

## Establishing a sexual identity: The Norwegian immigration authorities practice in sexuality-based asylum cases

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### **Abstract**

This paper looks at how the Norwegian immigration authorities assess the credibility of asylum claims that are based on sexual orientation. The analysis is done through a case study of 187 Norwegian asylum cases from 2010-2015. Based on the case study the paper analyses how concepts such as sexual orientation, or as it is increasingly formulated in national guidelines and decisions, *sexual identity* is understood and established by the immigration authorities. Furthermore, the paper discusses how the Norwegian practice relates to recommendations in international sources, such as UNHCR's Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity from 2012.

### 1. Introduction<sup>1</sup>

During the summer of 2017, a few days before the Pride celebrations were beginning in Oslo, the organisation Queer World warned that the Norwegian State is imprisoning and deporting gay asylum seekers to countries where they face persecution. This warning was based on the case of 'Mehdi', a young man whose asylum application had been rejected a few days earlier. According to Queer World's statement, the reason for the rejection was that 'Mehdi' was perceived as behaving too stereotypically gay by the immigration authorities, and was therefore not considered as credible.<sup>2</sup> Some weeks later, a national newspaper reported that five asylum seekers who had been denied refugee status in Norway on the basis of their sexual orientation, had been granted residence permits in other western countries. In three of

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<sup>1</sup> This paper is based on master thesis of the author that was written at the University of Oslo in 2016. The thesis is a part of the project 'Gender Identity and Sexual Orientation in International and National Law' which is funded by the Norwegian Research Council. A modified version of the master thesis has been published through the Institute of Women's Law at the Faculty of Law in Oslo, and may be accessed in Norwegian: [http://www.jus.uio.no/ior/forskning/omrader/kvinneverett/publikasjoner/skriftserien/99\\_gustavsson.html](http://www.jus.uio.no/ior/forskning/omrader/kvinneverett/publikasjoner/skriftserien/99_gustavsson.html).

<sup>2</sup> 'Norge arresterer homofile asylsøkere' ['Norway arrests gay asylum seekers'], VG, 22.06.2017. Accessible in Norwegian: <http://www.vg.no/nyheter/meninger/asyl-debatten/norge-fengsler-homofile-asylsoekere/a/24079721/>.

these cases the Norwegian rejection was based on the immigration authorities not considering the asylum applicants' claim of being gay as sufficiently substantiated.<sup>3</sup>

In a later radio interview, the Director of the Immigration Appeals Board, Ingunn-Sofie Aurnes, stated that the caseworkers in charge of assessing sexuality-based asylum cases in Norway receive sufficient training. Aurnes pointed to the fact that the routines for such cases has been developed in cooperation with national LGBT organisations, and that the caseworkers reflect the general diversity in sexuality and gender that exist in the Norwegian society. While admitting that processing asylum cases based on sexual orientation may pose particular challenges, Aurnes stated that the competence of the Norwegian immigration authorities in this area is at such a high level that they currently provide training to caseworkers in other European countries.<sup>4</sup>

Over the past few decades, the legal position of lesbian, gay, bisexual, trans and intersex persons in Norway has significantly improved. In the annual report produced by ILGA-Europe for 2016, Norway was ranked in second place out of the European countries in regards to the human rights situation for LGBTI people.<sup>5</sup> As a part of this development, tolerance of sexual and gender diversity has been promoted as a core value that is characteristic of the Norwegian society. The idea that equality and tolerance of sexual minorities are distinctive aspects of Norwegian society has also been used as a way to separate *our values* from the values of people from non-western States. At the same time, the legal advancements for sexual minorities in Norway have, to a large degree, been based on depictions of non-heterosexuality as love-based, long-term and monogamous relationships, thereby influencing the ways in which sexual minorities are understood and perceived as a group.<sup>6</sup>

In light of this context and the above examples, a central question arises; namely how the Norwegian immigration authorities assess the credibility of an alleged sexual orientation. In other words, who are considered to be a 'real' gay, lesbian or bisexual asylum seeker? This paper will look at what narratives are considered to be credible in accordance with Norwegian practice in cases where a person applies for refugee status on the basis of their sexual orientation.

## 2. Method and terminology

In order to answer these questions, the paper will analyse decisions of the Norwegian immigration authorities in 187 cases from 2010 to 2015 where the asylum seeker applied for

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<sup>3</sup> 'Avslag i Norge, opphold i utlandet' ['Rejectioned in Norway, Granted Residence Permits Abroad'], Dagsavisen 10.07.2017, Accessible in Norwegian: <http://www.dagsavisen.no/innenriks/avslag-i-norge-opphold-i-utlandet-1.994131>.

<sup>4</sup> Dagsnytt 18, July 11 2017. May be accessed in Norwegian: <https://tv.nrk.no/serie/dagsnytt-atten-tv/nnfa56071117/11-07-2017>.

<sup>5</sup> ILGA Europe, Annual Review 2017

<sup>6</sup> Deniz Akin, 'Queer Challenges to the Norwegian Policies and Practices of Immigration', Doctoral theses at NTNU, 2017:198, p. 16.

refugee status on the basis of their sexual orientation.<sup>7</sup> As in most other States, few asylum cases regarding lesbian, gay or bisexual asylum seekers have been considered by the courts in Norway. Knowledge about how the immigration authorities understand and interpret concepts such as sexual orientation is therefore central to assess whether the right to refugee status of sexual minorities is being realised in practice.

The processing of applications for residence permits in Norway is organised through the Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE). The Directorate of Immigration is the central agency in the Norwegian immigration administration and is responsible for processing applications for protection (asylum) as well as other residence permits and citizenship. The Immigration Appeals Board is an independent, court-like administrative agency, and is responsible for assessing complaints against UDI decisions. Decisions from UNE cannot be further appealed, but may be brought before the ordinary courts of law.

There are no complete statistics of how many people apply for asylum in Norway every year on the basis of their sexual orientation. In recent years, UDI has begun registering the number of LGBTI claims, but does not link such information with specific cases due to privacy considerations.<sup>8</sup> As a consequence, the case study is based on manual identifications of relevant cases carried out by UDI and UNE. In total, access was granted to 87 cases from the Directorate and 100 cases from the Appeals Board. Out of these, 125 cases had been rejected and 93 of these rejections was due to the alleged sexual orientation of the asylum seeker not being considered as credible. In the remaining 62 cases asylum was granted. In these cases, access was also given to the case workers notes, as positive decisions do not include information about why the application has been granted. Transcribed versions of the asylum interview were also included in 65 of the cases from the Directorate.<sup>9</sup>

The choice of terms and definitions used to describe the groups that this article pertains to raises some particular challenges. The aim of the article is to analyse how Norwegian immigration authorities understand the concept ‘sexual orientation’ in regards to asylum applications. In accordance with the Yogyakarta Principles, sexual orientation refers to ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender’.<sup>10</sup> In addition to this term, the term ‘gay’ will be used to describe male asylum

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<sup>7</sup> As mentioned, this analysis builds on a master thesis written by the author from 2016 at the University of Oslo, and will consequently refer to the findings in this thesis, c.f. n 1.

<sup>8</sup> Estimates indicate that the number of LGBTI asylum seekers have gone up in recent years. In a report from 2015, it was reported that UDI had adopted 139 decisions from 2012 until the middle of 2014, c.f. Cecilie Schjotvet ‘Forfølgelse basert på religion og medlemskap i en spesiell sosial gruppe’ [‘Persecution based on religion or membership in a particular social group’], 2015 p. 5.

<sup>9</sup> Andrea Gustafsson, ‘Fra handling til identitet – troverdighetsvurderingen i seksualitetsbaserte asylsaker’ [‘From behaviour to identity – the credibility assessment in sexuality-based asylum cases’], Kvinnerettslig skriftserie nr. 99, 2016, p. 21-23.

<sup>10</sup> The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were developed in 2006 by human rights experts after the initiative of UNHCR. The document contains 29 principles and aims to interpret existing human rights obligations in relation to sexual minorities and gender minorities. While not legally binding, the Yogyakarta Principles has increasingly been

seekers who are attracted to persons of the same sex, while ‘lesbian’ will be used to describe female asylum seekers who are attracted to persons of the same sex. The term ‘bisexual’ will be used about persons who are attracted to more than one sex. In addition to this, ‘sexual minorities’ will be used as an umbrella term to describe all persons who are not heterosexuals.

However, it is important to note that not all asylum seekers define themselves within these categories, and that the terms may have different meanings in different cultures.<sup>11</sup> In Norwegian legal sources there is also a tendency to address LGBTI people as one group. This is problematic seeing as lesbian and gay people may experience different challenges in their country of origin, and furthermore mixes a person’s gender identity (i.e. a person’s individual experience of their gender) with issues relating to their sexuality. When categorising the groups included in this case study, it also became apparent that dividing the asylum seekers into categories based on their sexual orientation was problematic, seeing as not everyone used terms such as ‘gay’ or ‘lesbian’ to describe themselves, and that some were not certain of their sexual orientation.

While keeping these issues in mind, it may still be appropriate to give a brief overview of how the asylum seekers included in this case study were categorised. Out of the 187 cases that were included in the case study, a clear majority of 75 % (141 cases) consisted of asylum seekers who either self-identified or who were assessed by the immigration authorities as gay, male applicants. By comparison only 13 % of the cases were related to lesbian applicants (24 cases), and merely 5 % of the cases were related to bisexual applicants (9 cases). In 6 % of the cases, the applicants stated that they were perceived as being non-heterosexual in their country of origin without identifying as such themselves. This constituted 12 cases, all of which were rejected.<sup>12</sup> Due to the small amount of cases regarding other categories than gay asylum seekers, it is difficult to draw conclusions regarding particular issues relating to for example lesbian or bisexual applicants.

### 3. Refugee law and sexual minorities

#### 3.1 Development of the right to asylum for sexual minorities

The Refugee Convention defines a refugee as a person ‘who is unable or unwilling to return to their country or origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion’.<sup>13</sup> Norway has ratified the Refugee Convention, and the definition of a refugee is reproduced in section 28 of the Norwegian Immigration Act.

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pointed to by Norwegian authorities in issues relating to the rights of lesbian, gay, bisexual, trans and intersex people. The definition of sexual orientation may be found in the preamble of the Principles.

<sup>11</sup> HCR/GIP/12/09 nr. 11.

<sup>12</sup> Gustafsson (n 9) 2016, p. 25-26.

<sup>13</sup> The 1951 Refugee Convention covers people who became refugees as a result of events occurring before 1 January 1951. With the adoption of a 1976 Protocol, this time limit was removed.

Sexual orientation is not explicitly mentioned among the five grounds which may form the basis of a person's right to refugee status in accordance with the Refugee Convention. Historically, this has been used as an argument for rejecting the asylum applications of lesbian, gay and bisexual asylum seekers. However, over time there has been a growing legal recognition that people who face persecution in their country of origin on the basis of their sexual orientation may be entitled to refugee status.<sup>14</sup> In most jurisdictions, this has been done by including sexual minorities in the Convention grounds as 'a particular social group'. In Norway, national guidelines first recognised that people with a 'homosexual orientation' could be entitled to asylum as a particular social group in 1998.<sup>15</sup> Over time, this category has been expanded to include other groups such as lesbian, bisexual, trans and intersex people.

Despite this, reports and studies have shown that sexual minorities face specific legal and procedural challenges when applying for refugee status.<sup>16</sup> As a consequence, lesbian, gay and bisexual asylum seekers are often excluded from the asylum institute through State practice. One example of the particular challenges facing sexual minorities is the so called 'discretion requirement', by which lesbian, gay and bisexual asylum seekers are required or expected to conceal their sexual orientation in their country of origin in order to avoid persecution. Discretion reasoning has been formulated as a reasonable expectation that sexual minorities should 'cooperate' in their own protection to the extent that is possible by exercising 'self-restraint'.<sup>17</sup>

In the past decade, discretion reasoning has increasingly been rejected in several different jurisdictions, both in Europe and in outside. In 2010 the UK Supreme Court unanimously found that asking whether lesbian, gay or bisexual asylum seekers could 'reasonably be expected' to tolerate being discreet about their sexual orientation in their country of origin was contrary to the Refugee Convention. Instead the Supreme Court Judges proposed a step-by-step method to determine whether the asylum seeker would act discreetly out of fear of being persecuted (in which case they would be entitled to refugee status), or cases where the choice to act discreet is due to other reasons such as personal choice or societal pressure (in which case they would not be entitled to refugee status).<sup>18</sup>

### 3.2 Norwegian practice regarding discretion

Similarly to other European States, Norwegian immigration law previously imposed a discretion requirement in asylum cases relating to sexual orientation. In guidelines that were issued by the Ministry of Justice to the Directorate of Immigration in 2009, it was stated that

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<sup>14</sup> Jenni Millbank, 'Sexual orientation and refugee status determination over the past 20 years' in *Fleeing Homophobia* (ed. Thomas Spikjerboer (2013), p. 34.

<sup>15</sup> Retningslinjer for nye asylkriterier [Guidelines for new asylum criteria] no. 4 (1998).

<sup>16</sup> HCR/GIP/12 no.1, as well as Sabine Jansen and Thomas Spijkerboer 'Fleeing homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe', Vrije Universiteit Amsterdam 2011, and Petter Højem, 'Fleeing for love: asylum seekers and sexual orientation in Scandinavia', Research paper no. 181 2009.

<sup>17</sup> Jenni Millbank, 'From discretion to disbelief', the International Journal of Human Rights, vol. 13 2009 p. 2.

<sup>18</sup> HJ (Iran) and HT (Cameroon) v Secretary for the Home Department, UK Supreme Court, 7 July 2010.

when processing asylum cases regarding ‘homosexual orientation’, the question of how the asylum seeker could be expected to adapt to sociocultural limitations in the country of origin would be of relevance in regards to the risk assessment. The guidelines further stated that in many communities there are general social, cultural and statutory limitations on behaviour in the public sphere for to both heterosexual and homosexual people, without these limitations necessarily constituting persecution. As a consequence, the guidelines held that an assessment should be made regarding the severity of the limitations imposed on the individual’s life, taking into account the risk the applicant would face by breaking restrictions that he or she could not ‘reasonably be expected’ to adapt to.<sup>19</sup>

A similar interpretation was practiced by the Immigration Appeals Board, which in a case from 2010 stated that ‘regarding an evaluation of the risks that the complainant will meet if he returns to Iran, we must consider the socio-cultural framework which exists in Iranian society. The Appeals Board supposes that the applicant will not act in a way which is in conflict with what is socially acceptable’.<sup>20</sup>

This practice was upheld until 2012, when the Norwegian Supreme Court unanimously found that an asylum application based on sexual orientation cannot be rejected by the concluding that the asylum seeker may be ‘reasonably expected’ to adapt to sociocultural norms in the country of origin.<sup>21</sup> The decision of the Supreme Court was heavily influenced by the UK judgement from 2010, and included several direct quotes from the British decision. Based on this, the Supreme Court introduced an identical step-by-step method for considering asylum cases based on sexual orientation.<sup>22</sup> Similar to the UK judgment, the Norwegian approach distinguishes between asylum seekers who would conceal their sexual orientation in their country of origin due to fear of being persecuted, and asylum seekers who would be discrete for other reasons.<sup>23</sup>

Although the verdict represented a positive shift in Norwegian immigration law, other problematic aspects of the asylum process have become more central after the rejection of the discretion requirement, in particular the credibility assessment. Research from Australia and the UK has shown that the rejection of discretion reasoning has resulted in ‘a clear shift away from discretion to disbelief as the major area of contest in decisions [...] with a significant increase in decisions where the applicant’s claim to actually being gay, lesbian or bisexual is outright rejected’.<sup>24</sup>

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<sup>19</sup> AI-105-2009: ‘Guidelines regarding gender-based persecution’.

<sup>20</sup> The decision is from autumn 2010, c.f. Jansen (n 16) p. 34.

<sup>21</sup> Rt. 2012 p. 494 (decision of the Supreme Court of Norway, March 29 2012).

<sup>22</sup> After the Supreme Court’s verdict, the Ministry for Justice issued new guidelines that expanded the method that was introduced by the Court to apply to all asylum cases that are based on sexual orientation and gender identity, c.f. GI-07/2012.

<sup>23</sup> It is worth noting that the approach adopted by the Supreme Court has been criticised for not going far enough in eliminating discretion reasoning, seeing the current method is constructed around a distinction between the asylum seeker’s motivation for acting discreetly in their country of origin, c.f. Janna Wessel, ‘Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe’, in *Fleeing Homophobia* (2013), p. 5.

<sup>24</sup> Millbank (n 17) 2009, p.

The case study indicates that such a shift in the decisions has also occurred in Norway after the Supreme Court verdict from 2012. In the decisions that were included in the case study, rejections based on the alleged sexual orientation not being found credible increased by 10 % in the time period following the verdict.<sup>25</sup> However, it is worth noting that the immigration authorities have explained this increase by stating that they previously often did not consider it necessary to assess the credibility of the sexual orientation, seeing as many cases could be rejected based on discretion reasoning regardless of whether the asylum seeker was actually lesbian, gay or bisexual. Regardless of this explanation, the increase in rejections based on the asylum ground not being found credible, nonetheless makes it central to assess how the immigration authorities define and interpret who is a credible gay, lesbian or bisexual asylum seeker, as this assessment will all the more often be the decisive factor in a case.

### 3.3 The credibility assessment

Processing an asylum case can be divided into two stages; first it is necessary to establish the facts of the case, and then the refugee definition must be applied to these facts. The credibility assessment refers to the first stage, or in other words what facts the legal assessment should be built on. In accordance with recommendations from UNHCR, an asylum seeker's explanation should be considered as substantiated if it is 'capable of being believed'.<sup>26</sup> This corresponds with Norwegian practice, which determines that the asylum seeker's explanation does not need to be the most likely alternative, but can neither be completely unlikely.<sup>27</sup>

The central question in asylum cases relating to sexual orientation will usually be whether the alleged sexual orientation is credible – is the asylum seeker in fact gay, lesbian or bisexual? Although providing verifiable documentation to substantiate a refugee claim is a general challenge for asylum seekers, the evidentiary situation in sexuality-based cases is often particularly difficult. This is due to the fact that a person's sexual orientation is not something that can be objectively verified, and the assessment will therefore usually solely depend on the asylum seeker's explanation regarding their own inner self-identification.<sup>28</sup> As a consequence, lesbian, gay and bisexual asylum seekers become particularly vulnerable to the decision maker's assumptions or prejudices regarding what it means to belong to a sexual minority.

In practice, stereotypes regarding lesbian, gay and bisexual people has proven to be a substantial obstacle for sexual minorities who are applying for asylum. In several receiving States, the credibility assessment has been influenced by stereotypical assumptions regarding

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<sup>25</sup> This percentage is calculated based on decisions made between 2012 (after the Supreme Court verdict) until 20159. It is, however, difficult to know if this is representative, seeing as the case study is based on manual reports from case workers, c.f. section 2 of the paper.

<sup>26</sup> UNHCR 1998, para 11.

<sup>27</sup> Rt. 2011 p. 1481, The Norwegian Supreme Court, November 16 2011.

<sup>28</sup> Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants', *Journal of Refugee Studies*, Volume 22, Issue 2, 2009, p. 196.

how lesbian, gay and bisexual people look, dress or behave.<sup>29</sup> A common practice has furthermore been to ask asylum seekers who apply for refugee status based on their sexual orientation detailed question about their sexual experience or preference. In addition to this, some States have also required asylum seekers to provide medical or psychological documentation to substantiate their sexual orientation, or requested photographs or similar documentation. In some cases, this has even included so-called ‘phallometric tests’ that are meant to show a person’s arousal in reaction to viewing pornographic material.<sup>30</sup>

To address these (as well as other) issues facing lesbian, gay and bisexual asylum seekers, UNHCR has issued guidelines regarding asylum cases based on sexual orientation and/or gender identity. The guidelines set out recommendations for what the credibility assessment should and should not be built on in these cases. Firstly, the Guidelines determines that the credibility assessment should not be built on stereotypes or culturally inappropriate assumptions. As a consequence, it should not be expected that lesbian, gay or bisexual people look or behave in a certain manner. It is also noted that not all sexual minorities identify within specific categories such as ‘gay’, ‘lesbian’ or ‘bisexual’.<sup>31</sup>

Secondly, the Guidelines states that the asylum seeker should never be asked to provide evidence that violates their human rights, such as the right to family and privacy. This includes being asked ‘explicit questions’ regarding the asylum seeker’s sexual experience or preference. In addition, the applicant should not be asked to provide photographic material or similar documentation to substantiate their case. It is also determined that medical testing is not suitable for proving a person’s sexual orientation, and should never be used.<sup>32</sup>

Thirdly, the Guidelines further establishes that the credibility assessment should be done in an individualised and sensitive manner. As examples, the Guidelines states that lesbian, gay and bisexual asylum seekers may have internalised homophobic attitudes that might it difficult for them to talk about their sexual orientation, or that they may experience fear when it comes to revealing their sexual orientation to representatives from the authorities. It is also noted that lesbian, gay and bisexual asylum seekers may be married, divorced or have children.<sup>33</sup> The Guidelines further states that exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation, rather than a focus on sexual practices. However, it is noted that it is important to bear in mind that there is no magic formula of questions to ask or set of ‘right’ answers that can establish a person’s sexual orientation.<sup>34</sup>

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<sup>29</sup> ICJ, ‘Refugee Status Claims Based on Sexual Orientation and Gender Identity’ 2016, p. 18.

<sup>30</sup> UNHCR, ‘Comments on the Practice of Phallometry’ (2011), p. 1.

<sup>31</sup> HCR/GIP/12/09, no. 49 and 11.

<sup>32</sup> Ibid, no. 64-65.

<sup>33</sup> Ibid, no. 3, 59 and 63 (iv).

<sup>34</sup> Ibid, no. 62-63.



While guidelines from UNCHR is not legally binding, the preparatory works of the Norwegian Immigration Act states that recommendations from UNHCR should be given considerable weight when determining the Norwegian authorities' interpretation of the Refugee Convention.<sup>35</sup>

## 4 Findings

### 4.1 How is 'sexual orientation' defined in Norwegian practice?

Following the Supreme Court's rejection of the discretion requirement, the Directorate of Immigration recommended that the term 'sexual orientation' should be given a clearer definition. The Directorate made the following suggestion:

*'a sexual orientation may not be limited to sexual acts, but includes all behaviour or beliefs that are related to, and essential for, a person's sexual identity'.<sup>36</sup>*

The case study showed that this definition is repeatedly referred to in the practice of the immigration authorities. The definition illustrates the change in focus that has occurred in the interpretation of Norwegian immigration law, from a person's sexual behaviour (and whether this can be suppressed, modified or hidden in the country of origin), to sexual orientation as an identity including a wide range of different components.<sup>37</sup> The change is also illustrated by the immigration authorities use of terminology, which increasingly uses the term 'sexual identity' rather than 'sexual orientation' or 'homosexual inclination' in newer decisions.

In line with the new definition, the case study indicate that an asylum seeker is required to substantiate something 'more' than merely having had (a) sexual relationship(s) with persons of the same gender. As an example, in one of the cases from 2014, the asylum seeker stated that his same-sex conduct with a male friend had been discovered, and that he would therefore be perceived as gay by the authorities in his country of origin. The applicant was unclear about whether or not he considered himself to be gay, but explained that he might start a relationship with a man in the future if he was in a country that accepted this, seeing as this was what he was used to. UDI concluded that the applicant was not gay, pointing to the fact that 'the only motivation to be in the relationship with his male friend was to achieve sexual gratification, rather than attraction or romantic feelings'.<sup>38</sup>

This example indicate that the asylum seeker is required to demonstrate an emotional motivation for having entered into a same-sex relationship. In another case from 2015, the asylum seeker stated that he had become involved with a man in his teens, and that this man

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<sup>35</sup> Ot.prp. nr. 75 (2006-2007) p. 73 [Governmental paper].

<sup>36</sup> GI-07/2012 Instruks om tolkning av Utlendingsloven § 28 første ledd bokstav a – forfølgelse på grunn av seksuell orientering og kjønnsidentitet [Instruction regarding the interpretation of the Immigration Act § 28 first paragraph a – persecution on the basis of sexual orientation and gender identity]

<sup>37</sup> Gustafsson (n 9), p. 59.

<sup>38</sup> Case no. 2, c.f. Gustafsson (n 9) p. 59.

gave him money, bought him things and paid his tuition. In return, the man required sexual favours from him. Although UDI concluded that the applicant had not sufficiently substantiated his explanation, the decision went on to note that the asylum seeker would not have been entitled to asylum even if the alleged relationship had been considered as credible. In this assessment UDI pointed to the fact that the motivation for entering into the relationship with the man was the economic support that the asylum seeker had received rather than the relationship being a part of his sexual identity. According to UDI the applicant's explanation indicated that his emotions for the man were characterised by gratitude rather than 'expressions of sexual, affectionate or romantic attraction'.<sup>39</sup>

In summary, the case study shows that the immigration authorities require that the asylum seekers substantiate that they have an emotional, romantic and sexual attraction towards persons of the same gender in order for an alleged sexual orientation to be considered as credible. Sexual experience may be included in the asylum seekers' sexual orientation, but is only relevant if it is motivated by these feelings (rather than merely sexual gratification or gratitude). In addition to these factors, the case study also suggested that the asylum seeker is expected to have undergone a process of having defined their own sexual orientation in a way that is recognisable to the immigration authorities. As an example, in one of the cases included in the case study, UDI pointed to the fact that the asylum seeker could not guarantee which gender his partners would have in the future, and that he did not appear to have 'completed the process of defining his sexual identity'.<sup>40</sup>

#### 4.1 The relationship between the Norwegian practice and international recommendations

In general, the case study shows that the immigration authorities rarely explicitly refer to international recommendations regarding the credibility assessment in sexuality-based asylum cases, such as for example guidelines from UNHCR or the Yogyakarta Principles. Where such references were made, they were first and foremost used to support the immigration authorities' understanding of the term sexual orientation. As an example, UDI pointed to these sources in one case to demonstrate that being gay or bisexual is 'something you are, and not something you choose to become'.<sup>41</sup>

Despite the lack of explicit references to international sources, however, the case study indicates that the criteria that are included in the immigration authorities' assessment of credibility, largely correspond with the issues that are addressed in the UNHCR's Guidelines, indicating that these recommendations have influenced the content of the practice of the Norwegian immigration authorities.

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<sup>39</sup> Case no. 128, Gustafsson (n 9) p. 60.

<sup>40</sup> Case no. 161, Ibid.

<sup>41</sup> UDI's decision in the case is from 2014. An appeal to UNE was later rejected. Out of the 187 cases, only 4 cases explicitly referred to Guidelines or recommendations from UNHCR.

As such, the case study revealed few examples of ‘traditional’ stereotypes regarding sexual orientation being referenced in the decisions, such as assumptions regarding sexual minorities’ behaviour, dress or appearance.<sup>42</sup> The immigration authorities also seemed to be aware of the UNHCR Guidelines’ warning against decision makers asking explicit or detailed questions concerning sexual experience or preferences. In several of the decisions it was furthermore explicitly stated that a late disclosure of sexual orientation should not automatically be considered to weaken the credibility of the applicant, seeing as internalised homophobia or cultural taboo regarding sexuality can make it difficult for the applicant to talk about these issues. It is further recognised that sexual minorities may be (or have been) married to a partner of the opposite gender in their countries of origin, or have children.<sup>43</sup>

These examples illustrate an awareness of some of the common pitfalls that have been documented in receiving States in relations to the credibility assessment. Furthermore, focusing on the personal experiences, feelings and reflections of the asylum seeker rather than on sexual practice is in line with the recommendations in UNCHR’s Guidelines. At the same time, however, the case study indicate that the immigration authorities operate with an assumption that a person’s sexual identity should be formed and expressed in a particular way to be credible. Most of the rejections included in the case study were based on the applicant not being considered to be ‘sufficiently reflected’ regarding their sexual orientation or not being able to give a sufficiently detailed account of the process in which they became aware of being lesbian, gay or bisexual.

#### 4.2 From old stereotypes to new? The normative expectations of a credible narrative

A general feature of the decisions included in the case study, is that the immigration authorities focus on topics such as the asylum seeker’s feelings of difference, shame and stigma. These issues have similarities with the so-called ‘DSSH model’ which has been developed to avoid a focus on sexual practice in the credibility assessment of an alleged sexual orientation. The model is furthermore meant to provide a sensitive and appropriate way of eliciting a detailed narrative that provides evidence to establish whether an asylum seeker is gay or lesbian.<sup>44</sup> The model focuses on experiences and feelings that it is assumed will be

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<sup>42</sup> At the same time, the internal notes of the case workers in cases that were granted were often scarce when it came to why an asylum seeker had been found to be credible. In some of the cases the case worker simply stated that they found the asylum seeker to be ‘very credible’ without specifying the reason.

<sup>43</sup> Despite such statements, however, how these factors influenced the assessment of the individual case varied. As an example, the case study indicates that where the asylum seeker had more than one child, or has had more than one partner of the opposite gender, these factors may be considered to weakened the credibility of the alleged sexual orientation. Furthermore, while it was almost always stated that a late disclosure concerning sexual orientation should not automatically mean that the alleged sexual orientation was not considered to be substantiated, this aspect was often linked with a ‘general decreased credibility’ in the individual case.

<sup>44</sup> Chevland, S, ‘From ABC to DSSH: How to prove that you are a gay refugee’ at Freemovement.uk.org (<https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/>)

shared by all sexual minorities who have lived in a homophobic society, namely a feeling of being different, experiences of shame and stigma and possibly harm from persecutors.

The case study indicated that these notions are central in the immigration authorities' assessment of whether an asylum seeker is 'sufficiently reflected' regarding their sexual orientation. In several of the applications that were granted, the asylum seeker explained that the discovery of their sexual orientation had led to them feeling different, and this was pointed to as a factor that strengthened their credibility. Another common feature was that the asylum seekers stated that the discovery of their sexual orientation caused them to feel fear, shame and/or feelings of isolation. As an example, the case worker in one case from 2015 concluded that the asylum seeker was credible, pointing to the fact that he was considered to be 'very reflected in regards to being gay in a homophobic society'. In the asylum interview the asylum seeker explained that he had found it frightening to discover that he was gay, and that he initially experienced this as an internal conflict.<sup>45</sup>

Conversely, in cases where the asylum seeker did not present the discovery of their sexual orientation as something that invoked feelings of being different or as something conflicting, shameful or frightening, this would generally result in the credibility of the asylum seeker being considered as weakened. In several of the cases included in the case study, explanations that the asylum seeker felt happy or free when discovering their sexual orientation, or in connection to starting a relationship with a person of the same sex, were considered to weaken the credibility of the asylum seeker. The same applied to cases where the asylum seeker did not experience the discovery of their sexual orientation as a process.

The findings illustrate that while focusing on the asylum seeker's personal experiences and feelings may help avoid explicit questions regarding sexual practice, the explanation of the asylum seeker will still need to comply with the case workers' expectations regarding how a sexual orientation is discovered and developed. This is problematic, seeing as the notion that there is a 'normal' or 'typical' way for a sexual orientation to develop has been criticised within legal research. In the following, the paper will give some examples of how the normative expectations of the immigration authorities influence the credibility assessment.

#### *4.2.1 Process of self-actualisation: coming out of the closet*

Based on the decisions included in the case study, the immigration authorities have a clear expectation that a credible asylum seeker should have undergone a process of self-actualisation regarding their sexual orientation. These expectations may be illustrated by one case from 2014, where the asylum seeker was asked to talk about 'the process he went through when he realised that he was gay'. He answered that he had not experienced this discovery as a process. UDI stated that the asylum seeker depicted becoming aware of his sexual orientation in a 'in a trivial and simplistic manner' and pointed to the fact that homosexuality is connected with a strong taboo in the asylum seeker's country of origin. As a

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<sup>45</sup> Case no. 112, Gustafsson (n 9) p. 64.

consequence, UDI concluded that the applicant should be able to give more detailed reflections about his reactions upon discovering that he was gay.

The notion that sexual minorities should have undergone a specific process of self-actualisation is problematic because it builds on the idea that there is a correct way in which a sexual orientation develops and is experienced. This idea has been criticised for being based on western understandings of sexuality.<sup>46</sup> In the article ‘Constructing the Personal Narratives of Lesbian and Gay Asylum Seekers’, Berg and Millberg argues that such notions are often built around the expectation that sexual orientation is developed through a staged, linear process which moves from an initial denial or confusion and finishes with the person coming out of the closet as a self-actualised gay or lesbian person. However, this step-by-step model for how the identity of sexual minorities is developed is based on western experiences and perspectives, and is therefore not necessarily transferable to other cultural contexts.<sup>47</sup>

The case study also indicated that the requirements for the asylum seeker’s reflections increase where the applicant is considered to have been aware of their sexual orientation for a long time. As an example, in one case from 2015, UDI rejected the application of an asylum seeker due to the fact that he was considered to answer very generally on questions relating to his sexuality.<sup>48</sup> The asylum seeker had been asked to reflect on his sexual orientations, and had several times answered that ‘when you start to get feelings for another person, I get feelings for other men and I am attracted to them rather than to women’. In the decision UDI emphasised that it was noteworthy that the asylum seeker was so lacking in his reflections, especially considering that he claimed to have been exposed to violent attacks in his country of origin.

In the complaint against UDI’s rejection, the asylum seeker stated that homosexuality is taboo his country of origin and that he consequently had not been able to talk about his sexual orientation many years due to fear and shame. Although UNE made note of this statement in the decision, it was nonetheless concluded that it is reasonable to expect that a person who applies for protection on the basis of their sexual orientation has undergone a process of self-actualisation. It was also pointed to the fact that the asylum seeker claimed to have known about his sexual orientation for several years and had lived in a relationship with another man over a long period of time.

The decision is both based on the assumption that all asylum seekers must undergo a specific self-actualisation process, and that an asylum seeker’s shame or stigma regarding their sexual orientation will decrease over time. As such, the process of ‘coming out’ is depicted as a natural and ‘organic’ process. Furthermore, the decision illustrates a paradox in the immigration authorities practice; although it is stated in nearly all of the decisions that the immigration authorities are aware that topics regarding sexuality and gender may be shameful or difficult to talk about due to the applicant’s internalised homophobia or cultural taboo, it is also precisely these reasons that are pointed to as a justification of why the asylum seeker

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<sup>46</sup> Berg (n 28) p. 206.

<sup>47</sup> Ibid, p. 206-207.

<sup>48</sup> Case no. 117, Gustafsson (n 9) p. 67.

should be able to reflect *more* about their sexual orientation. This notion is particularly problematic where the asylum seeker's experience of violence or other forms of assault is also mentioned as a reason the applicant should be able to be more detailed in their explanation (such as in the example above), as this fails to take into account the effect that trauma may have on the asylum seeker's ability to talk about these events.<sup>49</sup>

#### 4.2.2 *Sexual acts vs. sexual identity*

As previously mentioned, the immigration authorities' definition and understanding of the term 'sexual orientation' emphasises emotional and romantic attraction as a central factor. In line with this finding, there were few examples of the case workers asking explicit questions regarding the asylum seeker's sexual experience or preference. However, the case study did not only indicate that sexual practice was a topic that the immigration authorities avoided asking about, but also that the case workers in several cases became mistrustful of applicants who would voluntarily talk about their sexual experiences, or who did not express shame in connection with such experiences. One example of this can be found in an older case from 2010, where the asylum seeker was considered to be credible. In the notes relating to the decision, the case worker pointed to the fact that the applicant's explanation was not focused on 'the sexual act' and further stated that the case worker had 'heard rumours that non-credible asylum claims often focus on sexual acts'.<sup>50</sup>

Similar findings have been made by Deniz Akin, who has interviewed case workers in UDI regarding their understanding of sexual orientation. In the article 'Assessing Sexual Orientation Based Persecution' Akin found that the case workers, without being asked or prompted, made it clear that they avoided talking about sexual practice in asylum cases based on sexual orientation.<sup>51</sup> As a consequence, sexual practice became irrelevant or was even considered to be misleading in the credibility assessment. Akin connects this division between sexual practice and sexual orientation with prevalent norms in the Norwegian society regarding sexual minorities.<sup>52</sup> The modern gay and lesbian movement in Norway has, to a large extent, focused on concepts such as love and emotions to argue for rights and protection for sexual minorities. One example is the rhetoric used in connection with the Same-sex Marriage Act, where the slogan 'Greatest of all is love' was used. This illustrates how activists of LGBTI rights has avoided references to sex in order not to 'activate' homophobic attitudes.

At the same time these strategies may also have contributed to limit the understanding of being lesbian, gay or bisexual means, and may exclude people who do not fulfill normative

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<sup>49</sup> UNHCR's Guidelines also points to the effect that trauma may have on the explanation of the asylum seeker, c.f HCR/GIP/12/09 para 59.

<sup>50</sup> It is worth noting that the statement of the case worker is written in the internal notes of the case rather than the formal decision. Nonetheless, the statement indicates a skepticism towards asylum seekers who focus on sexual practice rather than emotional or romantic aspects of their sexual orientation.

<sup>51</sup> Deniz Akin, 'Assessing Sexual Orientation-Based Persecution A Closer Look at the Norwegian Practices of Asylum Evaluation of Gay and Lesbian Claimants'. I: *lambda nordica*, vol. 1, 2015, p. 17-42.

<sup>52</sup> Ibid p. 34

assumptions of an identity and love-based understanding of their sexual orientation. Making explanations regarding sexual experiences irrelevant in regards to the credibility assessment also limits the asylum seeker's possibility of substantiating their claim, as it may be difficult for the applicant to separate such experiences from their explanation regarding their sexual orientation.

#### *4.2.3 Identity categories – lost in translation*

Sexual minorities will often face language barriers in regards to their explanation regarding their sexual orientation. In countries where homosexuality is taboo or stigmatized, there will not necessarily be a neutral language for describing gay, lesbian and bisexual people. As a consequence, the applicant may lack the terms to describe their sexuality without making use of degrading or homophobic expressions. To the extent that there are specific terms for sexual minorities, such knowledge may also be restricted to members of the group. This means that the applicant's explanation may be misunderstood or that it may appear that the applicant's explanation is contradictory. The decisions in the case study indicated that while the immigration authorities state that they do not require asylum seekers to identify with specific terms or categories in regards to their sexual orientation, the asylum interviews still focused on definitions and identity categories.

One example of the challenges that may arise from such a focus can be found in a case from 2015. In the decision UDI concluded that the asylum seeker presented himself in a stereotypical and simplistic manner. UDI pointed to the fact that the applicant, when asked to define what it means to be 'a homosexual' answered that this term 'include any man who has had a relationship with another man'. When the case worker suggested that homosexuality may include more than just sex, such as emotions, love, behaviour and identity, the asylum seeker answered that he thought it was sufficient to have sex with another man to be a homosexual.

The decisions illustrate the difficulties that may arise when an asylum applicant is asked to define concepts such as 'homosexual' or 'gay'. Based on the transcribed interview in the case it is difficult to know whether the asylum applicant was basing his statement regarding what it means to be a homosexual on how he thinks the interviewer understand this term, his personal definition of being gay, or on perceptions of sexual minorities in his country of origin. Questions regarding the content of such definitions will consequently rarely be of help when assessing an asylum seeker's sexual orientation.

#### *4.2.4 Risk behaviour – a new type of discretion reasoning?*

Finally, the case study also implied that asylum seekers were expected to have taken precautions in how they expressed their sexual orientation to avoid risk of being discovered. Several of the decisions included in the case study contained references to general information about how sexual minorities in the country would normally act due to fear of persecution. Where an asylum seeker had behaved in a way which might create a risk of being discovered, this resulted in the credibility of the asylum seeker being weakened in several of

the cases. Such behaviour included showing signs of affection in public, revealing their sexual orientation to potential partners without being certain of their sexual orientation first or by not taking precautions to avoid that family members, people in the local community or authorities become aware of the asylum seekers sexual orientation.

As an example, the asylum seeker in one case from 2012 stated that he discovered that he was gay after making friends with another boy his own age. The two of them began talking, and told each other that they both felt an attraction towards persons of the same sex. Gradually this developed into a romantic relationship. On one occasion the asylum seeker invited the other boy to his family house and the two had sex in a guest room. The family of the asylum seeker returned to the house and discovered the two of them, consequently trying to kill the asylum seeker. In the decision, UDI concluded that the credibility of the asylum seeker was weakened as it was considered unlikely that he would have invited his boyfriend to his house when he did not know at what time his parents would return. UDI also found it unlikely that the asylum seeker, shortly after having discovered his sexual orientation would initiate a relationship with another man, and ‘just like that’ have sex with him in his parents’ house.

Similar factors were emphasised in another case from 2014, where the asylum seeker explained that he had had sex with two men in his country of origin. The sexual relations had taken place outside, a short distance from where the asylum seeker lived, and in a hotel room that the asylum seeker had rented. In the assessment of the case, UDI stated that it was difficult to understand why the asylum seeker had behaved in a way that exposed him to a risk of being discovered.

In the above examples, UDI found it to be an unreasonable risk to have sexual relations in the asylum seekers own home, outdoors as well as in a hotel room. The cases thereby illustrate a difficult dilemma for lesbian, gay and bisexual people in countries where sexual minorities are persecuted, namely that there may not be any ‘safe spaces’ where it is possible to live out their sexual orientation completely free of risk. In the British report ‘Failing the Grade’ it is pointed to the fact that it is generally common for humans to engage in risky sexual behaviour. In light of this it is argued that it is natural that lesbian, gay and bisexual people will act in ways that may pose a risk of being discovered in the absence of other alternatives.<sup>53</sup>

As a consequence, using the fact that an asylum seeker has engaged in behaviour that may expose them to a risk of being discovered may lead to the same result as the previous discretion reasoning, by implicitly requiring sexual minorities to conceal or suppress their sexual orientation in the country of origin in order to be perceived as credible.

#### 4.3 Conclusion

As a summary, the findings of the case study show that the credibility assessment of the immigration authorities favour asylum seekers with a clear and defined sexual orientation that corresponds with the Norwegian understanding of what being gay or lesbian means. Asylum

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<sup>53</sup> UKLGIG, ‘Failing the grade – Home office initial decisions on lesbian and gay claims for asylum’ 2010. Accessible at: <https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf>.



seekers who do not define their sexual orientation within a recognisable identity category, who do not state that they had undergone a process of self-recognition or who cannot guarantee the gender of their future partners were not considered credible. These findings illustrate the need to turn the focus on prevailing norms in the Norwegian society regarding sexuality, in order to address the implicit expectations and understandings of sexual orientation that form the basis of the case workers assessment regarding credibility.

Looking back to the statements made the Director of the Immigration Appeals Board in the introduction of this paper, the findings also serves as a warning that cooperating with national LGBT organisations or relying on the experiences of a 'diverse' workforce is not necessarily sufficient in itself to address the specific challenges facing lesbian, gay and bisexual asylum seekers.

At the same time, examples from the case study also highlights a reoccurring problem in regards to the assessment of the credibility of an alleged sexual orientation: In accordance with Norwegian law, case workers are required to look for patterns in the cases they process to ensure that similar cases are treated equally. Such a method is inevitably built on the assumption that people's sexual orientation is developed and understood in the same way, in spite of cultural differences or personal preferences and variations. Such notions fail to take into account the diversity that exists in human sexuality and therefore creates a risk that the claims for refugee status from lesbian, gay and bisexual asylum applicants are rejected on the wrong ground.