Global Campus Europe

UNIVERSITÉ LIBRE DE BRUXELLES

European Master's Degree in Human Rights and Democratisation

A.Y. 2018/2019

QUEER? PROVE IT.

Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?

Author: Alice Gould

Supervisor: Sarah Ganty

ABSTRACT

The Common European Asylum System (CEAS) aspires towards consistency in the process of asylum applications and acceptance throughout the EU. However, multiple reports have found incongruent results and methods that are not compatible with international legal standards. One of the predominate issues that these results originate from revolves around how to credibly assess a person's sexual orientation or gender identity (SOGI). It has been acknowledged that to protect the institution of asylum there may need to be a method to assess whether an asylum seeker's claim is credible, rather than relying solely on self-identification. However, it has been repeatedly reported that stereotyping and problematic practices occur during the asylum process within the EU. Whilst the CJEU has set limits as to what authorities can do to assess credibility, there is no affirmative instruction from the EU on how to credibly assess claims. The main research question of this thesis considers whether the EU should create a common framework for SOGI based asylum claims and how would this be implemented? This paper will recommend that a standardised methodology is appropriate and that the EU should implement such a framework through the work of the EASO, through implementing guidelines and training, which will be both mandatory and explicitly referenced. In order to do this this thesis will reflect on the main issues when assessing the credibility of SOGI and what a proposed EU framework do to mitigate these issues. Extrapolating from these problematic components the essay will then analyse barrister and specialist in queer asylum law S Chelvan's Difference, Stigma, Shame, Harm (DSSH) model as a possible model of credibility assessment while offering critique to consider the full range of identities that fit within SOGI and without a gendered bias. Finally, this thesis will go on to consider the proposed changes to the CEAS and the role of the European Asylum Support Office, and what that role could be in supporting a framework for SOGI credibility assessment.

ACKNOWLEDGMENTS

There are several people I would like to thank, whose advice and support have helped me complete this thesis.

First and foremost, my supervisor, Sarah Ganty, has helped me exponentially with her valuable input and advice on research and on the drafting of this thesis. Furthermore, a special thank you to Denise Venturi for giving me guidance on what to include within this work and the SOGICA Project for their excellent resource database.

Many of my friends also deserve a special mention for keeping me sane during these last few months. Thank you to: Holly, Cariad and Mark for letting me stay with you/obsessively write on your sofas in July; to Eu, Leone and eventually Liesbet for the wonderful times we spent in Belgium; to my E.MA Sisterhood for helping me through darker times; and also to Jack for agreeing to proofread my 29,969 word thesis for the princely sum of a bottle of Belgian beer and a box of chocolates, as well as giving me the courage and inspiration to embark on this masters in the first place.

Finally, I am incredibly grateful to everyone I have met on my E.MA journey, including my supportive and amazing classmates, the E.MA staff back in Venice, the staff at ULB and everyone who helped contribute to and create the E.MA Human Rights Blog.

TABLE OF ABBREVIATIONS

APD	Asylum Procedures Directive
COI	Country of Origin Information
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DSSH Model	S Chelvan's Difference, Stigma, Shame and Harm Model for assessing the credibility of asylum claims based on sexual orientation or gender identity
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FRA	European Union Agency for Fundamental Rights
LGBTI	Lesbian, Gay, Bisexual, Trans, Intersex +
QD	Qualification Directive
MS	Member States of the European Union
SOGI	Sexual Orientation and Gender Identity
SOGICA	Sexual Orientation and Gender Identity Claims of Asylum
UNHCR	United Nations High Commissioner for Refugees

GLOSSARY

Bisexual	This thesis will consider 'bisexual' to mean a person of any gender who is attracted to more than one gender. For the sake of ease the term bisexual will be considered to include queer, pansexual and any other sexuality that is not exclusively attracted to one gender.
Gay	The term 'gay' shall be used to refer to a person of any gender who is attracted to persons of the same gender as themselves.
Gender Dysphoria	Gender dysphoria is the term used to describe when a person's biological sex is incongruent with their gender identity. Its medicalization is controversial.
Intersex	Intersex persons are individuals who do not biologically fit into the category of either male or female. There is no one condition that makes a person intersex, but instead it is a person who is both with any of many variations in sex characteristics which may affect their chromosomes, gonads, sex hormones, or genitals.
Lesbian	The term 'lesbian' shall be used to refer to persons who identify as women who are attracted to other women.
Queer	'Queer' can refers to anyone who identifies outside of sexual or gender majorities. It is an inclusive umbrella term that means anyone non-heterosexual or non-cis-gendered.
Trans	'Trans' or 'transgender' refers to a person who identifies as a gender that does not correspond to the gender they were assigned at birth. This may mean that they identify as a woman whilst biologically male, a man whilst biologically female, or their identity may fall outside of traditional binary genders all together. Medical or surgical intervention has no bearing on their gender identity.
SOGI minority	See "Queer"

TABLE OF CONTENTS

7 1. Introduction
8 1.1 Hypothesis and Research Questions
11 1.2 State of the Art
14 1.3 Methodology
15 1.4 Outline of Research
16 2. The Legal Basis of SOGICA
16 2.1 SOGICA at the UN Level
18 2.2 SOGICA in the Yogyakarta Principles
20 2.3 SOGICA at the EU Level
25 2.4 Intermediate Conclusion
26 3. Issues When Assessing Credibility
27 3.1 Stereotyping
31 3.2 Previous Opposite Sex Relationships and Children
34 3.3 Sexual Behaviour Over Identity
35 3.4 Medical, Psychiatric and Psychological Tests
38 3.5 Delay in Disclosure
39 3.6 The Demeanor of the Applicant
40 3.7 Intermediate Conclusion
42 4. The DSSH Model as a Method of Credibility Assessment
44 4.1 The DSSH Model
45 4.1.1 Difference
45 4.1.2 Stigma
46 4.1.3 Shame
46 4.1.4 Harm
46 4.1.5 Reflections on the DSSH Model
47 4.2 Criticisms of the DSSH as a Homosexual Male Default
55 4.3 Further Criticisms of the DSSH Model Raised by the Literature
58 4.4 Intermediate Conclusion
60 5. A Common European Solution
61 5.1 Is Europe Ready for a Common System for LGBTI Refugees?
65 5.2 The Common European Asylum System
68 5.2.1 Training
69 5.2.2 International Protection Needs Arising *Sur Place*
71 5.2.3 Late Disclosure
71 5.2.4 Information and Questioning Related to SOGI
71 5.2.5 Statistics
73 5.3 The Role of the European Asylum Support Office
77 5.4 Intermediate Conclusion
80 6. Conclusion

1.

INTRODUCTION

There is no way to prove sexual orientation or gender identity. Whilst there are many aspects that may support a claim that a person is LGBTI,[1] it cannot be fundamentally, intrinsically or reliably proved. In most situations, a person's sexual orientation or gender identity (SOGI) is established through self-identification. However, when it comes to asylum claims where the predominant reason for seeking refugee status is based on SOGI (SOGICA) States are concerned that simply self-identifying as LGBTI could lead to issues of credibility, where non-LGBTI persons claim to be queer as an 'easy' way of gaining asylum. Therefore there must be some kind of credibility assessment of SOGI, and the methodology employed to determine this impossible problem has, and does, lead to abuses of human dignity and rights. Credibility assessment is, in essence, the process by which asylum officials attempt to evaluate whether a particular applicant's claim is sincere. Every claim for asylum, no matter the basis, must go through a credibility assessment, which can be aided by documents and testimony. However, due to the particular nature of SOGICA the method of credibility assessment provides certain difficulties.

Whilst this problem has existed for many years, the process of credibility assessment is still riddled with problems based on stereotypes, misinformation, ignorance and pejorative biases throughout Europe and the rest of the world. Last year, a prominent example in Austria made global headlines. A teenager from Afghanistan applied for asylum as he was gay and consensual same-sex activity is illegal in Afghanistan. However, in the official assessment that rejected his claim it was reportedly written that he did not walk, act or dress like a homosexual; that he acted aggressively, when homosexuals are not aggressive; that he did not act socially, which the official expected of a homosexual man; that he had realised he was

[1] The author is all too aware of the diversity of both the LGBTI community and the terminology which is used to refer to it and of the multitude of debates as to which term is most correct. The author has chosen to use 'LGBTI': the term most commonly used and accepted in international law. The terms 'queer' and 'SOGI minority' shall also be used interchangeably.

gay when he was 12, which the official thought was too early to be true, particularly in Afghanistan.[2] This thesis will analyse how such loose procedures happen frequently and often give these vulgar social stereotypes reign, in processes which play a key role in determining the fate of an individual's life.

To further contextualise this example, less than two weeks later came reports of Austria rejecting another asylum seeker; a male, Iraqi homosexual. Again, the credibility of his claim to being homosexual was the reason for denial. Yet, providing a notable counterpoint to the prior example, this claim was rejected because the applicant was too stereotypical and 'girlish', therefore thought to be 'faking it'.[3]

Within a minute passage of time, both these examples from Austria have the potential to illuminate the social realities that account for their polar nature. Whilst these cases demonstrate the extremes of SOGICA, and were both subject to appeals, they also demonstrate the issues that can occur when people who are not experts in SOGI matters are faced with the incredibly difficult task of assessing credibility, and the need for change.

1.1 HYPOTHESIS AND RESEARCH QUESTIONS

The purpose of this thesis is to consider if something can and even should be reformed and instituted at the EU level in order to make the process of assessing the credibility of SOGICA as in line with human rights and dignity as possible. As current academic and public discourses call for the EU to act, this paper will consider whether EU intervention is appropriate, and if so, what form such an intervention should take. Therefore, the central research question of this text is: *should the EU create a common framework for SOGICA and how would this be implemented?* This thesis will continue to demonstrate the need for a standardised methodology instituted by the EU for SOGICA based on the specific problematics developing out of variation in SOGICA results that differ from asylum claims with different bases. This thesis will then consider that this framework would be most efficiently implemented by being added to existing guidance and training provided by the European Asylum Support Office (EASO), and explicitly referred to within the recast of the Common European Asylum System (CEAS).

---

[2] Agence France-Presse, 'Austria Rejects Afghan's Asylum Bid Because He "Did Not Act or Dress Gay"' *The Guardian* (London, 15August2018)
[3] Tom Batchelor, '"Fake Gay": Iraqi Man Denied Asylum in Austria Because He was "Too Girlish" *Independent* (London, 24August2018)

The paper will also consider several sub-research questions to add context and nuance to the investigations of the central research question. In order to discuss how to create a consistent and humane methodology for the credibility assessment of SOGICA, firstly, the current system must be established and dissected to determine what is currently problematic in SOGICA credibility assessment within MS. Therefore, the first sub-question to be considered is: *what are some of the central issues when assessing the credibility for SOGI minority asylum seekers and what could a proposed EU framework do to mitigate these?* This sub-question will focus on the recurrent problems arising from how SOGICA credibility assessments are currently performed. This thesis will argue that the main issues when assessing SOGICA as credible, arise from the prevalent use of stereotypes by adjudicators; how having long-term opposite sex relationships or children disadvantages queer asylum seekers; the consideration of sexual behaviour over identity; the use of medical, psychiatric and psychological tests to 'prove' SOGI; and taking the applicant's demeanour into account.

The second sub-question will consider the methodolgy to bring a human rights and dignity approach to credibility assessment. The most commonly promoted model is S Chelvan's *Difference, Stigma, Shame and Harm* (DSSH) model. The UNHCR has recognised the DSSH model of credibility assessment within its *Guidelines on International Protection No 9: Claims to Refugee Status Based on SOGI.* [4] The DSSH model was created in 2011 by barrister S Chelvan, and further developed in 2015 in a non-binding training manual *'Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual. Volume 2*' by Chelvan and other asylum experts.[5] The manual attempts to shift the perspective of asylum questioning from whether someone is LGBTI, to whether they are considered to be outside of cisgendered and heteronormative roles within society, and whether this has a repressing or ostracising effect extreme enough to warrant refugee status. DSSH stands for the four elements that the model considers: difference, stigma, shame and harm originating from being LGBTI in a repressive society. Therefore this sub-question will focus on whether *the DSSH model is the most appropriate model to implement and what are its criticisms?* This question will mostly be addressed within chapter four of the thesis. It shall be argued that the most prominent criticisms of the DSSH model focus on the methodology's foundation

[4] UNHCR, Guidelines on International Protection No.9: Claims of Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Art1A(2) 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees,2012

[5] Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures. A Multidisciplinary Training Manual. Volume 2* (2015)

in homosexual male perspectives, using this perspective as its default and therefore being disadvantageous when used for women, bisexual, trans and intersex applicants. The chapter also considers further arguments raised by the literature, such as Westernisation within the DSSH model; whether the inclusion of shame is appropriate and universal and whether is it easier to create a false narrative under the DSSH model than the current system. This thesis concludes that the DSSH model must be adjusted to properly take these criticisms into account, however, the model provides a helpful basis for efficient and respectful credibility assessment of SOGICA.

This thesis will also consider *how the proposed recast of the CEAS affects SOGICA, and what can be done in order to improve the human rights situation of SOGICA?* This sub-question will consider how a framework for assessing the credibility of SOGICA can be codified into EU law, through explicit references in regards to what guidance and training should be instituted by MS. With the right verbage, the laws could ensure that data and statistics of SOGICA are taken to provide an accurate, updating source of information that would serve as the basis for future adjustments as needed. The sub-question will then examine what is lacking in current proposals to change the CEAS and how these proposals should reconsider the necessity of instituting a standardised methodology for SOGICA credibility assessment that respects human rights and dignity.

An additional sub-question will consider: w*hat role could the EASO play with regards to SOGICA?* As the EASO is the EU's expert centre on asylum and is working on developing the CEAS and providing practical support for MS, it would surely have a role in any proposal put forward by this paper. This thesis argues that the EASO has several important roles to play in creating and establishing a common framework for the credibility assessment of SOGICA. The EASO should: 1) create research, data and statistics in order to support EU Member States (MS) in SOGICA; 2) create detailed country of origin information (COI) that explicitly refers to the situation SOGI individuals within these countries; 3) provide guidance to MS on how to assess credibility, producing said guidance on the revised DSSH model; and 4) provide frequent and high-quality training on how to implement the framework and assess credibility.

SOGICA is a large and diverse topic, easily liable to expand into multitudes of nuanced subfields pertaining to both before and after the process. Whilst these would be of interest and worth to study, not all of these facets can be adequately considered within this paper. Therefore, topics such as reception conditions and integration shall not be considered,

as this paper will focus on credibility assessment and its corresponding methodologies. Some large reaching concepts, for example the role of interpreters in the asylum process, may also have an implication on credibility, but merit a full research proposal that this thesis would not have enough time to do justice.

In addition, M Yanick Saila-Ngita has called for change at the UN level, with the implementation of the DSSH Model as an optional protocol. This paper recognises that adding this protocol at UN level has the advantage of addressing a larger geographic scope than implementing these changes as EU legislation. However, this thesis will focus on change at the EU level, as it is convinced that it is more feasible to enact effective change at the EU level where the guidelines are not merely optional, allowing the space for a binding and enforceable framework applicable to all MS. This thesis acknowledges that change in the realm of UN legislation represents an area of interest to which supplemental research could be devoted to.

1.2 STATE OF THE ART

The CEAS aspires towards asylum applications being conducted in a manner, 'fair and effective throughout the EU and impervious to abuse.'[6] However, multiple reports have shown that for SOGICA, the way in which the credibility is assessed can vary depending on which MS they apply in.[7]

The issue of credibility in SOGICA in the EU was acknowledged in the Court of Justice of the European Union (CJEU) cases of *XYZ v Minister voor Immigratie en Asiel,*[8] *ABC v Staatssecretaris van Veiligheid en Justitie*[9] and *F v Bevándorlási és Állampolgársági Hivatal.*[10] The CJEU in *XYZ* stated that criminalising same-sex activities amounted to persecution and that therefore being gay (other LGBTI identities were not considered) meant belonging to a 'particular social group' under EU asylum law. This case was essential for demonstrating that being LGBTI, when coupled with persecution, is a reason for gaining refugee status. This cemented the concept that being LGBTI meant having 'membership of a

[6] European Commission, 'Common European Asylum System' (*Migration and Home Affairs)*<https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en>accessed 3February2019
[7] See Sabine Jansen, Thomas Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (2011)<https://www.refworld.org/docid/4ebba7852.html>;FRA, *Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers* (2017)
[8] [2013](C-199/12,C-200/12,C-201/12)
[9] [2014](C-148/13,C-150/13)
[10][2018](C-473/16)

particular social group' which, as under the 1951 Geneva Convention on the Status of Refugees, is necessary to be recognised as a refugee. Furthermore it stated that gay asylum seekers cannot be asked to return to their country and 'be discreet' about their SOGI, ending the so-called 'discretion principle', where SOGI minorities were denied asylum on the basis they would not be persecuted if they were 'discreet' about their SOGI. According to multiple sources, after *XYZ* the credibility of SOGICA became the main reason for denial of refugee status, whereas previously it had been the discretion principle.[11] A year later, the case of *ABC* concerned itself with the limits of what could legitimately be used to credibly assess sexual orientation. The CJEU stated that assessment cannot be based solely on stereotypes, and that medical tests or evidence such as videos of sexual acts breach human dignity and the right to privacy. Even more recently in 2018 the case of *F v Bevándorlási és Állampolgársági Hivatal*[12] continued the line of reasoning within *ABC* and stated that psychological tests cannot be used to 'prove' an applicant's sexual orientation. Importantly, it also specified that it is not always necessary to assess the credibility of an applicant's sexual orientation if persecution based on perceived sexuality can be demonstrated.

Whilst these cases were incredibly influential and progressive for the protection of LGBTI asylum seekers' human dignity and determined limits for what cannot occur during an asylum application, they did not proscribe affirmative practices.[13] In practicality, whilst these cases informed States and those working in the asylum procedure that certain things cannot be done or asked, there is still relatively little guidance about what can and ought to be. There is no extant EU legislation that explains how credibility assessment of LGBTI asylum seekers should occur.[14] As previously mentioned, the UNHCR has recognised S Chelvan's DSSH model. Despite this brief recognition, there is no legally binding methodology informing credibility assessment at the UN or another international level. Currently some MS have a national methodology, including Cyprus, Finland, Hungary and the UK who have attempted to use the DSSH model with varying degrees in success.

---

[11] See S Chelvan, 'At the End of the Rainbow: Where Next for the LGBTI Refugee?' (*University of Oxford*, 24January2014) <https://www.rsc.ox.ac.uk/news/at-the-end-of-the-rainbow-where-next-for-the-lgbti-refugee-s-chelvan>accessed 3March2019; Jansen(n7) 47; Erin Gomez, 'The Post-ABC Situation of LGB Refugees in Europe'[2016]30Emory International Law Review475,480

[12] *F*(n10)

[13] M Yanick Saila-Ngita, 'Sex, Lies, and Videotape: Considering the ABC Case and Adopting the DSSH Method for the Protection of the Rights of LGBTI Asylum Seekers' [2018]24Southwestern Journal of International Law275,276

[14] Andrea Mrazova, 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law' in Arzu Güler, Maryna Shevtsova, Denise Venturi(eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (SIP2019)188

The status and results of SOGICA remained somewhat neglected by legal discourse on asylum, the first large, comparative study focusing on the EU came as late as 2011; titled '*Fleeing Homophobia'*. The report was a combined project between COC Netherlands and VU University Amsterdam in operation with the Hungarian Helsinki Committee and the European Council on Refugees and Exiles. To obtain the requisite statistics and demographics, a questionnaire was sent to national experts from all MS aside from Estonia, Latvia and Luxembourg (where experts argued that they would not be able to report on SOGI based asylum) and also to Norway. This report had two main conclusions: firstly practices utilised when adjudicating SOGICA were not congruent, and secondly some practices were not compatible with standards of international human rights and refugee law.[15] It called for the EASO to create specific LGBTI asylum training modules (which have now been made, but have lower participation than other modules[16]) and for SOGICA to be a standard part of asylum officials' education.[17]

More recently, in 2017 the EU's Agency for Fundamental Rights (FRA) completed a comparative report with similar findings. The report found that MS still do not collect official statistics for SOGI based asylum.[18] This lack of statistics and research is highly problematic. Without empirical data it is very difficult to objectively assess how SOGICA is treated by MS and therefore what, if any, guidance needs to be given by the EU. Therefore, this paper will rely on the research and data provided from other, non-governmental sources. In addition, the FRA report found that only a few MS had specific guidelines and that stereotypical conceptions about LGBTI persons still severely impacted asylum interviews.[19]

Throughout the literature on the topic there are multiple calls to change the varying and inconsistent methodologies currently employed by MS. Andrea Mrazova argues that Common European Guidelines must be adopted for SOGIA credibility assessment, and if not that then MS must be responsible for definitely ensuring the application of existing guidelines from the UNHCR.[20] Another concept Mrazova considers is to create a Communication such as COM/2009/313 which gave precise criteria when questioning suspected marriages of convenience.[21]

---

[15] Jansen(n7)19
[16] EASO, *EASO Training Curriculum* (2016)
[17] Jansen(n7)9
[18] FRA(n7)2
[19] Ibid,2
[20] Mrazova(n14)204
[21] Ibid,197

M Yanick Saila-Ngita, asks for S Chelvan's DSSH model, to be added as a protocol at UN level, rather than simply remain recognised briefly within UN Guidelines.[22] M Yanick Saila-Ngita argues within his paper that the DSSH model should be added as an optional protocol to the 1951 Convention on the Status of Refugees in order to make it legally binding to those States who choose to sign the protocol.

Jasmine Dawson looks in depth at a criticism of the DSSH model. She argues that whilst the DSSH model is a definite improvement to credibility assessment, it takes gay (not bisexual) males as the default applicant and attempts to slot all other members of the LGBTI community within this framework, which evidently disadvantages them.[23] It is objectively inefficacious work from the standpoint of a male archetype on an issue that is intrinsically outside of gendered and sexual norms. Other reports criticise the DSSH model relate as whilst several MS may use it in theory, they fail to adhere to its principals in practice.[24]

1.3 METHODOLOGY

This thesis will focus primarily on the review of the relevant academic literature, with the aim of creating a theoretical framework to critically evaluate the current primary sources relating to SOGICA from international and European law. In addition, relevant reports that have engaged in both field work and interviews with experts, NGOs and refugees themselves will be considered as well as case law in order to consider State practice in its actuality. Other documents that supplement primary sources such as UN Guidelines will also be analysed.

This paper will use a gendered and queer lens throughout, following the research of Dawson, extending its boundaries to fully consider trans and intersex individuals, who are often neglected within the relevant literature or by authorities.

1.4 OUTLINE OF RESEARCH

This thesis is split into four main chapters, each of which develops the idea of SOGICA and humane, dignified credibility assessment within the EU. After this introduction, the second chapter will consider the legal basis of SOGICA. It shall consider UN law and guidance, the

---

[22] Yanick Saila-Ngita(n13)275,297

[23] Jasmine Dawson, Paula Gerber 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?'[2017]29International Journal of Refugee Law292

[24] FRA(n7)6

Yogyakarta Principles and relevant EU law. The third chapter shall address the problems that have occurred whilst assessing the credibility of SOGICA, namely stereotyping, perceived former 'heterosexual' actions, sexual behaviour as an indicator, the use of medical, psychiatric and psychological tests and conclusions drawn from the behaviour of applicants during the asylum process. The next chapter will analyse S Chelvan's *Difference, Stigma, Shame and Harm* model and the various criticisms that have been established within written discourse on the topic. This thesis will use these criticisms to make suggestions with the aim of improving the model for a framework that should be implemented throughout the CEAS. The final chapter will discuss how such a framework can be added into EU law. This examination will be carried out by analysing the situation of CEAS as it stands currently, as well as analysing the proposed recast of the CEAS and finally, shall consider the role of the EASO in implementing such a framework.

2.

THE LEGAL BASIS OF SOGICA

This chapter will consider the legal basis of SOGICA at both international and regional levels. The aim of this chapter is to acquaint the reader with the current legal standing of SOGICA at the EU level, in order to elucidate areas where improvements could be achieved in order to answer the main research question as to whether a common European framework should be implemented and how such a framework would be effectively implemented. The chapter will begin by considering the UN level, in particular the Geneva Convention of 1951 and its 1967 Protocol that provides the legal basis of refugee law for not only the UN, but also the EU (2.1.). It will then go on to discuss the role played by the Yogyakarta Principles with regards to SOGICA (2.2.). Next the chapter will consider EU legislation, with particular regard to the Qualification Directive (QD) of 2011 and the Charter of Fundamental Rights of the European Union (CFR) (2.3.). Finally, this chapter will conclude by looking at the three CJEU cases that have tackled the issue of SOGICA: *XYZ v Minister voor Immigratie en Asiel* [2012]; *ABC v Straatssectaris van Veilgheid en Justitie* [2014]; and *F v Bevándorlási és Állampolgársági Hivatal* [2018] (2.4.).

2.1 SOGICA AT THE UN LEVEL

The basis of current international law pertaining to refugees stems from the 1951 Geneva Convention on the Status of Refugees. Whilst this core Convention initially suffered from limitations based on geography and time, the addition of the 1967 Protocol ensures the effects of the Convention were more widely applicable, and even earned the document the epithet 'the Magna Carta for refugees'.[25] The rights contained within the 1967 Protocol and the 1951 Convention are identical, and almost all of the States who initially signed the Convention have signed the Protocol.

[25] James Read, GJ van Heuven Goedhart, *Magna Carta for Refugees*(United Nations,1953)

Within the Convention, for a person to successfully gain refugee status they must fulfil certain criteria that can be found under Article 1A(2): in addition to a well-founded fear of persecution, the persecution must derive from one of a number of closed reasons, the applicant's 'race, religion, nationality, membership of a particular social group or political opinion'.

It is clear that within the text neither sexual orientation nor gender identity are explicitly listed as reasons for granting asylum. In fact, in 1951 even the countries that today accept the most SOGI minority refugees would have themselves discriminated against LGBTI persons.[26] It cannot be construed that when the phrase 'particular social group' was written that it was meant to include SOGI minorities. In fact, 'a particular social group' was more likely to be comprehended as those who were targeted by nascent socialist States.[27] However, this issue has been clarified with the publication of the UN *Guidelines on International Protection No. 9* pertaining to SOGI minorities, which replaced a guideline from 2008. Both of these documents confirmed that SOGI minorities are included within the signification of the phrase, 'a particular social group', the later clarifying that 'race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap' and therefore that there may be more than one ground to grant asylum for an individual applicant.[28]

Additionally, a significant judgment that classifies and defines the phrase 'a particular social group' derives from the 1993 case of *Canada (Attorney General) v Ward.*[29] Whilst this case did not expressly mention SOGI minorities, it clarified that 'a particular social group' can be broken down into three categories: 1) 'groups defined by an innate, unchangeable characteristic;' 2) groups that choose to associate, that cannot be forced to not associate as such an association is based on reasons fundamental to human dignity; and 3) groups who associate in way that was once voluntary, but now is not because of 'its historical permanence.'[30] The subcategory that has traditionally been employed when referring to LGBTI applicants, is the first, that of 'groups defined by an innate, unchangeable

---

[26] Chelvan(n11)
[27] Raphael Ruppacher, 'Not that Kind of Gay: Credibility Assessment and the Concept of Sexual Orientation in European Asylum Law' (2015)EMA Awarded Thesis<https://repository.gchumanrights.org/bitstream/handle/20.500.11825/333/Ruppacher_2014□2015.pdf?sequence=4&isAllowed=y>accessed 1February2019
[28] UNHCR(n4)para40
[29] [1993]2SCR689
[30] Ibid,p7-8

characteristic'.[31] This decision was later echoed by the UN *Guidelines on International Protection No. 2* which gives two approaches to interpreting 'a particular social group'. The first is the 'immutability approach'[32] in which 'a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it'. The second is the '"social perception" approach' which considers whether a characteristic of the group sets them apart from the majority in a way that the majority perceives as reprehensible or meriting repression.[33] The guidelines explicitly refer to the fact that homosexuals and women can use both of these approaches as grounds for asylum. It does not mention trans or intersex persons, however the phrase 'a particular social group' is not considered to be a closed list, and would additionally allow for the inclusion of trans people (and potentially other groups of people who in the future may be considered a social group) under the same legal grounds. In regards to the 'immutability approach', within current discourses of queer theory the concept which postulates being LGBTI is either innate or unchangeable is outmoded and subject to debate, which has its own implications for SOGICA.[34]

2.2 SOGICA IN THE YOGYAKARTA PRINCIPLES

In addition to the UN, other international instruments refer to SOGICA. In 2006 the Yogyakarta Principles were published after a meeting of human rights experts aimed to affirm pre-existing binding obligations relating to SOGI to which all States ought to comply. The Yogyakarta Principles are not human rights laws in their own right, but are instead meant to act as a guide in order to follow existing human rights norms.[35] However, despite supposedly applying universally, the Yogyakarta Principles have been rejected by the UN General Assembly, with criticism from Russia, Malawi and South Africa.[36] In addition, no UN human rights bodies, the EU nor the Council of Europe have fully endorsed the principles

---

[31] Ibid,p7
[32] UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Art1A(2)1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees,UNdoc.HCR/GIP/02/02(2002)para6
[33] Ibid,para7
[34] Ruppacher(n27)
[35] Yogyakarta Principles, 'The Yogyakarta Principles' (YP,10November2017)<https://yogyakartaprinciples.org>accessed 5January2019
[36] International Service for Human Rights, 'Majority of GA Third Committee Unable to Accept Report on the Human Right to Sexual Education' (*International Service for Human Rights,* 26October2010)<http://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education>accessed 10June2019

publicly. Although the Principles act as a guide to pre-existing international human rights, many countries argue that they are too far-reaching and go beyond international responsibilities that they have previously agreed to, or even that they contradict other rights such as the freedom of religion and speech.[37] Nevertheless, the Council of Europe has recognised certain aspects of the Principles[38] and the CJEU has referenced them.[39] They have, in addition, been referred to by national courts and governments.[40] The Yogyakarta Principles hold tremendous potential to aid SOGI minorities in many realms of human rights issues, not just SOGICA.

Despite their lack of endorsement at the international level, the Principles remain an important and respected document worthy of recognition within this thesis. Whilst the UN requires States to protect SOGI minorities from discrimination, the current 'international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.'[41] The Yogyakarta Principles aimed, amongst other objectives, to remedy this fragmentation. Many of the principles have direct application to SOGICA, however the most apparent is Principle 23 which states that:

> "Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity."[42]

This Principle is derived from the Universal Declaration of Human Rights, and rather than specifically manipulating a pre-existing human right to apply to LGBTI individuals, it affirms that the right is for 'everyone': recognising that the right to seek and enjoy asylum is a

---

[37] Stefano Gennarin, 'Countries Reject Declaration of Homosexual Rights at OSCE Gathering' (*Center for Family & Human Rights*, 18July2013)<https://c-fam.org/friday_fax/countries-reject-declaration-of-homosexual-rights-at-osce/>accessed 8June2019

[38] See: Thomas Hammarberg, 'Commissioner for Human Rights - Human rights and Gender Identity' (Council of Europe, Commissioner for Human Rights, Mandate 2006-2012); Andreas Gross, 'Discrimination on the Basis of Sexual Orientation and Gender Identity' (Council of Europe, Parliamentary Assembly,2010)

[39] *F*(n10)para62

[40] Michael O'Flaherty, 'The Yogyakarta Principles at Ten' [2015] Nordic Journal of Human Rights33(4)280

[41] International Commission of Jurists, 'Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (*ICJ*, March2007)<https://www.refworld.org/docid/48244e602.html>accessed 23April2019

[42] The Yogyakarta Principles,Principle23

universal human right that SOGI minorities are systematically denied.[43] Furthermore, additional Yogyakarta Principles, such as the right to privacy[44] and the right to protection from medical abuses,[45] contain potential refinements for SOGICA. Importantly for this thesis, the Yogyakarta Principles attempt a move away from a Westernised concept of SOGI and also group-by-group analysis (e.g. looking at gay men, lesbians, trans persons, bisexuals, intersex persons etc as separate groups). This paper argues that a Westernised concept of SOGI has dictated much of the research on and approaches to SOGICA and should be avoided, but it also considers that whilst a 'group-by-group' analysis may not always be appropriate, it is important to consider the wide range of identities within SOGI during the asylum process.

As has been mentioned, the Yogyakarta Principles do not create rights but instead intend to clarify rights that arguably already exist within international law. Therefore, MS should already follow these principles; though it is clear from internationally reported discrimination and unequal treatment of SOGI minorities that this is not the case. Accordingly, there as there is no international endorsement or acceptance of the Yogyakarta Principles, and therefore there is no mechanism in order to enforce compliance.

2.3 SOGICA AT THE EU LEVEL

With regards to SOGICA at the EU level, the EU recognised the right to asylum within Article 18 CFR which guarantees adherence to the 1951 Geneva Convention and the 1967 Protocol. In addition, the EU has recognised sexual orientation as a 'particular social group' since 2004.[46] The current legal instrument, the 2011 QD, follows the UN distinction of approaches categorising SOGICA applicants as sharing an innate characteristic, or perceived as different by society, as being 'a particular social group'.[47] The Directive also explicitly recognises sexual orientation as a common characteristic developed along unique lines depending on the country of origin. It furthermore stipulates that gender identity 'shall be given due consideration for the purposes of determining membership of a particular social

[43] ORAM, 'Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles' (ORAM, September2010)<http://www.sogica.org/wp-content/uploads/2018/11/Yogyakarta-Principles-Article-by-ORAM-September-2010.pdf>accessed 23April2019
[44] The Yogyakarta Principles,Principle6
[45] The Yogyakarta Principles,Principle18
[46] Qualification Directive(2004/83/EC),Art10(1)(d)
[47] Qualification Directive(2011/95/EU),Art10(1)(d)

group or identifying a characteristic of such a group'. Notably, the Directive does not place gender identity within the same category as sexual identity. Gender identity has a seemingly lower threshold of protection, merely to be given 'due consideration', as opposed to the explicit recognition of sexual orientation. The vagueness of the term 'due consideration' has the semblance of a rhetorical feint; it appears to promise security although it could potentially allow for dubious interpretations of the term. This has yet to be interpreted by the CJEU, however from an intersectional and queer perspective, it is problematic that gender identity and sexual orientation should be treated as adjacent or separate categories evaluated at varying levels of importance.

Article 4 QD is additionally pertinent, and instructs MS on how claims of asylum should be assessed. Whilst Article 4(1) does place the duty of the application onto the applicant, Article 4(3) stipulates that the assessment of an application needs to be done on an individual basis, by evaluating all relevant facts, documents and circumstances of the particular asylum seeker. However, as with many other types of asylum seeker, queer asylum seekers, particularly those who have hidden their SOGI, are unlikely to possess documents in order to support their claims (applicants who may have acted as activists in their country of origin are the exception to this).[48] In this case, individual statements compared with COI should be utilised in order to assess an asylum claim. This can illuminate the objective elements of SOGICA. Whilst this safeguard may protect the many asylum seekers who do not possess supporting documents, it is weakened by the fact that many States lack sufficient and current COI. What information States possess may also lack proper scope such as by taking account of information regarding criminalisation alone, and not the political and social actuality of present circumstances for SOGI minorities in a particular country.[49] Where there is an absence of COI, it is often interpreted as grounds that said country is safe for LGBTI persons.[50] Even within the limited COI in general it has been noted that there is particularly very little COI information surrounding bisexuals.[51] The same can be said for trans and intersex persons who are even excluded from an EU handbook aimed to help research the situation of lesbian, gay and bisexual persons in their country of origin.[52] Therefore, based on

[48] Mrazova(n14)187
[49] Jansen(n7)10
[50] Ibid,71
[51] UNHCR, 'The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees'(2010)UNCHR Roundtable<https://www.refworld.org/pdfid/4cff9a8f2.pdf>accessed 25April2019
[52] EASO, *Researching the Situation of Lesbian, Gay, and Bisexual Persons (LGB) in Countries of Origin* (EASO,2015)

this limited amount of information that may be pertinent to SOGICA any framework proposed by this thesis will have to take this lack of information into account.

As previously mentioned the Article 18 CFR brings EU law regarding refugees in line with UN law and the Geneva Convention, however there are further relevant Articles within the Charter. Whenever relying on the CFR it is important to remember that it only applies to the institutions and bodies of the EU, and to MS only when they are implementing EU law.[53] As can be seen above through the various provisions of EU law relating to asylum, it is clear that asylum fits within EU law and therefore that the rights within the CFR do apply. Additional relevant Articles are that of Article 1, human dignity; Article 3, the right to integrity of the person; Article 7, respect for private and family life; and Article 19, protection in the event of removal, expulsion or extradition. With regards to credibility assessment, the first of these three Articles will be significantly useful when considering how to execute credibly assessing SOGICA. The subsequent chapter will continue a discussion of this topic as MS have been infringing these rights. This paper will argue that whilst these human rights have been both in place and binding on MS, the fact that they have been ignored demonstrates a need for further and more explicit instruction when assessing the credibility of SOGICA.

A more recent EU document relevant for SOGICA is the 2013 Asylum Procedures Directive (APD).[54] Within the preamble of the Directive, both sexual orientation and gender identity are listed as aspects of certain applicants who may need 'special procedural guarantees'. There is an open list of conditions potentially exigent for these applicants, such as support and time in order to substantiate their claim. This concept of sufficient time may be particularly important as many LGBTI asylum seekers do not declare their SOGI during their first asylum interview, but later, which may hurt the credibility of their case. This phenomena often occurs due to the sensitivity of 'coming out', particularly after living in a country where SOGI minorities are persecuted.[55] Article 2(d) recognises that those in need of 'special procedural guarantees' may be limited by their individual circumstances to both benefit from the rights conferred by the Directive and also comply with its obligations. In addition, Article 24(3) states that asylum seekers who have 'special procedural guarantees' need to be supported throughout the duration of the asylum procedure. The Directive also

[53] Charter of Fundamental Rights of the European Union(2000/C 364/01)Art51(1)
[54] Asylum Procedures Directive(2013/32/EU)
[55] Jansen(n7)67-68

explicitly references SOGI within Article 15(3)(a) ensuring that an asylum interviewer competently assesses an asylum seeker's SOGI.

Whilst these documents and cases are a step forward for the EU, there is still no affirmative law providing consistent and reliable methodologies for credibility assessment. In 2016, the Commission proposed a reform, in which the QD and APD would be changed into Regulations, however the reform has not been adopted.[56] The recast did not include a change to how credibility is assessed in SOGICA. In order to answer the main research question of this thesis, the fifth chapter will look at the proposed reform and attempt to determine whether a framework for SOGICA assessment should be included in this reform and, if so, how.

As well as the established legislation and guidance from various international institutions and the EU itself, the CJEU has given guidance that is relevant to SOGI based asylum within the EU. There are three main cases that tackle this issue: *XYZ v Minister voor Immigratie en Asiel* [2012]; *ABC v Straatssectaris van Veilgheid en Justitie* [2014]; and most recently *F v Bevándorlási és Állampolgársági Hivatal* [2018]. Each of these cases have further developed the law relating to SOGICA in the EU.

The case of *XYZ* confirmed that homosexual orientation (it is important to note that other SOGI identities were not considered and all applicants were male) warrants being part of 'a particular social group'.[57] Whilst multiple MS had already come to this conclusion, this decision forced all MS to comply, an important first step towards a common SOGICA system.[58] The reasoning of the Court for this decision mirrors what has been previously discussed, declaring that 'it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it'[59] and that the existence of laws criminalising homosexuality means they are seen as a particular social group by society as a whole.[60]

Another aspect of the ruling considered to what extent the criminalisation of homosexual acts could be considered to be persecution with regards to Article 9(1) and (2) of the QD. Read conjointly, these state that for the relevant acts to be considered as persecution

---

[56] Proposed Qualification Regulation COM(2016)466final
[57] *XYZ*(n8)
[58] Allan Briddock, 'The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure'[2016]4(1)BLR123,135
[59] *XYZ*(n8)para46
[60] Ibid,para49

they must be 'sufficiently serious' enough to constitute a 'severe violation of basic human rights' through either the nature of the act itself, or an accumulation of various acts.[61] Based on this, the Court held that infringing Article 8 ECHR (and therefore Article 7 CFR) that occurs from the criminalisation of homosexual acts is not 'sufficiently serious' enough in itself to constitute a 'severe violation of basic human rights' under Article 9(1) QD. This judgment does not seem to consider the accumulation of acts that infringe the right to privacy. This is despite the fact that criminalisation not only puts SOGI minorities in danger of criminal punishment because of their SOGI, but also induces discrimination from non-State actors. This then forces SOGI minorities into an extremely vulnerable state, unprotected against myriad discriminations and repressive actions by both State and non-State actors.[62]

Another important aspect of this ruling was that of the principle of discretion. In this regard the CJEU did apply a level of protection satisfactory from a human rights perspective, one that the ECtHR has since failed to do.[63] The Court held that 'requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it'[64] and therefore it would be incompatible with the grounds of asylum, for an asylum seeker to have to maintain concealment of their SOGI in order to evade persecution.[65] With regards to the aim of this thesis this is an excellent development as it set a clear standard common to all MS; asylum cannot be denied on the basis that the applicant remains 'discreet'. This can be held to be part of a standardised framework that all MS must follow rather than prior to this judgment where different MS may have required discretion to different extents.

Following just one year later from *XYZ* is the case of *ABC v Straatssectaris van Veilgheid en Justitie* this case was incredibly important for the development of the limitations of what evidence can be used for credibility assessment in SOGICA cases. More recently in 2018 the case of *F v Bevándorlási és Állampolgársági Hivatal*, like *ABC*, discussed and improved the limitations of what evidence can be used in SOGICA. Both of these cases were

---

[61] QD(n47)Art9(1)
[62] Human Dignity Trust, 'Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations' (*HDT*, 2016)<https://www.humandignitytrust.org/wp-content/uploads/resources/Criminalisation-of-Homosexuality-and-Good-Governance-1.pdf>accessed 26April2019
[63] *ME v Sweden*[2014]No.71398/12
[64] *XYZ*(n8)para69
[65] Ibid,para70

highly influential for SOGI credibility assessment and for ensuring the protection of human rights and dignity. However, as has been mentioned, they do fail to provide a positive example of what asylum adjudicators should do when assessing asylum. The next chapter of this paper will delve into the minutia of these cases and explore their results further.

2.4 INTERMEDIATE CONCLUSION

This chapter has considered several examples of international level legal instruments, and cases that relate to SOGICA with the aim of familiarising the reader with the current legal concepts behind how SOGICA currently operates at the EU level, which is necessary before considering the benefit of applying an additional framework for how SOGICA should be assessed. The Geneva Convention can be considered the most important authority in modern asylum law, with Article 1A(2) giving the accepted definition of what makes a refugee. This definition is explicitly mentioned in EU law, bringing all EU countries within the same framework. Most importantly for this thesis the types of people who can be considered refugees are listed, and SOGI minorities are not explicitly named. There is, however, mention of ‘a particular social group’ which through case law and UN Guidelines has come to include SOGI minorities. This chapter also considered The Yogyakarta Principles, which whilst not binding law themselves, were compiled by SOGI experts in order to establish what principles and rights SOGI minorities are accorded in international law, and attempts to provide a codification of them in one place. Finally this chapter looked at the status of EU law relating to SOGICA, both through legislation and the development of case law. As the reader is now acquainted with the law that relates to SOGICA, the thesis will go on to consider the relevant sub-questions to answer whether a standardised framework for credibly assessing SOGICA should be implemented at the EU level and how.

3.

ISSUES WHEN ASSESSING CREDIBILITY

To establish the grounds which have prompted a serious investigation into whether it is appropriate for the EU to create a framework for SOGICA, one must first establish that there is a need for such a framework by demonstrating that. This chapter will demonstrate the inefficacy of putting individual MS in charge of the task of creating, implementing and maintaining a system of SOGICA that respects human rights whilst providing consistent, accurate outcomes throughout all MS, and consequently illuminate the necessity for EU intervention. In doing so, this chapter will analyse various problems that persistently plague the asylum process for SOGI minorities and demonstrate the manifold problems with the current methodology used by MS for credibility assessment, focusing on considerations of methodology concerning the assessment of each claim by adjudicators. These assessments attempt to verify the applicant's claim of being queer and whether they are the victims of persecution. It will examine various reports that have been created in this area as well as consider relevant academic literature on the subject. Therefore, the purpose of this chapter is to demonstrate that there are problems with the way that SOGICA is assessed within MS currently and will support the hypothesis of this thesis that a common framework should be established.

This chapter will consider some of the main problems prevalent within SOGICA that relate to credibility assessment. The first issue that will be considered is the prevalent use of stereotyping within credibility assessment, even after the judgment of *ABC* (3.1.). This will be followed by a consideration of how previous long-term opposite sex relationships and having children could disadvantage claims (3.2.). Then the essay will investigate how examinations of sexual behaviour were prevalent to a higher degree than analysis of identity; despite progression made by case law in this field (3.3.). Similarly, the next subchapter shall undertake to demonstrate that despite the cases of both *ABC* and *F v Bevándorlási és Állampolgársági Hivatal* adjacently stating that medical, psychiatric and psychological tests cannot be relied upon in these matters, there is still a need for EU enforcement (3.4.). Finally,

this chapter will analyse how and why the demeanour of the applicant being used to assess the validity of a claim is particularly problematic for SOGI based asylum applicants (3.5.).

3.1 STEREOTYPING

An immediate issue hampering asylum assessment derives from the frequent use of stereotypical assumptions and tropes about LGBTI identities on the part of asylum officials.[66] This subchapter will go on to demonstrate how the use of such stereotypes within SOGICA intrinsically cannot be the same in each MS (and even between places within individual MS) and therefore is indicative of the need for a common European framework. In the case of *ABC* the CJEU held that whilst a judgment cannot rely solely on stereotyped concepts and questions, they can be useful for asylum officials when adjudicating. This thesis, concurring with previous literature on the topic, argues that the judges' decision was problematic not only to allow, but to suggest the use of stereotypes in certain instances, as such stereotypes reveal more about the ignorance and prejudice of the questioner than bear upon the reality of the applicant and consequently should not be allowed within legal determinations.[67] The particular wording of this ruling can be interpreted to mean the Court would tolerate, even support the utilisation of these dangerous and misleading tropes.[68] Furthermore, by insinuating that pernicious stereotypes might be legitimate tools, the ruling creates a dangerous situation, lacking any safeguard or protections for individuals whose identity does not conform with a particular asylum adjudicator's stereotypical notions about SOGI minorities. This subchapter will argue that stereotypes should not be used as part of the credibility assessment for SOGICA, and believes that the EU should create guidance for MS in order to rectify the gross error created in *ABC*, and make sure no MS use stereotypes or tropes when assessing SOGICA.

The case of *ABC* was the first time the use of stereotyping during SOGICA assessment had been considered by the EU. As with *XYZ*, the three applicants were gay males with claims held to be uncredible. Here, two of the three had submitted video evidence of themselves committing homosexual acts which had been rejected. With regards to the potential invasiveness that this type of evidence, the Court was asked what limits were set by Article 4 QD and the CFR (particularly Articles 3 and 7) when assessing the credibility of

[66] Ruppacher(n27)
[67] Gomez(n11)475,495
[68] Gomez(n11)475,495

SOGICA. The use of pornographic videos and photos will be discussed in a later subchapter (3.3), but importantly for this subchapter the decision provided guidance to MS concerning the use of stereotypes in credibility assessment. It is evident within the judgment that assessment based solely on stereotyped notions of homosexuality (other queer identities were not considered) cannot be wholly relied upon to establish credibility and that the individual's personal and situational circumstances must be taken into account.[69] However, within the same paragraph the judges do state that 'questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment'[70] which has been criticised by scholars and activists and will be discussed throughout this subchapter.

The argument of this thesis, and of much queer scholarship and public opinion, is that SOGI is not an identity within itself, but rather a part of a person's background that, along with other elements, pose the basis for the formation of identity.[71] Having a particular SOGI (similar to belonging to a certain sex or race) does not, and should not be considered to, give a person defining characteristics, manners or behaviour, and asylum authorities should not adjudicate with stereotyped notions that assume this is the case. There is no formula for how SOGI minorities ought to comport themselves, and relying on these stereotypes puts SOGI minority asylum seekers into an 'evidential prison' where they are forced to conform to the denigrating characteristics of prejudiced tropes.[72] In addition, the stereotyped conceptions held by such officials are intrinsically influenced by their cultural, social, economic and political contexts, and frequently appear as Westernised.[73] Furthermore, stereotypes regarding LGBTI persons are often focussed on the experiences of homosexual men, leaving sexual minority women, bisexual men and trans and intersex persons even less likely to fulfil some of these stereotypes which creates a unique disadvantage for their cases at the outset of the asylum process.[74] Finally, in actual situations where people with similar SOGI backgrounds share certain characteristics, it has been commented that such patterns appear from social association and cultural influence, which may not correspond to the realities of many SOGI minorities.[75]

---

[69] *ABC*(9)para62-63
[70] Ibid,para62
[71] Ruppacher(n27)
[72] Hungarian Helsinki Committee(n5)67
[73] Chelvan(n11)
[74] Dawson(n23)
[75] Ruppacher(n27)

Three years later a FRA report regarding LGBTI asylum seekers found that SOGICA assessment connected to stereotypical views on SOGI minorities are common with asylum officers.[76] It was been found that 'adjudicators tend to judge applicants' claims according to their own expectations of how "normal" LGB applicants should look, behave, or feel.'[77] This is supported by the 2018 Austrian case mentioned in the introduction, which stated that applicant did not walk, dress or act like a homosexual.[78]

Fleeing Homophobia noted in 2011 how important it was that asylum adjudicators are conscious of their susceptibility to reliance on stereotyped conceptions of LGBTI identity, that they understand what tropes were used when considering cases, subsequently querying the validity of any stereotypes employed.[79] However, even with the advance made by *ABC* and the training modules that the report called for being produced, stereotypes persistently dictate asylum interviews within the EU.[80] In addition, due to lack of data on SOGICA, it is impossible to know to what extent these stereotypical notions are relied on by adjudicators or if they pass the boundary set by the *ABC* judgment's 'useful element'. In fact, this appears to be another problem with the *ABC* judgment that once again calls for a clearer framework for MS to assess SOGICA – there is no easily calculable test for when the use of stereotypes forms a 'useful element' or indeed passes into being the basis of the rejection or acceptable of SOGICA. Again, this could mean that the reliance of stereotypes in SOGICA assessment varies between MS. Therefore this thesis argues that this is another reason to not allow the use of stereotypes or tropes in a standardised framework issued by the EU for SOGICA.

The stereotypical notions that such asylum seekers are required to fulfil can also seem highly bizarre, in addition to the aforementioned problems of being Eurocentric and male-focused. One of the most prominent examples of this relates to queer specific 'knowledge,' this knowledge being a series of canonical cultural references assumed to be pertinent in queer communities and lifestyles. Applicants are questioned about their 'knowledge' in this field where questions purport to investigate participation or preference toward queer cultural production (history, music, film, literature.) The foundation of these practices rests on maligned and pernicious stereotypes and the absurd assumption that all queer persons actively and homogeneously partake in such media, entirely based on a Eurocentric standard,

---

[76] Ibid,2
[77] Gomez(n11)475,493
[78] France-Presse(n1)
[79] Jansen(n7)9
[80] Sabine Jansen, *Good Practices Related to LGBTI Asylum Applicants in Europe* (ILGAEurope,2014)

evidently problematizes how an asylum seeker responds to questioning.[81] One prominent example cited by multiple news sources to illustrate this is refers to a UK judge who asked a Ugandan lesbian if she had read any Oscar Wilde.[82]

Superfluous questions relating to queer 'scenes', which obviously take for granted that the applicant may have no desire to participate in such scenes, or that participation in said scenes would be affected by the level of repression and violence toward LGBTI communities in the applicant's homeland, or that there a plethora of possible reasons as to why it may not even be appropriate for them to engage in such scenes.[83] Whilst having knowledge of LGBTI scenes might be helpful in terms of supporting an individual claim, it is important that the lack of such knowledge or participation in certain communities is not used to reject a claim.[84] For example, whilst going to a gay bar may be behaviour that accurately depicts a conception of European LGBTI lifestyles, it fundamentally contradicts the values of an LGBTI person who abstains from alcohol. This abstention may originate from social or religious interdictions, phenomena much more common outside of Europe, which also correlates highly with countries that criminalise homosexuality. It is evident that to force such stereotypes upon SOGI minority applicants would result in skewed SOGICA results, comprise the dignity of the applicants, and waste resources on inaccurate methods. Therefore it is inappropriate for such questions to form any part of a credibility assessment, and also will necessarily change depending on the MS asking the questions, such as the aforementioned British Oscar Wild example. It is posed that any model developed by this research needs to take into account that lack of 'queer knowledge' is an inappropriate factor to find a negative assessment, whilst also realising that engaging and being aware of queer culture should aid a positive assessment.

In addition to such stereotypes regarding knowledge of queer scenes as being intrinsically Westernised, there is also a danger of them lacking a gendered approach. Women are disadvantaged when recreational activities, such as going to gay clubs and events, are considered as part of an asylum process. It has been acknowledged that the 'pink dollar market' (businesses aimed specifically at LGBTI persons) is made predominantly of

---

[81] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom'[2009]13IJHR391,399

[82] Jerome Taylor, 'Gay? Prove it Then – Have You Read Any Oscar Wilde?': Judges Accused of Asking Lesbian Asylum Seekers Inappropriate Questions' *Independent* (London, 4April2013)

[83] Jansen(n7)57

[84] Ibid,58

male clientele.[85] Furthermore, this thesis argues that this is even worse for trans, intersex and bisexual individuals, who may often feel excluded from physical queer spaces.[86] Demonstrating an active involvement in queer recreational activities such as visiting gay bars should still be considered as evidence of a person's SOGI and be considered demonstration of the threat of persecution however, when not participating in such activities is counted against that person's credibility, it comprises the legitimacy of the process by knowingly enforcing a faulty standard that cannot possibly correspond to all SOGI realities. This gendered and trans and intersex exclusionary aspect of stereotypical question yet further demonstrates the need for clear guidance from the EU, as well as a future framework being aware of these potential issues.

In a paper regarding LGB asylum seekers in Europe, Erin Gomez argues that due to 'the absence of state-mandated guidelines' adjudicators are allowed a 'wide discretion' that permits their decisions to be shaped by their own concept, both personally and culturally, of sexuality and other aspects that may affect it.[87] This thesis argues that such discretion has no place in the legal and humanitarian process of granting asylum. Allowing the idiosyncratic and stereotypical views of adjudicators to decide the fate of SOGI minorities in flight from persecution, dramatically contradicts the concept of the CEAS. It is resoundingly evident that precluding the use of crass and denigrating stereotypes, must be implemented by the EU. The model developed by this thesis to be implemented within a systemised framework must also take this into account.

3.2 PREVIOUS OPPOSITE SEX RELATIONSHIPS AND CHILDREN

Whilst tropes about SOGI minorities' appearance, dress, and behaviours are an inappropriate and present part of credibility assessment of SOGICA, another concept that has not received guidance from the CJEU concerns stereotypes about the way in which a SOGI minority may have conducted their lives prior to their application for asylum. This subchapter will consider how many asylum adjudicators find the fact that the applicant has been in an opposite sex marriage or long-term relationship, or has had children as evidence that their claim is not

[85] Sarah Keenan, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject' in Sharron FitzGerald(eds), *Regulating the International Movement of Women: From Protection to Control* (Routledge,2011)36

[86] Eleanor Formby, 'Why You Should Think Twice Before You Talk About 'The LGBT Community' (*The Conversation*, 8August2017)<https://theconversation.com/why-you-should-think-twice-before-you-talk-about-the-lgbt-community-81711>accessed 24May2019

[87] Gomez(n11)475,493

credible.[88] This practice creates problems on many different fronts. To begin with, the practice seems to ignore the existence of sexual minorities who are not exclusively attracted to the same sex, such as bisexual persons, perhaps even suggesting they are not worthy of asylum on these grounds; although this is fundamentally wrong. Even for those who do identify as only being attracted to the same sex, this line of thought appears to forget the global phenomena of many SOGI minorities who have lived 'double lives' with previous opposite-sex relationships, marriages and children.[89] The widespread nature of the double-life phenomena does not exclude Europe and there are well documented cases among many famous SOGI minorities. In addition to both of these factors, this practice also ignores the huge social pressures that SOGI minorities (and even heterosexual and cisgendered people) face in certain countries, not accounting for cultures which coerce individuals to marry against their will.[90] Furthermore, being married and having children may be necessary in order to hide one's true SOGI and the potentially fatal persecution that could follow.[91] The stereotype that LGTI persons (for the moment excluding bisexual and other related sexual minorities) could not possibly marry or have children is residual of reducing SOGI to behaviour alone (which will be discussed further in this chapter). This antiquated notion that LGTI persons are somehow not be capable of marrying or having children due to their SOGI has no place in the legal process.[92] Therefore, this thesis will again argue that having had children or a long-term opposite sex relationship should not cast doubt over the credibility of SOGICA, and these guidelines ought to be included within a methodological framework to be followed by all MS, which will be taken into consideration in the next chapter.

As with stereotypes, doubting credibility based on prior opposite sex relationships or having children disadvantages women more than men. As will be discussed in more detail in the next chapter, women tend to become aware of their sexuality later in life than men which may mean that they are more likely to engage in long-term opposite sex relationships and have children.[93] This is even more prominent in oppressive regimes where women's sexuality and sexual agency is taboo.[94] In addition to this, women are more likely to be confronted with forced marriage and corrective rape than sexual minority men, which adjudicators may fail to

---

[88] Mrazova(n14)193
[89] Jansen(n7)58
[90] Ibid,60
[91] Hungarian Helsinki Committee(n5)67
[92] Jansen(n7)60
[93] Alexander Martos, Sheila Nezhad, Ilan Meyer, 'Variations in Sexual Identity Milestones among Lesbians, Gay Men and Bisexuals'12(1)SexRes Social Policy24
[94] Hungarian Helsinki Committee(n5)78

recognise as resulting from the intersection of being gay and being a woman.[95] Immigration attorney and scholar Nielson writes that sexual minority women (who come from the most dangerous places to be LGBTI and therefore have the highest need to hide their sexual identity for fear of persecution) may find it the hardest to have their claims credibly assessed, as these individuals would likely not be able to socialise or have relations with another woman due to fear of the repercussions.[96] Even though the discretion principle was no longer considered a reason to deny asylum in the case of *XYZ* in the EU, the current methodology indirectly places s higher burden of proof on non-heterosexual women applicants.[97] This gendered imbalance of claims demonstrates a further reason for the adoption of a sensitive framework for SOGICA credibility assessment that takes factors such as gender and country of origin into account.

No research could be found as to whether having children or being married affected trans or intersex persons credibility during the assessment of their claim for asylum. It should be made clear that for intersex people it does not, as neither of these things relate to their intersex status. As for trans persons, it is possible that marrying a person of the opposite sex to their trans identity could be used as evidence to support their claim. However, once again marrying someone of the same sex as their trans identity cannot be used in support of an non-credible finding. Firstly, as with sexual minorities, trans persons may feel pressure to marry in a cisgender and heternomative conforming manner. Secondly, trans identity relates only the gender, and not sexuality. Trans people may also have a minority sexual orientation, so having a relationship with someone of the same gender should not cast doubt on the credibility of their gender identity. Again, this is a complicated matter that could improve with guidance and training. Any model used by the EU should take this into account.

3.3 SEXUAL BEHAVIOUR OVER IDENTITY

[95] Dawson(n23)292,314
[96] Victoria Neilson, 'Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims'(2005)16Stanford Law & Policy Review417
[97] Rachel Lewis, '"Gay? Prove It": The Politics of Queer Anti-deportation Activism' [2014]17(8)Sexualities958,961

The prevalence of stereotypes about how queer persons conduct their lives in substantial parts of the asylum process is indicative of the archaic medicalisation theories which centre on the belief held by adjudicators that SOGI is a behaviour, rather than an integral part of an identity. A further symptom of this is a line of questioning, evidence gathering and even medical and psychological testing which attempts to affirm credibility based on the sexual behaviour of the applicant. This problem was dealt with in depth by the CJEU within the case of *ABC*. As previously mentioned, two of the applicants had submitted pornographic material as 'evidence' of their sexuality. In this case, it was held by the CJEU that such documents, even when willingly produced by the applicant themselves, infringe Article 1 CFR: human dignity.[98] The same was said of medical 'tests' to prove an applicant's homosexuality. Furthermore, the CJEU itself cast doubt on the probative value of such evidence. In addition, *ABC* also held that questioning applicants on their sexual practices is contrary to Article 7 CFR, with regard to the right to privacy of the applicant[99] Nevertheless, as with rampant stereotypes, it has been found that these questions have been continued to be asked by officials and form part of the basis for acceptance of SOGICA.[100] This is problematic for a variety of reasons. To begin with, as noted by Gomez 'most applicants are not suffering harm in their bedroom, but rather in their societies, as they are punished for their failure to conform to societal norms and not for their sexual conduct'.[101] As discussed in the previous two subsections, *ABC* demonstrates a need for a common framework that lays out what SOGI applicants can and cannot be asked about.

In the same vein as the previous subsection regarding stereotyping within asylum adjudication, by depending on explicit, sexual questioning, asylum officials are presuming that to be a SOGI minority, applicants must have participated in certain sexual acts.[102] However, this assumption is evidently invalid for many reasons. To begin with, if being a SOGI minority results in persecution in the applicant's country of origin then the applicant may be too scared to engage in sexual activities that reveal their SOGI for fear of such persecution.[103] In addition, neither SOGI minorities, nor heterosexual or cisgendered persons should be required to have a certain sexual history in order to 'prove' their identity. People who have never participated in sexual acts with another person still have a sexual orientation

[98] *ABC*(n9)para65
[99] Ibid,para64
[100] Dawson(n23)292,292
[101] Gomez(n11)475,488
[102] Ibid,475,488
[103] Chelvan(n11)

and gender identity; people may engage in sexual acts with persons of the same sex and still identify as heterosexual and cisgendered. Therefore this line of questioning, as well as being potentially disparaging, does nothing to aid in credibility assessment. One again, when creating a standard framework for SOGICA credibility assessment having not participated in certain sexual acts should not be held to cast doubt over a person's SOGI in order to reflect the realities of human sexuality, which exists irrespective of sexual experience.

Another problem with sexually explicit questioning was found in the 2011 FRA report. Answers were often considered to be 'evasive' by adjudicators, contributing towards a finding of lack of credibility.[104] This problem will be considered further in under subchapter 3.6.

3.4 MEDICAL, PSYCHIATRIC AND PSYCHOLOGICAL TESTS

As mentioned briefly in the previous subchapter, whilst it was not expressly asked about by the referring State, the use of medical tests in order to credibly assess sexuality was banned in the judgment of *ABC*. The use of 'testing' as a method to prove a person's SOGI has been highly controversial. The Yogyakarta Principles states that '[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity'.[105] However, this has been common practice in certain EU countries up until very recently, when the aforementioned *ABC* case was decided in 2014. Though, despite this, in the Czech Republic, phallometric tests (which measure blood flow to the penis whilst the subject is shown pornographic material) have continued to have been used on asylum seekers.[106]

Whilst the judgment of *ABC* can be celebrated for banning medical tests, one problem with the limits the Court set with regards to credibility assessment is that they did not make clear what exactly was included within the realm of 'tests' that were banned. The issues caused by this uncertainty became clear in the later case of *F v Bevándorlási és Állampolgársági Hivatal* in 2018. The applicant was, once again, a homosexual man and during the credibility assessment the authorities determined that a psychological report was necessary to determine his sexuality. This psychological report included 'an exploratory examination, an examination of personality and several personality tests, namely the 'Draw-

[104] Jansen(n7)55
[105] The Yogyakarta Principles,Principle18
[106] *NEE v Ministerstvo vnitra* 5Azs53/2016–26(2016)

A-Person-In-The-Rain' test and the Rorschach and Szondi tests'.[107] The integrity of such tests to determine sexual orientation has been completely rejected by the scientific community at large, and it follows that psychiatric and psychological tests have been banned by many countries in relation to SOGICA.[108] Based on the results from these tests the psychologist stated they could not confirm the applicant's self-identified sexual orientation (not that he was not gay) and the application for asylum was rejected. The CJEU was asked whether Article 4 QD should be interpreted to mean that, as long as no explicitly sexual questions are asked and there is no physical test, can psychological and projective personality tests be used in SOGICA?

An earlier opinion by Advocate General Wahl had stated that psychological examinations could be admissible in the case of SOGICA where the applicant had given consent.[109] The CJEU disagreed with this, casting doubt on how freely consent can be given when a person is taking part in an asylum application.[110] With regards to the tests themselves, it was found that the right to respect for an individual's private life was interfered with by the psychologist's examinations and, as the test had been contested vis-à-vis its reliability, the interference was not proportionate to the aim.[111] The CJEU also referenced Yogyakarta Principle 18 with regards to forcing a person to undergo a psychological test based on their SOGI, which strengthens the authority of the Principles.[112] Furthermore, the judgment puts the onus on national authorities to improve their own staff member's knowledge and skills in order that they do not need to use expensive experts.[113] Finally, the judgment states that, in accordance with Article 4(5) QD, when the applicant's statements are both consistent and plausible they do not need further confirmation, such as an expert's report.[114]

Both *ABC* and *F v Bevándorlási és Állampolgársági Hivatal* are important cases in considering how public discourse about SOGI minorities changes over time as well as typical cultural perceptions about how they behave. Identifying as homosexual or bisexual has ceased to be considered a medical or psychiatric condition by the World Health

---

[107] *F*(n10)para22
[108] Nuno Ferreira, Denise Venturi, 'Testing the untestable: The CJEU's decision in CaseC-473/16, *F v Bevándorlási és Állampolgársági Hivatal*' (*European Database of Asylum Law*, 28June2018)< https://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu's-decision-case-c-47316-f-v-bevándorlási-és-állampolgársági-hivatal>accessed 15May2019
[109] Opinion of Advocate General Wahl,C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2017]para39
[110] *F* (n10)para52
[111] Ibid,para54,58-59
[112]Ibid,para62
[113] Ibid,para66-67
[114] Ibid,para68

Organisation.[115] In addition, there is a rising movement to depathologise trans identity.[116] Between the 10th edition of the World Health Organisation's International Classification of Diseases and the most recent 11th edition, gender identity has been rephrased from the 'gender identity disorders' category of 'mental and behavioural disorders;' to 'gender incongruence' under 'conditions related to sexual health'.[117] An example of this is the change in recent years from the term 'gender identity disorder' to 'gender dysphoria' in order to reduce stigma.[118] The decisions in *ABC* and *F v Bevándorlási és Állampolgársági Hivatal* are therefore welcome additions and need to remain enforced, as the medicalization of SOGI minorities becomes less and less relevant. The rules set in these cases should be included in a common European system for all MS to follow. The fact that the ruling of *ABC* was ignored by the Czech Republic, and that psychiatric tests of such controversial nature were used up until so recently in Hungary support this thesis's hypothesis that a common framework, backed up by guidance and training is evidently appropriate.

Whilst the use of medical and psychological tests in the process of verifying someone's sexuality has been rightly considered as infringing on human rights, it may sometimes be appropriate to use certain approved medical tests in order to demonstrate intersexuality, or trans identities if that person has had any medical treatments. Medical testing has even been linked to the fact that there are far less credibility issues with trans and intersex asylum cases.[119] The Yoyakarta Principles do not ban testing, but instead ban forced testing and suggest that it is not reliable, and the case of *F v Bevándorlási és Állampolgársági Hivatal* refers only to sexual orientation, and neither this case, nor any other of the CJEU refers to gender identities, being intersex or any other SOGI identities that it may be appropriate to test. Consequently, there is no legal precedent as to why such persons may not give medical evidence or have tests in order to prove their status. However, this testing can be invasive and, as was said about such evidence within the case of *F v Bevándorlási és Állampolgársági Hivatal* in the context of asylum, it is doubtful how freely consent can be given. Furthermore, whilst many trans and intersex persons may already be engaged with

---

[115] Susan Cochran et al, 'Proposed Declassification of Disease Categories Related to Sexual Orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)' (*World Health Organisation*, September2014)<https://www.who.int/bulletin/volumes/92/9/14-135541/en/>accessed 24May2019

[116] Roy Grinker, 'Being Trans Is Not a Mental Disorder' (The New York Times, 6December2018)

[117] World Health Organisation, 'Gender Incongruence' (World Health Organisation's International Classification of Diseases, April2019)<https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f411470068>accessed 24May2019

[118] Hungarian Helsinki Committee(n5)67

[119] Jansen(n7)51

doctors, many may not and may not want to be or go through invasive medical testing.[120] Therefore, there are manifold reasons why many trans and intersex persons may reasonably not want to have to go through such testing to provide evidence, however adjudicators may falsely infer from this refusal that this is some evidence the applicant is not a SOGI minority. Furthermore, many trans persons may not have had any treatments that a medical professional would be able to detect as 'proof'. In fact, many trans persons choose not to have any medical intervention.[121] Again, this doubt would be helped by the use of a common model and guidance given to all MS by the EU.

Whilst medical or psychological tests should not be used in order to 'prove' sexuality or gender identity and only allowed by consenting trans applicants or other SOGI identities that may find the tests pertinent to their case, ancillary medical or psychological tests may be useful in order to demonstrate the harm that is caused as a result of being a SOGI minority within a country where SOGI minorities are persecuted. For example, a doctor's report could show physical or mental health problems as a result of being persecuted because of their SOGI, as opposed to directly proving SOGI.[122] This should be included within any common EU framework.

3.5 DELAY IN DISCLOSURE

It is not just the way that SOGI minorities have lived their lives that is can impact the credibility of their claim. In addition, the way in which applicants behave during their asylum application and interviews are also used to assess the truth of the claim. Once again, this thesis will argue that this is inappropriate and represents the need for affirmative guidance toward a standardised system for MS.

As mentioned in the proceeding chapter, the EU's APD identifies SOGI minorities as potentially needing 'special procedural guarantees', which includes potentially needing more time in order to substantiate their claim. This was supported by yet a further development from the case of *ABC* which stated that a claim cannot be found to not be credible on the sole basis of an applicant not disclosing their SOGI at the first available opportunity.[123] However,

---

[120] Ibid
[121] Planned Parenthood, 'What do I need to know about transitioning?' (*Planned Parenthood*) <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning>accessed 3March2019
[122] Jansen(n7)51
[123] *ABC*(n9)para71

neither of these conditions absolutely suggest that late disclosure cannot be used at all by decision makers to doubt the credibility of SOGICA. Such officials could argue that based on the individuals particular circumstances they do not qualify for the 'special procedural guarantees' as under the APD and, whilst *ABC* prohibits late disclosure being the only reason a claim is found not to be credible, the is no legal precedent to say cannot be used at all to question the credibility of the claim.[124]

It is well established that late disclosure of SOGI during the asylum process is common for SOGI minority asylum seekers.[125] *Fleeing Homophobia* gives many reasons for this (e.g. fear and shame after living through homo/transphobia, being unable to name or identify their SOGI, not knowing that it is relevant to asylum applications).[126] Despite the many reasons for late disclosure, it often causes problems within credibility assessments, with some decision makers considering late disclosure a sign of an applicant 'adding' SOGI with the aim of improving their chance of getting refugee status.[127] However, this thesis takes into account the particular nature of SOGICA; in particular, the trauma SOGI minorities have faced because of part of their identity, the situation resulting in their not being able to trust authorities and the fact that so many do disclose later in their application, this should not be considered to have an effect on credibility. This will be discussed further in chapter 5, where it is suggested that both the relevant parts of the APD relating to delay in disclosure during the asylum process, and also a potential SOGICA framework, should exempt SOGI minorities from negative findings relating to credibility resulting from late disclosure on the basis of their specific circumstances.

3.6 THE DEMEANOR OF THE APPLICANT

One final issue with the way credibility assessment is currently performed has less to do with the plausibility of the claim itself, and more to do with the demeanour of the applicant. In fact, outside of the contents of the claim, demeanour and consistency have been named as two key features of credibility assessment.[128] This thesis argues that when considered alongside the highly sensitive nature of the lines of questioning, augmented by the stigma and

---

[124] Home Office, 'Asylum Policy instruction Sexual orientation in asylum claims Version 6.0' (Home Office, 3 August 2016) 35
[125] Jansen(n7)67
[126] Ibid,9
[127] Ibid,68
[128] Janna Weßels, *Sexual Orientation in Refugee Status Determination* (Refugee Studies Centre, Working Paper SeriesNo.73,2011)

shame an applicant may feel about their SOGI, having been forced to hide their status for such a long period of time there are several reasons why assessments taking demeanour into account when establishing validity is potentially dangerous.

The demeanour of a person who is telling the truth is, in fact, a stereotype itself. The elements of the trope of the truth-teller that a decision maker may take into account include: maintaining eye contact; answering without hesitating and demonstrating a certain amount of particular emotions.[129] However, when reflecting on SOGI based interviews, feelings such as shame, mistrust of authorities, uncertainty and stigma undoubtedly cause the applicant to act in different ways that might contradict this set of assumptions. Furthermore, the trope of the truth-teller bares the mark of ethnocentrism and does not take into account cultural variations on what constitutes the proper attitude accorded to the honest actor.[130] Finally, one must consider the gendered aspect of this trope and how behaviours that contradict these tropes do not necessarily indicate illegitimate claims. As for the second key feature, consistency, trauma is well documented to have an effect on the memory and can make a story inconsistent.[131] These factors, when combined with the particularity of SOGICA in comparison with other asylum cases show the need for a common EU framework that does not take demeanour into account when assessing credibility.

3.7 INTERMEDIATE CONCLUSION

This chapter has demonstrated that there is still a great deal of problems associated with the credibility assessment of SOGICA within the EU. The existence of such issues supports the central hypothesis of this thesis: that there should be some sort of framework and guidance for MS dealing with SOGICA. Furthermore, recognising these issues will be important when considering how to mitigate them in the next chapter, which will focus on proposing a methodology for credibly assessing SOGICA.

This chapter has considered how the case of *ABC*, whilst not allowing claims to be denied as incredible based solely on stereotypes nevertheless allowed for stereotypes to be considered to at least some extent within adjudicators decisions. This chapter then analysed how these stereotypes create problems and recommended that stereotypes should not be

[129] Mrazova(n14)196
[130] Atushi Senju et al, 'Cultural Background Modulates How We Look at Other Persons' Gaze' [2013] 37(2)International Journal of Behavioral Development131
[131] Mrazova(n14)196

allowed to be used at all within the context of asylum interviews. As with stereotypes, this thesis recommends that the applicant's history of long term opposite-sex partners or children should not be used to state that their claim is invalid. By doing so it completely ignores the societal pressure that SOGI minorities are under, as well as ignoring bisexual and related orientations. Furthermore, this once again disproportionately disadvantages women. This chapter went on to consider how behaviour, particularly sexual behaviour, is problematic when considered as a testament to the validity of a claim. Whilst case law has made progress against the use of sexually explicit evidence and questioning, an applicant not having had sexual relations should not mean that their claim is invalid. This can be traced to the outmoded concept that sexual orientation is a behaviour rather than part of who a person fundamentally is and operates. The subchapter on medical, psychiatric and psychological tests looks have been rightly banned by both *ABC* and *F v Bevándorlási és Állampolgársági Hivatal.* It also considered how ancillary tests, not aimed at 'proving' SOGI, can be helpful demonstrating the harm posed to the applicant, as long as lack of such evidence does not count against applicants. Late disclosure was also recommended to be banned from being considered as a factor related to credibility with regards to SOGICA. Finally, this chapter considered how the demeanour of the applicant during interviews has been used to assess the validity of claims. This subchapter concluded that looking at demeanour is particularly problematic for SOGI based asylum seekers as the sensitive nature of their claims may make them act in a way that does not fulfil a Westernised concept of a 'truth teller'.

4.

THE DSSH MODEL AS A METHOD OF CREDIBILITY ASSESSMENT

The previous chapters have considered the current set of laws governing credibility assessment in the EU, and have demonstrated that there are a multitude of issues in the way that SOGICA is assessed within the EU, validating the hypothesis of this thesis: a standardised framework to overhaul assessment methodologies is needed for MS to assess the credibility of SOGI based claims in a way that is uniform throughout the EU and respects human rights and dignity. This chapter, therefore, will attempt to suggest a framework for which credibility can be assessed that minimises the potential for infringement of rights as seen in the preceding chapter, is not hinged on a bias towards male homosexual applicants, and strives to create cohesion between MS. In order to answer the main research question of this paper, this chapter will consider the sub-question: *is the DSSH model is the most appropriate model to implement at the EU level and what are its criticisms?*

As has been stated previously in this thesis, there is no way to definitively prove someone is LGBTI. However, the EU and the CJEU still require SOGI minority asylum seekers to demonstrate the credibility of their claim. Therefore, when it comes to the credibility assessment of SOGICA, even experts in queer theory, or those considering the issue from a human rights perspective will not be able to create a system in which SOGI can be truly discovered. Whilst it refers to credibility assessment in all asylum procedures, and not just SOGICA, the *2015 Hungarian Helsinki Committee's Multidisciplinary Training Manual Volume 2* on credibility assessment states on its first page that it 'does not offer magic tricks, techniques or solutions to overcome the serious challenges of credibility assessment – simply because no such tricks exist.'[132]

[132] Hungarian Helsinki Committee(n5)5

Similarly, the call for a set questionnaire that could be read to refugees by any asylum officer has also been rejected. Whilst this may seem like it would be a good method of ensuring that there are no discrepancies between not only MS but also asylum officers, in fact it may only increase inconsistency and inequity within credibility assessments. Chelvan went as far as to state this would happen 'over my dead body'.[133] The main arguments against providing such a questionnaire are twofold. There is a concern that adjudicators may claim that asylum seekers are 'cheating', whereby if an applicant did particularly well, they may be accused of finding the questions in advance and preparing answers in order to come across as queer. Conversely, having a questionnaire with particular answers would intrinsically be based on stereotypes and assumptions about being a SOGI minority. In this case, a person who is a SOGI minority but who may not match the questionnaire writers' assumptions about SOGI minorities and therefore may answer incorrectly could also have their application denied due to a lack of credibility.

How then should credibility be assessed? Surprisingly there seems to only be proposed and supported model of SOGICA credibility assessment, S Chelvan's *Difference, Stigma, Shame and Harm* (DSSH) model. This thesis considers that based on Chelvan's experience of over a decade of working on SOGICA cases, refinement within the Hungarian Helsinki Committee report and endorsement by the UN and multiple other countries, this model is in a good position to be used for credibly assessing the claims of LGBTI applicants from a human rights perspective. This model is already being utilised by Cyprus, Finland and the UK.[134] However, despite its popularity within the literature, the model is under-analysed. Therefore, this chapter will go on to summarise criticisms of the model and draw conclusion from this discourse to suggest how to mitigate these issues.

This chapter will first describe Chelvan's DSSH model in more detail describing each of the four elements and what they signify and how they can be used within the process of credibility assessment (4.1). The rest of this chapter will consider various criticisms of the model, and use these criticisms suggest an ameliorated form of this model that would serve as the premise for a standardised framework that can be applied within EU law. The first criticism will consider how the model appears to be based on male homosexuals and how this male default is problematic for other identities that fall within SOGI (4.2). The next

[133] Chelvan(n11)
[134] EMN Ad-Hoc Query on NL AHQ on National Asylum Policies Regarding LGBT-Asylum Seekers Requested by NL EMN NCP (European Commission,2016)

subsection will consider other criticisms that can be found within the literature, such as the DSSH model promoting Westernised concepts of sexuality, the element of shame being considered universal and whether the DSSH model makes it easier for false narratives to progress (4.3).

4.1 THE DSSH MODEL

The DSSH model was created by S Chelvan, based on 13 years of defending SOGICA cases in the UK. The model was published in 2012 and created in the context of British jurisprudence relating to SOGI refugees, in particular the 2010 case of *HJ and HT v Secretary of State for the Home Department*.[135] This case was particularly frustrating for lawyers and activists in this area, as it was held by Lord Rodger in this case that there was a difference between applicants who are openly gay and those who choose to live discreetly, citing a fundamental difference between choosing to live discreetly because of fear of persecution and those who chose to live discreetly because 'that was how he himself would wish to live, or because of social pressures'.[136] This therefore put a larger burden of proof on SOGICA.

The DSSH model stands for the Difference, Stigma, Shame and Harm model. The model looks at the journey and life of a SOGI minority person through an interview consisting of broad 'trigger questions' that enable them to tell their story.[137] The main intention of the model is to change the narrative that was predominant in SOGI based asylum interviews, moving away from sexual practices and towards non-conformity within a heterosexual narrative. [138] The premise should not be that they are a SOGI minority, but that they are 'not straight enough'.[139] From this quote, which will be discussed in more detail below, it can begin to be seen that this model was created to rectify the playing field for sexual minorities yet doesn't account much for certain gender minorities. Another way the DSSH model shifts the traditional focus of SOGICA is by focusing more on the potential persecution rather than trying to prove whether someone is LGBTI or not.[140] Whilst the model first appeared in 2012, it was revised by Chelvan and others within the aforementioned Hungarian Helsinki Committee Report, which has made an impact on some of the criticisms

[135] [2010]UKSC31
[136] Ibid,para 82
[137] Hungarian Helsinki Committee(n5)77
[138] Dawson(n23)293
[139] Chelvan(n11)
[140] Ibid

that will be mentioned later in this chapter, particularly relating to women, trans and intersex persons within the model. The report acknowledges that the 'journeys' of LGBTI persons are unique, but states that the four elements of difference (4.1.1), stigma (4.1.2), shame (4.1.3) and harm (4.1.4) are common to 'many' (the report intentionally leaves this open) and closely connected.[141] The model also clarifies that it does 'not provide a one-size-fits-all recipe equally applicable in all relevant cases'[142] but should be tailored to each individual.

4.1.1 DIFFERENCE

The first element of the DSSH model to be established is *difference*. As the world is dictated by heteronormative and cis-gendered narratives, the DSSH model assumes that an LGBTI person's journey begins with the discovery that they are different from mainstream society.[143] The report emphasises this difference is not just about sex and sexuality, but also the stereotypes and gender norms that drive socialisation and the construction of the ego from childhood, and evolve during the various stages and changes with each individual.[144] The report does acknowledge that not all LGBTI persons do demonstrate a difference with regard to gender norms.[145]

4.1.2 STIGMA

The next element, which is based off the feeling of difference is that of stigma. Stigma is defined within the Hungarian Helsinki Committee report as 'extreme social disapproval of or discontent with a person or group, based on a certain characteristic that serves to distinguish them from other members of a society.'[146] In this case, the stigma comes from disapproval and discrimination of SOGI minorities. The report also mentions that stigma can be both direct and indirect and comes not only from State actors but also family, friends and the wider community as well as religious groups and cultural customs.[147] In fact the 'micro-environment' of friends, family and community can be the main source of persecution for SOGI minorities and stigma can diminish or even eradicate a supportive network or legal protection for LGBTI asylum seekers.[148]

---

[141] Hungarian Helsinki Committee(n5)77
[142] Ibid
[143] Ibid,77
[144] Ibid,78
[145] Ibid,78
[146] Ibid,80
[147] Ibid,80
[148] Ibid,81

4.1.3 SHAME

Shame is described by the Hungarian Helsinki Committee report as 'a natural consequence of stigma. The disapproval and other negative messages of society are inevitably internalised'.[149] Whilst the model assumes that this is true, this essay will criticise this hypothesis later in the chapter. The report describes shame as a fear of harm, which can produce 'avoidance strategies' and behaviours, which it gives an open list of.[150]

4.1.4 HARM

Whilst SOGI minorities in any country and context may feel difference, stigma and shame, what makes certain SOGI minorities applicable for asylum is their fear of harm based on their SOGI.[151] Harm derives from the stigma of being LGBTI in a given society, and can come from both State and non-State actors.[152] Whilst many forms of harm are experienced by different asylum-seekers, some (such as corrective rape) are exclusive to or more common for those who seek asylum because of their SOGI.

What is important when establishing SOGICA is the link between the applicant's SOGI and the harm, along with the nature of the harm itself; not all harm can be considered to fall under the level required of persecution under the Geneva Convention and therefore the EU legislation derived from it. Usually this is causal; the harm is caused due to the applicant's SOGI. However, in some situations, the harm may not relate directly to SOGI but be an ancillary result. For example an applicant may not be protected from harm because of their SOGI, such as the police failing to protect them because they are a SOGI minority.[153]

4.1.5 REFLECTIONS ON THE DSSH MODEL

The DSSH Model has undeniable merits and has brought about a profound change to assessing the credibility in SOGICA. Chelvan's DSSH model, whilst not perfect, has been successful in providing a guide to asylum adjudicators that shifts the concept of SOGI away from sexual acts and towards a concept of being outside of gender norms. It moves away from westernised terms and ideas and allows for asylum seekers to tell their own stories and

---

[149] Ibid
[150] Ibid,82
[151] Ibid,83
[152] Ibid,83-84
[153] Ibid,84

identify themselves in their own way. It has been endorsed by the United Nations High Commissioner for Refugees (UNHCR) and multiple States both inside and outside of Europe.

Acknowledging that this model has done a lot for SOGICA, it does have its problems, which this thesis wants to address and attempt to remedy before proposing a model for SOGICA assessment. Chelvan himself acknowledges that the model cannot work for every individual.[154] What is interesting, however, is that despite its endorsement by the UNHCR and multiple countries and acknowledgement in literature, the DSSH model is subject to very little academic analysis.[155] This chapter will now consider some of the DSSH model's weaknesses and what can be done to overcome them, before using this model as a basis for an EU framework.

4.2 CRITICISMS OF THE DSSH AS A HOMOSEXUAL MALE DEFAULT

This thesis' biggest criticism of the DSSH model is its purported basis on male homosexuality. This is very similar to the use of stereotypes that was mentioned in the previous chapter, and the author postulates stems from the same root. As with much of the relevant academic scholarship, the DSSH model does not acknowledge trans, intersex or other gender identities to the same extent as sexuality. In addition, Jasmine Dawson, one of the few writers who has deeply analysed the DSSH model, has also added that several of the components may disadvantage sexual minority women. This thesis argues that these criticisms also apply to bisexual men and gender minorities. If the DSSH model is to be used as the base of a standardised framework to be applied by the EU, this must be addressed.

The Hungarian Helsinki Committee report states that its primary focus is sexual orientation as 'claims based on sexual orientation, are considered much more challenging than those related to gender identity and intersexuality, *from the point of view of credibility assessment*.'[156] In Chelvan's earlier versions of the model he rarely, if ever, referred to trans or intersex persons. There is some merit to focussing on sexuality, as mentioned in the last chapter credibly assessing whether a person is intersex or trans can be simpler if there is

---

[154] S Chelvan, 'From ABC to DSSH: How to Prove You Are a Gay Refugee' (*Free Movement*, 23July2014) <https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/> accessed 27February2019

[155] Dawson(n23)292

[156] Hungarian Helsinki Committee(n5)59

medical evidence. However, as has been previously discussed in chapter 3.4, there are a multitude of reasons why such testing may not be appropriate and other methods of assessments should take place. The report does acknowledge that trans and intersex people are 'often unduly overlooked',[157] however this thesis argues that its approach will only cause them to be overlooked further. This thesis therefore argues that trans and intersex people have been shoehorned into the model as an afterthought and in some regards, this has not been practical for their inclusion. This thesis argues that the individual needs of gender minorities should be specifically and explicitly included. This thesis is adamant that the methodology for credibility assessment proposed by this chapter must be fully inclusive of trans, intersex and any other gender minorities and anything that may specifically challenge them within the asylum process.

In addition to trans and intersex persons, Dawson considers how useful the DSSH model is for non-heterosexual women.[158] Whilst empirical data on SOGICA is lacking, it is clear that the vast majority of claims are made by sexual minority men, rather than women, trans or intersex persons.[159] Therefore, whilst the law is applied to all, SOGICA precedent is 'overwhelmingly based on cases involving men.'[160] Indeed, all applicants in the three CJEU cases considering SOGICA are men, and the judgements refer only to 'gay' persons. Dawson argues that whilst the DSSH model attempts gender-neutrality there are important omissions that mean that it still includes gender based stereotypes.[161] There is a genuinely agreed upon consensus in the relevant literature that judges and asylum officers assume that the narrative of a Western, middle-class and white gay man are experienced by and can be universally applied to all LGBTI persons.[162] Without explicit reflection and acknowledgement of gender and the intersection between gender and sexuality in the DSSH model then there is the risk of Western, gay male experiences, and the stereotypes and tropes considered in the prior chapter, being enacted on all sexual and gender minorities. Dawson argues that this can, and currently does, negatively affect asylum claims of non-hetero women.[163] This thesis also believes this has a negative affect for trans and intersex persons and even bisexual men. Again, this 'default' must be countered when creating a standardised framework. Any model

---

[157] Ibid
[158] This article does not consider trans or intersex people.
[159] Dawson(n23)305
[160] Ibid,305
[161] Ibid
[162] Laurie Berg, Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2007)22Journal of Refugee Studies195,206
[163] Dawson(n23)306

proposed for a common framework to be used by all MS must be fully inclusive of all SOGI minority identities and provide a fair assessment outcome for all.

Within the DSSH model, the two elements that are most problematic if painted within the context of Western, gay men alone is 'difference' and 'harm'.[164] As previously mentioned the first element of the DSSH model, 'difference', refers to how SOGI minorities may start the process of discovering that they are LGBTI by realising that they are different from mainstream society. However, the way in which men and women's sexual identities progress are extensively different, with regards to time, rapidity and structure.[165] It is also problematic to take for granted that the way sexual identities progress is comparable to that of gender identities. Furthermore, none of these progressions of difference are analogous to the process faced by intersex people, whose gender minority status comes from a biological difference that could be clear from birth or puberty. Whilst the revised DSSH model acknowledges these differences and clearly states that '[t]here are no stereotypical recipes of how gay or trans people should realise they are different from others'[166] this paper argues that without explicit recognition of the intersecting groups of SOGI minorities, there is a danger that the common homosexual male realisation of difference may become the default, and that those who do not subscribe to this norm may face a disadvantage because of this.

One of the major criticisms of the initial 2012 DSSH model was the implication that SOGI individuals begin to notice gendered differences between themselves and the social majority in childhood. There is a lot of research that gender atypicality in children often does not apply to women.[167] The Hungarian Helsinki Committee report expressly mentions that in countries where women have an inferior place in society and/or their sexual desires are taboo they may realise their difference later than men.[168] However, it does not discuss that this also occurs outside of oppressive regimes, as studies have found that gay women experience milestones regarding their sexual identity after men, and bisexuals even later even in Western cities such as New York.[169] As well as being realised at a later stage in life, women's sexual identity can manifest itself differently to men's, often beginning with a specific woman.[170]

---

[164] Ibid,307
[165] T Hughes, A Matthews, 'Race/Ethnicity and Sexual Orientation: Intersecting Identities' (2004)10Cultural Diversity and Ethnic Minority Psychology241,248
[166] Hungarian Helsinki Committee(n5)78
[167] Dawson(n23)307
[168] Hungarian Helsinki Committee(n5)78
[169] Martos(n93)
[170] Dawson(n23)307

Dawson recommends, as does this thesis, that guidelines or a framework must take this difference in 'timelines' into account, rather than applying a set age of 'realisation' that casts doubt on those who become aware of their SOGI at an earlier or later age than this set number.

Trans persons realisation of difference also varies. Gender dysphoria (when a person's biological sex is incongruent with their gender identity) can be separated into early-onset, where difference is visible in childhood and late-onset, occurring after childhood.[171] Again each gender follows a trend; trans women are much more likely to have late-onset gender dysphoria than trans men.[172] Once again there are exceptions, for example in the UK gender reassignment surgery for 61-71 year-olds is increasing.[173] As with sexual minorities, setting a date when gender identity develops disadvantages those who realise their SOGI later. This must be considered and included in any EU model or guidance.

For intersex persons, the sex characteristics that make them intersex are most commonly discovered when the child is born or during adolescence.[174] The whole category of 'difference' seems inappropriate as it is a biological and not social difference that is present at birth. Again, this is necessary to be included within any model or guidance.

In addition to *when* awareness of difference starts, *how* it starts is also problematic. The 2015 report describes a '[g]radual recognition of sexual and emotional attraction to members of the same sex'[175] and a 'gradual recognition of [difference]'[176] insinuating a slow and linear progression. Women are more likely to 'suddenly' realise that they are gay,[177] and studies have shown sexual minority women do not follow a gradual trajectory.[178] Therefore, if the DSSH model is to be used as a basis for credibility assessment, this reference to a gradual assessment should be removed. For gender minorities once again more research is needed to see whether the DSSH model is appropriate.

---

[171] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn,American Psychiatric Publishing,2013)455-456
[172] Ibid
[173] Gavy Hinsliff, '"Age has Nothing to Do with It": How it Feels to Transition Later in Life' *The Guardian* (London, 17November2018)
[174] 'Disorders of Sex Development' (*NHS*, 5October2016) < https://www.nhs.uk/conditions/disorders-sex-development/> accessed 5May2019
[175] Hungarian Helsinki Committee(n5)79
[176] Ibid,87
[177] Carren Strock, *Married Women Who Love Women* (2ndedn, Routledge,2008)
[178] Lisa Diamond, Ritch Savin-Williams, 'Explaining Diversity in the Development of SameSex Sexuality Among Young Women' (2000)56Journal of Social Issues297

Failing to recognise the differences of how SOGI develops with gendered concepts in mind, particularly when it is inferred that 'difference' is often first acknowledged in childhood, meant that sexual minority women and bisexuals claims could seem less credible, as they are outside of the homosexual male narrative that the DSSH model imposes.[179] Furthermore, trying to compress trans and intersex persons within the same model as LGB persons without clear guidance as to the differences they face is similarly problematic. This inclusion of the term 'gradual recognition' as a definitive assumes that all SOGI minorities develop an understanding of their SOGI in the same linear and structured way, which does not fit with post-modern sociological theories of SOGI.[180] For the DSSH model to take into account this, and in particular to women's claims which to tend to develop differently, the DSSH model must take the fluidity of sexuality into account, rather than considering sexuality as immutable and unchangeable. However, this has its own dangers as discussed in chapter 2 of this thesis. The 'immutability' approach tends to have prevalence over the 'social perception' approach, and if SOGI is no longer considered immutable then this could have implications for asylum based on SOGI. However, with the 'social perception' approach enshrined within Article 1A(2) of the 1951 Convention one would hope that SOGI minorities continue to have protection. Overall, for the DSSH model to be used as a basis for credibility assessment, it must be made clear that there are a multitude of ways recognition can occur. Instead of focussing on a particular age or 'speed' of recognition, the assessing authority should listen to the self-identification and narrative of the applicant in their own words.

Another aspect of the DSSH model that potentially suffers from a male homosexual default that could negatively impact other SOGI minorities is that of the 'heterosexual narrative'. The Hungarian Helsinki Committee report goes as far as to say that '[t]he most important common element is that the asylum-seeker is not living a "heterosexual narrative"'.[181] As mentioned in the previous subchapter, both bisexuals and non-heterosexual women are more likely to become aware of their sexual identity later in life, with many being in long-term opposite sex relationships or having children: essentially following a heterosexual narrative. In fact, as was mentioned in the third chapter, adopting a 'heterosexual narrative' is a direct consequence of the intersection of being both gay and a woman.[182] In addition, as bisexual persons are intrinsically attracted to persons of the same

[179] Dawson(n23)309
[180] Ruppacher(n27)
[181] Hungarian Helsinki Committee(n5)77
[182] Dawson(n23)314

and different sexes, they may have lived a heterosexual narrative as a matter of circumstance, without this impacting their actual SOGI. Furthermore, the term 'heterosexual narrative' implicitly excludes trans and intersex persons, who may be heterosexual, gay or bisexual, but this has no bearing on their gender identity. Additionally, for many intersex persons the reason for their persecution is purely based on their physical body and may have no effect on their 'narrative' which could fit well into hetero and cisgendered norms. Previous criticisms relating to queer culture and the 'pink dollar' are also necessary to consider here. All of these factors demonstrate that the 'heterosexual narrative' concept should not be relied upon as part of the model utilised by credibility assessors in EU SOGICA. As with other aspects that have been mentioned in this thesis, this could be included in part of such a model in order to support an application, but it is important, in order to not disadvantage certain individuals, not to count towards a negative assessment. In addition, any model adopted needs to make sure that this does not veer into the territory of stereotypes and tropes.

The other part of the DSSH model that Dawson considers problematic when applied without reference to the gendered differences between men and women is the element of harm. Harm is arguably the most important aspect of the DSSH model as it is what marks a SOGI minority as persecuted, and therefore able to qualify to seek asylum, however Dawson remarks that in the Hungarian Helsinki Committee report there is a lack of detail in the ways that sexual minority women are likely to suffer harm as opposed to sexual minority men, which impacts on how asylum officials consider lesbian and bisexual women's asylum claims negatively.[183]

Essentially the difference between harm committed to male and female sexual minorities is the arena in which it occurs in, as was discussed in the last chapter: men are more likely than women to suffer harm in public, and this is also true of sexual minorities.[184] It has been argued that this can lead to adjudicators inferring that sexual minority women are less likely to be persecuted because of their SOGI because there is less public harm committed against them.[185] Even more dangerously, it is considered that adjudicators may not understand the intersection between gender and sexuality enough to realise that certain acts such as rape and forced marriage are not carried out because the victim was a woman *or*

[183] Ibid,317
[184] Neilson(n96)420
[185] Rachel Lewis, Nancy Naples, 'Introduction: Queer Migration, Asylum, and Displacement'(2014) 17Sexualities911,915

because she was gay or bisexual, but for both of those reasons.[186] Any model or guidance to be adopted by the EU needs to take such differences in the types of harm into account, and not priorities physical harm that occurs in public but also look at domestic and sexual abuse, as well as emotional abuse within the private arena.

The Hungarian Helsinki Committee report details the kind of harm that trans persons are particularly at risk of. They acknowledge the high levels of physical, psychological and sexual harm, and also the risk of being 'outed' when their official documents do not match their gender expression.[187] This has further implications not listed in the report, such as abuses on other human rights like the right to education, employment or healthcare, where official documents would have to be produced. Specific harm against intersex persons is also mentioned briefly in the 2015 DSSH model and it is acknowledged that in some countries being intersex can cause abuses and denials of human rights because the child may not be registered at birth,[188] or as a recent BBC article acknowledged, birth papers may not be properly filed.[189] Similarly, even where they have been registered as they grow older, their chosen gender, or gender expression may not match their official documents, as with transgender persons.[190] They may be considered as trans persons if there is a lack of understanding or education surrounding intersex people.[191] Intersex persons may also suffer from further intersectional discrimination if their intersexuality has led to a disability or medical condition.[192] The report also mentions that in some culture intersexuality is considered evil or witchcraft, and not only the intersex person, but their family can be targeted.[193] However, there are many forms of violence that intersex people face that is not mentioned that, as with women, happens more in the private sphere and in addition could demonstrate the likelihood of harm and persecution. Infanticide is a problem that many intersex people face, particularly in southern and eastern Africa, South Asia, Brazil, and China.[194] In addition, both intersex children and adults are forced to go through medical procedures, hormone therapy and even genital mutilation in order to make their body more in

---

[186] Lewis(n97)964
[187] Hungarian Helsinki Committee(n5)65
[188] Ibid,66
[189] Megha Mohan, 'The Doctor Wrote a Question Mark for my Child's Sex' (*BBC*, 18April2019) <https://www.bbc.com/news/stories-47964634>accessed 18April2019
[190] Hungarian Helsinki Committee(n5)66
[191] Ibid
[192] Ibid
[193] Ibid
[194] 'What are Intersex Rights?' (*The Open Society Foundation*, April2019) <https://www.opensocietyfoundations.org/explainers/what-are-intersex-rights>accessed 5May2019

line with a particular sex.[195] Much of this happens quietly and with the consent or even dictated by the intersex person's family. It is particularly shocking that medical intervention is not mentioned within the Hungarian Helsinki Committee report, particularly with the recent *European Parliament Resolution on the Rights of Intersex People*[196] which '[s]trongly condemns sex-normalising treatments and surgery… and encourages other Member States to adopt… legislation as soon as possible'.[197] However, as intersex children still have their human rights violated through unnecessary treatments and genital mutilation in the guise of sex-normalisation treatment within the EU (with only Malta and Portugal that prohibit such surgery) there may be a confusion as this amounting to harm, or indeed if other EU countries would even be appropriate to provide asylum if they also carry out these practices.[198] These types of harm are very different to that experienced by sexual minorities, and asylum adjudicators need to be educated on these matters when assessing their claims. Therefore, any model adopted and any guidance given by the EU must reflect this.

Whilst it is progress within the 2015 DSSH model that the different kinds of harm experienced by different SOGI groups are mentioned, these need to be expanded on and explicitly referenced in order to show the full types of harm and persecution that may be faced by SOGI minorities. If the only SOGI based harm considered by authorities is physical violence in a public arena, this is a disadvantage to sexual minority women, trans and intersex persons. This thesis demands that such claims are considered in any model or guidance adopted by the EU.

In addition, it is important that harm is not characterised only by whether there is a law that specifically criminalises that individual. This is demonstrated by a lesbian asylum seeker from Gambia who in 2013 was told by a UK judge that she would not fear persecution as Gambian law only prohibited same-sex sexual activity that occurs between men and not between women.[199] There are significantly more countries with homophobic laws that only consider men and not women, or trans and intersex persons. However, this is a reflection of the invisibility faced by women, trans and intersex persons and should not be taken to

[195] Ibid
[196] European Parliament Resolution on the Rights of Intersex People(2018/2878(RSP))
[197] Ibid,2
[198] Ibid,1L
[199] UKLIG, *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (UKLIG, September 2013)27

consider that they are any less persecuted or any less deserving of asylum. The 2015 model does not consider this, and this thesis argues that it should explicitly be mentioned.

Overall the DSSH model being set within a male default is major criticism against using the model as it stands as a basis for a common framework to be applied by the EU. With regards to sexual minority women and bisexual men, adjustments need to be made to the language so that differences between the way that their sexuality develops does not disadvantage them if it is to be used as a base for a model to be used by the EU. As for trans and intersex persons, their position needs to be researched more fully, and also considered cross-culturally in order to either make sure that the DSSH model is adjusted to include all SOGI minorities or a separate, more appropriate model is made if the needs of gender minorities are not compatible. If these criticisms are taken into account, the DSSH model becomes more inclusive and intersectional and may be appropriate to be used as the basis for an EU framework.

However, the male homosexual default is not the only flaw of the DSSH model, and the next subchapter will consider other issues that have been raised within relevant literature.

4.3 FURTHER CRITISMS OF THE DSSH MODEL RAISED BY THE LITERATURE

This subchapter will look at further criticisms that need to be assessed and ameliorated before the DSSH model can be used as the basis for an EU framework. Similar to having a default based on the standards of homosexual men, another criticism of the DSSH model is to what extent is its basis in Westernised concepts of sexuality. One of the many positive aspects of the DSSH model is its awareness of SOGI within a global perspective as opposed to the typical Westernised concepts of what 'LGBTI' means. With this considered, language is very important – a man who has had sex or romantic relationships with men may not consider themselves to be 'gay' as 'gay' has different meanings in different cultures. Indeed, even the term 'LGBTI' whilst attempting to be inclusive is a Western term.

The 2015 DSSH model recognises this by comparing Western concepts of childhood, the terms used to describe SOGI identities and what can be considered plausible to other parts of the world that the decision maker may not be familiar with.[200] However, does it go far enough? As part of the *UCL Migration Research Unit Working Papers,* Connely writes that

[200] Hungarian Helsinki Committee(n5)96,86 and 55 respectively

the 'narrative of difference' approach presupposes that feelings of difference are transnational and universal.[201] She goes on to consider that the way this narrative is erected within the literature is 'highly socially and geographically specific'.[202] It is not that many SOGI minorities didn't feel different, but the way in which they describe their difference. For example, whilst it has been a longstanding campaign in Europe to decry that SOGI is not a choice, many people when interviewed about their asylum status say that they chose to be LGBTI. The same stands here.

The narrative of difference approach is useful because it gives asylum-seekers the opportunity to tell their own story and self-identify their own SOGI. It important that if the DSSH model is to be the basis of a credibility assessment framework than telling a story through the 'narrative of difference' should continue to be a central concept, but take place in a way that does not impose Western standards on how 'difference' should manifest itself.

Another aspect that the DSSH model appears to argue as universal that may not be is that of shame. Whilst a SOGI minority person can be considered 'different' in a world that is dominated by a heteronormative and cisnormative narrative and stigma from others and the harm that results from this are necessary in order for a SOGI minority person to become a refugee, it is hard to see how shame is necessary, or indeed, if all SOGI minority persons do suffer from shame. Coming to terms with one's identity, even in countries where SOGI minorities are not persecuted, can be a difficult process that takes a varying amount of time and can lead to feelings of shame. However, for many SOGI minorities, it is not a difficult process. Whilst there is a consensus on SOGI minorities having some feelings of difference from the majority, there is no consensus that they must feel shame.[203] In terms of LGB persons, some studies have found that some sexual minorities have little interest in their sexual orientation, and may not have had a 'serious psychological struggle' or 'difficult coming-out process'.[204]

Like many criticisms of the DSSH model, taking an applicant's feelings of 'shame' into account when trying to assess their credibility is not a problem in itself. Many SOGI minority asylum seekers will have felt shame and can describe this in interviews to help their case. However, once again the problem occurs that for any SOGI minority persons that do not

---

[201] Elizabeth Connely, 'Queer, Beyond a Reasonable Doubt: Refugee Experiences of "Passing" into "Membership of a Particular Social Group"'(UCL Migration Research Unit Working Papers2014/3)29
[202] Ibid,32
[203] Gomez(n11)496
[204] Jansen(n80)24

feel shame that their claims will be dismissed. Even more dangerously, there is a concern that where asylum officials are looking for a narrative of shame, any aspects of happiness or pride felt by an applicant could make the applicant's narrative seem uncredible.[205] Similarly, asylum officials may argue an applicant's account is not credible because they would not have committed certain acts because of the shame they felt relating to their SOGI. This is even more problematic when religion is also brought into the asylum process, either formally or from the adjudicators own, Western, understanding of religion which may result in the opinion that being both a SOGI minority and religious is implausible.[206] Therefore, whilst shame can be helpful in establishing SOGI identity, this paper argues that due to the risk of it being applied in a stereotyped way, with the addition that many SOGI minority persons may not even feel shame about their identities, the shame aspect of the DSSH model should be removed as a necessity if it were to be enshrined by the EU.

In addition to the above criticisms of the DSSH model, whilst writing that the UN should adopt the DSSH model as an optional protocol M Yanick Saila-Ngita also criticised the DSSH model. He argued that the DSSH model failed to 'provide safeguards to ensure that false narratives cannot pass as credible.'[207] This criticism is the crux of this whole thesis, and indeed the whole topic of credibility within SOGICA. There is no way to 'prove' a person's SOGI and yet the desired model to be used throughout the EU must be both palatable from a human rights perspective, allow genuine SOGI minorities' claims to be found credible whilst simultaneously not allowing false narratives to pass as credible.

M Yanick Saila-Ngita's argument is that the DSSH model is straightforward enough that, over a period of time, asylum seekers, or their representatives, would be familiar enough with the model to create a false narrative that would be able to pass the credibility test. It is not impossible that a person would be able to create a credible narrative using the DSSH model, particularly when so many applicants lack any documentary evidence to support their claims. However, this thesis argues that the same could be said of the current tests employed by countries, which rely on knowledge of queer trivia, which is also possible to revise for. This thesis argues that it would be easier for a person to simply revise a list of facts relating to queer trivia (such as reading Oscar Wilde, as mentioned in the previous chapter, or learning the names of several gay bars or clubs) than it would be to create a narrative of their

[205] Berg(n162)196
[206] Gomez(n11)496
[207] Yanick Saila-Ngita(n13)298

life that demonstrates their feelings of difference, allows them to identify and communicate their SOGI and demonstrate that they are being persecuted. Therefore, this thesis does not consider this a valid criticism to cast doubt as to whether the DSSH model, once having the above improvements made, should be implemented by the EU.

As was mentioned earlier, research has found that the DSSH model is already being used in Cyprus, Finland and the UK.[208] However, it is very important that when the DSSH is applied it is done so in a manner that is appropriate. A UK government investigation has found that the DSSH model has been reduced to a questionnaire with 'only as a framework of four headings', rather than an opportunity for an applicant to tell their own story in a meaningful way.[209] It was even described as a 'half-way house' and there is a need to create more open ended questions.[210] Similarly, a further source has stated that Hungary attempted to use the model but did not have 'enough skills and knowledge for it to work.'[211] These results demonstrate that simply having a framework is not enough, and that the EU needs to do more to ensure it is used properly, such as further guidance and training. The role of the EU will be discussed further in the next chapter.

Overall, these secondary arguments do demonstrate further improvements that must be made to the DSSH model in addition to considerations based on a male homosexual default. In particular, it is very important that universal and non-Westernised concepts of SOGI are understood by adjudicators. In addition, the role of shame should be considered more thoroughly, and it certainly should not be held to the same standard as the other four elements, and maybe should not be included at all. Finally, it is important that when the DSSH model is used, the staff using it have enough training and knowledge to properly implement it, as opposed to simply creating a list of questions.

4.4 INTERMEDIATE CONCLUSION

To conclude, this chapter has looked at the ways in which credibility of SOGICA can be assessed by analysing the current models and frameworks that are used. As has been mentioned, the DSSH model appears to be the only widely accepted model for credibility

[208] EMN(n134)
[209] John Vine, 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation' (*gov.uk*, June2014)
[210] Ibid
[211] FRA(n7)

assessment. It has had an irrefutably positive impact on the development of credibility assessment for SOGICA and has provided a basis for several countries and been endorsed by the UNHCR. However, the DSSH model is not without its criticisms and before it can be implemented it needs to be adjusted in order to move the model away from its current 'gay male default' in order to be more inclusive of all sexual minorities. In addition, further research needs to be done in order to see how efficient it is to include trans and intersex persons within this model, and based on this make the language of the model more inclusive, or create separate guidelines. Furthermore, it should be considered whether the inclusion of the element of 'shame' is both appropriate or even necessary within the model.

This thesis argues that, with the criticisms and improvements mentioned within this chapter, plus further research with regards to all SOGI minority identities, the DSSH model does provide a useful basis in order to create a framework within the EU to improve the methodology of SOGICA. However, this thesis also argues that simply creating a model is not enough to protect SOGI minority asylum seekers. The next chapter will go further in detail as to how to apply this model and also make sure that it is maintained.

5.

A COMMON EUROPEAN SOLUTION

Thus far this thesis has provided a background to the credibility assessment of SOGICA, including its problems and their potential solutions. In the second chapter this essay established the current legal framework and laws pertaining to SOGICA, applied by the EU to its MS, as well as highlighting ancillary international agreements. In chapter 3, this thesis demonstrated the way in which MS assess the credibility of SOGI asylum seekers is not only inconsistent among MS, but does not produce cohesive results throughout the EU. This erratic and unpredictable system is constantly at risk of creating inequitable outcomes for applicants that may even breach their human rights and dignity. In the previous chapter, the method of credibility assessment most heavily relied upon in civil society and professional discourse on the subject, Chelvan's DSSH model, was considered as a basis for what ought to be applied. The chapter went onto elucidate the various criticisms surrounding this model and ventured an analytic synthesis of these existing components to propose an ameliorated model. Therefore, as this thesis has revealed the plethora of problematics associated with the methodology behind SOGICA credibility assessment and having appraised a model that creates a more appropriate framework, this chapter will consider first of all whether a common system for the entirety of the EU is indeed the best way forward; and if so what is the best way to implement such a system? To supplement this investigation the chapter is to additionally consider proposals for the reform of the CEAS, which may be improved and incorporated in this model.

The first subsection will consider whether a common system for SOGI asylum is the most appropriate solution for the EU to take (5.1). The chapter will challenge the concept of European/Western 'saviourism' that paints the EU as a civilised force against the uncivilised remainder of the world. It will go on to consider the multitude of social problems that exist in Europe for LGBTI persons – with particular attention to the discrimination against trans persons that is predominate in every European country. The essay shall then refer to current

trends driving the regression of LGBTI rights in Europe. Continuing, the thesis will examine difficulties arising from reception conditions for SOGI asylum seekers in Europe, as well the detail various problems that SOGI refugees face even after they have gained protective status.

Moving forward on the basis that whilst the EU must enact reforms to ensure that SOGICA are handled in a manner that guarantees the dignity and respect of the applicant, it still offers valuable protection to SOGI individuals; the second subsection will consider this in regards to the CEAS (5.2). In particular, this subchapter will examine the current status of the CEAS and the current proposals being considered for adoption. The chapter will consider the proposals through the lens of queer theory and study potential problems either within or absent from the proposals with particular reference to *sur place* activities, late disclosure, specific information and questions asked to SOGI applicants and statistics. This subchapter will finally discuss how further proposals for the CEAS have the potential to include the implementation of a framework for the credibility assessment of SOGICA.

The last subchapter will contemplate the limits of the role played by the EASO with regards to SOGICA and what practices that office can institute in order to support credibility assessment of SOGICA in a way that is consistent throughout the EU and protects the rights of SOGI minority asylum seekers (5.3). This chapter will propose recommendations concerning how the EASO can implement research, collect data and statistics, research and collate COI and prepare guidance and training in a fashion that guarantees progress towards the aim of this thesis: a standardised EU methodology informing credible assessment of SOGICA.

5.1 IS EUROPE READY FOR A COMMON SYSTEM FOR LGBTI REFUGEES?

A driving force, heavily documented and commented upon in various discourses among the humanities, revolves around analysing the presence a social conception of an 'idealized European self and a demonized, non-European other' that enables the legitimisation of European social and economic dominance.[212] This dichotomy is particularly pronounced when studying the process of European asylum, and possibly even more so for queer asylum seekers in Europe. The advancement of LGBTI rights in Europe have become a symbol of

[212] Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' [2018]29Law Critique221,221-222

Europe, and are used to further this dichotomy: differentiating the forward-thinking West from the supposedly archaic and homophobic East.[213] However, this Orientalist dichotomy garners increasingly poignant critique, with the dated and clearly ethnocentric narrative of the 'civilised West' cultivating a 'save the queers' mentality being heavily condemned.[214] The Orientalist premise of this social trope and its role in SOGICA must be considered, particularly with relation to the impact the Western Imperialism has had on creating homophobia and anti-queer laws in Eastern and Southern continents.[215] Yet, there is also the argument that failing to 'save the queers' must be considered inhumane and to allow the international oppression of queer persons, could also be a violation of international and human rights law.[216] In the same vein, the chapter will consider how Western countries position queer persons as 'trophies' or cultural currency in the effort to gain political clout by virtue signalling despite having an inequitable asylum process.[217] The subchapter will debate whether Europe is the best place for queer refugees. It shall consider the problems faced by queer asylum seekers and refugees in Europe generally, as well as examining the situation in various MS to consider whether a common system throughout Europe would indeed alleviate the difficulties faced by these refugees.

One of the many problems within Europe is discrimination against trans and intersex persons. A FRA report from 2014 revealed that trans persons within the EU 'face frequent infringements of their fundamental rights' including 'discrimination, violence and harassment'.[218] As mentioned previously, intersex persons are often forgotten in discussions on the infringements against SOGI minorities despite evident discrimination, even throughout MS. Intersex persons are often the victims of unnecessary and potentially even dangerous treatments and surgery, often in infancy or early childhood, recommended by doctors in order to 'normalise' their sex, for example having surgery on their genitals in order to make it look more like a penis or vulva. The only benefit of such treatments and surgery is to make an intersex person closer to fitting within a male or female boundary, and can even have negative health effects including sterilisation, incontinence, scarring, lack of sensation and

---

[213] Philip Ayoub, David Paternotte. 'Introduction' in Philip Ayoub, David Paternotte(eds), *LGBT Activism and the Making of Europe. A Rainbow Europe?* (PalgraveMacmillan,2014)3,12,14
[214] Sarah Bracke, 'From "Saving Women" to "Saving Gays": Rescue Narratives and Their Dis/Continuities' [2012]2European Journal of Women's Studies237
[215] Alan Yuhas, 'A Win for Gay Rights in Botswana is a 'Step Against the Current' in Africa' *New York Times* (New York, 11June2019)
[216] Nuno Ferreira, 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?'[2018]GeniusV(2)25,42
[217] Ibid
[218] FRA, *Being Trans in the EU: Comparative Analysis of the EU LGBT Survey Data*(2014)1

nerve damage, and psychological trauma.[219] In the EU, such treatments and surgery are only outlawed in Malta and Portugal.[220]

Another report by Transgender Europe found that trans asylum seekers are more likely to experience 'violence, human trafficking, health problems, alcohol and drug abuse and suicidal thoughts'.[221] Few MS respect the gender identity or even name of trans asylum seekers, failing to recognise them entirely, which is evidently necessary as the basis for respecting the right to privacy and prevent individuals from being 'outed' which could lead to harassment and discrimination.[222] Furthermore, trans rights in general, even outside of the boundaries of asylum, are regressing in certain parts of Europe. For example, recently Bulgaria removed previously established procedures that allowed trans persons to change their name or gender marker on official documents.[223]

Whilst sexual orientation is recognised as a legitimate source of persecution in 24 MS, gender identity is only recognised in 15 and sex characteristics (which relate to both trans and intersex individuals) are only recognised in three.[224] One positive change however, is the rate of change for these laws. In the past six years the number of countries to include persecution founded on gender identity has increased from three to the present 15, although the number of MS which recognise sexual orientation has remained constant.[225] Clearly, however, there is room for improvement.

Other LGBTI minorities also face discrimination or abuse, with a recent study finding harassment and discrimination of LGBTI persons occurs multiple times every day.[226] The main issues effecting queer persons in general as well as asylum seekers and refugees in the

---

[219] HRW 'US: Harmful Surgery on Intersex Children' (*Human Rights Watch*, 25July2017)<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>accessed 13July2019

[220] Intersex Resolution(n196)2

[221] TGEU, 'Welcome to Stay–Building Trans Communities Inclusive of Trans Asylum Seekers and Refugees. Transgender Europe' (*TGEU*, September2017)<https://tgeu.org/wp-content/uploads/2017/09/TGEU_TransAsylumBrochure_LR.pdf>accessed 3June2019

[222] Dodo Karsay, 'Protecting LGBTQI rights in Europe – Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity(CM/Rec(2010)5)', (*ILGA-Europe, Transgender Europe and OII Europe and endorsed by EL*C, IGLYO, and NELFA*, October2018)<http://www.sogica.org/wp-content/uploads/2018/10/coe-submission-18-tgeu-ie-oii_0.pdf>accessed 29May2019

[223] ILGA, 'Rainbow Europe 2019' (*ILGA*,13May2019)<https://www.ilga-europe.org/rainboweurope/2019>accessed 10June2019

[224] European Union Agency for Fundamental Rights, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU – Comparative Legal Analysis*(2015)

[225] ILGA, 'ILGA-Europe Rainbow Index' (*ILGA*,May2012)<https://www.ilga-europe.org/sites/default/files/Attachments/ilga-europe_rainbow_index_side_b.pdf>accessed 4May2019

[226] 'LGBTI' (*Fundamental Rights Agency*)<https://fra.europa.eu/en/theme/lgbti>accessed 19June2019

EU, however, vary in frequency depending on the country of reception. There is a growing concern that in some MS LGBTI rights have begun to regress despite conceited efforts by lawmakers and advocates to ameliorate repressive policies.[227] For example, Hungary and Poland recently blocked EU legislation because of the inclusion of the term 'LGBTIQ'.[228] This discrimination, hostile atmosphere brewing in conservative public discourse, and malignant policies must be taken into account when establishing whether to create a common European framework for SOGICA. Despite these difficulties, however, it can be argued that the position of SOGI minorities in the EU is better than in many countries. Whilst violence and hate crimes still occur against SOGI minorities in the EU, it can be argued that such persons are more protected than in many countries of origin.

Potentially a more pressing concern for LGBTI asylum seekers in the EU is that of the conditions of reception for queer asylum seekers. LGBTI persons may be unsafely placed in accommodation with people who share the views of those they are fleeing from. Trans asylum seekers are particularly at risk as they may be placed in gendered facilities that do not respect their identity or a facility that fits their identity but not their physical appearance 'outing' them to other asylum seekers, increasing the likelihood of them being subjected to discrimination and even violence.[229] Their healthcare, such as gender affirming care like hormonal treatment, can often be barred without consideration to the damage this privation would inflict on both the treatment and the mental health of the patient.[230] Reception conditions for LGBTI asylum seekers create a situation where the ability for MS to provide protection for SOGI minority asylum seekers is dubious and inconsistent at best. The most cursory examination of the variation in reception conditions, and unnecessary harm caused by thoughtless and reckless procedure, evinces the need for a common, standardised system to ensure the safety and dignity of refugees. Reception conditions which are not appropriate for LGBTI individuals but feature in many MS also give credit to the argument that an EU framework may not be the best method of protecting LGBTI asylum seekers.

It is clear that the situation for LGBTI individuals in the EU still requires a lot of conscious efforts by lawmakers and advocates in many arenas to ensure equality, particularly for SOGI minority asylum seekers and refugees who are evidently more vulnerable to abuse

---

[227] ILGA(n223)
[228] Mehreen Khan, 'Europe's Quiet New Culture Wars Over LGBTI Rights' (*Financial Times*, 5December2018)<https://www.ft.com/content/d027b3c8-f902-11e8-8b7c-6fa24bd5409c>accessed 14June2019
[229] TGEU(n221)
[230] Ibid

and discrimination. Does this mean, however, that a European solution to asylum, particularly one that is common and binding for all States within the EU, including MS with little respect for LGBTI rights, should be brushed aside in favour of a solution aimed at ameliorating the situation in MS more amenable to pro-LGBTI policies?

This thesis argues that such an approach would be problematic and less effective. Whilst the situation within the EU represents a series of battlegrounds with drastically different terrains, there is no MS where LGBTI 'acts' are illegal, immediately attesting to the fact that it is safer than many countries where asylum seekers begin the diaspora. Additionally, there are laws protecting individuals against discrimination and the EU is fighting for laws to protect LGBTI persons, including the historic *European Parliament Resolution on the Rights of Intersex People* which demonstrates the EU's desire to make change for the most vulnerable and ostracised members of the LGBTI community.

In terms of the undesirability of certain countries within the EU for SOGI asylum seekers, the Dublin Regulation means that the first MS in which the applicant enters is where they must apply for asylum, meaning SOGI minority seekers do not have a choice to go to a MS that has more progressive LGBTI attitudes and laws. In addition, it is important that even if the State may not have the most progressive attitude towards LGBTI persons, an LGBTI person who applies for asylum in that country deserves the same respect throughout the asylum process and result as if they had applied in another State: the purpose of the CEAS. Despite its many flaws, the EU has some of the best conditions that can be offered for refugee protection, within real world constraints.[231] Therefore, this thesis considers that, with regards to the primary research question, the EU should create a common framework for SOGICA as the EU is still well placed to provide protection for queer asylum seekers. The rest of this subchapter will consider how such a framework should be implemented within the CEAS and the role of the EASO in supporting SOGICA.

5.2 THE COMMON EUROPEAN ASYLUM SYSTEM

'Asylum must not be a lottery.'[232] This is a statement found on the CEAS website. However, as multiple reports referenced in this essay have indicated, for SOGI asylum seekers elements of such a 'lottery' is constantly at play and in some cases these change elements drive the

[231] Rainer Bauböck, 'Refugee Protection and Burden-Sharing in the European Union'[2017]56JCommon Market Studies141
[232] European Commission(n6)

entire procedure. The way in which credibility is assessed, what evidence is taken into account and the final decision varies from State to State.[233]

The premise of the CEAS is founded on the idea that individuals should be given the same treatment no matter which MS they seek asylum in.[234] Currently the CEAS is composed of five legal texts, some of which have been mentioned previously in this thesis: the QD,[235] which establishes who is eligible for international protection, and the rights constitute said protection; the APD,[236] which sets the processes common for permitting and also withdrawing refugee status; but there is also the Reception Conditions Directive,[237] the Dublin Regulation,[238] and the EURODAC Regulation.[239] The majority of the current law of the CEAS is framed in Directives, meaning that MS have a margin of discretion when implementing the provisions of the Directive. Whilst the CJEU has the power to limit this discretion, as has been seen in the cases of *ABC* and *F v Bevándorlási és Állampolgársági Hivatal*, a standardised system, common to all MS would rectify the large margin of error inherent in the current system. Whilst this thesis argues to minimise the discrepancies between States by creating a single system, MS remain unwilling to assign powers relating to asylum processes to the EU, and without this political will, then a truly common system is impossible.[240]

In response to the deficiencies of the CEAS that were demonstrated during the refugee 'crisis', the CEAS is currently going through a period of reform, named the European Agenda on Migration.[241] The areas that the Agenda prioritises, which are of particular importance to the topic of this thesis are as follows: a system to monitor how asylum rules are implemented and applied; guidance on improving both reception conditions and asylum procedures with measurable indicators to clearly demonstrate how MS will be engaged in protecting fundamental rights; enhancing the practical abilities of EASO especially to produce COI; effectively dealing with 'abuses' of the asylum system; and strengthening the concept of

---

[233] Jansen(n7)
[234] Pieter Boeles et al, *European Migration Law* (2nd Edition, Intersentia 2014)246
[235] QD(n46)
[236] APD(n54)
[237] Reception Conditions Directive(2013/33/EU)
[238] Dublin Regulation(No.604/2013)
[239] Eurodac Regulation(No.604/2013)
[240] Natascha Zaun, 'From EASO to the European Agency for Asylum: "Business as Usual?"' (*EU Immigration and Asylum Law and Policy*, 3July2017)<http://eumigrationlawblog.eu/eu-asylum-policies-the-power-of-strong-regulating-states/>accessed 30May2019
[241] European Commission, A European Agenda on Migration,COM(2015)240

'safe' Countries of Origin.[242] The need for an adoption of 'a single asylum decision process to guarantee equal treatment of asylum seekers throughout Europe' was one of the main debates at the conclusion of the Agenda.[243] This, therefore, supports the central hypothesis of this thesis.

The reform of the CEAS has been cited by many as an opportunity to address and improve the law that governs SOGICA.[244] However, if any or to what extent any improvements will be made are yet to be seen. The documents of the CEAS reform find themselves at different stages, with provisional agreements being reached in June 2018 on the EURODAC Regulation, the EU Asylum Agency Regulation, the Reception Conditions Directive, the Qualification Regulation and the Union Resettlement Framework Regulation.[245] Within these provisional agreements there are some improvements with regards to both the language and the protection of SOGI based asylum seekers.[246] However, there is yet to be an agreement on the Asylum Procedure Regulation or the Dublin Regulation.[247] As the CEAS reform is considered as a 'package' nothing can be ratified into law until the last two Regulations also have been agreed upon.[248] It is unsure when this will occur.[249] This thesis poses that this reform provides an opportunity to implement a standardised framework to improve the credibility assessment of SOGICA.

As mentioned previously, one of the proposals for reform would include changing the Procedures Directive and QD to Regulations.[250][251] This means that MS have less flexibility when implementing EU standards, which some authors are concerned means that States who would have created higher standards for refugees will not be able to.[252] However, this thesis

---

[242] Ibid
[243] Ferreira(n2)27
[244] Nuno Ferreira et al 'The Reform of the Common European Asylum System: Fifteen Recommendations from a Sexual Orientation and Gender Identity Perspective' (*SOGICA*,May2018)<http://www.sogica.org/wp-content/uploads/2018/05/SOGICA-CEAS-reform-Recommendations-1.pdf>accessed 25March2019; ILGA, TGEU, 'LGBTI rights in the reform of the Common European Asylum System' (*ILGA*,2019)<http://www.sogica.org/wp-content/uploads/2019/02/Overview-of-the-CEAS-Reform-ILGA-Europe-TGEU.pdf>accessed 30May2019
[245] European Commission, *Annual Report 2018 on the List of Actions to Advance LGBTI Equality* (European Commission,2019)
[246] ILGA, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People 2019:European Union (*ILGA*,2019)<https://www.ilga-europe.org/sites/default/files/european_union.pdf>accessed 28February2019
[247] European Commission(n245)
[248] ILGA(n246)
[249] European Commission(n245)
[250] Proposed Asylum Procedures Regulation COM(2016)0467
[251] Proposed Qualification Regulation(n56)
[252] Paul Craig, Gráinee de Búrca, *EU Law: Text, Cases, and Materials* (6thedn,OUP,2015)106-109

argues that for the purpose of SOGICA a fair and effective model should be imposed equally to all MS, so that asylum seekers are not prejudiced based on their country of reception.

The European Commission's Annual Report of 2018 on *The List of Actions to Advance LGBTI Equality* explicitly referred to SOGI minority asylum seekers, however, only with regard to their specific needs for reception conditions, and did not acknowledge faulty credibility assessment or the lack of coordination between MS, which both remain acutely affective problems.[253] One of the most prominent global NGO organisations, ILGA, who is working for both the CEAS's Vulnerability Experts Network and with the European Parliament has praised the reforms of the CEAS for offering better protection for SOGI asylum seekers and refugees, particularly with regards to the Reception Conditions Directive and the Qualification Regulation.[254] However, this thesis argues that the recast Procedures Directive should include a binding legal responsibility for MS to follow a framework for SOGICA and that further problems remain within the proposed recast for SOGICA. In addition to the moral argument of providing a fair assessment for queer asylum seekers throughout the EU, such a framework supports the aim of the CEAS, for common and cohesive results for asylum throughout the Schengen zone. The details of how such a framework is to function should be the responsibility of the EASO, which shall be considered in the next subchapter.

This subchapter will now consider other elements of the CEAS recast and how various facets of this recast can be further adjusted thereby facilitating the institution of a framework for credibility assessment of SOGICA supported by this thesis.

5.2.1 TRAINING

In order to establish a framework throughout the EU that assesses SOGICA fairly and equally, it is imperative that asylum adjudicators are well trained. The current APD requires that MS provide both 'sufficient competent personnel'[255] and 'take into account the relevant training established and developed by the EASO.'[256] However, this does not define 'relevant training' nor mention which modules must be taken, which leads to different outcomes in

[253] European Commission(n245)
[254] ILGA, 'Activity Report 2017/2018' (*ILGA*,2019)<https://www.ilga-europe.org/sites/default/files/activityreport2018.pdf>accessed 9June2019
[255] APD(n54)Art4(1)
[256] Ibid,Art4(3)

different MS.[257] This margin of discretion has changed within the Proposed Procedures Regulation which states that personnel must 'have the appropriate knowledge and are provided with the necessary training and instructions'[258] and that 'personnel interviewing applicants, including experts deployed by the EU Agency for Asylum, shall have received relevant training'.[259] This Regulation broadened the requirement for what constitutes training by not necessitating the training to the training produced by the EASO. This thesis argues that broadening the scope of where the training may be provided from would allow for the possibility of, and would likely result in even further diversity in MS standards. This thesis calls for two changes to this Article. First of all, the legislation in question requires that all MS have a specified minimum standard of training provided by the EASO in order to create an equal and applicable level between MS within the system. There are no prohibitions limiting MS that want to engage in additional training, but all States should be trained to have a standard level by the EASO. Secondly, the modules that the relevant asylum officials must pass ought to be specified. Of particular relevance to this thesis, one of these modules should be for the framework used in order to credibly assess SOGICA throughout the EU. Additionally, the low participation within the current, optional SOGI minority module could be improved and stabilised across MS, if the modules that States must take were specified within the Asylum Procedures Regulation.

5.2.2 INTERNATIONAL PROTECTION NEEDS ARISING *SUR PLACE*

Another problem that has arisen within the CEAS recast that may be of particular relevance to SOGI individuals is that of international protection needs arising *sur place:* the persecution having its basis on events that occur after the applicant left their country of origin. The legal basis for providing this *sur place* protection can be found under Article 5(3) of the Proposed Qualification Regulation. *Sur place* claims are particularly important for SOGI asylum seekers. As covered within the previous two chapters, many SOGI minorities in discriminating countries may be forced into a heteronormative lifestyle in order to conceal their true SOGI. Therefore, it is very possible that whilst they may have not acted in a way that created a well-founded fear of persecution prior to leaving their country of origin, once in another country they may participate in activities that do result in certain actors finding out

[257] Samantha Velluti, *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts* (Springer,2014)58
[258] Proposed Asylum Procedures Regulation(n250)Art5(5)
[259] Ibid,Art12(7)

about their SOGI.[260] A common example of this is a young person who leaves their country in order to study abroad. Once in a country that is more progressive in terms of queer rights, they may feel more comfortable expressing their SOGI which, if found out by persons in their country of origin, may put them at risk of persecution.

Whilst *sur place* restrictions were also present within the 2011 QD, there is an important change of the language. The 2011 version puts MS in control of assessing whether an applicant can be granted refugee status (if the claim of persecution is based on circumstances which, resulted in the necessity for the claim, occurred after the applicant left their country of origin) by stating that 'Member States may determine' such cases.[261] However, there is much less flexibility within the Proposed Qualification Regulation which instead states that, 'an applicant who files a subsequent application… shall not normally be granted refugee status or subsidiary protection status'.[262] Although orientation is explicitly mentioned with Article 5(2) there is some room for MS to allow *sur place* claims, however the bar is much higher in the proposed Regulation, and this thesis argues that therefore it would be easier for MS to disallow cases based on *sur place* conditions. Both civil society and the European Parliament have called for the optionality offered in the 2011 QD to be maintained.[263] A further issue with the proposed reform is that the 2011 Directive referred only to refugee status, whereas the proposed 2016 Regulation extends this to also include subsidiary protection status.

Sur place restrictions when placed upon SOGI minorities demonstrate a fundamental misunderstanding of SOGI that the DSSH model has attempted to eliminate. Restricting SOGICA because of an act that occurred *sur place* once again reduces SOGI to behaviours rather than identity. A person who is a SOGI minority, but can only express this after leaving their country of origin should not be considered *sur place* as their identity has not changed. Similarly a person who discovers that they are a SOGI minority whilst living outside their country of origin should not have their SOGICA disallowed because of the timing. Therefore this thesis argues that, based on the very specific circumstances of SOGI asylum seekers, there should be a further subsection to the 2016 Regulation that explicitly mentions that this article should not apply to SOGICA, as part of the framework.

---

[260] Ferreira(n244)
[261] QD(n47)Art5(3)
[262] Proposed Qualification Regulation(n56)Art5(3)
[263] European Parliament, Report on the Proposed Qualification Regulation(COM(2016)0466–C8-0324/2016–2016/0223(COD))Amendment68

5.2.3 LATE DISCLOSURE

This thesis has already detailed the ways in which late disclosure can significantly and particularly affect the credibility assessment of SOGI asylum seekers, and why applicants often disclose their SOGI after the first interview. Under both the current QD and the Proposed Qualification Regulation it is stated that additional evidence is not needed unless 'the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so'. This thesis, along with reports from civil society, recommends that the Proposed Qualification Regulation is revised to explicitly reflect the judgment of *ABC* as part of a framework for SOGICA.[264] This revision aims to stop adjudicators putting too much importance on late disclosure which can negatively affect credibility.

5.2.4 INFORMATION AND QUESTIONING RELATED TO SOGI

With regards to late disclosure, one oft cited reason as to why a SOGI asylum seekers did not mention their SOGI at the first possible instance is because they did not realise that it was relevant to their application. One thing that the SOGICA Project has recommended in order to ameliorate this situation is to change Article 5 of the Proposed Reception Conditions Directive so that it is obligatory to tell all asylum seekers that persecution for SOGI is grounds for asylum, in a clear and concise way that is comprehensible to the applicant.[265] There is no EU law that mandates that such information is given to asylum seekers; meaning applicants may not mention their SOGI, or some attempt to use different information and consequently may apply with a weaker case for their claim, or fail to make a claim at all. In a similar vein, the project also recommends that adjudicators explicitly ask asylum seekers' about their SOGI, even if it is not brought up by the asylum seeker, by means of adding such a provision to Article 27 of the Proposed Procedures Regulation.[266] Both of these elements have the potential to improve how SOGICA is credibly assessed by giving SOGI minority asylum seekers the best tools to demonstrate their case as early and coherently as possible.

5.2.5 STATISTICS

As previously discussed, the majority of MS cannot produce statistical data on SOGI asylum seekers.[267] Again, this data is essential to understand why asylum is sought, and to further our

---

[264] Ferreira(n244)
[265] Ibid
[266] Ibid
[267] EMN(n134)

understanding about the situation of SOGI in particular countries. This issue regarding to data also has an important link to credibility, to be discussed further in the potential role of the EASO, nevertheless this could also be amended by a legal requirement to the CEAS that would compel States to record SOGI when listed as a reason for asylum. At present, when questioned as to why SOGI asylum statistics are not taken MS cite legal obstacles such as personal data laws or technical obstacles.[268] The SOGICA Project recommends including the mandate of domestic authorities to record such data under Article 27 of the Proposed Procedures Regulation in order to create reliable statistics.[269]

Overall, with regards to the reform of the CEAS, there is still much that could be done to help the specific plight of SOGI minority asylum seekers. Whilst some elements of this situation have changed for the better, there is still a substantial amount of resilient features that the new proposals have failed to improve, and indeed some aspects of this problem have even got worse for LGBTI asylum seekers. Although it is outside the scope of this thesis, it is worthy to note that the proposal for a 'safe country of origin' list for CEAS MS is also potentially problematic for SOGI minority asylum seekers.

The reform to the CEAS describes multiple mechanisms that are designed to inhibit adjudicators listening to the story of an asylum seeker; the duty to treat an asylum seeker as an individual.[270] This goes completely against the purpose of the DSSH model, civil society objectives and academic literature on the subject. In addition it is problematic for valid and consistent credibility assessment that respects human rights and dignity. The EU is failing to step in as a barrier against these mechanisms and their pernicious effects.[271] This thesis argues that not only should the above changes be implemented to the proposed CEAS in order to create a system that is fair to SOGI minority asylum seekers, but a legally binding, standardised framework should be included so that all MS are assessing based on the same criteria. This framework should be based on the DSSH model after the adjustments mentioned in the last chapter. However, due to the nature of the CEAS legislation, this thesis argues it would be inappropriate for the full framework to be included within it and instead the framework should be supplemented and provided by the EASO.

---

[268] Ibid
[269] Ferreira(n244)
[270] Elspeth Guild, 'From Persecution to Management of Populations: Governmentality and the Common European Asylum System'[2012]4Nijmegen Migration Law Working Papers Series25
[271] Ibid

5.3 THE ROLE OF THE EUROPEAN ASYLUM SUPPORT OFFICE

The EASO's main purpose is to add to the development of the CEAS 'by facilitating, coordinating and strengthening practical cooperation among MS on the many aspects of asylum'.[272] In the realm of this purpose, the EASO is allotted many tasks, but the practices which will be central to this thesis that have the possibility of improving the methodology behind credibility assessment for MS are: providing data on asylum trends including analysis of asylum trends, push-pull factors and risk scenarios; developing and giving training to enhance the harmony and quality of the asylum process; producing COI reports; and deploying operational support in the form of asylum experts such as asylum support teams or whatever other support necessary.[273] Therefore, this thesis considers that the EASO has a significant role to play in creating a standardised framework that can be used by MS for assessing the credibility of asylum seekers. This thesis shall also explore the ways in which these tasks can be used to aid SOGI asylum seekers later within this chapter.

In 2014 a European Parliament Resolution the *EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* focussed on SOGI minorities within the EU. Amongst many other topics the resolution considered SOGI based asylum and the EASO had a prominent role. Alongside other EU agencies the EASO was called upon to mainstream SOGI issues into its work and provide the Commission and MS with advice based on evidence towards the rights of SOGI minorities.[274] However, based on the issues presently facing and additional facets to the argument to be discussed later in this subchapter, this goal does not appear to have been achieved. This is important to achieve a high standard of SOGICA throughout each facet this thesis has discussed, including credibility assessment.

More specifically the EU Roadmap requires the EASO, the Commission and other agencies to include the 'specific issues linked to sexual orientation and gender identity asylum in the implementation and monitoring of asylum legislation'.[275] It explicitly refers to the APD and the QD, which as detailed earlier, was not adjusted enough to account for all the issues effecting SOGI asylum seekers. Finally, the Roadmap mandates duties to collect both

---

[272] 'European Asylum Support Office' (EASO,2016) <https://www.easo.europa.eu/sites/default/files/publications/EASO-Brochure-EN%20_0.pdf>accessed 3March2019
[273] Ibid
[274] European Parliament Resolution on the EU Roadmap Against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity(2013/2183(INI))
[275] Ibid,K(i)

the 'legal and social situation' of LGBTI persons from countries of origin within the COI information. However, as described in the second and third chapter of this thesis, information relating to SOGI minorities in their country of origin is severely lacking. This thesis postulates that in order to obtain the most effective and humane results in SOGICA, the EASO adhere to the direction established by the Roadmap.

The EASO can potentially play an important role in the way that SOGICA is decided and in implementing a standardised framework for the EU. In addition, this thesis proposes that the EASO can enhance accurate and dignified assessment of SOGI claims by engaging in more research and statistical analysis of current SOGICA. Research, data and statistics are an essential contribution that the EASO could streamline into a new framework for SOGICA credibility assessment. A handbook produced by the EASO states one of its present tasks, with aim of, 'providing the latest asylum trends data as well as in-depth asylum data, an outlook with an analysis of asylum trends and push–pull factors, plus risk scenarios'.[276] However, as previously mentioned, the vast majority of MS cannot produce statistical data on SOGI asylum seekers.[277] Additionally, neither a report produced on EU+ asylum trends for 2018[278] or the EASO's article on the latest asylum trends from March 2019[279] break down any of the statistics with regard to SOGI, or even mention that such data is lacking. Therefore this thesis argues that whilst EU Roadmap's request for the EASO to mainstream SOGI is a way in which the situation can be ameliorated, this has failed to occur. Whilst this problem of MS failing to document statistics of SOGI asylum seekers does hinder the EASO's ability to provide analysis, it should still be aiming to gain its own data on such claims, or at least acknowledging the lack of data collected. This thesis argues that the lack of data and subsequent statistical analysis of said data, first must be resolved at MS level, with a requirement that all MS collect information regarding SOGICA. However, this data must then be analysed by the CEAS in order to demonstrate trends with regards to SOGI asylum seekers. This research and statistic inductions are essential for creating a framework for protecting SOGI asylum seekers.

[276] EASO(n272)
[277] EMN(n134)
[278] EASO, *EASO EU+Asylum Trends 2018 Overview* (EASO,2019)
[279] 'Latest Asylum Trends–March2019' (*EASO*, 13May2019)<https://www.easo.europa.eu/latest-asylum-trends>accessed 6June2019

Related to the research of EASO, is the task of producing and publishing COI.[280] COI has the dual role of not only providing asylum adjudicators with important and relevant information regarding the country of origin of a particular asylum seeker that can assist with accurate credibility assessment of their claim, but also creates cohesion throughout the assessment by MS resulting in consistent and similar outcomes.[281] Therefore, the gathering of this information is essential to achieve the objectives proposed by this thesis in the realm of establishing a humane, efficient, and reliable SOGICA framework.

As mentioned previously, the European Parliament, within its 2014 Roadmap, has called for both the legal and social situation of LGBTI persons to be documented and included within COI. It is very important that both the legal and social situation is recognised, as there are many countries where whilst it may not be explicitly illegal to be a SOGI minority, the persons are likely to be persecuted. Once again, a focus on illegality has an intrinsic male bias, as far more countries criminalise male homosexual acts or homosexuality than female homosexuality.[282] Trans persons, some of the most persecuted individuals in the world, only face criminalisation within six countries that have laws which target trans and gender non-conforming people.[283] Similarly, intersex persons, though they can face wide ranging harm, even including infanticide, are not 'illegal' per se. Therefore, it is very important to consider the social-cultural situation also.

EASO has taken on this task to some extent, however, in this paper's judgement the EASO's approach has some major shortfalls. One such shortfall revolves around the production of the 2015 guide to give practical advice in aiding such research.[284] The subject to be studied 'focuses on researching the situation of LGB since transgender and intersex applicants for international protection are not so common.'[285] Whilst it is true that LGB applications are more common, this approach drastically undermines understanding the situation of gender minorities, an already highly marginalised group. In addition, without statistics and research being collected, how can the frequency at which certain groups are present accurately and objectively be determined? This thesis recommends that a new guide is created that takes into account the specific needs of such persons, and that a fair SOGICA

---

[280] EASO(n272)
[281] Ibid
[282] ILGA'State-Sponsored Homophobia 2019' (*ILGA*,March2019) <https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf>accessed 14April2019
[283] '#Outlawed the Love that Dare Not Speak its Name' (*Human Rights Watch*,2019)<http://internap.hrw.org/features/features/lgbt_laws/#type-of-laws>accessed 4May2019
[284] EASO(n52)
[285] Ibid,8

framework cannot be created without taking all SOGI minorities into account. Most MS use COI when determining the credibility of asylum claims, so it is a very important area in the vein of ensuring all SOGI minority groups are considered by the asylum process.[286]

A further role that the EASO can offer in order to improve the situation of SOGI asylum seekers is giving guidance to MS on how to conduct credibility assessment of SOGICA. Guidance is an incredibly important aspect when trying to create a framework that can be applied equally in all MS. As mentioned, whilst there is a training module based on gender and SOGI, it has low attendance rates compared to other such modules. While persistent guidance should be given, ad-hoc guidance might be equally important in improving the situation faster, on the group, in real ways that could have immediate positive benefits.

Looking back at the criticisms in the previous chapter in regards to this issue, this thesis encourages the revision of the DSSH model to mandate guidance by the EASO to furnish examples, ideas and principles – importantly the DSSH model must not be reduced to a simple questionnaire, a practice criticised previously in this paper. Aspects of credibility assessment of SOGICA such as what evidence can be accepted, what ideas should be discussed, how interviews should be conducted, what should not prejudice the credibility of a SOGI asylum seekers claim and what differences should be taken into account with SOGICA and interviews than others amongst other ideas should be included. Furthermore, the EASO should work with civil society and SOGI experts in order to develop practical and helpful guidance. This thesis also recommends speaking directly to LGBTI refugees in order to gain their input in the mission of crafting reliable and informative guidance. Guidance and tools relating to SOGICA credibility assessment have been reported as being used by MS, demonstrating that they are useful.[287] However, MS should be encouraged to use these more, and they must be made easily accessible to asylum officials, for example being translated into multiple languages. Guidance from the EASO is a positive method in which MS can be directed on applying a framework to SOGICA in their country that remains cohesive throughout the EU.

Training is a further excellent way for MS to understand and be able to apply an EU framework to their practice of SOGICA. Currently the EASO provides different types of

[286] EMN(n134)
[287] Ibid

training in order to promote quality and harmonisation. It uses interactional modules including 'methodology, combining e-learning and face-to-face sessions' which gives both a theoretical and a practical knowledge.[288] It is also advantageous for using a 'train-the-trainer' methodology, so that after going to training attendees can multiply what they have learnt to other authorities.[289] With regards to what improvements need to be made, members of the SOGICA project, Ferreira and Venturi, stress that the focus should be less on the quantity of the content and more on quality methodology and means of training.[290] Possessing large quantities of knowledge on LGBTI persons does not make an adjudicator immune to interpreting that information in a problematic fashion, whether that faulty interpretation be comprised via reliance on ethnocentric assumptions or pejorative stereotypes. High-quality, standardised training conscious of its need to constantly alter its approach and consider individuals, will seek to address this.[291]

Current EASO SOGICA training modules were developed in 2016, and whilst they remain available they have not been updated since their creation. Considering the problems that still occur in all MS with relation to SOGICA, this thesis considers that, with the aid of civil society, previous refugees (as with guidance) and further research, these modules should be developed and improved upon. The call for 'much better training' has been heard in civil society.[292]

5.4 INTERMEDIATE CONCLUSION

To conclude, this chapter has considered not only how, but if the EU should take on a common approach to SOGI based asylum. The first subsection looked at this question of whether action needed to be taken and what actions were appropriate to take. It pointed to notions derived from academic discourse positing that asylum can promote European/Western 'saviourism' whilst simultaneously using SOGI minority refugees as 'trophies' despite the trials that they are put through during the asylum process due to mismanagement and the wide berth given to adjudicators ignorant of COI, without proper training. The essay went on to highlight the many problems and hostile social atmosphere

[288] EASO(272)
[289] Ibid
[290] Ferreira(n108)
[291] Ibid
[292] Ibid

faced not only by SOGI minority asylum seekers and refugees, but also all SOGI minorities within the EU. Contemplating this issue with a particular eye for the terrible discrimination that is faced by trans persons, the lack of protection and unnecessary surgery and treatments inflicted on intersex children before they are able to give consent, how many MS do not have full protection of SOGI minorities and the worrying trend of LGBTI rights in general starting to regress in certain parts of Eastern Europe – with particular reference to the discrimination of trans persons that exists in every European country. However, as a whole that the situation in the EU is better than many other countries, and that SOGI asylum seekers can find better protection within the EU. However, this should not be a reason not to improve the situation further where there are apparent faults.

The second subsection then examined the CEAS, both as its stands currently and paid attention to the proposed recast. After describing and analysing the place of LGBTI individuals within the asylum system, it carefully considered how the current reform of the CEAS could be considered as an opportunity to create a fairer SOGICA system, including the inclusion of a framework for SOGICA credibility assessment. Building on that argument, this thesis undertook an examination of the proposed recast of the CEAS, and in particular the Procedures Regulation, to propose the inclusion of a provision that mandates instituting a standardised framework for SOGICA that is rigorously adhered to and legally binding for each MS. Concerning the current documents that make up the proposal, this chapter gives recommendations to explicitly exclude SOGI applicants from conditions related to *sur place* activities and late disclosure. The essay recommends that all asylum seekers are explicitly, and in a way is comprehensible to the applicants, told that being persecuted for being a SOGI minority is grounds for asylum; subsequently, applicants are to be explicitly how they identify. Finally, it calls for MS collecting statistics on SOGI based asylum to be compulsory.

The third subchapter considered the potential role of the EASO in creating a framework for SOGICA credibility assessment. This thesis considers that due to its nature as a practical body, the EASO may have the largest role in SOGICA credibility assessment, by researching, creating and giving guidance and training in order to maintain a framework for SOGICA, whereas the CEAS documents should provide the legal basis. This chapter looks at many reasons as to why this should be. It builds on the previous argument that MS should be obtaining data with regards to SOGI based asylum. Despite one of the EASO's roles being data analysis there was no specific data on SOGI applicants, and in order to mainstream SOGI into its work this must change. Furthermore, the inclusion of gender minorities is

incredibly important. This subchapter also emphasizes the need for up-to-date, accurate and explicit reference to the situation of SOGI minorities in COI. Again making sure that all members of the LGBTI community are included. It also makes recommendations for the EASO to continually update and improve its guidance and training relating to SOGICA as well as make this more accessible.

6.

FINAL CONCLUSION

This thesis, and the governments who accept SOGI based asylum seekers, are struggling with a dilemma that is insoluble. There is no way to 'prove' a person's sexual orientation or gender identity, and attempting to do so has resulted in practices throughout the EU that impinge human rights and dignity. This amalgam of poorly defined and poorly conceived laws has created a system which is incongruous, inconsistent, and at times grotesquely procrustean for SOGI minority applicants. This thesis is grounded in discovering what redress, if any, might be enacted at an EU level to credibly assess the claims of SOGI minority individuals in a fashion that produces consistent, humane results across all MS.

As an examination of current legal affairs took place, issues began to formulate the central question of this thesis: *should the EU create a common framework for SOGI based asylum claims and how would these reforms be implemented?* This thesis proposes an approach divided into supplemental research questions which will provide the background necessary to fully contextualise the central investigations of the paper.

This thesis began by studying the legal developments of SOGICA at an international legal level. Chapter 2 demonstrated the development of the international legal regime necessary to consider SOGICA, from the so-called 'Magna Carta for refugees', the Geneva Convention, which did not explicitly mention SOGI minorities to how such minorities have been recently included in legislation via the concept of 'a particular social group'. The chapter covers how these developments were reproduced into EU law and tracks the most recent legal developments regarding SOGICA credibility assessment; analysing the CJEU's decision in *F v Bevándorlási és Állampolgársági Hivatal*, a case demonstrating some of the positive changes European law has brought about with regards to the human rights approach within credibility assessment. In order to accurately determine how to address issues within that system, the second chapter sketched the current legal situation of SOGICA credibility assessment at the EU level.

After establishing the current legal framework for SOGI minority asylum seekers in the EU, the essay poses the first sub-question: *what are some of the main issues when assessing the credibility for SOGI asylum seekers and what could a proposed EU framework do to mitigate these issues?* The third chapter details said issues, describing them at length and begins the proposal for standardisation.

In chapter 3 it was found that despite progression from the CJEU in the landmark case of *ABC*, stereotypes still formed a significant basis of credibility assessment. Stereotypes, vulgar popular social fictions displaying European ethnocentrism and prejudice, determined the fate of asylum seekers. This thesis found the use of stereotypes and tropes not only to be inappropriate, but also to disadvantage those SOGI minorities who are not male homosexuals who do not act congruently with tropes believed by adjudicators. Therefore, this thesis argues that stereotypes should have no place in asylum decisions and evince the laxity and problematics of current SOGICA credibility assessment; a standardised framework which bans such a reliance on stereotypes is the simplest solution to the problem. In addition, judgements based on previous long-term opposite sex relationships and having children are also elements considered unsound and prejudiced within credibility assessment. These elements ignore bisexual applicants and the pressure of fitting into a heteronormative narrative. Once more, a standardised framework which bans judgments based on an applicant's previous relationships, or having children, would be the simplest to enact. This chapter also developed the sub-question by examining how certain adjudicators privileged sexual behaviour over identity in their judgements – despite that fitting within 'a particular social group' is defined by innate characteristics, not solely sexual behaviour. Whilst these practices were ameliorated by the judgment in *ABC*, a framework that concentrated on the individual, rather than their behaviour, would help solve this dilemma. The demeanour of the applicant and late disclosure of their SOGI were also analysed as particularly problematic for SOGICA applicants when factored into credibility assessment. Chapter 2 clearly demonstrated that there are still problems with the way that SOGICA is assessed within the EU, and that these issues could be solved by adjudicators taking a different approach, which could be formulated into a model or guidance. This supports the main research question in suggesting that the EU should create a framework, and then develops what that framework should consist of.

Chapter 4 of this thesis sought to suggest a model for SOGICA credibility assessment. To establish a basis for the model, the chapter hearkened to the most commonly promoted

and UN-endorsed *Difference, Shame, Stigma and Harm* model, created by barrister S Chelvan. This lead to the second sub-question which focused on whether *the DSSH model is the most appropriate model to implement and what are its criticisms?* The chapter praises the DSSH model for its impressive shift of perspective in SOGICA credibility assessment, as moving the focus away from considering SOGI to be a physical behaviour and instead recognised SOGI as part of an identity. In addition, the DSSH method allows an asylum applicant the ability to identify themselves through their own narrative. These elements are what make the DSSH model so impressive and it is these elements that any model proposed by this thesis must continue. However, the thesis also identified many criticisms of the DSSH model that have not been studied sufficiently by academic literature. Most notable is the DSSH model's 'gay male default' which does not sufficiently consider sexual minority women, bisexuals or trans and intersex individuals. In particular, the differences faced by trans and intersex individuals warrant further research to see whether it is appropriate for them to be assessed by the DSSH model, or what changes could be made to fully integrate gender minorities. Additionally, the aspect of shame must be researched and criticised further to see if it should be included, several reports state many SOGI minorities do not feel shame. Finally, this model needs to make sure it does not fall into the trap of Westernisation. The chapter argued that the overall aims and concept of the DSSH model are strong; if potential criticisms are considered and further research into ameliorating the issues is completed then the paper proposes an amended DSSH model as an appropriate framework.

The final chapter ventures an answer at the crux of the question of this thesis, and looks overall at not only *should* a framework for the credible assessment of SOGICA be applied within the EU but also *how*. The chapter begins by considering if the EU is even a place that can offer SOGI minorities protection, with regards to the rising problems in certain EU countries for SOGI minorities in countries such as Hungary and Bulgaria where regressing laws for SOGI minorities have been enacted, to the detriment of their own citizens. The essay continues by examining the discrimination faced by SOGI minorities, and particularly trans persons, throughout the EU. However, despite these potential issues this thesis concluded that the EU still has a lot to offer SOGI asylum seekers in terms of refuge, including some of the most progressive and inclusive rights in the world and no laws that criminalise same sex or non-cisgendered acts or identities. With further reference as to whether a standardised framework should be applied within the EU, the third chapter demonstrated the substantial problems faced by SOGI asylum seekers in the EU.

Discrepancies abound between not only MS but even within MS and therefore the need for a framework that not only improved SOGICA credibility assessment from a human rights perspective, but also to create a cohesive methodology throughout the EU.

The final chapter then considered the role of the reform of the CEAS and the EASO with regards to SOGICA, looking at how the framework that was developed within the fourth chapter, based on Chelvan's DSSH model, can be applied. The fourth chapter considered Chelvan's DSSH model in depth, and made substantial recommendations for its improvement. If such improvements were to take place, the thesis held that this should be the baseline of a model for the CEAS. Therefore, the final chapter considered how this would be practically included within the EU. The sub-question *how the proposed recast of the CEAS affects SOGICA, and what can be done in order to improve the human rights situation of SOGICA* is answered within this chapter. The CEAS reform allows for the possibility of a higher level of protection for SOGI asylum seekers than is currently offered by the EU, however it has been demonstrated through analysis that the currently agreed upon proposals do not go far enough to ensure protection. The thesis gives direct recommendations as to how the proposed CEAS documents, which can be amended in order to provide for a fair SOGICA credibility assessment. Most notably this thesis argues that reference to the legally binding framework that was developed within the fourth chapter for SOGICA credibility assessment should be found within the Asylum Procedures Directive (or Regulation), the details of which should be developed by the EASO. In addition the thesis recommends that training should be better specified in order to reduce discrepancies between MS; that Articles relating to *sur place* acts and late disclosure both contain explicit exclusions for SOGI minority applicants; that applicants are advised that being a SOGI minority is grounds for asylum and that they are directly questioned with regards to their SOGI; and that MS must collect data and statistics on how many SOGI minority asylum seekers they receive.

The final sub-question examined w*hat role could the EASO play with regards to SOGICA?* This thesis argues that the EASO has a very important role in the development of a framework of SOGICA credibility assessment. As the role of EASO is to facilitate practical coordination of MS, this thesis argues that it should create the framework as part of its guidance, which MS in the CEAS are legally bound to follow after provisions found in the recast CEAS. Furthermore, it should create higher quality training and guidance with regards to SOGICA, truly mainstream LGBTI issues, and not disregard trans and intersex persons as too difficult, collecting data and statistics in order to produce better COI.

To restate the question: should the EU create a common framework for SOGI based asylum claims and how would this be implemented? The answer of this thesis is that the EU should create a SOGICA credibility assessment model that is based on a version of Chelvan's DSSH model that takes into account all the criticisms considered in chapter 4. This model should be implemented through a legally binding provision within the recast Asylum Procedures Regulation and developed, trained, guided and enforced by the EASO.

BIBLIOGRAPHY

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, American Psychiatric Publishing 2013)

Ayoub P, Paternotte D. 'Introduction' in Philip Ayoub, David Paternotte (eds), *LGBT Activism and the Making of Europe. A Rainbow Europe?* (Palgrave Macmillan 2014)

Batchelor T, '"Fake Gay": Iraqi Man Denied Asylum in Austria Because He was "Too Girlish" *Independent* (London, 24 August 2018)

Bauböck R, 'Refugee Protection and Burden-Sharing in the European Union' [2017] 56 J Common Market Studies

Boeles P et al, *European Migration Law* (2nd Edition, Intersentia 2014)

Bracke S, 'From "Saving Women" to "Saving Gays": Rescue Narratives and Their Dis/Continuities' [2012] 2 European Journal of Women's Studies 237

Briddock A, 'The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure' [2016] 4(1) BLR 123

Berg L, Millbank J, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2007) 22 Journal of Refugee Studies 195

Chelvan S, 'At the End of the Rainbow: Where Next for the LGBTI Refugee?' (*University of Oxford*, 24 January 2014) <https://www.rsc.ox.ac.uk/news/at-the-end-of-the-rainbow-where-next-for-the-lgbti-refugee-s-chelvan>accessed 3 March 2019

Chelvan S, 'C-148/13, C-149/13 and C-150/13, *ABC v Staatssecretaris Van Veiligheid en Justitie*: Stop Filiming and Start Listening – a Judicial Black List for Gay Asylum Claims' (*European Law Blog*, 12 December 2014)<http://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/>accessed 20 May 2019

Chelvan S, 'From ABC to DSSH: How to Prove You Are a Gay Refugee' (*Free Movement*, 23 July 2014) <https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/> accessed 27 February 2019

Cochran S et al, 'Proposed Declassification of Disease Categories Related to Sexual Orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)' (*World Health Organisation*, September 2014) <https://www.who.int/bulletin/volumes/92/9/14-135541/en/>accessed 24 May 2019

Connely E, 'Queer, Beyond a Reasonable Doubt: Refugee Experiences of "Passing" into "Membership of a Particular Social Group"' (UCL Migration Research Unit Working Papers 2014/3)

Craig P, de Búrca G, *EU Law: Text, Cases, and Materials* (6thedn, OUP, 2015)

Dawson J and Gerber P, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' [2017] 29 International Journal of Refugee Law 292

Diamond L, Savin-Williams R, 'Explaining Diversity in the Development of SameSex Sexuality Among Young Women' (2000) 56 Journal of Social Issues 297

European Asylum Support Office, *EASO EU+ Asylum Trends 2018 Overview* (EASO 2019)

European Asylum Support Office, *EASO Training Curriculum* (2016)

European Asylum Support Office, *Researching the Situation of Lesbian, Gay, and Bisexual Persons (LGB) in Countries of Origin* (EASO 2015)

European Commission, 'Common European Asylum System' (*Migration and Home Affairs)*<https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en>accessed 3 February 2019

European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative Analysis of the EU LGBT Survey Data* (2014)

European Union Agency for Fundamental Rights, *Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers* (2017)

European Union Agency for Fundamental Rights, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU – Comparative Legal Analysis* (2015)

France-Presse A, 'Austria Rejects Afghan's Asylum Bid Because He "Did Not Act or Dress Gay"' *The Guardian* (London, 15 August 2018)

Ferreira N, 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?' [2018] Genius V(2)

Ferreira N et al, 'The Reform of the Common European Asylum System: Fifteen Recommendations from a Sexual Orientation and Gender Identity Perspective' (*SOGICA*, May 2018)<http://www.sogica.org/wp-content/uploads/2018/05/SOGICA-CEAS-reform-Recommendations-1.pdf>accessed 25 March 2019

Ferreira N, Venturi D, 'Testing the untestable: The CJEU's decision in Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*' (*European Database of Asylum Law*, 28 June 2018)< https://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu's-decision-case-c-47316-f-v-bevándorlási-és-állampolgársági-hivatal>accessed 15 May 2019

Formby E, 'Why You Should Think Twice Before You Talk About 'The LGBT Community' (*The Conversation*, 8 August 2017)<https://theconversation.com/why-you-should-think-twice-before-you-talk-about-the-lgbt-community-81711>accessed 24 May 2019

Gennarin S, 'Countries Reject Declaration of Homosexual Rights at OSCE Gathering' (*Center for Family & Human Rights*, 18 July 2013)<https://c-fam.org/friday_fax/countries-reject-declaration-of-homosexual-rights-at-osce/>accessed 8 June 2019

Grinker R, 'Being Trans Is Not a Mental Disorder' (The New York Times, 6 December 2018)

Gross A, 'Discrimination on the Basis of Sexual Orientation and Gender Identity' (Council of Europe, Parliamentary Assembly, 2010)

Gomez E, 'The Post-ABC Situation of LGB Refugees in Europe' [2016] 30 Emory International Law Review

Guild E, 'From Persecution to Management of Populations: Governmentality and the Common European Asylum System' [2012] 4 Nijmegen Migration Law Working Papers Series 25

Hammarberg T, ‘Commissioner for Human Rights - Human rights and Gender Identity’ (Council of Europe, Commissioner for Human Rights, Mandate 2006-2012)

Hinsliff G, ‘'Age has Nothing to Do with It': How it Feels to Transition Later in Life’ *The Guardian* (London, 17 November 2018)

Home Office, ‘Asylum Policy instruction Sexual orientation in asylum claims Version 6.0’ (Home Office, 3 August 2016)

Hughes T, Matthews A, ‘Race/Ethnicity and Sexual Orientation: Intersecting Identities’ (2004) 10Cultural Diversity and Ethnic Minority Psychology241

Human Dignity Trust, ‘Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations’ (*HDT*, 2016)<https://www.humandignitytrust.org/wp-content/uploads/resources/Criminalisation-of-Homosexuality-and-Good-Governance-1.pdf>accessed 26 April 2019

Human Rights Watch ‘US: Harmful Surgery on Intersex Children’ (*Human Rights Watch*, 25 July 2017)<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>accessed 13 July 2019

Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures. A Multidisciplinary Training Manual. Volume 2* (2015)

ILGA, ‘Activity Report 2017/2018’ (*ILGA*, 2019)<https://www.ilga-europe.org/sites/default/files/activityreport2018.pdf>accessed 9 June 2019

ILGA, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People 2019: European Union (*ILGA*, 2019)<https://www.ilga-europe.org/sites/default/files/european_union.pdf>accessed 28 February 2019

ILGA, ‘ILGA-Europe Rainbow Index’ (*ILGA*, May 2012)<https://www.ilga-europe.org/sites/default/files/Attachments/ilga-europe_rainbow_index_side_b.pdf>accessed 4 May 2019

ILGA, ‘Rainbow Europe 2019’ (*ILGA*, 13 May 2019)<https://www.ilga-europe.org/rainboweurope/2019>accessed 10 June 2019

ILGA 'State-Sponsored Homophobia 2019' (*ILGA*, March 2019) <https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf>accessed 14 April 2019

ILGA, TGEU, 'LGBTI rights in the reform of the Common European Asylum System' (*ILGA*, 2019)<http://www.sogica.org/wp-content/uploads/2019/02/Overview-of-the-CEAS-Reform-ILGA-Europe-TGEU.pdf>accessed 30 May 2019

International Commission of Jurists, 'Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (*ICJ*, March 2007)<https://www.refworld.org/docid/48244e602.html>accessed 23 April 2019

International Service for Human Rights, 'Majority of GA Third Committee Unable to Accept Report on the Human Right to Sexual Education' (*International Service for Human Rights*, 26 October 2010)<http://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education>accessed 10 June 2019

Jansen S, *Good Practices Related to LGBTI Asylum Applicants in Europe* (ILGA Europe, 2014)

Karsay D, 'Protecting LGBTQI rights in Europe – Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5)', (*ILGA-Europe, Transgender Europe and OII Europe and endorsed by EL*C, IGLYO, and NELFA*, October 2018)<http://www.sogica.org/wp-content/uploads/2018/10/coe-submission-18-tgeu-ie-oii_0.pdf>accessed 29 May 2019

Keenan S, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject' in Sharron FitzGerald (eds), Regulating the International Movement of Women: From Protection to Control (Routledge, 2011)

Khan M, 'Europe's Quiet New Culture Wars Over LGBTI Rights' (*Financial Times*, 5 December 2018) <https://www.ft.com/content/d027b3c8-f902-11e8-8b7c-6fa24bd5409c> accessed 14 June 2019

Lewis R, '"Gay? Prove It": The Politics of Queer Anti-deportation Activism' [2014] 17(8) Sexualities 958

Lewis R, Naples N, ‘Introduction: Queer Migration, Asylum, and Displacement’ (2014) 17 Sexualities

Martos A, Nezhad S, Meyer I, ‘Variations in Sexual Identity Milestones among Lesbians, Gay Men and Bisexuals’12(1) Sex Res Social Policy24

Millbank J, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ [2009] 13 IJHR 391

Mohan M, 'The Doctor Wrote a Question Mark for my Child's Sex' (*BBC*, 18 April 2019) <https://www.bbc.com/news/stories-47964634> accessed 18 April 2019

Mrazova A, ‘Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law’ in Arzu Güler, Maryna Shevtsova and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (SIP 2019)

Neilson V, ‘Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims’ (2005) 16 Stanford Law & Policy Review 417

O’Flaherty M, ‘The Yogyakarta Principles at Ten’ [2015] Nordic Journal of Human Rights 33(4) 280

ORAM, ‘Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles’ (ORAM, September 2010) <http://www.sogica.org/wp-content/uploads/2018/11/Yogyakarta-Principles-Article-by-ORAM-September-2010.pdf> accessed 23 April 2019

Planned Parenthood, ‘What do I need to know about transitioning?’ (*Planned Parenthood*) <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning>accessed 3 March 2019

Read J, van Heuven Goedhart GJ, *Magna Carta for Refugees* (United Nations 1953)

Ruppacher R, ‘Not that Kind of Gay: Credibility Assessment and the Concept of Sexual Orientation in European Asylum Law’ (2015) EMA Awarded Thesis <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/333/Ruppacher_2014□2015.pdf?sequence=4&isAllowed=y>accessed 1 February 2019

Senju A et al, ‘Cultural Background Modulates How We Look at Other Persons’ Gaze’ [2013] 37(2)International Journal of Behavioral Development 131

Spijkerboer T, ‘Gender, Sexuality, Asylum and European Human Rights’ [2018] 29 Law Critique 221

Strock C, *Married Women Who Love Women* (2nd edn, Routledge 2008)

Taylor J, 'Gay? Prove it Then – Have You Read Any Oscar Wilde?': Judges Accused of Asking Lesbian Asylum Seekers Inappropriate Questions‘ *Independent* (London, 4 April 2013)

TGEU, ‘Welcome to Stay – Building Trans Communities Inclusive of Trans Asylum Seekers and Refugees. Transgender Europe’ (*TGEU*, September 2017) <https://tgeu.org/wp-content/uploads/2017/09/TGEU_TransAsylumBrochure_LR.pdf> accessed 3 June 2019

UKLIG, *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (UKLIG, September 2013)

UNHCR, ‘The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees’ (2010) UNCHR Roundtable <https://www.refworld.org/pdfid/4cff9a8f2.pdf> accessed 25 April 2019

Velluti S, *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts* (Springer, 2014)

Vine J, ‘An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation’ (*gov.uk*, June 2014)

Jansen S, Spijkerboer T, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (2011) <https://www.refworld.org/docid/4ebba7852.html>

Weßels J, *Sexual Orientation in Refugee Status Determination* (Refugee Studies Centre, Working Paper Series No. 73, 2011)

World Health Organisation, ‘Gender Incongruence’ (World Health Organisation’s International Classification of Diseases, April 2019) <https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f411470068> accessed 24 May 2019

Yanick Saila-Ngita M, 'Sex, Lies, and Videotape: Considering the ABC Case and Adopting the DSSH Method for the Protection of the Rights of LGBTI Asylum Seekers' [2018] 24 Southwestern Journal of International Law

Yogyakarta Principles, 'The Yogyakarta Principles' (YP, 10 November 2017) <https://yogyakartaprinciples.org> accessed 5 January 2019

Yuhas A, 'A Win for Gay Rights in Botswana is a 'Step Against the Current' in Africa' *New York Times* (New York, 11 June 2019)

Zaun N, 'From EASO to the European Agency for Asylum: "Business as Usual?"' (*EU Immigration and Asylum Law and Policy*, 3 July 2017) <http://eumigrationlawblog.eu/eu-asylum-policies-the-power-of-strong-regulating-states/> accessed 30 May 2019

-- '#Outlawed the Love that Dare Not Speak its Name' (*Human Rights Watch*, 2019) < http://internap.hrw.org/features/features/lgbt_laws/#type-of-laws> accessed 4 May 2019

--'Disorders of Sex Development' (*NHS*, 5 October 2016) < https://www.nhs.uk/conditions/disorders-sex-development/> accessed 5 May 2019

--'European Asylum Support Office' (EASO, 2016) <https://www.easo.europa.eu/sites/default/files/publications/EASO-Brochure-EN%20_0.pdf>accessed 3 March 2019

-- 'Latest Asylum Trends – March 2019' (*EASO*, 13 May 2019) <https://www.easo.europa.eu/latest-asylum-trends> accessed 6 June 2019

-- 'LGBTI' (*Fundamental Rights Agency*) <https://fra.europa.eu/en/theme/lgbti> accessed 19 June 2019

--'What are Intersex Rights?' (*The Open Society Foundation*, April 2019) <https://www.opensocietyfoundations.org/explainers/what-are-intersex-rights>accessed 5 May 2019

EU LEGISLATION

Asylum Procedures Directive (2013/32/EU)

Charter of Fundamental Rights of the European Union (2000/C 364/01)

Dublin Regulation(No.604/2013)

Eurodac Regulation(No.604/2013)

Qualification Directive (2004/83/EC)

Qualification Directive (2011/95/EU)

Reception Conditions Directive (2013/33/EU)

OTHER EU DOCUMENTS

European Commission, *A European Agenda on Migration*, COM(2015)240

European Commission, *Annual Report 2018 on the List of Actions to Advance LGBTI Equality* (European Commission 2019)

European Parliament, Report on the Proposed Qualification Regulation (COM(2016)0466–C8-0324/2016–2016/0223(COD))

European Parliament Resolution on the EU Roadmap Against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity (2013/2183(INI))

European Parliament Resolution on the Rights of Intersex People (2018/2878(RSP))

EMN Ad-Hoc Query on NL AHQ on National Asylum Policies Regarding LGBT-Asylum Seekers Requested by NL EMN NCP (European Commission 2016)

Proposed Qualification Regulation COM(2016)466final

Proposed Asylum Procedures Regulation COM(2016) 0467

UN DOCUMENTS

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189

UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606

UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Art. 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN doc.HCR/GIP/02/02(2002)para6

4 UNHCR, Guidelines on International Protection No. 9: Claims of Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Art1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, 2012

CASES

ABC v Staatssecretaris van Veiligheid en Justitie [2014] (C-148/13, C-150/13)

Canada (Attorney General) v Ward [1993] 2 SCR 689

F v Bevándorlási és Állampolgársági Hivatal [2018] (C-473/16)

F v Bevándorlási és Állampolgársági Hivatal [2017] Opinion of Advocate General Wahl

ME v Sweden [2014] No.71398/12

NEE v Ministerstvo vnitra 5Azs53/2016–26(2016)

XYZ v Minister voor Immigratie en Asiel [2013] (C-199/12, C-200/12, C-201/12)