

(In)credibly Queer: Sexuality-based Asylum in the European Union

by [Johannes Lukas Gartner](#)



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Abstract

Finally recognised as eligible for refugee status in Europe, asylum seekers fleeing from persecution on the ground of sexual orientation remain among the European asylum systems' most invisible constituents. To be granted asylum, queer refugees need to prove to immigration authorities and judiciaries that they are queer, that they fear persecution on the grounds of their sexuality, and that such fear is well-founded. Even more than in cases of political, religious or ethnic persecution, however, the outcome of their claims is largely dependent on the existence of usually non-existent evidence. By implication, queer quests for refuge are regarded as easily made and impossible to prove. While the European legal framework has been extending its invitation for protection to queer identities, access to the premises seems to increasingly be restricted to those who comply with an expected dress code. As the number of queer refugees increases, issues of credibility and stereotyping do too. Queer refugees are invited to present their selves in ways that are easily understandable to their adjudicators in order to increase the likelihood of succeeding with their claims. Hereby, European countries' asylum systems are turning non-normative identities into active accomplices in the perpetuation of limited Western hetero-normative understandings of what it means to be queer. By reflecting on a limited range of the challenges that queer asylum cases pose to the European systems and that the European systems pose to queer asylum seekers, this article seeks to draw attention to often neglected individuals who also form part of asylum systems, which presume refugees to be heterosexuals.

'I Am So Sorry I Was Born Gay. I Wish our Boat had Sunk' (1)

As the institutions of the European Union (EU) have tediously struggled to transform the fragmented asylum policies in its area of '*freedom, security and justice*' towards a unified common asylum system that does more justice to its name's ethos, the waters surrounding the old continent rather silently turned into one of the world's deadliest borders. (2) Until quite recently, Europeans were largely oblivious to the humanitarian disaster that has been unfolding at the fortress' borders. The images of boats in the Mediterranean, with humans packed like sardines, have become components of the European media landscape

too frequent to be ignored. The news reports linger: since the beginning of this year alone, almost 100,000 migrants have arrived in Italy by sea, with yet another thousand having lost their lives in attempts to touch European soil. (3) For those who succeed in entering, seeking refuge in the EU is often said to equate with playing the lottery. (4) Aside from notoriously unequal distributions, (5) asylum procedures still vary largely from one member state to another; both in substance and in outcomes.

Surely, applying for safety in a union of nations that likes to pride itself on trail-blazing democratic values should never be comparable or akin to gambling. When the variables 'LGBTQ' (6) and 'refugee' cross, however, when the former causes the latter, the game dimensions of the European asylum system become ever more apparent. On the one hand, this is due to the fact that the game queer asylum seekers are required to play is simply one that was not designed for them. (7) On the other hand, queer refugees carry stories of persecution that take place at the very margins. These margins are not only of the societies they flee from, travel, and arrive in. Queer refugees stand also at the margins of migration and international development research, law, policy and practice.

Migrants are heterosexuals. Ingrained with and built around this premise, hetero-centric frameworks lead only very few to question how queer migrants engage in the system. (8) Almost half a million asylum applications were processed throughout the EU in 2013. How many of them were filed on the basis of loving the wrong kind? How and where are the places queer refugees who arrive in Europe originally escaped? What are the experiences of queer refugees on the journeys they embark on after fleeing their homelands? Are queer asylum seekers in immigration detention relatively more exposed to violence and abuse than heterosexual ones, similar to queer prisoners' fates in prisons?

We are left to guess. Primary research with queer refugees is sparse. Based on news reports and some of the research that exists on queer refugee law and policy, the following seeks to draw attention to a few of the issues queer asylum seekers face in Europe and a few of the issues Europe faces with queer asylum seekers. Queer identities will by definition never be the most central of any of the above-mentioned realms, and this article is thus no attempt to present them as such. Precisely for this reason, however, relegating queer experiences to footnotes is difficult to sustain. The margins, after all, tend to define and confine their core.

Mind the Gap

Sexuality avowedly remains among the most ideologically fraught and culturally contested themes in contemporary societies. These days queer rights are making headlines as they never have before. If nothing else, they make apparent the ever-increasing divide between the stances towards and against sexual minorities.

With the last decades came tremendous advances for the rights of certain queer communities. In many other places, however, the situation has drastically deteriorated. Over 175 million queer individuals worldwide are estimated to live under persecutory environments. (9) In at least 76 jurisdictions, privately engaging in sexual intercourse with a person of the same sex is outright criminalised, in seven of which it is punishable by death. (10) Though laws and state-sponsored abuses tend to target homo- and bisexual men and women, discrimination against those who transcend conventional gender norms is no less prevalent. Beyond the provisions of national statute books, individuals who do not perform in accordance with their environments' socio-cultural master

narratives frequently face systematic violence including assault, rape, torture and murder, and the denial of their basic civil rights. In the ‘better’ cases this might just be limited to discrimination in employment, health and education. (11) Honour killing campaigns, blackmail, or corrective rape for lesbians are only some of the methods employed around the globe to exterminate deviant sexualities and identities. (12) In homophobic socio-cultural environments, incidents of violence naturally stay unreported as a result of government officials acting as either wilful or as reckless accomplices. (13) In contexts like these, impunity for perpetrators is more norm than exception. (14)

Particularly in most recent times, several governments have opted for the (re)instatement of drastic measures to free their societies from the queer evil. In Africa, for example, Ugandan president Yoweri Museveni earlier this year publicly signed a law in front of numerous media representatives that imposes life prison sentences for homosexual conduct and the promotion thereof. (15) Though struck down again in the beginning of August by the Constitutional Court of Uganda, (16) the government has promptly filed an appeal, (17) a strong indication that the law will likely return sooner rather than later. Around the same time, yet much less overtly, Nigeria passed its Same Sex Marriage (Prohibition) Act. (18) In contrast to its title, the statute criminalises any direct or indirect ‘public show of same-sex amorous relationships’ and foresees prison sentences of up to ten years for anyone who ‘supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria’. (19) We witness similar developments in Chad, Ethiopia or the Democratic Republic of Congo. (20) Not long ago, Gambian president Yahya Jammeh invited its queer population to leave the country. (21) The stated alternative to the invitation was having their heads cut off. Six years down the road, the country’s parliament passed a bill imposing life imprisonment for ‘aggravated homosexuality’. Cameroonian students suspected to be queer are expelled and handed over to the police for arbitrary arrest. (22) In Lebanon, civil society in August this year warned homosexual men to leave their phone calls unanswered as police forces allegedly arrest members of the community to subsequently examine text messages in an attempt to track down other homosexuals. (23) In Asia, the Indian Supreme Court last year reinstated section 377 of the Penal Code, which outlaws same-sexual relations and imposes prison terms of up to 10 years in the world’s largest democracy. (24) In Malaysia, where 86% of the population views homosexual persons as unacceptable, (25) school boys identified by their teachers as being too ‘effeminate’ have been sent to anti-gay camps to guide them back to a proper life style. (26) In September 2014, the Indonesian province Aceh passed a law that foresees public caning as the penalty for anal sex between men and for the ‘rubbing’ of inappropriate body parts in the case of women. (27) Closer to Europe and inspired by Russia’s infamous homosexual propaganda legislation, (28) the Kyrgyz Parliament is currently in the process of passing a similar bill that criminalises any conduct or statements in favour of non-traditional sexual relationships. (29) Concerns were raised last month that Belarus might soon follow suit. (30) Albeit subsequently withdrawn, replicates of such laws have been introduced in the Armenian and Moldavian parliaments last year. (31)

As the list of countries and societies that most recently and most harshly persecute queer identities goes on, in other parts of the world this last decade is set to go down in history as the beta version of the Stonewall riots. (32) Though queer rights everywhere remain ‘among the many leftovers of the unfinished business of modern democracies’, (33) political and socio-cultural climate change is swiftly on its way. Latin American societies, for example, have often been regarded as particularly suited to high levels of institutionalised homo- and transphobia due to the prevalence of religious ideology and widespread *machismo*. And yet, progressive developments on issues around queer rights are on the rise. Argentina was not only the first country in the Americas to federally introduce same-sex marriage, but it was also the first one globally to introduce the most progressive piece of gender identity legislation. (34) Marriage or civil union rights for same-sex couples furthermore exist in Brazil, Uruguay, Mexico City, Colombia and Ecuador. International news headlines at the time of writing included Ecuadorian President Rafael Correa’s bold announcement that the country is set to recognise the unions of same-sex couples on national identity documents. (35) Similarly, socially conservative Chile now has its first openly gay member of the armed forces. (36) Also in Cuba,

where queer men barely five decades ago were among those who paid the highest price for the Cuban leadership's determination to succeed with its Revolution, (37) sex-change operations are now funded by the state and reasons exist to believe that the country is not too far from legalising same-sex unions. (38) In the United States (US), President Barack Obama caused a stir in the American political climate in 2012 when he followed US-Vice President Joseph R. Biden Jr.'s lead in publicly endorsing same-sex marriage as the first Head of State in the history of the country. (39) Alongside judiciaries and legislatures across the nation dropping their states' same-sex marriage bans like rolling dominos, the Defense of Marriage Act was in 2013 finally ruled unconstitutional by the US Supreme Court. (40)

In Europe especially, however, considerable changes in societal attitudes, laws and policies under the rainbow have emerged in recent years. Though miles away from a queer paradise, (41) progress is sweeping over many countries. At the Council of Europe level, the European Court of Human Rights' (ECtHR) reading of the European Convention on Human Rights (ECHR) as a living instrument has over the course of the last three decades led to drastic legal and societal changes in favour of queer rights across the board. (42) Out of the eighteen jurisdictions that globally allow for same-sex marriage, eleven are situated in Europe, eight of which are member states of the EU. (43) Another dozen give same-sex couples the right to engage in a civil union, including deeply Catholic countries like Malta, which legalised same-sex unions earlier this year. (44) Public authorities, state and local, have across the Union started to implement a range of initiatives to advance queer rights and have launched action plans to combat queer discrimination. The Charter of Fundamental Rights of the EU explicitly prohibits discrimination based on sexual orientation. (45) Albeit only applicable to employment, EU law specifically outlaws discrimination on the grounds of sexual orientation in all its member states. (46) In 2012, a Directive was passed that aims at protecting victims of hate crimes based on sexual orientation, gender identity and, for the first time ever mentioned in any international legislation, gender expression. (47) The EU Parliament has its own LGBT intergroup, which is the Parliament's largest and among its most outspoken and active stakeholders. In 2014, 394 out of 570 Members of the European Parliament adopted a recommendation for a future EU roadmap against discrimination on grounds of sexual orientation and gender identity. (48) The EU Commission has mandated the EU Agency for Fundamental Rights to collect evidence about the situations of queer people in the member states. Furthermore, it has itself produced a detailed report on queer discrimination. (49) Besides several publications, the EU Agency in 2013 furthermore conducted a survey directed at sexual and gender minority members in the EU. (50) Falling short of 100,000 respondents, it represents one of the most comprehensive research projects ever conducted on the experiences of and discrimination against queer persons worldwide.

In short, while the journey remains incomplete and while the queer rights records continue to differ drastically from member state to member state, discriminating against queer persons is becoming increasingly unsustainable and unfashionable across the EU.

Queer Journeys

This ever-increasing separation between the stances towards and against non-conforming sexualities is taking place in the context of unprecedented global population movements. (51) Its logical by-product is that masses of queer individuals flee their home countries in the hope for international protection in less homo- or transphobic environments. (52) For the majority of queer refugees this hope never translates into reality. As is the case with more than 80% of all global refugees, reaching their intended destination also remains an illusion for most queer ones: rather than arriving in accepting places, their journeys frequently terminate in neighbouring or transit countries. (53) Often, as for example in the cases of Egypt, Kenya or Turkey, such places differ insubstantially

in the hostility that is awarded against them. (54)

While little to nothing is known about the experiences of queer refugees both on their journeys and in their countries of first asylum, it still more perplexing that almost as little is known about the minority of queer refugees who do manage to file asylum applications based on sexuality in refugee-receiving nations. In the EU, this was noticed in 2009 by the EU Agency for Fundamental Rights in one their earliest reports on LGBT persons in Europe. (55) Subsequently, in an effort to commence filling the massive research gaps, the first comprehensive study on queer asylum policies and realities in Europe was undertaken by the Dutch researchers Sabine Jansen and Thomas Spijkerboer in 2011. (56) An effort, which will hopefully spark further enquiry and debate in the near future.

Globally, the Organisation for Refuge, Asylum and Migration (ORAM) estimates that fewer than 2,500 queer refugees a year are accorded protection, (57) yet neither the United Nations High Commissioner for Refugees (UNHCR) nor the majority of the 176 territories that share asylum statistics with the UNHCR maintain statistics or hold any other form of data concerning this field. (58) Europe is no exception. Belgium is the only EU country that systematically collects and publishes the number of queer asylum applications. (59) In its case, the overall number of asylum decisions between 2008 and 2012 totalled 67 576, of which 2 992 or 4.43% were based on sexual orientation or gender identity. (60)

Though Norway is often cited to be the second European (yet non-EU) country that systematically registers its asylum decisions based on sexual orientation and gender identity, (61) its data are not officially published. Upon enquiry for this article, the Norwegian Directorate of Immigration provided its manually counted numbers for the years 2008 to 2013, emphasising that ‘these numbers are very uncertain’ as ‘manual reports can be both incomplete and incorrect’. (62) Even if not entirely accurate, the absolute values differ tremendously from those in Belgium: Norway’s first instance asylum decisions between 2008 and 2013 totalled 76 361, of which 170 or 0.22% were based on sexual orientation or gender identity. (63)

Thus, if the Belgian average of 4.43% were to be extrapolated to the total number of asylum applicants in the EU in 2013 (435,000), the annual number of queer asylum claims would be around 19,000. (64) If the same were done for the Norwegian average, in contrast, the number would stand at less than 1,000. (65) This difference makes it impossible to calculate reliable estimates about the actual numbers of queer refugees entering or staying in the EU.

In relative terms, however, both cases strongly support an often-stated assumption that queer refugee figures are drastically on the rise. In the case of Belgium, where the number of queer asylum decisions stood at 116 cases in 2006, the number had more than doubled by 2008, and has increased sharply every single year since, culminating in 1,059 decisions in 2012 alone. (66) The relative increase in Norway is in fact much higher than that of Belgium: compared to 2008, where Norway administered 3 decisions, the number was up to 11 in 2011 and stood at 73 in 2013. (67)

Three main lessons may be taken away from these numbers, or the lack thereof;

- (i) Queer identities have started to penetrate both countries’ refugee systems at exponentially increasing rates. Despite the differences in the Belgian and Norwegian data, it is to be assumed that the Belgian numbers, representing the only available for the EU, serve as a better indicator of the wider trends in the EU. Even if the real number stands somewhere between Belgium and Norway, this would still signify that thousands of queer refugees are entering Europe every year; (68)

- (ii) The fact that these thousands of queer petitions are not captured by 27 out of 28 member states' asylum data banks essentially renders them invisible. Invisibility is easily conflatable with non-existence, which can in turn implicitly work to legitimise omissions by state authorities and civil society actors in taking up this issue on their agenda;
- (iii) Data and research are needed on queer asylum applications and their recognition rates. EU governments that do not collect any data on queer asylum seekers, let alone make such data public, impede asylum seekers, practitioners and the general public from any knowledge of, or the capacity to draw comparisons about, the (non-)importance of this migration, about the trends and developments therein, or about the (un)likelihood of succeeding with an asylum claim based on queer persecution. Beyond this problematic, the pertinence of data lie in more fundamentally democratic questions about transparency and EU human rights standards. How, for example, without the availability of any such knowledge, would anyone theoretically or practically ever be able to hold EU governments accountable for the persecution of [who knows how many] queer refugees that follows after these are quietly being returned to the conditions they originally escaped from in [who knows where]? (69)

Queer Refugees under the Law

While executives have no data and policymakers demonstrate limited interest, judiciaries and legislatures have in many contexts become rather acquainted with the existence of queer refugees. A heritage of WWII, the primary instrument for the protection of all refugees remains the 1951 Convention Relating to the Status of Refugees (hereafter: the Convention). (70) Geographically and temporally expanded to its current scope by its 1967 New York Protocol, (71) there are currently 146 state parties mandated under international public law to grant surrogate or substitute protection to refugees. The Convention defines a refugee as a person with a *'well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group'*. (72) In line with all other international human rights legislation that stems from the days the Convention was drafted, sexuality is not explicitly enumerated as a persecution ground deemed deserving of protection. (73) If a person is granted the status of a refugee in accordance with the Convention, she is entitled to not face the removal to her country of origin or residence. (74)

Interpreting the Convention as not encompassing protection against queer persecution was first deemed unsustainable by the Dutch in 1981. (75) Ever since, sexual orientation (and, to a lesser extent, also gender identity) have increasingly entered the legal asylum vocabulary of many refugee-receiving nations. In most 'Western' countries it is now quite widely accepted that queer refugees can *prima facie* constitute members of 'a particular social group', thereby falling within the ambit of the Convention. (76) (77) (78)

Different analyses have been followed to fit queer refugees into the social group category, two of which have dominated in international refugee law. One, originally developed in North American jurisprudence, (79) sees sexual orientation as an innate and immutable characteristic, building on the notion that sexuality is such a fundamental aspect of an individual that she cannot be required to forsake it. (80) A second analysis, developed in Australian case law, (81) adopts a test of social perceptions, whereby members of the particular social group meet the threshold for protection only if they are united by a common characteristic that is perceived as differentiating them from (and in) their society at large. (82) Both approaches have their strengths and weaknesses, (83) rest on limited assumptions about sexuality, and may often converge since groups that are persecuted on the basis of an immutable characteristic are frequently also perceived as a distinct social group. (84)

In the EU, the Court of Justice of the European Union (CJEU) in November 2013 clarified that sexual minority members definitely constitute members of a particular social group for the purposes of the member states' asylum procedures. (85) It thereby only formalised and fostered a previously existent consensus on what had already been well reflected in the EU, where the 2004 Qualification Directive incorporated the 1951 Refugee Convention definition of a refugee into supra-nationally binding EU law. (86) The Directive, part of an (on-going) effort to harmonise asylum policies across the Union, provides that sexual orientation as well as gender identity (subsequently added in 2011) are relevant persecution grounds. (87) Reflective of the divergent practices across the Union at the time it was passed, it lists both approaches mentioned above as valid conceptualisations for such a finding. Seemingly inconsistent with the UNHCR position on this matter, however, the wording of the EU Directive suggests that the two approaches are to be treated as cumulative requirements (rather than as alternative bases). (88) The recent ruling of the CJEU, while articulating that sexual minority members do share an innate *protected characteristic*, due to which they 'must be regarded as forming a particular social group', (89) has upheld the cumulative reading. The member states of the EU continue to be left with a prerogative to examine whether a queer petitioner meets the 'social perception' threshold in the context of her case.

While the consensus that queer identities (though notably first and foremost, gay men and lesbians) certainly constitute a particular social group is a tremendous movement in the right direction, jurisprudence on the matter has been and continues to be extremely inconsistent in its definitions and analyses. Especially the cases of gender identity claims have despite their practical and legal uniqueness often been appended to the grounds of gender and sexual orientation and continue to be subject of a limited body of jurisprudence and scholarship. (90) (91)

In sum, after queer identities were for decades entirely excluded from protection under the Convention, since comparably recently queer refugees are recognised under the particular social group category. This recognition, however, 'has only created the condition for protecting LGBTI applicants'. (92) Legally, to be granted refugee status a queer petitioner still needs to prove her sexuality, a well-founded fear of persecution on the basis of the aforementioned, and that the country of her nationality or residence is unwilling or unable to offer protection. Practically, evidentiary hurdles are present in every single of these legal ones. These practical hurdles can roughly be seen as falling into two main areas. The first one concerns proving a refugee's queerness. Questions of credibility and stereotyping dominate this context. The second one concerns evidence of queer persecution in her country of origin. Non-existent answers to questions that are asked by immigration officials but few others, dominate that one.

(In)credibly Queer

Credibility is always 'at the core of the asylum process' and most refugees deal with a certain culture of disbelief on the side of immigration authorities. (93) In many cases 'the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails'. (94) An asylum seeker is generally faced with the burden of proving her claim; she needs to persuade the decision-makers that her quest for refuge is a credible one. For several reasons, this burden becomes a little more burdensome for queer refugees than for others. On its most obvious level, being queer neither comes with a membership card, (95) nor have the queer genes been discovered yet. (96) Thus, needing to prove queerness to (hetero-centric) state authorities is prone to lead to rather nasty situations. The increase of such situations seems to be an unfortunate companion to progress in queer asylum law.

Reactionary Proof

So how does one go about (dis)proving queerness? In an ideal world, one wouldn't. (97) While the burden of proving an asylum petition rests on the claimant, asking petitioners to prove what entire cohorts and decades of scientists haven't quite managed to, has led authorities to get quite actively and passively involved in 'assisting' queer claimants in the process. Different strategies have been pursued. Reflective of a continuously prevalent societal understanding that being queer is mostly about sins and sex (rather than, say, identity and love), a lot of the practices commonly employed by state authorities build on precisely such ideas.

The Czech authorities are probably the most skilled at uncreatively reducing queer identities to penile and vaginal reactions. In 2010, it emerged that sexual arousal tests (also going by penile plethysmography and vaginal photoplethysmography) represented a practice used in the first decade of the new millennium to test whether purportedly queer asylum seekers were actually queer. (98) Developed in the 20th century as a diagnostic tool to assist in aversion therapies to cure homosexuality and as an objective method to prove sexual deviancy or paraphilia, (99) Czech immigration officials hooked gay and lesbian petitioners to machines that determined levels of sexual arousal by measuring the asylum seekers' physical reactions as they were exposed to homo- and heterosexual porn. After the revelations, the practices were immediately condemned by the EU Agency for Fundamental Rights, the EU Commission and the UNHCR as invasive, degrading and irreconcilable with European human rights standards. (100) Although the Czech Republic seems to have been an exceptional case, the same method was applied in at least one case by the Slovak authorities in 2012. (101) Ultimately, taking recourse to such methods reflects on an out-dated and medical understanding of homosexuality. (102) In line with such, many countries across the EU still use psychologists, psychiatrists and sexologists to determine the sexuality of its asylum applicants. (103) Notably, even judges have not shied away from asking legal representatives which medical evidence existed for their claimants to be queer. (104)

Less physical but equally questionable, the UK Home Office has earlier this year come under heavy attacks after a confidential report leaked, which revealed details about how its immigration officials interrogated (vs. interviewed) queer asylum applicants. (105) In the hours-long interviews that queer petitioners undergo, questions asked to male applicants by officials included '*Did you put your penis into x's backside?*', '*When x was penetrating you, did you have an erection?*', '*Did x ejaculate inside you?*' or '*Why did you use a condom?*'. (106) While this has caused particular outcry in the UK media, the authorities' use of questions that reduce queer identities to anal or oral penetration are equally common in other EU countries including Belgium, the Netherlands, Ireland, Austria and Cyprus. (107)

More concerning still is a trend among queer asylum seekers that appears to develop in the United Kingdom. It has been revealed that queer asylum seekers - as a result of a climate of increasing disbelief - are indirectly forced to undertake extreme steps to increase the likelihood of having their sexuality believed by immigration caseworkers and the judiciary. (108) Among these are 'voluntary' submissions of photographic and video evidence showing them while engaging in intimate contact with persons of the same sex. (109)

Aside from the democratic questions scenarios like these raise, they are above all reflective of the general vulnerability of asylum seekers. Vulnerability may often translate into submissiveness, which leads many petitioners to 'agree to anything' that is asked from them, whereby authorities, in turn, can relatively easily get away with (indirectly) demanding such questionable submissions of evidence. (110)

Fake it till You Make it

A reduction of queer identities to sexual conduct has not been limited to tests and interview questions. It underpinned ‘discretion reasoning’, which at least until last year was widely applied by judiciaries across Europe. (111) Implicitly resting on the above ‘social perception’ approach, queer asylum seekers were denied refugee status on the basis of their ability to ‘behave discreetly’ about their non-conforming identity in order to avoid persecution. (112) Even in cases where claimants were believed to be queer and to have a well-founded fear of facing persecution, petitions were commonly rejected on the basis of a ‘reasonably expectable discretion’ regarding their sexual orientation. (113) Thus, those fleeing from persecution were found to be persecuted before subsequently being returned to the same persecutory environments, justified by an argument that they may just avoid showing publicly the cause of their persecution. Put differently, European courts effectively required refugees to play hide and seek with their persecutors. Thereby, they played into the persecutors’ hands by imposing on queer asylum seekers ‘the same submissive and compliant behaviour’ that ‘the agent of persecution in the country of origins seeks to achieve by persecutory conduct’. (114)

Questionable in light of its morality and practical consequences, the UNHCR has firmly rejected this approach. (115) The prevalence of this reasoning serves as evidence for the different standards that are applied to cases of queer asylum. Its tragedy is ‘that courts advanced this obligation of behaviour modification, in effect postulating self-censorship, against gay applicants even as they vigorously (and appropriately) rejected any comparable duty to disguise one’s political opinions or religious convictions in order to be safe’. (116) Indeed, having demanded from refugees to cooperate in their own protection has for years subverted the entire logic behind the establishment of a system that grants surrogate protection. (117) The assumption present in such reasoning is again a view of queer identity as something sexual and behavioural, as opposed to considering queer identity belonging a highly complex matter integral to one’s personal identity. An assumption, which would hardly be applied to heterosexuals. (118)

Following Australia’s lead, the UK Supreme Court in a controversial landmark judgment abolished discretion reasoning in 2010. (119) While since then also Finland, Sweden and Germany followed suit in one way or another, (120) the CJEU in its 2013 ruling held that discretion reasoning is no longer a valid basis for denying protection to queer asylum seekers anywhere in the EU. (121) In July 2014, an Advocate General of the CJEU furthermore issued an opinion that asylum authorities should avoid taking recourse to methods that undermine the human dignity of queer asylum seekers. (122) The opinion emphasises that cases like the ones described above, including physically intrusive queer-testing, intimate sex questions, or sexually explicit photographic or video evidence, are in violation of EU law. (123) According to the Advocate General, statements by asylum seekers about their own self-identification must be the starting point of credibility assessments. (124)

Thus, much movement in the right direction has very recently been taking place. It remains to be seen, however, what effects the CJEU decision and the subsequent opinion will have on queer asylum jurisprudence and policy across those member states. Commentators have suggested that where discretion reasoning ends, cultures of increasingly disbelieving queer applicants like to follow. (125)

Kylie Concerts and Colourful Cocktails

The adjudicator's identity in queer asylum cases might often tend to end up being more decisive than the one of the claimant. (126) Naturally, in the European context adjudicators and immigration officials are usually culturally 'European', Caucasian, heterosexual and - in the context of the legal profession - largely male. Against the orthodox premise of law being an objective tool of adjudication in liberal legal systems, the neutrality of law is always, as a matter of course, curtailed by the personal experiences, socio-economic background, culture, race and sexuality of the individual applying and interpreting it. (127)

Especially in light of the credibility of an asylum claim being entirely dependent on the determination by authorities, which usually and naturally exhibit a limited understanding of both queer and foreign identities (and when taken together, of a sort of double-'other'), decision-makers are continuously at risk to reach decisions that are disproportionately informed by their own subjective preconceptions of the (foreign, often non-Caucasian, queer) subject they adjudicate on. Aside from the negative impact this has on the outcome of individual cases, interview and court rooms thereby become normative construction sites of a limited set of queer identities which adjudicators deem worthy of protection. (128)

More worthy of protection seem to often be those petitioners who correspond to essentialist, Western and hetero-normative stereotypes of queer individuals (or bodies). (129) Asylum jurisprudence across Europe is riddled with cases where decision-makers deemed queer men not to be 'camp' enough, or queer women not to be 'butch' enough. (130) Examples include an applicant in Cyprus whose claim failed because he had not tried to avoid the country's military service, which was found to contradict 'gay' conduct, or a Nigerian woman in Hungary whose medical examination resulted in the finding of her 'strong feminine sexuality' (i.e. a femininity not masculine enough), a factor that hindered the positive outcome of her quest. (131)

Queer asylum seekers are confronted with assumptions about their own identities and the experiences they have had. Such assumptions logically rest on 'Western' hetero-normative and essentialist characterisations of sexual and gender minorities. Lord Roger of the UK Supreme Court serves a telling illustration. Giving a 'trivial example from the Western context', his lordship is of the opinion that *'just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates'*. (132) While the Supreme Court judge in his seventies has laudable intentions, points to the triviality of his examples, and did state that the same must apply in other societies ('suggesting that he has some awareness that there are differences between gay cultures here and there'), (133) such clichéd depictions of queer (or straight) individuals, irrespective of whether they stem from the highest judicial instance of the United Kingdom or immigration authorities all across Europe, are troublesome on many levels.

The perpetuation of flawed assumptions by majorities about minorities is obviously in and by itself problematic. Muslims aren't terrorists, foreigners don't stink, blonde women aren't thick, and queers do love their beers. They are especially problematic, however, when they are imposed by heterosexual adjudicators on foreign identities in legal processes that function to secure the claimants' physical and psychological integrity, namely by providing transnational protection to their 'different' identity. Offering protection to only those who meet clichéd definitions defeats the point of protecting who is persecuted on the grounds of being different.

Sexuality and gender identity are not entirely static phenomena. Both relate to complex internal identity processes and are subject to external influences. Among these is culture. Queer identities vary substantially from society to society as culture has an immense impact on how identities are individually

expressed (or not expressed). (134) The UNHCR remarks to this end that the experiences of queer persons ‘*are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant’s background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly [queer].*’ (135) By presupposing limited notions of supposedly European homosexuality as part of asylum processes, queer petitioners are being ‘moulded, through their individual asylum claims, into a particular, Western characterization of queer identity’. (136) Queer asylum seekers are thereby required to ‘perform their identities in a way that shows they are ‘in place’ among the receiving state’s good gay and lesbian citizenry’. (137) Being in place often equates to embodying the expectations that immigration officials have of their own local and culturally specific queer communities.

Among them, for example, is evidence of participation in the local commercial queer scene. To establish the truthfulness of their queer identity, petitioners are asked about their experiences in, and details about, local gay and lesbian establishments. (138) Given the linguistic obstacles, the financial burdens, the stigmatisation many asylum seekers face in their host countries, as well as the impacts of physical and psychological sufferings in a past of persecution, this is often neither possible nor desired. Common as well is the testing of supposedly queer Western cultural references. A Jamaican lesbian petitioner in the UK, for example, was recently asked as part of her credibility assessment whether she had read Oscar Wilde. (139) Previous heterosexual relationships or marriages (including forced) are frequently and mistakenly used as evidence against a claimant’s queerness, as are children stemming from such. Coming-out stories are expected to be provided in accordance with authorities’ pre-conceived understandings of such. Viewed as a pivotal element in a queer narrative by many immigration officials, an expectation of this kind neglects that the notion of ‘coming out’ is a largely Western phenomenon that might not even exist, or at least expresses itself differently, in the cultural settings of a claimant. Prevalently required is also the evidence of intimate relationships with local queers, an expectation that asylum seekers may neither be able nor want to live up to. (140) The list of erroneous stereotypical notions employed by European immigration and judicial authorities to conclude that queer identities aren’t actually queer is non-exhaustive. (141) The results of their employment are devastating, not least for those petitions that are rejected on this basis.

Simple, the Best

The personal stories of queer refugees are usually their only evidence to support their claim. In part, this is only logical, given that queer individuals in societies that persecute them will as a matter of course engage in ‘queer activities’ in the most closeted ways, leaving behind as little evidence as possible. The lack of information and evidence about the shape of queer persecution worldwide only fuels the importance of queer refugees’ narratives in their credibility assessment. The stereotypical assumptions made about queer asylum seekers are thus frequently required to match coherently narrated accounts about the petitioners’ sexual or gender identity, at best in line with the authorities’ expectations thereof. (142) Given the very nature of queer persecution, however, an expectation of coherency can both be absurd as well as ill-founded. Persons fleeing from persecution in societies causing them to conceal their identity for the sake of physical or social survival may exhibit a degree of shame, trauma and distress that impedes them from offering entirely coherent narratives. (143) Besides, queer refugees may often have had very limited experience in articulating facts or feelings about their queer identity as well as about their sex life, another major factor that can work against them in credibility assessments. (144)

Increasing cultures of disbelief, arguably causative to increased legal accommodations of queer refugees (such as their applicability for asylum under the

Convention or the abolition of discretion reasoning), may work to incentivise queer asylum seekers to turn away from the complexities of their individual stories to lean towards presenting simplified, more easily understandable, and thereby more stereotypical Western versions of their selves. While the UNHCR reports that ‘some applicants exaggerate or fabricate their claims based on inept advice or in a misguided belief that doing so will help their case’, (145) it is questionable whether European asylum realities would prove such advice or beliefs to be misguided. At the contrary, in light of the above, European immigration authorities implicitly invite queer petitioners to present themselves in accordance with euro-centric and hetero-normative ideals of queer persons. It seems more plausible that accepting this invitation increases the likelihood of succeeding with, rather than hurting, a claim. Commenting on the US context, Sarah Hinger’s finding that *‘an applicant must anticipate and perform certain stereotypes in her own application as the surest means of gaining asylum. In this way, stereotypical descriptions become the legal truth of what it is to be "homosexual" and form the standard to be applied beyond the individual case’* only support this logic. (146)

European asylum systems, along the lines of ‘flee, but make sure you wear pink’, seem to be increasingly accepting of queer refugees, yet under the unstated condition that they meet clichéd and unsubstantiated hetero-normative ideals of European queer individuals. Shall this trend continue and become the safest avenue to succeed with a queer asylum claim in the EU, its product would be paradoxical: European asylum policies and laws would indirectly turn non-normative identities persecuted on the basis of their non-normativity into active accomplices in perpetuating Western flawed normative stereotypes about sexual and gender minorities. Moreover, they would hereby aid a morally and culturally questionable construction and promotion of a pseudo-universal queer subject that operates on limited Western-centric notions of sexuality. (147)

Well-founded Fears of Fake Sodomites?

Underlying much of the above is the problematic of distinguishing between bona fide and fake claims. With queer identities being hard to prove, a fear of ‘fraudulent’ applications by authorities is not unjustified. It is questionable though, whether claims such as those of journalist Steve Korver, that *‘posing as a homosexual is the latest trick to get refugee status or benefit from the subsidiary protection’* or that of the UK judge Marquess of Queensberry, that *‘the real mischief (...) that is likely to be caused by this allowing his appeal is by encouraging a flood of fraudulent Zimbabwean (and no doubt other) asylum-seekers posing as sodomites’* are actually reflective of European asylum trends. (148) The experiences of British lawyer Jill Power, who has defended hundreds of queer asylum seekers for the UK Lesbian & Gay Immigration Group, suggest that such claims are hardly sustainable: *‘Not telling the truth while providing an in-depth, detailed and consistent story would be difficult for someone to maintain over the long period that we work with them. It would very quickly be obvious to us if someone tried to ‘act’ a lesbian, gay or trans persona and lifestyle and to regularly attend LGBT events for the purpose of embellishing an asylum claim’*. (149)

Since neither data that would permit us to systematically evaluate the validity of a fear of fraudulent queer applications, nor qualitative research on such exist, conclusions in this context are hard to reach. Regarding queer asylum petitions on the basis of sexual orientation as easily made and impossibly disproven is not ill-founded. On the flipside, however, the contention that ‘findings of the falsity of sexual identity in refugee determinations are easy to make and impossible to appeal’ is at least as, if not more, valid. (150) In the UK, for example, NGO findings suggest that 98-99% of asylum claims made by lesbian and gay persons from 1999 to 2009 failed, compared to a 73% average of all other grounds. (151) Little reason exists to believe that cases of gender

identity are more successful, given they are equally hard to prove, except perhaps in the cases of post-operative transgender applicants.

Solutions

Queer asylum cases will always be messy, says UK Shadow Immigration Minister Chris Bryant. (152) The mess referred to is arguably two-fold. Firstly, it relates to the fact that the challenges that authorities and asylum seekers encounter in queer asylum cases are to a disproportionately high degree focused on the provision and subsequent interpretation of evidence, rather than on questions of law. Secondly, such evidence is often not existent. The lack of tangible evidence for a claimants' queerness is something law and policy might just have to accept. Proving sexual orientation lies beyond the means of science, let alone of courts and immigration authorities. Credibility assessments will nonetheless always be a central part of queer asylum cases. Different solutions have been put forward to counter developments that push queer petitioners either into degrading situations or that require them to resemble hetero-normative Western stereotypes of queer identities to increase the likelihood of succeeding with their claims.

Among them are S. Chelvan's increasingly prominent 'Difference, Stigma, Shame & Harm Model', which seeks to overcome stereotype reliance by shifting the focus of credibility assessments to enquiries about the non-heterosexual life experiences of queer claimants. (153) Instead of questions about sexual conduct, the model suggests that queer refugees should be questioned on their feelings about being (perceived as) 'different' in their respective societies, the stigma that arises out of such, the potential isolation that follows, and the related harm they have experienced.

Other commentators regard LGBTQ cultural competency training for asylum officials to be a worthwhile solution. (154) Nicole LaViolette in this context rightly notes that since the refugee determination process is a guardian system that at its core is about deciding 'who gets in and who does not', 'the best we can hope for is that staff and adjudicators will have the qualifications and resources to do the job well'. (155) She thus suggests trainings on awareness and attitudes about adjudicators' own biases and stereotypes, on cross-cultural and queer-sensitive skills development as well as on knowledge about the foreign cultures and their queer communities.

Ouagadougouwhat?

Such knowledge is dependent on research about foreign queer communities and the persecution thereof. Information on the social, political and legal environments linked to queer experiences with persecution is not merely relevant for such training purposes, however. Its existence is crucial in the legal and evidentiary context of the Convention's persecution requirement, which lies at the heart of the definition of a refugee. (156) A claim will only succeed if an asylum seeker is found to have been, or will be upon her return, subjected to such forms of harm that are deemed persecutory. While the term itself has no universally accepted definition, (157) consensus exists that not all kinds of treatment that are unjust, discriminatory or unconstitutional will meet the legal threshold of persecution. Rather, the human rights violation needs to be particularly grave and of a systemic nature. (158)

Objective, complete and reliable information on the conditions in the places asylum seekers purport to be fleeing from therefore needs to thus be available. Such information is pertinent both for petitioners to support the authenticity of their claims, and for authorities to reach their decisions. (159) The

Qualification Directive stipulates in this context that decision-makers need to ‘take into account all relevant facts as they relate to the country of origin’ and to obtain ‘precise and up-to-date information’ on the situation of queer asylum-seekers in their countries of origin. (160) EU law furthermore requires member states to ‘ensure that precise and up-to-date information is obtained from various sources (...) as to the general situation prevailing in the countries of origin of applicants for asylum’. (161)

In other asylum contexts such information is commonly retrieved from governmental or non-governmental reports, research, and media coverage. Systematically collected and objective documentary evidence about queer persecution is comparably scarce, however. (162) As such, it comes as no surprise that Jansen and Spijkerboer have identified substantial problems with the country condition information that European immigration authorities currently base their adjudications on. (163)

With the exception of less than a handful of countries, authorities across the EU mainly rely on non-queer specific documentation and often on media reports. (164) Reliance on the prior is problematic not least because general human rights related country reports do not often encompass queer issues. This can mistakenly be, and has been, interpreted as evidence that queer persecution does not occur. (165) Besides being symptomatic for the marginalisation of queer issues in international development research, overly relying on the latter above all enhances the ability of authorities to adjudicate in accordance with their own biases and conceptions, instead of with the realities of their petitioners.

The country of origin information guide by ILGA Europe, Europe’s most prominent queer rights NGO, implicitly illustrates this point. (166) On its first page it is stated that ‘[a] Google search on the situation of LGBT persons in their countries of origin will likely produce many results of news reports and blog entries documenting individual cases of persecution and mistreatment. The challenge is in having asylum decision-making bodies accept these documents as credible evidence of the situation on the ground for LGBT individuals’. (167) Asylum lawyer Barbara Wessel, recently speaking at Humboldt University, suggests that the challenge lies elsewhere: in reference to how German immigration authorities go about identifying the right sources of information in queer asylum claims when little information is available, she states that ‘sometimes they make it easy for themselves. The first best article they find on Google that suits their view of the conditions is the one that will be brought up as valid evidence’. (168)

Research on Australian case law indicates even worst scenarios: a number of Australian tribunals made use of dubious gay travel guides including the ‘Spartacus Guide’ or ‘CruisingForSex.com’ to evaluate the country conditions of queer asylum seekers. (169) While no similar cases have (yet) been identified in the EU, the use of random articles retrieved from Google is not uncommon. (170) It is questionable whether use using such material in legal proceedings of this kind is really reconcilable with the standards of fairness, neutrality and seriousness that asylum cases deserve to be judged on.

The problematic inherent to relying on fragmented documentation is furthermore underpinned by the fact that that the determination of whether specific circumstances amount to persecution is, again, ‘highly dependent on how a decision-maker interprets and weighs the evidence’. (171) Arwen Swink to this end rightly notes that ‘two asylum judges, making determinations separated by very small periods of time, will often review conditions for a single country in a radically different fashion’. (172) Though this finding applies similarly to other judicial contexts, it is especially prone to arise when, as a result of a lack of credible documentation, authorities need to reach their judgements on the basis of arbitrarily chosen sources rather than on recognised and substantiated evidence. Interestingly, research Norwegian case law shows that the majority of queer asylum cases were actually rejected pertaining to country of origin

information, and not on the basis of negative credibility findings. (173)

Serious and queer-specific documentation that is not out-dated, (174) and which covers not just persecution of gay men, but also of lesbians and transgender identities, is thus extremely crucial to minimise arbitrariness and maximise fairness and nuance in queer asylum decision-making. Without the availability of such, no substantiated answers can be found to questions concerning the extent to which a petitioner is persecuted, the different levels of persecution from one place to another within the same country, (175) the particularities of the particular social group in question, or whether the non-enforcement of anti-homosexuality laws can legitimately be regarded as meaning that no persecution takes place. (176) Nuanced asylum decision-making simply requires nuanced understandings about the persecution of foreign queer identities. Today, such an understanding on the side of European authorities remains miles away. Or in Wessel's words: *'they cannot even pronounce the names of the capitals of the country, and then they have to decide about the situations for gays and lesbians in that country'*. (177)

Conclusion

While pronouncing foreign capital names will always be a tricky, more research about the situation of queer asylum seekers within the European borders, and about the persecution of queer identities outside of these, are endeavours European states can and need to engage in. Not least, since today's persecution of queer identities in many parts of the world is to a considerable extent the product of our European colonial history. (178)

It is thus difficult to sustain the degree to which asylum claims based on sexual orientation continue to be severely under-researched and obscured throughout the EU. Though legally the situation for queer refugees in Europe has progressed dramatically over the last decade, queer identities are rendered invisible by 27 out of 28 member states' asylum data banks. We are left to guess how many of almost half a million asylum applications are based on the grounds of queer persecution, where queer refugees originate from and what precisely they escaped.

What we do know, in turn, is that credibility issues dominate queer asylum procedures and that lacks of evidence disproportionately burden petitioners. As a matter of course, petitioners' sexualities are subjective in nature and hard to prove. Though whether the fear of persecution is a genuine one is equally subjective, the most objective element of queer asylum claims is the evidentiary question of persecution. While this question remains only one aspect of queer asylum cases, the fact that it is *per se* more provable should in and by itself make it merit increased attention.

Beyond the basic problematic of how authorities can adjudicate responsibly on a well-foundedness of a fear of persecution if no knowledge exists about the persecution in the first place, increased European research would lead to more nuanced understandings of the specific contexts that European asylum systems' subjects are shaped by and are purportedly fleeing from. With such an understanding, adjudicators would also be less justified and consequently less likely to engage in ill-founded attempts to shut the floodgates. Rather than perpetuating a culture that operates on an initial presumption that queer asylum seekers are liars and on disproportionate state powers to define sexuality norms for foreign queer identities, European authorities would assist themselves and their claimants by taking the evidentiary aspects of persecution, rather those of sexuality, more seriously. This could leverage at least some of the subjectivities that fuel many elements of queer asylum claims and guarantee fairer results of queer asylum adjudications.

Simply put, it might be time to bring some colour into the European research palettes. Only by way of increased efforts to capture queer issues on both the internal European asylum and external international development agenda can the outcomes of queer asylum cases become substantiated and just.

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About the Author

[Johannes Lukas Gartner](#) is a law and international affairs graduate student from King's College London, Humboldt University Berlin and the Johns Hopkins University School of Advanced International Studies. His interest in human rights has led him to work for the Centro Nacional de Comunicación Social in Mexico City, the United Nations Development Program and the EU Fundamental Rights Agency. At the time of writing, he was working in public sector strategy consulting in Berlin, Germany. Johannes is a Humanity in Action Senior Fellow (Diplomacy and Diversity 2014).

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3. United Nations High Commissioner for Refugees (hereafter: UNHCR), UNHCR Central Mediterranean Sea Initiative (CMSI) EU Solidarity for rescue-at-sea and protection of refugees and migrants (CMSI Action Plan, UNHCR Bureau for Europe, Updated Version 22 July 2014); UNHCR, *Statistical Yearbook 2012* (12th ed., Geneva, Switzerland: UNHCR, 10 December 2013).
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law spark change?', *The Guardian*, 1 September 2014.

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40. At the time of writing, same-sex marriage had been legalised through court verdicts in: California (28 June 2013), Connecticut (12 November 2008), Iowa (24 April 2009), Massachusetts (17 May 2004), New Jersey (21 October 2013), New Mexico (19 December 2013), Oregon (19 May 2014), Pennsylvania (20 May 2014); through state legislation in: Delaware (1 July 2013), Hawaii (2 December 2013), Illinois (1 June 2014), Minnesota (1 August 2013), New Hampshire (1 January 2010), New York (24 July 2011), Rhode Island (1 August 2013), Vermont (1 September 2009); and through popular vote: Maine (29 December 2012), Maryland (1 January 2013), Washington (9 December 2012). Furthermore, pending appeals existed in over a dozen States where district courts have deemed their legislative prohibitions on same-sex marriage as unconstitutional.

41. In 2013, the first ever EU-wide survey directed at LGBT persons was conducted by the EU Agency for Fundamental Rights. Based on the results of over 93.000 LGBT-identifying respondents, almost half said that they had felt personally discriminated against or harassed on the grounds of sexual orientation in

the year preceding the survey. For the results of the survey see: <http://fra.europa.eu/DVS/DVT/lgbt.php>. For their summary see: http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf.

42. The ECtHR considers the ECHR as a living instrument which is to be interpreted in light of present-day conditions (referred to as ‘the living instrument doctrine’ or ‘evolutive approach’), see: *E.B. v France* [GC] (2008), (43546/02), at 92. With this understanding, the ECtHR has held, inter alia, that legislation criminalising consensual sexual acts between same-sex adults is in breach the ECHR (*Dudgeon v United Kingdom* (1981) 4 EHRR 149), that the age of consent for homosexual intercourse may not legally differ to that of heterosexual one (*Sutherland v United Kingdom* (1997) 24 EHRR CD 89), that homosexual men may not be banned from participating in the national military (*Lustig-Prean and Beckett v United Kingdom* (1999) 31417/96 ECHR 71), that discrimination based on sexual orientation is not permissible under the ECHR (*Karner v Austria* (2003) 2 FLR 623); that same-sex couples constitute ‘family’ under the ECHR (*Schalk and Kopf v Austria* (2010) 30141/04), or that post-transition transgender persons have a legal right to get their legal sex changed and consequently be conferred full (opposite-sex) marriage rights (*Goodwin v United Kingdom* (2002) 28957/95 and *I v United Kingdom* (2002) 25680/94).

43. Full marriage rights for same-sex couples at the time of writing existed in: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, England and Wales (and from 1 October 2014 Scotland), Uruguay and 19 States of the United States, where a further 8 native tribal jurisdictions issue marriage licenses for same-sex couples. Luxembourg will be the 17th country to introduce same-sex marriage on 1 January 2015.

44. Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Slovenia and the United Kingdom.

45. See Art. 21, Charter of Fundamental Rights of the European Union.

46. European Union, Directive 2000/78/EC.

47. European Union, Directive 2012/29/EU.

48. European Union, Parliament Resolution 4 February 2014, 2013/2183(INI).

49. See: Silvan Agius and Christa Tobler, *Trans and Intersex People - Discrimination on the grounds of sex, gender identity and gender expression* (Luxembourg: Office for Official Publications of the European Union, European Commission Directorate-General for Justice, 2012).

50. See: European Union Agency for Fundamental Rights, *EU LGBT Survey. Results at a glance* (Luxembourg: Publication Office of the European Union, 2013).

51. For more on the trends of irregular migration, see: UNHCR, *Global Trends 2013* (Geneva: UNHCR, 20 June 2014). The report, published annually to

give an overview of the previous year's refugee movements, makes no mention of queer refugees in any form.

52. See: UNHCR (2012), above no. 6.

53. Nicole LaViolette, 'Overcoming Problems with Sexual Minority Refugee Claims: is LGBT Cultural Competency Training the Solution?' in: Thomas Spijkerboer (ed.), *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Preprint Version 2013), at 5. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573.

54. Jonathan Kalan, 'The Gray Area of Gay Refugees', *GlobalPost*, 1 December 2011; Duncan Breen, *The Road to Safety. Strengthening Protection for LGBTI Refugees in Uganda and Kenya* (Human Rights First, 2012); Neil Grungras and Rachel Levitan and Amy Slotek, 'Unsafe Haven: The Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey', *The Fletcher Journal of Human Security* XXIV (2009): 41-61; Corinne Chin, 'Why Ugandan Gays Who Fled To Kenya Still Feel Like They're In Danger', *Associated Press/HuffingtonPost*, 17 August 2014.

55. European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part II - The Social Situation* (Vienna, Updated version 2009), at 129.

56. Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity* (Vrije Universiteit Amsterdam, September 2011).

57. Neil Grungras, 'Rising Numbers of LGBTI Refugees Facing Fight for Survival', *HuffingtonPost*, 20 June 2014.

58. For more on UNHCR asylum statistics and territories, see: UNHCR 2012, above no. 3, at 43-49.

59. While apart from Belgium no other member state of the EU collects data, out-dated estimates by national authorities exist for Sweden (where the number in 2002 was thought to be around 250 to 300 per year), the Netherlands (approx. 200 per year), and Italy (54 cases filed between 2005 and 2007). In a few other countries, non-governmental organisations have released estimates. In the United Kingdom (UK), for example, the UK Lesbian & Gay Immigration Group (UKLIG) states that 18 men and women were granted asylum based on sexual orientation in 2008, 25 in 2009, 70 in 2010, 49 in 2011 and 55 in 2012. See: Stig-Åke Petersson, *Questionnaire Sweden* (submitted for Jansen and Spijkerboer's *Fleeing Homophobia Research Project*, above no. 56), at 2 (available: http://www.rechten.vu.nl/nl/Images/Sweden%20questionnaire_tcm22-240748.pdf); Jansen and Spijkerboer 2011, above no. 54, at 15; Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd ed., Strasbourg: Council of Europe Publishing, 2011), at 66; United Kingdom Lesbian & Gay Immigration Group, *Missing the Mark. Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (September 2013), at 9.

60. The numbers of asylum decisions (in brackets: numbers of asylum decisions on sexual orientation and gender identity) in Belgium were the following for the years 2008 to 2012:

2008: 8.964 (226); 2009: 8.883 (362); 2010: 13.170 (522); 2011: 16.828 (823); 2012: 19.731 (1059). Total 2008 to 2012: 67.576 (2992). The statistics for the year 2008 and 2009 are no longer available on the website of the Belgium Officer for the Commissioner General for Refugees and Stateless Persons and were taken from: Jansen and Spijkerboer (2011), above no. 56, at 15. For the years 2010, 2011 and 2012, see: Dirk Van den Bulck (ed.), 2010 Annual Report (Officer for the Commissioner General for Refugees and Stateless Persons, Brussels, June 2011); Dirk Van den Bulck (ed.), 2011 Annual Report (Officer for the Commissioner General for Refugees and Stateless Persons, Brussels, June 2012); 2012 Annual Report (Officer for the Commissioner General for Refugees and Stateless Persons, Brussels, June 2013). At the time of writing, Belgium has not yet released any statistics for 2013. The data collected by Belgium cover sexual orientation and gender identity as one category, an exact breakdown for each is therefore not possible.

61. See for example: Jansen and Spijkerboer (2011), above no. 56, at 15.

62. Helen Sandal (Senior Advisor, Enhet for statistikk og analyse, Utlendingsdirektoratet), Personal E-Mail Communication, 27 August 2014.

63. The numbers of first instance asylum decisions (in brackets: numbers of asylum decisions on sexual orientation and gender identity) in Norway were the following for the years 2008 to 2013:

2008: 9.700 (3); 2009: 15.686 (17); 2010: 16.455 (26); 2011: 10.496 (28); 2012: 11.441 (23); 2013: 12.583 (73). Therese Bergwitz-Larsen (Senior Advisor, Kommunikasjonsstaben, Utlendingsdirektoratet), Personal E-mail Communication 26 August 2014; Helen Sandal (Senior Advisor, Enhet for statistikk og analyse, Utlendingsdirektoratet), Personal E-Mail Communication, 27 August 2014.

64. The troubles inherent to estimates on this data is evidenced by contrasting this number with Sabine Jansen and Spijkerboer's extrapolation that used an average percentage of 3,58% (based on the Belgian numbers from 2008-2010 only) and a total of 235.900 (number of asylum applications in the EU for the year 2010), resulting in an estimate of 8.450 queer asylum seekers in the EU annually. The real number is likely to lie between Jansen and Spijkerboer's and the estimate provided in this article if two assumptions held true: 1) the number of queer refugees has continued to rise as sharply as was the case for Belgium between 2010 and 2012; 2) the 2013 figure of total asylum applications in the EU is a misleading basis due to that year's global political events, namely most notably a disproportionately large influx of refugees from the Middle East that year. For Spijkerboer and Jansen's calculation, see: Spijkerboer and Jansen 2011, above no. 56, at 15.

65. An extrapolation based on the numbers provided in fn. 61 would lead to a total of 957.

66. See above no. 60. For the data for 2006 see: Officer for the Commissioner General for Refugees and Stateless Persons to the Council of Europe, in: Council of Europe 2011, above no. 59, at 65.

67. See above. no. 63.

68. It is also worth noting that in the last two years, since Spijkerboer and Jansen's research in 2011, the numbers of 2012 and 2013 have risen at an exponentially higher rate than during the time their research concerned.

69. While no systematic data or research exists on the countries of origins of queer asylum seekers in the EU, the qualitative questionnaires provided by national experts for Jansen's and Spijkerboer's Fleeing Homophobia project (above no. 56) suggests that queer refugees originate from countries including: Afghanistan, Albania, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Barbados, Belarus, Bolivia, Bosnia-Herzegovina, Brazil, Burundi, Cameroon, Central African Republic, Chile, China, Colombia, Congo (DRC), Costa Rica, Croatia*, Cuba, Dominica, Ecuador, Egypt, Eritrea, Estonia*, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Guinea-Conakry, Guyana, Honduras, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kosovo, Lebanon, Liberia, Libya, Lithuania*, Macedonia, Malawi, Malaysia, Mali, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Palestine, Panama, Paraguay, Peru, Philippines, Qatar, Romania*, Russia, Rwanda, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia*, Somalia, South Africa, Sri Lanka, St. Vincent & the Grenadines, Sudan, Syria, Tajikistan, Tanzania, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia (FRY), Zambia, Zimbabwe (countries now member of the EU are marked with an asterisk). See: Jansen and Spijkerboer (2011), above no. 56, at fn. 23.

70. United Nations Convention Relating to the Status of Refugees, 1989 U.N.T.S. 150, 28 July 1951 (entry into force: 22 April 1954).

71. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 16 December 1967.

72. UN Convention, above no. 70, Article 1A(2).

73. While such implicit exclusion of queer bodies and sexualities is usually explained on the basis of such legislation's historical context, it is difficult to justify in view to the (commonly neglected) systematic persecution also of queer persons during the holocaust. See for example: Günter Grau and Claudia Shoppmann (eds), *The Hidden Holocaust?: Gay and Lesbian Persecution in Germany 1933-45* (3rd ed., London: Routledge, 1995); UNHCR, 'Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity' (Geneva: UNHCR Expert Roundtable, November 2010), at para. 3.

74. UN Convention, above no. 68, Article 33(1): Principle of non-refoulement.

75. Netherlands / Afdeling Rechtspraak Raad van State No. A-2.1113, RV 1981, 5. Available: <https://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=246>.

76. Among the most influential cases that led up to this acceptance, see: Australia: Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another, (1997) 190 CLR 225; Canada: (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993; New Zealand: Re G.J., New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, 1 NLR 387, 1995; United Kingdom: Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545 (25 March 1999); United States: Matter of Acosta, A-24159781, United States Board of Immigration Appeals, 1 March 1985.

77. Though membership of a particular group has emerged as the most relevant legal basis for accommodating queer claims, the grounds religion and

political opinion have across jurisdictions also served as legal bases (See for example: UNHCR 2012, above no. 6, at para. 40ff; Erik Ramanathan, 'Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence', *Georgetown Immigration Law Journal* (1996): 5-7; Kristen L. Walker, 'Sexuality and Refugee Status in Australia', 12(2) *International Journal of Refugee Law* (2000), at 178-79). For a judicial example of an asylum claim where sexual orientation was found to constitute a political opinion, see: Bundesverwaltungsgericht, Urteil vom 15.03.1988, BVerwG 9 C 278.86, Germany.

78. The UNCHR first dealt with the eligibility of 'homosexuals' in 1996, followed by the Council of Europe in 2000. See: UNHCR, 'Protecting Refugees: Questions and Answers' (UNHCR/PI/Q&A-UK1.PM5/Feb.1996); Council of Europe, Recommendation 1470 (2000) on Situation of Gays and Lesbians and their Partners in Respect of Asylum and Immigration in the Members of the Council of Europe (30 June 2000), 1470. The UNHCR published its first guidance note for this context in 2008 (See: UNHCR (2008), above no. 6).

79. Originally developed in the United States case *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), subsequently reaffirmed in *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (BIA. 1990). The Canadian Supreme Court followed a similar approach in: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

80. UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (UNHCR, HCR/GIP/02/02, 7 May 2002), at para. 6.

81. *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, (1997) 190 CLR 225.

82. UNHCR (2002), above no. 80, at para. 7.

83. The immutable characteristics approach operates on the wobbly presumption that 'sexual orientation [is] fixed, consistently taking the same form and following the same narrative of persecution across society and across cultures', thereby neglecting both the fluidity of sexuality as well as the impact cultural differences can have on such (Sarah Hinger, 'Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation based Asylum Claims', 19 *Colombia Journal of Gender & Law* (2010)). This impact is particularly relevant in the context of immigration authorities in refugee-receiving nations adjudicating on (their understanding of) foreign identities and sexualities. In contrast to the social perception approach, however, conceptualising sexuality as being immutable places less emphasis on external perceptions and behavioural patterns that are deemed associable with such identities. Emphasising the external over the internal easily leads to several troubles: it can indirectly demand a higher level of prove (since observations lend themselves to be provable, in contrast to immutable identity characteristics which cannot be proven in the first place), it may punish non-normative queer behaviour as such would be harder to be deemed recognisable by a united difference, and it may give rise to adjudicators focusing on the social visibility of the individual claimant rather than of the group the claimant purports to be a member of. For more on these issues see for example: Fadi Hanna, 'Punishing Masculinity in Gay Asylum Claims', 114(4) *The Yale Law Journal* (2005): 913-920 (commenting on US case law in this context); Fatma E. Marouf, 'The Emerging Importance of 'Social Visibility' in Defining 'A Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender', 27(1) *Yale Law & Policy Review* (2008): 47-106 (discussing the problematic of a social visibility requirement in the US context).

84. UNHCR (2002), above no. 80, at para. 9.

85. Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12)*, Judgment of the Court (Fourth Chamber) of 7 November 2013.

86. According to the EU Agency for Fundamental Rights, at least 22 member states of the EU moreover explicitly cover ‘sexual orientation’ as a persecution ground in their national asylum legislation. In their report, no similar finding is made for the ground of gender identity. See: European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity* (Luxembourg: Publications Office of the European Union, 2010 Update), at 55.

87. EU Directive 2004/83, O.J. 2004, L 304/12 and EU Directive 2011/95, O.J. 2011, L 337/9. See Article 10(1)(d), which states that ‘depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. (...) Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’.

88. See: UNHCR (2002), above no. 78, at 11; Maarten den Heijer, ‘Persecution for reason of sexual orientation: X, Y and Z’, 51 *Common Market Law Review* (2014): 1217-1234.

89. Above no. 85, at paras 48-49.

90. See for example UK Supreme Court judge Lord Roger’s statement: ‘the Convention offers protection to gay and lesbian people — and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour— because they are entitled to have the same freedom from fear of persecution as their straight counterpart’ (in: *HJ and HT* [2010] 3 *WLR* 386, 418 [76], at 350). For a valid critique of the flaws and problems inherent to appending transgender cases to those of sexual orientation, see: Ellen A. Jenkins, ‘Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgendered Asylum Seekers’, 40(1) *Golden Gate University Law Review* (2009): 67-96.

91. See: Laurie Berg and Jenni Millbank, ‘Developing a Jurisprudence of Transgender Particular Social Group’, 2013(1) *UTS Legal Studies Research Paper Series* (2013). For particular social group case law on transgender persons, see for example: *M B*, *Commission des Recours des Réfugiés (CRR)*, French Refugees Appeal Board, 496775, 15 February 2005, where an Algerian transgender person was recognised by a French court to constitute a member of a particular social group.

92. Sabine Jansen, ‘Introduction. Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe’, in: Thomas Spijkerboer (ed.), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Oxon: Routledge, 2013), at 1.

93. C. Blake, ‘Judging Asylum and Immigration Claims: The Human Rights Act and the Refugee Convention’, *Public Money & Management* 21/3 (2001) pp. 25, 27, quoted in: Robert Thomas, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’, 8 *European Journal of Migration and Law* 8 (2006), at 79; Barry O’Leary, ‘“We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals...”: The Particular Problems Facing those who seek asylum on the basis of their sexual identity’, 16 *Feminist Legal Studies* (2008), at 88.

94. *SW v Secretary of State for the Home Department (Adjudicators questions) Somalia* [2005] UKIAT00037, para. 20. Quoted in: Thomas (2006), above, at 79.
95. O’Leary (2008), above no. 93, at 89.
96. Except for the fragmented research that pops up every now and then, claiming the contrary before being disproven again by subsequent research.
97. Establishing sexual orientation (and gender identity) should in principle be based on self-identification. See, for example, main recommendation no. 5 in Spijkerboer and Jansen (2011), above no. 56, at 11. See also: Principle 3 of The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, which states that ‘Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom’.
98. European Union Agency for Fundamental Rights (2010), above no. 86, at 59-60; BBC Europe, ‘Czech gay asylum ‘phallometric test’ criticised by EU’, BBC News, 8 December 2010; International Lesbian, Gay, Bisexual, Trans and Intersex Association, Report on implementation by the Czech Republic of the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity (4 April 2012); Sabine Jansen, Credibility, or how to assess the sexual orientation of an asylum seeker? (EDAL Conference 2014: Reflections on the Current Application of the EU Asylum Acquis Workshop Sexual Orientation, Gender Identity and Human Dignity 2014). Available: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/alldfiles/Credibility%20of%20sexual%20orientation,%20%20presentation%20Sabine%20Jansen%20at%20EDAL%20conference%20Jan%202014.pdf>; David Kosar, Questionnaire Czech Republic (submitted for Jansen and Spijkerboer’s Fleeing Homophobia Research Project, above no. 56), at 19-20. Available: http://www.rechten.vu.nl/nl/Images/Czech%20Republic%20questionnaire_tcm22-236573.pdf. While Czech immigration authorities claim the numbers of cases where such tests were employed was limited to less than a dozen, this remains unproven. The UNHCR claims that these tests were first used by the Czech authorities in 2004 to test the sexualities of Armenian and Sri Lankan applicants.
99. Penile phallometry was developed in the 1950s by Kurt Freund. Several courts in the US have rejected the admissibility in legal proceedings of the tool’s results in the 1990s. See: Organization for Refuge, Asylum & Migration, Testing Sexual Orientation – A Scientific and Legal Analysis of Phletysmography in Asylum & Refugee Status Proceeding (San Francisco: 2010, ORAM), at 4-7.
100. See: UNHCR, UNHCR’s Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation (UNHCR Bureau for Europe, April 2011); European Union Agency for Fundamental Rights (2010), above no. 86, at 59. For the comments by Cecilia Malström (European Commissioner for Home Affairs) see: ‘Response to the parliamentary question on phallometric testing’ (3 March 2011), available: <http://www.lgbt-ep.eu/parliamentary-work/response-to-the-parliamentary-question-on-phallometric-testing/>.
101. Jansen (2014), above no. 98.
102. Homosexuality was considered a mental disease in the World Health Organisation’s International Statistical Classification of Diseases and Related

Health Problems (ICD) until 1990, but was dropped due to the results of a body of research that provided evidence that sexual orientation was in fact no disease. Transgender identities are still today viewed as suffering from a medical illness, both by the WHO and the American Psychiatric Association (APA). See: Agius and Tobler (2012), above no. 49, at 16.

103. Jansen (2014), above no. 98; Jansen and Spijkerboer (2011), above no. 56, at 49. See also: Derek McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu', 6(1) *Body and Society*: 29-50, for a critique of a case in which the UK Home office required a homosexual applicant to undergo a medical anal examination to prove his sexual orientation.

104. O'Leary (2008), above no. 93, at 2006.

105. Aaron Day, 'Leaked report: UK Home Office 'interrogates' LGBT asylum seekers with degrading questions', *Pink News*, 9 February 2014.

106. Diane Taylor and Mark Townsend, 'Gay asylum seekers face 'humiliation'', *The Observer*, 8 February 2014.

107. See: Jansen and Spijkerboer (2011), above no. 56, at 55; Jansen (2014), above no. 98.

108. See: S. Chelvan, 'From Silence to Safety: Protecting the Gay Refugee?', lecture delivered by one of Britain's leading barristers at the Law Society of England and Wales on 5 February 2013. For a podcast of the lecture and its transcription, see: <http://cpdcentre.lawsociety.org.uk/course/5262/the-eleventh-stonewall-lecture-podcast>; See also: Home Office Select Committee, *Asylum: Seventh Report of Session 2013-14*, (House of Commons, 8 October 2013).

109. Home Office Select Committee, above, at 28; Scott Roberts, 'Home Office Select Committee slams government on LGBT asylum policy', *Pink News*, 11 October 2013.

110. See: Interview with Klaus-Dieter Sohn in: Sabrina Papst, 'Sohn: 'Ein Asylwerber würde alles tun'', *Deutsche Welle*, 21 July 2014.

111. Discretion reasoning has in one form or another still found to be used in judgements by courts in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Malta, the Netherlands, Poland, Romania, Spain, Norway and Switzerland. See: Jansen and Spijkerboer (2011), above no. 56, at 33-39.

112. Along lines such as: 'We take the view that the appellant would conduct herself discreetly as a lesbian in Albania and that it would be entirely reasonable in the circumstances to expect her to do so' (MK v. Secretary of State for the Home Department (MK Lesbians) [2009], UKAIT 0036 [405]).

113. Legally, this requirement has in courts been settled as a 'reasonable expectation that persons should, to the extent that this is possible, co-operate in their own protection' (See for example: 6 RRT Case No. V95/03527, [1998] RRTA 246, Australian Refugee Review Tribunal, 9 February 1996).

114. Refugee Appeal No. 75665/03, New Zealand Refugee Status Appeals Authority, 2004, para 114.

115. UNHCR (2012), above no. 6, paras 12, 31, 32.

116. James C. Hathaway and Jason Pobjoy, 'Queer cases make bad law', 44(2) *New York University Journal of International Law and Politics* (2012), at 325.

117. Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' 13(2/3) *International Journal of Human Rights* (2009): 391-414.

118. As Lord Roger of the UK Supreme Court has also noted by ruling that ' [n]o-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution'. (*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UKSC 31 [2010], para 76.

119. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473 (Australia); *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 (United Kingdom). For a critique of the refugee law analyses employed in the UK Supreme Court ruling (rather than its outcome) see: James C. Hathaway and Jason Pobjoy, 'Queer cases make bad law', 44(2) *New York University Journal of International Law and Politics* (2012): 315-389, arguing that the UK Supreme Court conflated the standards of persecution demanded from international refugee law with non-discrimination norms. For a critique of this critique, see: Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy', 44 *New York University Journal of International Law and Politics* (2012): 497-527.

120. In Finland through a judgment of the Supreme Court (*Korkein Hallinto-Oikeus*, 13 January 2012), in Sweden through policy rules ((*Rättschefens rättsliga ställningstagande angående metod förutredning och prövning av den framåsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning*), 13 January 2011, RCI 03/2011) and in Germany through a statement by the German immigration authority (Letter from Bundesamt für Migration und Flüchtlinge, BAMF, to Member of Parliament Volker Beck, 27 December 2012. Available: <http://www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf>).

121. The Court of Justice of the European Union, above no. 85.

122. Opinion of Advocate General Sharpston, delivered on 17 July 2014, Joined Cases C 148/13, C 149/13 and C 150/13. (N.b. Advocate General opinions are neither binding on the Court nor on the EU member states, but may impact future CJEU decisions).

123. The Advocate General regards sexual arousal tests as violating Art. 3 (Right to Integrity of the Person) and Art. 7 (Respect for Private Life); questions concerning claimants' sex life as disproportionate within the meaning of Art. 52(1) (Principle of Proportionality); and video or photographic evidence as contrary to Art. 7 of the Charter of Fundamental Rights of the European Union (See: para. 43, 63, 66).

124. Sharpston (2014), above no. 122, para 40.

125. See for example: Jenni Millbank (2009), above no. 117; *United Kingdom Lesbian & Gay Immigration Group* (2013), above no. 60; Jansen (2014),

above no. 98.

126. Paul O'Dwyer, 'A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court', 52 *New York Law School Review* (2007), at 186.
127. See, for example: Christopher Kendall, 'Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?', 15 *International Journal of Refugee Law* 4 (2003).
128. For more on how gender and sexuality norms are reproduced through immigration law, see: Susan Berger, 'Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States', 34(3) *Signs* (2009): 659-685.
129. Heteronormativity may be understood as the ways 'normalizing regimes produce heterogeneous, marginalized subjects and positionalities in relation to a valorised standard of reproductive sexuality between biologically born male-female couples who belong to the dominant racial-ethnic group and the middle class' (Luibhéid (2008), above no. 8, at 170-71).
130. For an analysis of this problematic in the context of US case law, see: Hanna Fadi, 'Punishing Masculinity in Gay Asylum Claims', 114 *The Yale Law Journal* (2005).
131. Spijkerboer and Jansen (2011), above no. 56, at 61.
132. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, para 78.
133. Sarah Keenan, 'Safe spaces for dykes in danger? Refugee law's production of the vulnerable lesbian subject' in: Sharron FitzGerald (ed.), *Regulating the international movement of women: From protection to control* (Oxon: Routledge, 2011): 29-47.
134. Sarah Hinger (2010), above no. 83, at 389-390; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants', 22 *Journal of Refugee Studies* (2009).
135. UNHCR (2012), above no. 6, at 4.
136. Hinger (2010), above no. 83, at 368.
137. Kennan (2011), above no. 133.
138. Deborah A. Morgan, 'Not Gay Enough For the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases', 15 *Law & Sexuality Review. Lesbian Gay Bisexual & Legal Issues* 135 (2006); Elisabeth Connelly, 'Queer, Beyond a Reasonable Doubt: Refugee Experiences of 'Passing' into 'Membership of a Particular Social Group'', 2014(3) *UCL Migration Research Unit Working Papers* (2014); Jenni Millbank, 'Ring of Truth A Case Study of

Credibility Assessment in Particular Social Group Refugee Determinations’, 21(1) International Journal of Refugee Law, Volume 21 (2009), at 18-19.

139. Scott Roberts, ‘UK: Judges accused of asking lesbian asylum seekers ‘inappropriate’ questions such as ‘Have you read Oscar Wilde?’’, PinkNews, 5 April 2013.

140. See for example: Elisabeth Connelly, ‘Queer, Beyond a Reasonable Doubt: Refugee Experiences of ‘Passing’ into ‘Membership of a Particular Social Group’’, 2014(3) UCL Migration Research Unit Working Papers (2014).

141. For a list of examples, see Jansen and Spijkerboer (2011), above no. 56, at 61.

142. Jill Powell in: Ashery (2010), above no. 22.

143. Berg and Millbank (2009), above no. 134, at 201; Millbank (2009), above no. 138, at 12; Morgan (2006), above no. 138, at 141.

144. Jordan (2009), above no. 7, at 175.

145. UNHCR, ‘The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees’ (Discussion Paper, Prepared for a UNHCR Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity, Geneva Division of International Protection, Geneva, 22 September 2010), at 10.

146. Hinger (2010), above no. 83, at 389.

147. See: Eward Ou Jin Lee and Shari Brotmann, ‘Identity, Refugeeeness, Belonging: Experiences of Sexual Minority Refugees in Canada’, 48(3) Canadian Review of Sociology (2011): 241-274.

148. Steve Korver, ‘Africa: Fake Gay Refugees’, AllAfrica, 19 August 2013; Marquess of Queensbury in: *Z v. Secretary of State for the Home Department*, [2004] EWCA Civ 1578, UK CoA, 2 December 2004 (original quote not to be found. Quoted in: Janna Weßels, ‘Sexual orientation in Refugee Status Determination’, Working Paper Series No. 74, Refugee Studies Centre, Oxford Department of International Development, University of Oxford (2011); S. Chelvan, ‘From Sodomy to Safety? The case for defining persecution to include unenforced criminalisation of same-sex conduct’ (Paper delivered at Fleeing Homophobia Conference, Amsterdam, 5 September 2011); Millbank (2009), above no. 117.

149. Jill Power in: Ashery (2010), above no. 22, at 11.

150. Millbank (2009), above no. 117, at 399.

151. As official data concerning queer claims are also absent in the UK, these numbers are composed of official UK asylum data, weighed against the percentage of rejections of all cases brought to UKLIG. (United Kingdom Lesbian & Gay Immigration Group, *Failing the Grade* (8 April 2010)), at 2.

152. Chris Bryant in: Scott Roberts (2014), 'Shadow Immigration Minister Chris Byrant blasted for saying gay asylum cases 'will always be messy'', Pink News, 2 September 2013.

153. See: S. Chelvan, DSSH Model and LGBTI asylum claims (Presentation, April 2014. Available: [www.no5.com/cms/documents/DSSH Model and LGBTI Asylum Claims.pdf](http://www.no5.com/cms/documents/DSSH%20Model%20and%20LGBTI%20Asylum%20Claims.pdf)).

154. See for example: Neil Grungras, 'Rising Numbers of LGBTI Refugees Facing Fight for Survival', The Huffington Post, 20 June 2014; Jansen (2014), above no. 98; Nicole LaViolette (2013), above no. 53.

155. LaViolette (2013), above no. 53, at 21.

156. Nicole LaViolette, 'Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process', 13(2) The International Journal of Human Rights (2009), at 440.

157. 'There is no universally accepted definition of 'persecution', and various attempts to formulate such have been met with little success'. The UNHCR provides the following: 'Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant' (UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva: re-edited Version of January 1992, at 51-52).

158. See: Hathaway and Pobjoy (2012), above no. 119, at 343.

159. Jansen and Spijkerboer (2011), above no. 56, at 10.

160. Qualification Directive (2004), above no. 87, Art. 4(3), 8(2).

161. Council Directive 2005/85/EC of 1 December 2005, Article 8(2)(b). Members of the European Parliament in 2011 proposed to amend the wording of this directive to 'Member states shall ensure that (...) the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child, gender, religious or sexual orientation issues'. The proposal was refused by the European Commission.

162. See: LaViolette (2009), above no. 157.

163. Jansen and Spijkerboer (2011), above no. 56, at 71-76.

164. The UK is the only country that extensively covers queer sections in its country reports. The Netherlands, Sweden and Finland also collect queer-related information for the purposes of their asylum procedures. See: ILGA 2014, at 37.

165. O’Leary (2008), above no. 93, at 91-92. For detailed research on this issue in the Canadian context, see: LaViolette (2009), above no. 156. The following excerpt of a US judgment best illustrates the problematic: ‘if there was a serious possibility that homosexuals, as a particular social group, had a well- founded fear of persecution because of their sexual orientation, the panel is of the opinion that one or more of the human rights publications would cite this as a concern . . . [however] [t]he panel was not able to find any reference to such a concern in the recent Amnesty International Report or Human Rights Watch World Report’ (Re H. (Y.F.), cited in LaViolette (2009), above no. 156, at 442). See also: UNHCR 2012 Guidelines para. 66: Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant’s claim is unfounded or that there is no persecution of LGBTI individuals in that country’.

166. ILGA Europe, Country of Origin Information (no date. Available: http://www.ilga-europe.org/media_library/ilga_europe/issues/asylum/asylum_country_by_country_resource/country_of_origin_information).

167. *ibid*, at 1.

168. Barbara Wessel, Lecture ‘Sexuelle Verfolgung als Asylgrund - LGBTI im deutschen Asylverfahren’, Humboldt University, Faculty of Law, 15 July 2014. Quote in German, noted down and translated into English by the author.

169. Arwen Swink, ‘Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities’, 29(2) *Hastings International and Comparative Law Review* (2005), at 260.

170. Apart from the case of Germany, see e.g.: Simone Rossi, Questionnaire Italy (submitted for Jansen and Spijkerboer’s Fleeing Homophobia Research Project, above no. 56), at 17; A court in the Czech Republic accepted YouTube Video as COI evidence. See: David Kosar, Questionnaire Czech Republic (submitted for Jansen and Spijkerboer’s Fleeing Homophobia Research Project, above no. 56), at 28.

171. Weßels (2011), above no. 149, at 14.

172. Swink (2005), above no. 169, at 256

173. Hojem (2009), at 14.

174. Which has even in the UK been found to be the case, despite its heightened efforts to specifically cater for LGBTQ documentation (for example by working with an independent advisory panel of experts on country information). See: UKLIG (2013), above no 59, at 23.

175. The answers to which are detrimental to cases where courts seek to rely on the internal flight alternative, whereby applicants are denied asylum on the basis of a reasonable expectation that by relocating to another area of their country of origin or residence they can escape persecution, See: Qualification Directive (2004), above no. 87, Art. 8(2); UNHCR (2008), above no. 6, at 33, 34.

176. Especially the latter is detrimental since immigration authorities may easily conflate non-enforcement of laws with non-persecutory environments, two

matters that are in many instances neither alike nor mutually exclusive. The understandings of this vary significantly across the EU, where the CJEU in its 2013 ruling furthermore left it up to each member state to determine whether the mere existence of anti-homosexuality laws suffices to be meet the Convention's persecution threshold. Though little consistency has been found across the EU in this context, in most member states, with the exception of Italy, the criminalisation of queer identities has to actually be enforced. (Jansen/Spijkerboer (2011), above no. 56, at 22. For Italian case law on this matter see: Trib. Trieste 304/1999; Trib. Caltanissetta 7.6.2010; Trib. Caltanissetta 10.2.2010; Trib. Torino 5.11.2010 n.426). The UNHCR in this context finds that petitioners should be able to rely on persecution even when existent legislation isn't enforced. (UNHCR (2008), above no. 6, at 20-22). Since the mere existence of statutory provisions that outlaw queer identities are usually reflective of a strongly persecutory environment, this appears to be a more reasonable approach. It should be noted that contrary to the CJEU, it is the approach taken by the European Court of Human Rights as well as the United Nations Committee Against Torture, which have followed the UNHCR line of reasoning. (See: *Dudgeon v the United Kingdom*, above no. 43; *Norris v Ireland* judgment of 26 October 1988, Series A no. 142; *A.D.T. v. the United Kingdom*, no. 35765/97, § 23, ECHR 2000-IX; *Modinos v. Cyprus* judgment of 22 April 1993; UN Committee Against Torture, *Mondal v. Sweden*. 23 May 2011, UNCAT, 338/2008).

177. Wessel (2014), above no. 168.

178. For more on this, see for example: Alok Gupta, *This Alien Legacy. The Origins of 'Sodomy' Laws in British Colonialism* (Human Rights Watch, New York, December 2008); Robert Aldrich, *Colonialism and Homosexuality* (New York/London: Routledge, 2003).

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