asylum Casework of the Independent Chief Inspector of Borders and Immigration, Asylum Aid response – 8th June 2017’, 8 June 2017, retrieved from: <https://www.refworld.org/docid/5948f32f4.html>, accessed on 13/05/2021.

(Brexit: EU-UK relationship) Eur-Lex, Access to European Law, ‘Brexit: EU-UK relationship’, retrieved from: <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html#1.SearchLink>, accessed on 13/05/2021.

Cambridge Online Dictionary, retrieved from: <https://dictionary.cambridge.org/dictionary/english/credibility>, accessed on 13/05/2021.

EMN (2016) European Migration Network, ‘EMN Ad-Hoc Query on NL AHQ on national asylum policies regarding LGBT-asylum seekers’, May 2016.

(European Commission, 2011) European Commission, ‘Answer given by Ms Malmström on behalf of the Commission’, OJ C 279 E, retrieved from: [https://www.europarl.europa.eu/doceo/document/E-7-2010-010829-ASW\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/E-7-2010-010829-ASW_EN.html?redirect), accessed on 13/05/2021.

The Guardian, ‘Gay asylum seekers face humiliation’, retrieved from: <https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>, accessed on 13/05/2021.

Watson Fowler, Henry and Fowler, Francis George and Thompson, Della (1995), ‘The Concise Oxford Dictionary’, Oxford University Press.

WHO (2018). International classification of diseases for mortality and morbidity statistics (11th Revision). World Health Organisation. Retrieved from <https://icd.who.int/browse11/l-m/en>, accessed on 13/05/2021.

UK Parliament, Home Affairs Committee, ‘The assessment of credibility of women, ... victims of torture .. within the decision making process and whether this is reflected in

appeal outcomes', retrieved from:  
[https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008\\_HC71\\_01\\_VIRT\\_HomeAffairs\\_ASY-35.htm](https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-35.htm), accessed on 13/05/2021.