

# THE POST-*ABC* SITUATION OF LGB REFUGEES IN EUROPE

## ABSTRACT

*This Comment discusses the current European legal framework for determining whether sexual minority asylum seekers are credible when they allege their sexual identities. This Comment pays special attention to the European Court of Justice's most recent ruling on the topic, A, B and C v. Staatssecretaris van Veiligheid en Justitie (ABC), and critiques the Court's holdings. This Comment then highlights what the author believes to be the three major problems facing sexual minority credibility determinations in Europe: (1) the use of sexually explicit questioning and invasive procedures to determine asylum applicants' sexualities; (2) the focus on asylum applicants' homosexual self-identification as opposed to their noncompliance with heterosexual norms; and (3) reliance on stereotypes to determine asylum applicants' sexualities. This Comment critically considers the English Barrister S. Chelvan's DSSH Method as a solution to these three problems. This Comment concludes by suggesting a limited version of the DSSH Method, allowing adjudicators a wide range of discretion, a complete end to the use of stereotypes in these determinations, and cultural competency training for adjudicators to aid in LGB asylum determinations.*

## INTRODUCTION

"What is it about men's backsides that attracts you?"<sup>1</sup> "What have you found is the most successful way of pulling men?"<sup>2</sup> "When x was penetrating you, did you have an erection?"<sup>3</sup> A confidential document leaked to the *Observer* newspaper revealed that these were some of the many degrading and humiliating questions asked of asylum applicants by the United Kingdom Home Office in 2013.<sup>4</sup> While shocking to most, the Home Office, like many European immigration authorities, frequently used explicit questions such as

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<sup>1</sup> Diane Taylor & Mark Townsend, *Gay Asylum Seekers Face 'humiliation,'* GUARDIAN (Feb. 8, 2014), <http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office> [hereinafter Taylor & Townsend, *Humiliation*].

<sup>2</sup> Mark Townsend & Diane Taylor, *'Home Office wouldn't believe I was gay: How do you prove it?,'* GUARDIAN (Feb. 8, 2014), <http://www.theguardian.com/uk-news/2014/feb/08/home-office-gay-asylum-seekers-questioning> [hereinafter Townsend & Taylor, *Home Office*].

<sup>3</sup> Taylor & Townsend, *Humiliation*, *supra* note 1.

<sup>4</sup> *Id.*; Townsend & Taylor, *Home Office*, *supra* note 2.

these<sup>5</sup> to help determine the credibility of asylum applicants who claimed to have been persecuted in their countries of origin because of their homosexuality.<sup>6</sup> While European Union (EU) member states have been directed to grant asylum to such applicants, they have struggled to find an appropriate way to determine whether the applicants who make such claims are in fact Lesbian, Gay, or Bisexual (LGB).<sup>7</sup> This Comment recommends various methods and practices that could help European adjudicators make such determinations in an appropriate and accurate manner.

Part I of this Comment will introduce the current legal framework in Europe for deciding whether LGB asylum applicants are credible in their assertions about their sexual identities. Part II of this Comment will discuss the most recent ruling from the European Court of Justice (ECJ) regarding asylum procedures for LGB refugees. In a reference for preliminary ruling regarding three combined cases submitted by the Netherlands, *A, B and C v. Staatssecretaris van Veiligheid en Justitie (ABC)*, the ECJ had the opportunity to adjudicate the legality of sexually explicit questioning and other methods for determining an applicant's sexuality.<sup>8</sup> While the Court proscribed various practices, including sexually explicit questioning, it failed to provide any real guidelines to states that are failing to make these determinations without violating human rights or missing meritorious claims by LGB applicants.

The overview of European asylum frameworks in Parts I and II will reveal that European asylum adjudicators rely on a varied range of determination methods in LGB cases, many of which are inappropriate, and that three problems commonly plague those determinations. In Parts III-V, this Comment

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<sup>5</sup> Nina Haase, *EU Court Examines If 'gay' is Grounds for Asylum*, DEUTSCHE WELLE (Feb. 24, 2014), <http://dw.com/p/1BEI0>.

<sup>6</sup> Under Article 1(a)(2) of the Convention Relating to the Status of Refugees (1951), asylum should be afforded to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ." Convention & Protocol Relating to the Status of Refugees art. 1(a)(2), July 25, 1951, 189 U.N.T.S. 137.

<sup>7</sup> Haase, *supra* note 5. The focus of this Comment involves only LGB individuals, though many sources cited by the author consider the larger LGBTI population, which includes Lesbian, Gay, Bisexual, Transgender, and Intersex individuals. The author believes that these sources still offer valuable insight into the situation of LGB individuals discussed in this Comment.

<sup>8</sup> See S. Chelvan, *C-148/13, C-149/13 and C-150/13, A, B and C v. Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – A Judicial Black List for Gay Asylum Claims*, EUROPEAN L. BLOG (Dec. 12, 2014), <http://europeanlawblog.eu/?p=2622> [hereinafter Chelvan, *Stop Filming*]; see also Louis Middelkoop, *Dutch Court Asks Court of Justice to Rule on the Limits of Verification of Sexual Orientation of Asylum Seekers*, EUROPEAN L. BLOG (Apr. 25, 2013), <http://europeanlawblog.eu/?p=1720> [hereinafter Middelkoop, *Limits of Verification*].

will consider the prevalence of and possible solutions to each of these problems since the ECJ released its decision in *ABC*.

Part III of this Comment will discuss the problem of using sexually explicit questions and invasive procedures by asylum adjudicators to determine applicants' sexualities. Such methods have long been condemned by LGB and refugee advocates,<sup>9</sup> as they are often degrading and ineffective determinants of sexuality.<sup>10</sup> The ECJ ruled in *ABC* that such methods violated applicants' fundamental rights to integrity and private family life.<sup>11</sup> This ruling should bring an end to reliance on proof of sexual behavior in making LGB credibility determinations.

Part IV of this Comment will discuss the problem of focusing on applicants' homosexual self-identification as opposed to their noncompliance with the heterosexual norm. The ECJ did not consider the practice in its ruling on *ABC*, but many scholars and private practitioners have. English Barrister S. Chelvan has proposed an entire method that focuses on applicants' inability to conform to the heterosexual norm as a basis for LGB asylum, regardless of how applicants specifically define their sexuality.<sup>12</sup> This well-recognized method, the DSSH Method,<sup>13</sup> focuses on allowing LGB applicants to "prove"

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<sup>9</sup> When this Comment mentions LGB advocates, it is generally referring to European advocacy groups, scholars, and practitioners who have published on the topic of LGB and/or LGBTI asylum procedures in Europe. This Comment will cite to reports by advocacy groups such as Stonewall, the International Lesbian, Gay, Bisexual, Trans, and Intersex Association, and the U.K. Lesbian and Gay Immigration Group. It will also cite written works by scholars and practitioners such as S. Chelvan, Louis Middelkoop, Laurie Berg, Jenni Millbank, Volker Türk, and Nicole LaViolette.

<sup>10</sup> See, e.g., U.N. High Comm'r for Refugees, Guidelines on International Protection No. 9, ¶ 63(vii), U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) [hereinafter Guidelines on International Protection No. 9]; SABINE JANSEN, INT'L LESBIAN, GAY, BISEXUAL, TRANS, & INTERSEX ASS'N, GOOD PRACTICES RELATED TO LGBTI ASYLUM APPLICANTS IN EUROPE 24 (Joël Le Déroff ed., 2014); U.N. HIGH COMM'R FOR REFUGEES ET AL., INFORMAL MEETING OF EXPERTS ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY: SUMMARY REPORT 11 (2011) [hereinafter INFORMAL MEETING OF EXPERTS]; S. Chelvan, *From ABC to DSSH: How to Prove That You Are a Gay Refugee?*, FREE MOVEMENT (July 23, 2014), <http://freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-your-are-a-gay-refugee/> [hereinafter Chelvan, *From ABC to DSSH*]; Haase, *supra* note 5; Middelkoop, *Limits of Verification*, *supra* note 8.

<sup>11</sup> Joined Cases C-148 to C-150/13, A, B, & C v. Staatssecretaris van Veiligheid en Justitie (*ABC*), ¶ 72 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>.

<sup>12</sup> Barrister S Chelvan's DSSH Model for LGBTI Asylum Claims is Internationally Recognised, LAWYER (May 23, 2014), <http://www.thelawyer.com/firms-and-the-bar/barrister-s-chlevans-dssh-model-for-lgbti-asylum-claims-is-international-recognised/3020986.article> [hereinafter *Internationally Recognised*].

<sup>13</sup> DSSH is an acronym for Difference, Stigma, Shame, and Harm. The method focuses on applicants' narratives of experiencing each of these elements. See S. Chelvan, Barrister, No.5 Chambers, DSSH Model and LGBTI Asylum Claims (Apr. 2014), <https://www.no5.com/cms/documents/DSSH%20Model%20and%20LGBTI%20Asylum%20Claims.pdf> [hereinafter Chelvan, DSSH Model].

their affiliation with a particularized social group (PSG) based on sexual orientation by presenting narratives reflecting their experiences of difference, stigma, shame, and harm.<sup>14</sup> This Comment acknowledges that the DSSH method can, and indeed already does, provide a useful framework for both state adjudicators and private attorneys who decide and represent these asylum claims, and can lead to more appropriate determinations of applicants' eligibility for asylum.

Part V of this Comment considers the problem of relying on prejudice and bias in making credibility determinations for LGB asylum applicants, particularly adjudicators' use of LGB stereotypes. In *ABC*, the ECJ chose to condemn reliance on stereotypes only when homosexual stereotypes constituted the sole basis for a credibility determination, but affirmed that stereotypes could sometimes be useful to adjudicators.<sup>15</sup> This Comment maintains that the ECJ's conclusions leave room for the use of unsound criteria when determining LGB applicants' credibility, including determinations based on applicants' demeanors. Further, this Comment cautions that the DSSH model's emphasis on applicants' experiences of shame is worryingly susceptible to reliance on stereotypes by adjudicators, especially in light of the ECJ's decision. In the alternative, this Comment endorses an emphasis on open-ended questioning and system-wide cultural competency and sensitivity training to protect LGB asylum applicants with genuine claims.

This Comment will conclude by summarizing its recommendations on solving the current problems facing European asylum adjudicators with regards to LGB applicants. This Comment provides a critical analysis of the ECJ's ruling in *ABC* and the dangerous room it leaves for adjudicators to use inappropriate and ineffective methods to determine LGB applicants' credibility. While the ECJ has missed an opportunity to address two of the problems present in European LGB asylum determinations, this Comment highlights measures that should and should not be endorsed by EU member states to ensure fair determinations for LGB asylum applicants.

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<sup>14</sup> Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>15</sup> See *ABC*, *supra* note 11, ¶ 62.

## I. THE CURRENT LEGAL FRAMEWORK FOR LGB CREDIBILITY DETERMINATIONS IN ASYLUM ADJUDICATIONS

### *A. Origins of LGB Individuals' Eligibility for Asylum Under European and United Nations Law*

*ABC*, the 2013 reference for preliminary ruling made to the ECJ, highlights the most recent struggle faced by the more than forty countries, including many non-European countries such as the United States,<sup>16</sup> that grant asylum to refugees of persecution based on sexual orientation.<sup>17</sup> While the 1951 United Nations (U.N.) Convention Relating to the Status of Refugees did not specifically identify individuals persecuted because of their LGB status as refugees, in 2004, the European Union issued a directive (the “2004 Council Directive”) that member states should afford refugee status to individuals persecuted because of their membership within a PSG based on LGB identity.<sup>18</sup> In 2005, the European Union issued a directive that member states should respect both the Charter of Fundamental Rights of the European Union (the “Fundamental Charter”) and the personal and general circumstances of applicants when granting or withdrawing asylum.<sup>19</sup> As many European states began hearing claims from LGB applicants, they struggled to determine which cases were meritorious.

*A*, *B*, and *C* were not the first cases the Netherlands sent to the ECJ for guidance. In April 2012, the Netherlands Council of State referred three different asylum cases, this time called *X*, *Y*, and *Z* (collectively “*XYZ*”), to the ECJ for preliminary rulings. The Dutch authorities wanted the Court to rule on whether the asylum applications could be denied when the applicants could avoid persecution in their countries of origin by keeping their sexual orientations discreet.<sup>20</sup> The Court struck down the Netherlands’ “discretion

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<sup>16</sup> While the ECJ’s ruling is only binding on member states of the European Union, the ruling could provide guidance for other countries, such as the United States and Canada. All member states of the United Nations are subject to the 2012 UNHCR Guidelines, which mandate the grant of asylum to LGB applicants, and most have signed the Universal Declaration of Human Rights, which guarantees that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The similarity of this provision to the Articles 3 and 7 of the Charter of Fundamental Rights of the European Union means that a similar analysis to the ECJ’s ruling could be relevant for most member states of the United Nations. *See infra* notes 38–39 and accompanying text.

<sup>17</sup> INFORMAL MEETING OF EXPERTS, *supra* note 10, at 2.

<sup>18</sup> Council Directive 2004/83/EC, art. 10(1)(d), 2004 O.J. (L 304) 12, 17 (EC).

<sup>19</sup> Council Directive 2005/85/EC, arts. 8, 13, 2005 O.J. (L 326) 13–14 (EC).

<sup>20</sup> Joined Cases C-199/12 to C-201/12, *X, Y, & Z v. Minister voor Immigratie en Asiel (XYZ)*, ¶ 65 (July 11, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=>

requirement,” drawing the following conclusions: (1) that sexual orientation is a fundamental part of one’s identity; (2) an applicant for asylum can not be expected to conceal his or her sexuality in order to avoid persecution; and (3) that the fact that the applicant could avoid risk by exercising restraint in his or her sexuality should therefore not be taken into account by adjudicators.<sup>21</sup>

*B. The Requirement for Applicants to Prove Their LGB Sexual Identities and the Problems Accompanying This Requirement*

After XYZ was issued, many European courts shifted their reasons for denying LGB asylum claims from a “discretion” reasoning to a “disbelief” reasoning, and an increasing number of courts found applicants ineligible for asylum because they did not find applicants’ assertions that they were actually LGB to be credible.<sup>22</sup> While asylum claims based on persecution for race, religion, or political opinion are likely to have some circumstantial evidence of membership within the persecuted group, claims based on persecution for sexual orientation usually do not, and are often only verifiable through the self-identification of applicants with one of these groups.<sup>23</sup> Therefore, many European adjudicators now rely on applicants’ self-narratives to determine if they are actually LGB and employ extremely varied methods to make such credibility determinations.<sup>24</sup>

Some advocates argue that verification of an applicant’s sexual identity is impossible, and therefore the benefit of the doubt should be given to the applicant.<sup>25</sup> Such advocates highlight the seeming policy contradiction of accepting that applicants have lied their whole lives about their sexuality to protect themselves, but expecting those same applicants to immediately and consistently proclaim their true sexuality as soon as they leave their country of

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EN&mode=lst&dir=&occ=first&part=1&cid=323037. This argument is commonly referred to as “discretion reasoning,” and was used by many states to deny asylum applications prior to this case. See JANSEN, *supra* note 10, at 13–19.

<sup>21</sup> XYZ, *supra* note 20, ¶¶ 70, 71, 75.

<sup>22</sup> Louis Middelkoop, *Normativity and Credibility of Sexual Orientation in Asylum Decision Making*, in FLEEING HOMOPHOBIA 154, 154 (Thomas Spijkerboer ed., 2013) [hereinafter Middelkoop, *Normativity and Credibility*].

<sup>23</sup> Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 196 (2009).

<sup>24</sup> While some states accept applicants’ self-identification as LGB, others have resorted to highly intrusive procedures such as phallometry, which has been used in both the Czech Republic and Slovakia to measure the applicant’s physical reactions to watching pornography by placing electrodes on the applicants’ sexual organs. Most states use methods that fall between these two extremes. JANSEN, *supra* note 10, at 23.

<sup>25</sup> *Id.* at 27 (referencing research by the Belgian NGO Çavaria).

origin.<sup>26</sup> Instead, advocates suggest that more attention be given to whether the applicant faces a real risk of persecution in the country of origin, an inquiry they claim is not presently being given much attention.<sup>27</sup> However, others maintain that such an approach would open the asylum process to abuse and fraud.<sup>28</sup>

Most advocates accept the credibility portion of asylum determinations as inevitable and so focus their critiques on reforming the methods used for determining applicants' credibility.<sup>29</sup> Though the methods employed by European asylum adjudicators vary widely, research shows that verification of sexual orientation in individual cases is often subject to three recurring problems: (1) verification usually involves inappropriate and invasive questioning; (2) it mistakenly emphasizes proof of LGB identity instead of nonconformance with the heterosexual norm; and (3) it is often subject to the adjudicator's individual prejudice and bias.<sup>30</sup> As this Comment will show, some of these problems have been addressed more successfully than others.

### *C. Guidance Offered to Help Adjudicators Appropriately and Accurately Determine LGB Identity*

In response to the difficulties faced in verifying applicants' sexual orientations, international groups produced various guidelines to help adjudicators and officials appropriately and sensitively handle such cases. In 2006, human rights experts created the Yogyakarta Principles, which provided officials with a definition for sexual orientation: "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or

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<sup>26</sup> KEINA YOSHIDA, U.K. LESBIAN & GAY IMMIGRATION GROUP, MISSING THE MARK: DECISION MAKING ON LESBIAN, GAY (BISEXUAL TRANS AND INTERSEX) ASYLUM CLAIMS 11 (2013), <http://www.uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>.

<sup>27</sup> JANSEN, *supra* note 10, at 13–19 (referencing research by the Belgian NGO Çavaria).

<sup>28</sup> Haase, *supra* note 5 (quoting S. Chelvan as responding to the suggestion that applicants should be able to refuse to answer any questions attempting to verify their sexuality with "[t]hat's utter legal nonsense," and "[c]learly if we say 'just saying you're gay is enough,' that would be open to abuse").

<sup>29</sup> See, e.g., JANSEN, *supra* note 10, at 20.

<sup>30</sup> Chelvan, *From ABC to DSSH*, *supra* note 10 (explaining that LGB refugees are recognized by their persecutors for their differences and not because of their self-proclaimed sexualities); Middelkoop, *Limits of Verification*, *supra* note 8; see also Jenni Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 INT'L J. HUM. RTS. 391, 398–402 (2009).

more than one gender.”<sup>31</sup> This definition led states to conclude that homosexual behavior, without “emotional, affectional and sexual attraction” would not qualify applicants for refugee protection, and that the 1951 Convention was meant to protect applicants for who they are, not just what they do.<sup>32</sup>

Additionally, in 2012, the United Nations High Commission for Refugees (UNHCR) issued guidelines on refugee claims relating to sexual orientation and how application procedures should be applied to LGB applicants “with a view to ensuring proper and harmonized interpretation of the refugee definition in the 1951 Convention.”<sup>33</sup> The guidelines cautioned adjudicators against basing their determinations on erroneous or superficial stereotypes or assumptions.<sup>34</sup> The UNHCR also reminded adjudicators that many applicants may still be developing their sexual identities at the time of the determinations, but that this should not preclude them from membership within the PSG.<sup>35</sup> The guidelines endorsed the framework set out in the Yogyakarta principles<sup>36</sup> and the DSSH model for determining sexual orientation, which focuses on applicants’ feelings and experiences of difference, stigma, shame, and harm, rather than applicants’ sexual practices.<sup>37</sup>

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<sup>31</sup> INT’L COMM’N JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.1 (Mar. 2007), [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) [hereinafter THE YOGYAKARTA PRINCIPLES].

<sup>32</sup> Middelkoop, *Normativity and Credibility*, *supra* note 22, at 157.

<sup>33</sup> Guidelines on International Protection No. 9, *supra* note 10, ¶ 4.

<sup>34</sup> *Id.* The guidelines directed adjudicators to remember that “[n]ot all LGBTI individuals look or behave according to stereotypical notions,” *id.* ¶ 49, and that there is “no requirement that members of the social group associate with one another . . .,” *id.* ¶ 48. Additionally, “[b]ehaviour and activities may relate to a person’s orientation or identity in complex ways. [Sexual orientation] may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways.” *Id.* ¶ 19. “The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity. There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.” *Id.* ¶ 60(ii).

<sup>35</sup> The guidelines acknowledged that “[w]here the identity of the applicant is still evolving, they may describe their sexual orientation . . . as fluid or they may express confusion or uncertainty about their sexuality and/or identity,” *id.* ¶ 47, and that “[m]any [applicants] will not have lived openly as LGBTI in their country of origin and some may not have had intimate relationships. Many suppress their sexual orientation . . .,” *id.* ¶ 30.

<sup>36</sup> *Id.* ¶¶ 7, 8.

<sup>37</sup> *See id.* ¶ 62.



Despite such guidelines and other scholarly commentary, states continually struggle to ask appropriate questions in making sexuality determinations. As evidenced by the Netherlands' referrals of *ABC*, in Europe, there was much debate on how questioning applicants about such personal and private matters impinged on the applicants' rights to integrity and private family life guaranteed by the Fundamental Charter.<sup>38</sup> The relevant articles of the Fundamental Charter, Article 3 and Article 7, state, respectively, that "[e]veryone has the right to respect for his or her physical and mental integrity" and "[e]veryone has the right to respect for his or her private and family life, home and communications."<sup>39</sup> Many advocates considered the sexually explicit questions that were often asked of applicants as violating these rights.<sup>40</sup>

It was in this context that the Netherlands submitted *ABC* to the ECJ. Though the Netherlands did not ask the Court to evaluate any particular method, many advocates from the Netherlands and other states around the world hoped the Court would provide guidance on how to make an accurate, appropriate, and respectful determination of sexual orientation in accordance with the Fundamental Charter and European Union Council Directives.<sup>41</sup> However, the Court declined the opportunity, instead limiting its opinion to the specific practices at issue in the cases before them<sup>42</sup> and leaving dangerous room for the misjudgment of applicants.

## II. *ABC V. STAATSECRETARIS VAN VEILIGHEID EN JUSTITIE*

### A. *Legal Questions Presented by the Case*

On March 25, 2013, the Judicial Division of the Netherlands Council of State referred three asylum cases, known individually as *A*, *B*, and *C*, to the ECJ for a preliminary ruling.<sup>43</sup> The cases, brought by male applicants claiming to have been persecuted because of their homosexuality, were initially denied by the Dutch Immigration and Naturalization Service due to the applicants'

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<sup>38</sup> See Charter of Fundamental Rights of the European Union arts. 3, 7, 2012 O.J. (C 362).

<sup>39</sup> *Id.*

<sup>40</sup> Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>41</sup> See Chelvan, *Stop Filming*, *supra* note 8; see also Middelkoop, *Limits of Verification*, *supra* note 8.

<sup>42</sup> Joined Cases C-148/13 to C-150/13, *A, B, & C v. Staatssecretaris van Veiligheid en Justitie (ABC)*, ¶ 59 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>.

<sup>43</sup> Middelkoop, *Limits of Verification*, *supra* note 8.

failures to convince adjudicators that they were in fact homosexuals.<sup>44</sup> In A's 2011 case, the Dutch authorities found that A was not credible and rejected his offer to prove his homosexuality by submitting visual evidence of his homosexual acts.<sup>45</sup> In B's 2012 case, the Dutch authorities found that B was not credible because he could not describe adequately his internal awareness of his homosexuality.<sup>46</sup> In C's 2012 case, the Dutch authorities found that C was not credible because he alleged his homosexuality in his second asylum application but not in his first, and the authorities rejected a video recording of C's sexual acts with another male.<sup>47</sup>

Concerned with how invasive the Court's questions could be regarding the applicants' alleged homosexuality, the Netherlands submitted a reference for a preliminary ruling to the ECJ, asking what limits the 2004 Council Directive and the Fundamental Charter imposed on credibility determinations in states' grants of asylum to applicants claiming persecution based on their homosexual identities, and how those limits were different than those upon grants of asylum for more traditional grounds of persecution.<sup>48</sup> As a reference for preliminary ruling, the Court was required to interpret the 2004 Council Directive and the Fundamental Charter as they pertained to LGB asylum determinations.<sup>49</sup> On February 25, 2014, hearings were held before the ECJ, which included observations from other member states of the European Union<sup>50</sup> bound by the ECJ's ruling on this issue.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> See *ABC*, *supra* note 42, ¶ 22.

<sup>46</sup> See *id.* ¶ 23.

<sup>47</sup> See *id.* ¶ 24.

<sup>48</sup> Case C-148/13, *A v. Staatssecretaris van Veiligheid en Justitie*, Request for a Preliminary Ruling From the Raad van State (Netherlands) (Mar. 25, 2013), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CN0148&from=EN>; *Raad van State Stelt Vragen an Hof in Luxemburg over Beoordeling Seksuele Gerichtheid Vreemdelingen*, RAAD VAN STATE (Mar. 20, 2013), [http://www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=557&summary\\_only=&category\\_id=8](http://www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=557&summary_only=&category_id=8). The request specifically referred to Articles 3 and 7 of the Fundamental Charter. See Charter of Fundamental Rights of the European Union, *supra* note 38, arts. 3, 7.

<sup>49</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Mar. 25, 1957, 2012 O.J. (C 326/50) 164; *Summaries of EU Legislation: The Reference for a Preliminary Ruling*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1423140120784&uri=URISERV:l14552> (last updated Jan. 15, 2014).

<sup>50</sup> Haase, *supra* note 5; Rules of Procedure of the Court of Justice art. 96(1)(b), 2012 O.J. (L 265/1) 24.

<sup>51</sup> *Summaries of EU Legislation: The Reference for a Preliminary Ruling*, *supra* note 49.

### B. *The Court's Opinion*

On December 2, 2014, the ECJ issued its opinion. The Court held that state authorities did not have to accept an applicant's declaration of his or her sexuality as fact solely because the applicant stated so, but that an applicant's assertion of his or her sexual identity was merely a starting point in the determination.<sup>52</sup> However, instead of taking the opportunity to define all of the limits that the 2004 Council Directive and the Fundamental Charter placed on LGB credibility determinations and how those limits differed from the credibility determinations of other asylum applicant groups, as the Netherlands requested, the ECJ limited its analysis to the alleged improper practices that occurred within A, B, and C's individual proceedings.<sup>53</sup> The Court did not have to limit its opinion in such a way, but claimed that it did so "in order to provide an answer useful to the referring court."<sup>54</sup> Therefore, the Court only considered the validity of four specific practices: (1) basing credibility determinations solely on homosexual stereotypes; (2) detailed questioning as to applicants' sexual practices; (3) allowing applicants to submit to physical testing to "prove" their sexualities or allowing applicants to submit films of their sexual acts; and (4) finding a lack of credibility for the sole reason that an applicant did not declare his or her sexual orientation during his or her first claim of persecution.<sup>55</sup> The Court found all of these practices to be unlawful under the 2004 and 2005 Council Directives when read in light of the Fundamental Charter.<sup>56</sup>

While the ECJ's ruling supplied a "black list" of prohibited practices in determining the credibility of an applicant for asylum based on LGB sexuality, it failed to provide meaningful guidance on appropriate methods for making LGB credibility determinations. The Court did not have to limit its interpretation to the facts of A, B, and C's cases, as the Netherlands did not ask it to.<sup>57</sup> While the Court's denouncements of the all too common practices described above offer some protection to LGB applicants, the ruling left states

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<sup>52</sup> Joined Cases C-148/13 to C-150/13, A, B, & C v. Staatssecretaris van Veiligheid en Justitie (*ABC*), ¶¶ 48–49 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>.

<sup>53</sup> *Id.* ¶ 59.

<sup>54</sup> *Id.* ¶ 58.

<sup>55</sup> *Id.* ¶ 72.

<sup>56</sup> *See id.* ¶¶ 68–69; *supra* notes 16–17, 38 and accompanying text.

<sup>57</sup> Indeed, the Court should not have so limited its analysis, according to the EU's online legal database, EUR-Lex, which states that the Court "cannot refuse to answer [the question presented] on the grounds that [its] response would be neither relevant nor timely as regards the original case." *Summaries of EU Legislation: The Reference for a Preliminary Ruling*, *supra* note 49.

without appropriate methods to take their places.<sup>58</sup> The ECJ's ruling leaves room for dangerous and unjust practices to continue in such determinations. In the absence of guidance from the ECJ, states will undoubtedly continue their varied and often inappropriate methods of determining the credibility of LGB applicants.<sup>59</sup> States should therefore look to other sources in addition to the Court's ruling in *ABC* when trying to create appropriate credibility determination methods.

### III. THE PROBLEM OF USING SEXUALLY EXPLICIT "PROOF"

#### A. *The Use of Sexually Explicit Questioning, Testing, and Video or Photographic Evidence of Sexual Acts*

While the Court failed to address many problems present in LGB credibility determination methods, the Court did address and end the disturbing practice of inquiring into applicants' sexual practices.<sup>60</sup> Reliance on sexually explicit "proof" was an unfortunately common practice for many European countries, including methods of inappropriate and irrelevant questions, such as, "did you ejaculate in him?" or "why did you use a condom?"<sup>61</sup> and the use of quasi-medical testing, such as phallometry or psychiatric evaluation.<sup>62</sup>

Most LGB advocates agree that applicants should not be asked about their sexual conduct and should under no circumstance be expected to provide film documentation of their performance of sexual acts.<sup>63</sup> These advocates stress that such questions are not only intrusive, but do not provide any insight on the

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<sup>58</sup> Though the Court was only asked to define the limits of LGB credibility determinations under the 2004 Council Directive and the Fundamental Charter, and not to provide affirmative guidelines on how to make such determinations, the Court should have defined all of the limits on credibility determinations and discussed why those limits were specific to LGB applicants. Fully answering the question presented to it would have allowed the Court to guide member states on the specific needs of LGB applicants and identify methods that impermissibly failed to account for such needs.

<sup>59</sup> For example, when U.K. Border Agency caseworkers were asked during a 2009 study why they relied so heavily on sexually explicit questioning when determining the credibility of LGB asylum applicants, the caseworkers replied that they felt they had no other approach to use. NATHANAEL MILES, STONEWALL, NO GOING BACK: LESBIAN AND GAY PEOPLE AND THE ASYLUM SYSTEM 16 (2010).

<sup>60</sup> *ABC*, *supra* note 52, ¶ 93.

<sup>61</sup> Haase, *supra* note 5.

<sup>62</sup> JANSEN, *supra* note 10, at 23–24. Phallometry measures an applicant's physical reaction to watching different types of pornography. *Id.*

<sup>63</sup> See e.g., Guidelines on International Protection No. 9, *supra* note 10, ¶ 63(vii); INFORMAL MEETING OF EXPERTS, *supra* note 10, at 11; JANSEN, *supra* note 10, at 24; Chelvan, *From ABC to DSSH*, *supra* note 10; Haase, *supra* note 5; Middelkoop, *Limits of Verification*, *supra* note 8.

credibility of a particular sexual orientation.<sup>64</sup> Such inappropriate questioning usually stems from adjudicators' misplaced emphasis on applicants' sexual conduct. Many scholars emphasize that persecution rarely results from applicants' sexual activity, but is instead most often based on their sexual orientation and identity, which should be the main subject of adjudicators' inquiries.<sup>65</sup> Nearly all advocates agree that quasi-medical testing is inappropriate, violates applicants' fundamental right to integrity, and should be banned.<sup>66</sup> This stance is in accordance with Principle 18 of the Yogyakarta Principles<sup>67</sup> and the Fundamental Charter.<sup>68</sup> Likewise, many non-European countries, such as the United States, specifically ban the asking of sexually explicit questions by their asylum adjudicators.<sup>69</sup>

### B. *The ECJ's Ruling on Such "Proof"*

The Court held that the Fundamental Charter clearly precluded both sexually explicit questioning and the requirement that applicants submit to physical testing or present film of themselves in sexual acts, as such practices clearly violate human dignity and privacy.<sup>70</sup> The Court noted that adjudicators should not accept even voluntary submissions of such testing or film, as it would compel other applicants to produce similar evidence, making the evidence a *de facto* requirement.<sup>71</sup> This holding should come as a great relief to

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<sup>64</sup> JANSEN, *supra* note 10, at 24; *see also* Berg & Millbank, *supra* note 23, at 204 (describing how difficult it can be for applicants to discuss their previous sexual conduct with adjudicators).

<sup>65</sup> Volker Türk, *Ensuring Protection to LGBTI Persons of Concern*, 25 INT'L J. REFUGEE L. 120, 124 (2013).

<sup>66</sup> *See e.g.*, Guidelines on International Protection No. 9, *supra* note 10, ¶ 65; JANSEN, *supra* note 10, at 23–24; Chelvan, *From ABC to DSSH*, *supra* note 10; Haase, *supra* note 5.

<sup>67</sup> Principle 18 states that, “[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity.” THE YOGYAKARTA PRINCIPLES, *supra* note 31.

<sup>68</sup> Such testing clearly violates Article 3 of the Fundamental Charter, which provides, “[e]veryone has the right to respect for his or her physical and mental integrity.” Charter of Fundamental Rights of the European Union, *supra* note 38, art. 3.

<sup>69</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SECURITY, GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX REFUGEE & ASYLUM CLAIMS: TRAINING MODULE 34 (2011). Readers should note though, that this training module is only binding on the United States Citizenship and Immigration Services agency, part of the Department of Homeland Security; it is not binding, though it may be persuasive, on immigration judges, who decide some asylum cases and are part of the Department of Justice.

<sup>70</sup> Joined Cases C-148/13 to C-150/13, A, B, & C v. Staatssecretaris van Veiligheid en Justitie (*ABC*), ¶ 72 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>.

<sup>71</sup> *Id.* ¶¶ 65–66.

nearly all advocates, and ban all such questioning and testing in the future by EU member states.

#### IV. THE PROBLEM OF FOCUSING ON “PROOF” OF APPLICANTS’ HOMOSEXUAL ORIENTATIONS

##### *A. The Superiority of Emphasizing Applicants’ Incapability to Conform to the Heterosexual Norm Instead of Focusing on “Proof” of LGB Identity*

The reliance on sexually explicit evidence stems from adjudicators’ expectation that applicants should be able to prove that their sexual identities conform neatly to an LGB category, and that applicants fully accept such identification.<sup>72</sup> However, the development of sexual identity occurs differently for every individual, and applicants who have struggled with their sexual identities in their home countries will not always feel secure in fully accepting their LGB identities.<sup>73</sup> On the contrary, these applicants are often fleeing persecution that is based on their inability to conform to the heterosexual norm, not because of their self-identification as LGB, and so should be judged not on their conformity to an LGB identity, but on their feelings and experiences of difference from the heterosexual norm.<sup>74</sup>

The requirement to develop a sense of sexual identity in opposition to the heterosexual norm is perhaps the one universal element in the narratives of LGB individuals around the world.<sup>75</sup> Additionally, most applicants are not suffering harm in their bedroom, but rather in their societies, as they are punished for their failure to conform to societal norms and not for their sexual conduct.<sup>76</sup> Focusing on the effects of having an alternative or different sexual orientation rather than the sexual orientation itself avoids inappropriate questioning and significantly reduces the risk of adjudicators relying on

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<sup>72</sup> See Middelkoop, *Normativity and Credibility*, *supra* note 22, at 167–68 (pointing out that asylum adjudicators often compare the narratives provided by applicants with what is known to them about different sexual orientations and believe that the gay identification must be proved by authority and evidence).

<sup>73</sup> Berg & Millbank, *supra* note 23, at 216.

<sup>74</sup> S. Chelvan, *The Assessment of Credibility of Women, . . . Victims of Torture . . . Within the Decision Making Process and Whether This is Reflected in Appeal Outcomes*, HOME AFFS. COMMITTEE (Apr. 2013), [http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008\\_HC71\\_01\\_VIRT\\_HomeAffairs\\_ASY-35.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-35.htm) [hereinafter Chelvan, *The Assessment of Credibility*].

<sup>75</sup> See Jessica F. Morris, *Lesbian Coming Out as a Multidimensional Process*, 33 J. HOMOSEXUALITY 1, 4 (1997).

<sup>76</sup> See Haase, *supra* note 5.

archaic “medical” testing or other erroneous information.<sup>77</sup> Under such a method, applicants would not be asked invasive and humiliating questions about their sexual history, in violation of the Fundamental Charter, because sexual conduct has no place in the inquiry.

Likewise, by focusing on applicants’ feelings of difference rather than applicants’ “proof” of being LGB, adjudicators would be considerably less likely to judge applicants’ claims according to their own expectations of how “normal” LGB applicants should look and behave. The development of sexual identity is far from universal or linear, and inquiry into applicants’ feelings of difference allows the necessary flexibility to consider narratives that meet well-established criteria, but include the countless different ways in which different applicants experience those criteria.<sup>78</sup> Applicants who have struggled with their sexual identities in their countries of origin will not necessarily fully accept their LGB sexuality immediately upon entering the receiving country and often will still be developing their sexual identities during an asylum application.<sup>79</sup> However, while these applicants may not be able to credibly affirm their own sexual identities, they should still be able to establish the effects that their “different” sexual orientations have had on them in their countries of origin.

*B. The DSSH Model as a Solution to the Misplaced Focus on “Proof” of LGB Identity*

The DSSH method, created by English Barrister S. Chelvan, was the first to promote the idea that LGB individuals are not persecuted because of their sexual orientations, but rather because they do not conform to the “straight” lifestyle.<sup>80</sup> Chelvan developed the DSSH method for credibility assessment in LGB asylum claims based on his thirteen years of experience in representing LGB asylum applicants in Europe.<sup>81</sup> Chelvan explained that the vast majority of his clients experienced feelings of difference from the rest of society, and these feelings of differences identified victims to their potential persecutors,

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<sup>77</sup> See Middelkoop, *Limits of Verification*, *supra* note 8.

<sup>78</sup> See Berg & Millbank, *supra* note 23, at 206 (“There are few even broadly common aspects in the experience of same-sex attraction.”).

<sup>79</sup> *Id.* at 216 (“There is no reason to expect that most, or even many, applicants will be in the final stages of an identity synthesis process at the time they leave their country or when they make their way through the refugee determination procedures.”).

<sup>80</sup> Chelvan, *DSSH Model*, *supra* note 13, at 29.

<sup>81</sup> Chelvan, *From ABC to DSSH*, *supra* note 10.

bringing them within the eligible PSG.<sup>82</sup> While Chelvan acknowledges that the DSSH method may not effectively lead to a credible sexual orientation determination for every individual, he claims it has the potential to create detailed and convincing narratives, and has resulted in many positive credibility determinations.<sup>83</sup>

The DSSH method, which has been endorsed by the UNHCR in its International Protection Guidelines, focuses on four feelings that are commonly experienced by LGB individuals in states that are hostile towards LGB rights: difference, stigma, shame, and harm.<sup>84</sup> The method's starting point, difference, focuses on applicants' recognition that they do not conform to the gender sex-roles that their society accepts.<sup>85</sup> The method directs inquiries into applicants' "[r]ecognition that [they] are not like other 'boys/girls' with respect to personal sex gender role development," "[g]radual recognition of attraction to members of the same sex/opposite sex," and "[r]ecognition that this 'difference' sets LGBTIs apart from straight people," among other areas.<sup>86</sup>

The method then shifts focus to any stigma applicants may perceive as a result of their differences. Stigma is connected with social, cultural, and religious norms, and asks whether applicants recognized that others around them did not approve of their "different" conduct or identity.<sup>87</sup> This inquiry should include whether applicants recognized that their conduct and identities were disapproved of by family members or friends, the "majority" of society, or state, cultural, or religious leaders, and if so, how such disapproval was expressed to applicants.<sup>88</sup>

The method focuses next on the natural consequences of stigma: applicants' internal feelings of shame.<sup>89</sup> This inquiry explores how stigma impacts the applicants' feelings of self worth.<sup>90</sup> Specifically, the method directs applicants to emphasize any feelings of isolation felt from family

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; Chelvan, DSSH Model, *supra* note 13, at 28.

<sup>85</sup> Chelvan, DSSH Model, *supra* note 13, at 29.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>88</sup> Chelvan, DSSH Model, *supra* note 13, at 31.

<sup>89</sup> Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>90</sup> Chelvan, DSSH Model, *supra* note 13, at 32 (noting that shame is an "[i]mpact of STIGMA").



members or friends, society, or religious and cultural institutions, and the impact on the applicant of feeling like the “other” instead of the “same.”<sup>91</sup>

Finally, the method inquires about the potential harm applicants suffered due to their different conduct or identity.<sup>92</sup> This inquiry should include harms directed towards the applicants by both state and non-state actors.<sup>93</sup> Potential harms include criminalization of homosexual acts, fear of arrest, detention, torture, mob violence, or family-initiated honor killings.<sup>94</sup>

The DSSH method first appeared in 2012 following its endorsement by the Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity in Bled, Slovenia.<sup>95</sup> The UNHCR endorsed the method in its 2012 Guidelines on International Protection No. 9, noting that “[e]xploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.”<sup>96</sup> Members of several European governments have since been trained to use the DSSH model.<sup>97</sup>

The difference inquiry of the DSSH model provides a useful framework for both applicants and adjudicators, and aims to protect applicants from both infringements upon their rights to integrity and private family life, and from erroneous credibility determinations.<sup>98</sup> The chief value of the DSSH method is its shift of focus from applicants’ sexual conduct to their inability to conform to the heterosexual narrative.<sup>99</sup> Under the DSSH method, adjudicators will not

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<sup>91</sup> *Id.*; Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>92</sup> Chelvan, *DSSH Model*, *supra* note 13, at 34.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Chelvan, *The Assessment of Credibility*, *supra* note 74; *see also* INFORMAL MEETING OF EXPERTS, *supra* note 10, at 10.

<sup>96</sup> Guidelines on International Protection No. 9, *supra* note 10, ¶ 62.

<sup>97</sup> Chelvan, *The Assessment of Credibility*, *supra* note 74. In October 2012, Chelvan provided training on implementing the DSSH method to members of sixteen governments during the Inter-Governmental Consultations on Migration and Asylum and Refugees’ workshop on Gender, Sexual Orientation, and Gender Identity that was held in Geneva. In 2014, Chelvan provided training on the DSSH method to over one hundred NGO delegates of the CREDO project in Madrid and members of the British Home Office in London. Additionally, Chelvan trained representatives of governmental refugee status determination authorities from Belgium, Cyprus, Finland, Germany, Greece, Italy, the Netherlands, Norway, Poland, Sweden and the United Kingdom on the DSSH method on behalf of the Hungarian Helsinki Committee. *Internationally Recognised*, *supra* note 12. Chelvan also states that the Finish, German, Swedish, and Cypriot governments have hinted to him that they are considering officially adopting the method. Chelvan, *From ABC to DSSH*, *supra* note 10.

<sup>98</sup> Chelvan, *The Assessment of Credibility*, *supra* note 74.

<sup>99</sup> *Id.*

determine whether applicants' narratives line up with adjudicators' often biased understandings of LGB sexuality, but instead inquire as to whether applicants recognize that their sexual identity does not meet the heterosexual norm, which is a much more accommodating test.<sup>100</sup>

*C. Additional Recommendations to Encourage Focus on Applicants' Incapability to Conform to the Heterosexual Norm*

In addition to the DSSH method, there are several widely supported recommendations on reforming the credibility assessment that could be implemented alongside the DSSH method. First, European adjudicators may look to the United States Citizenship and Immigration Services (USCIS) for guidance. USCIS officer training manuals remind adjudicators that an applicant may fit within the PSG as a "sexual minority" because of their real or perceived sexual orientation "outside the norm."<sup>101</sup> The manual further maintains that "the relevant inquiry is not whether the applicant actually possesses the protected trait," but instead whether persecutors believe the applicant to be LGB.<sup>102</sup> Thinking of the protected group as "sexual minorit[ies]" rather than LGB may help adjudicators accept applicants' inability to conform to the heterosexual norms without expressing a firm and accepted sexual identity.<sup>103</sup>

Additionally, adjudicators should conduct interviews and hearings using open-ended and broad questions. Such open questioning allows applicants to describe the process of their self-identification as a sexual minority and their experiences of persecution.<sup>104</sup> In contrast, narrow, leading questions are likely to rely on stereotypes about applicants' lifestyles as LGB and may include adjudicators' own prejudices.<sup>105</sup> An open form of questioning accommodates the DSSH method and allows the necessary flexibility for the vast diversity of LGB individual narratives from all over the world.

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<sup>100</sup> See *id.* (explaining that the central element of the DSSH model is not knowing with certainty that one's sexual orientation is LGB, but instead recognizing that one's sexual identity is different than the norm).

<sup>101</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 69, at 17.

<sup>102</sup> *Id.* at 30–31. But see *id.* at 43 (holding that applicants should be able to identify the specific time when they realized that they were attracted to members of the same sex).

<sup>103</sup> *Id.* at 43.

<sup>104</sup> YOSHIDA, *supra* note 26, at 20.

<sup>105</sup> *Id.*

## V. THE PROBLEM OF PREJUDICE AND BIAS

A. *Adjudicators' Improper Tendencies to Rely on Prejudice and Bias, Often in the Form of LGB Stereotypes, When Determining the Credibility of LGB Applicants*

Because of the wide discretion afforded to adjudicators in the absence of state-mandated guidelines, adjudicators often make determinations of applicants' sexuality that are biased by their own personal and cultural understandings.<sup>106</sup> Asylum adjudicators tend to judge applicants' claims according to their own expectations of how "normal" LGB applicants should look, behave, or feel.<sup>107</sup> Sexual orientation is difficult to define, at best, and conceptualization of what it means to be LGB is shaped by culture and personal experience.<sup>108</sup> Judges may expect applicants to be knowledgeable or involved in "gay life" or gay activism in their countries of origin, or to have experienced a significant psychological struggle when coming out; however, cases show that these expectations are unfounded and are based on a limited understanding of the intricacy and individuality of sexual identity.<sup>109</sup>

Scholars,<sup>110</sup> advocates,<sup>111</sup> and even media sources<sup>112</sup> have reported countless instances of credibility determinations based on misconceptions or assumptions about LGB individuals. For example, studies in the United Kingdom found that decision-makers tended to compare applicants' accounts of their relationships with what the decision-makers knew or believed about LGB relationships in the United Kingdom and found applicants not credible when the narratives did not match.<sup>113</sup> Such comparisons ignore the fact that LGB relationships that are practiced in oppressive and homophobic cultures are often extraordinarily different than relationships that occur in more progressive countries, such as the United Kingdom.<sup>114</sup> Likewise, adjudicators often assume that applicants will immediately conform to their local ideas of

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<sup>106</sup> Middelkoop, *Limits of Verification*, *supra* note 8.

<sup>107</sup> *Id.*; Türk, *supra* note 65, at 124.

<sup>108</sup> Middelkoop, *Limits of Verification*, *supra* note 8.

<sup>109</sup> JANSEN, *supra* note 10, at 24.

<sup>110</sup> See, e.g., Nicole LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary, 22 INT'L J. REFUGEE L. 173, 194 (2010).

<sup>111</sup> See, e.g., Chelvan, *Stop Filming*, *supra* note 8.

<sup>112</sup> See, e.g., Taylor & Townsend, *Humiliation*, *supra* note 1; Townsend & Taylor, *Home Office*, *supra* note 2.

<sup>113</sup> MILES, *supra* note 59, at 16.

<sup>114</sup> *Id.*

LGB activity once they arrive in the new country. In reality, however, it may be extremely difficult for applicants to connect with local LGB communities.<sup>115</sup> Applicants may feel guilt and embarrassment about the previous repression of their sexual identities or persecution stemming from their sexual identities, and therefore may struggle to relate to a progressive LGB social network.<sup>116</sup> If such applicants are compared by adjudicators to local LGB communities, then their narratives will often not match—but not because the applicants are lying about their sexualities.

The use of stereotypes is also demonstrated through the assessment of credibility based on an applicant's demeanor during asylum hearings and interviews. While demeanor can provide evidence of an applicant's feelings regarding their previous experiences of persecution, it can also easily lead to erroneous credibility determinations for LGB applicants, especially when those determinations are based on stereotypes such as the effeminacy of all gay men or the "butch" appearance of all lesbians.<sup>117</sup> Some countries, including the United States, specifically prohibit consideration of whether applicants "look" or "act" gay unless such characteristics were a basis of harm to the applicants in their countries of origin.<sup>118</sup> Credibility determinations based on demeanor can also fail to accommodate the mental challenges<sup>119</sup> faced by applicants who have suffered trauma because of their LGB identities, interpreting hesitancy, reticence, and inconsistencies as proof that the applicants are lying instead of dealing with significant psychological trauma.<sup>120</sup> The relevant focus should be on the applicant's narrative, not how the narrative is disclosed.<sup>121</sup> Chelvan believes that reliance on demeanor in determining credible sexuality claims is dangerous and inappropriate for applicants who were forced to suppress and

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<sup>115</sup> Ariel Shidlo & Joanne Ahola, *Mental Health Challenges of LGBT Forced Migrants*, 42 FORCED MIGRATION REV. 9, 10 (2013).

<sup>116</sup> *Id.*

<sup>117</sup> YOSHIDA, *supra* note 26, at 12.

<sup>118</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 69, at 40.

<sup>119</sup> Individuals who have been subjected to violence based on their sexual orientation commonly suffer from recurrent depression, dissociative disorders, panic disorder, generalized anxiety disorder, social anxiety, traumatic brain injury, substance abuse, and Post-Traumatic Stress Disorder. Shidlo & Ahola, *supra* note 115, at 9.

<sup>120</sup> MILES, *supra* note 59, at 16. While adjudicators expect applicants to relate a cogent and consistent narrative of their experiences of persecution, survivors of such persecution often develop Post-Traumatic Stress Disorder, which can lead to amnesia and denial of the impact and severity of traumatic events. Shidlo & Ahola, *supra* note 115, at 9.

<sup>121</sup> Chelvan, *From ABC to DSSH*, *supra* note 10, ¶ 11 (responding to Advocate General Sharpston's opinion on A, B, and C).

keep their sexual identities secret in their home countries.<sup>122</sup> Other advocates agree with Chelvan that credibility determinations based on demeanor often confuse applicants who are lying with applicants who are ashamed of or uncomfortable talking about their sexuality.<sup>123</sup>

*B. The ECJ's Failure in ABC to Ban the Use of Stereotypes in Credibility Determinations*

In *ABC*, the ECJ held that both the 2004 and 2005 Council Directives mandate that asylum determinations account for “the individual position and personal circumstances of [each] applicant,”<sup>124</sup> and so clearly preclude *exclusive* reliance on stereotypes or strict time requirements for an applicant to declare his or her sexuality.<sup>125</sup> This rule is worrisome, as the Court rejected reliance on stereotypes only when homosexual stereotypes constitute the *sole* basis for a determination.<sup>126</sup> The Court maintained that stereotyped notions and questions could sometimes be useful to adjudicators, so long as they did not exclusively determine the outcome of an applicant’s credibility determination.<sup>127</sup> This Comment argues that the Court was wrong to leave open the door to reliance on any kind of stereotype in these determinations. Stereotypes are often indicative of decision-makers’ prejudice or ignorance with regards to a group<sup>128</sup> and have no place in legal determinations. Further, the Court’s acquiescence to the continued use of stereotypes allows for credibility determinations based on the applicant’s demeanor during asylum hearings and interviews.

Perhaps the Court would not approve of using the stereotypes described above in Part A. However, because it did not explain when stereotypes may be useful,<sup>129</sup> decision-makers are free to interpret the Court’s opinion as supportive, or at least tolerant, of such practices. Reliance on LGB stereotypes currently appears to be extremely common when making credibility findings,

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<sup>122</sup> *Id.*

<sup>123</sup> See Middelkoop, *Normativity and Credibility*, *supra* note 22, at 160; see also Berg & Millbank, *supra* note 23, at 201 (explaining that trauma, shame, and depression commonly affect LGB asylum applicants and can render applicants unable to share or remember past distressing events).

<sup>124</sup> Council Directive 2004/83/EC art. 4(3)(c), 2004 O.J. (L 304) 12, 17 (EC).

<sup>125</sup> Joined Cases C-148/13 to C-150/13, A, B, & C v. Staatssecretaris van Veiligheid en Justitie (*ABC*), ¶¶ 62, 63, 69 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>.

<sup>126</sup> See *id.* ¶ 62.

<sup>127</sup> *Id.*

<sup>128</sup> Chelvan, *Stop Filming*, *supra* note 8, at 2.

<sup>129</sup> *ABC*, *supra* note 125, ¶ 62 (stating only that “questions based on stereotyped notions may be a useful element,” but giving no indication as to when or how such notions may be useful).

proving that firm disapproval by the Court is needed to end this troubling practice.

*C. The DSSH Model's Susceptibility to the Use of Stereotypes*

While the DSSH model's emphasis on the applicants' feelings of difference allows applicants to credibly demonstrate their membership in the PSG without compromising their integrity and family life privacy, the method's emphasis on internal shame may in many cases work against legitimate LGB applicants. Though scholars generally agree that the vast majority of applicants are likely to have recognized the DSSH model's difference between themselves and the rest of society,<sup>130</sup> there is no similar consensus for the feelings of shame.<sup>131</sup> Not all LGB applicants are interested in their sexual identities, much less combating a "serious psychological struggle" with those identities.<sup>132</sup> Additionally, using shame as an element carries with it a risk that adjudicators will discredit any feelings or experiences of happiness in relation to their sexuality that the applicants allege occurred in their countries of origin.<sup>133</sup>

Including shame as a primary step in the method is especially susceptible to an adjudicator's use of stereotypes to assess credibility. For example, in the United Kingdom, studies have found that many asylum claims were denied because of adjudicators' misconceptions about how LGB applicants behaved when subject to persecution because of their sexuality, often assuming that applicants would not have risked persecution for acts of intimacy.<sup>134</sup> Those studies also showed that adjudicators found that applicants were not credible when the applicants did not relate shame and/or a struggle with their sexuality because of their religion.<sup>135</sup> The problem with such criteria is that adjudicators are more likely to confront applicants with the formal doctrine of religion—or worse, the adjudicators' personal understanding of religious doctrine—and find that applicants are not credible if they practice a faith that condemns

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<sup>130</sup> See Middelkoop, *Limits of Verification*, *supra* note 8; see also INFORMAL MEETING OF EXPERTS, *supra* note 10, ¶ 4.

<sup>131</sup> See Middelkoop, *Normativity and Credibility*, *supra* note 22, at 161–62 (emphasizing that there is no support for an expectation that homosexuals go through "a phase of inner struggle"); see also JANSEN, *supra* note 10, at 24 (rebuking the stereotype that LGBs go through serious psychological struggles when coming-out). *But see* Berg & Millbank, *supra* note 23, at 201 (advancing that considerations of the impact of shame and trauma on applicants are highly relevant in LGB claims).

<sup>132</sup> JANSEN, *supra* note 10, at 24.

<sup>133</sup> Berg & Millbank, *supra* note 23, at 214.

<sup>134</sup> YOSHIDA, *supra* note 26, at 11.

<sup>135</sup> *Id.* at 16.

homosexuality without feeling ashamed.<sup>136</sup> In fact, studies suggest that many LGB individuals maintain their religious beliefs in spite of their religion's views on homosexuality.<sup>137</sup>

To be sure, narratives including the applicants' feelings of shame relating to their sexual orientation can present persuasive evidence of applicants' sexual orientation.<sup>138</sup> Emphasis on such feelings should be employed whenever possible by legal counsel for applicants. However, if shame is afforded the same weight as the other elements of the DSSH method by adjudicators, it will unnecessarily exclude (or at the least, present significant barriers to) LGB individuals who do not struggle with their sexual identities. The element is vulnerable to the use of stereotypes by untrained adjudicators. Since *ABC* neither explained how officials should be trained, nor prohibited the use of stereotypes in credibility assessments, the element's risk for misuse outweighs its potential value in guiding credibility determinations. Removal of the shame element from the method would not preclude applicants from portraying such feelings during adjudications, so long as decision-makers conduct their assessments in an open, rather than leading, way.

*D. Recommendations to Combat Reliance on Prejudice and Bias in Credibility Determinations*

Adjudicators should avoid *any* reliance on stereotypes in the making of credibility determinations.<sup>139</sup> Though the ECJ acquiesced to the presence of stereotypes in the credibility determination process in *ABC*, studies have shown the likelihood of faulty conclusions based on their use.<sup>140</sup> Therefore, adjudicators should be informed of the dangers of relying on stereotypes and instructed to refrain from using them when assessing credibility.

To do so, adjudicators and officials should complete cultural competency and sensitivity training to better serve LGB applicants, who often present a unique set of issues from other asylum applicants. Many advocates think that, in addition to having to use a proven method in credibility determinations, adjudicators and immigration officials should be trained in how to competently

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<sup>136</sup> *Id.* For example, one official found an LGB applicant incredible because he had had a relationship with another man despite his knowledge of Sharia law and its punishments. *See id.*

<sup>137</sup> *Id.* at 21.

<sup>138</sup> Berg & Millbank, *supra* note 23, at 201.

<sup>139</sup> *See supra* notes 97–98 and accompanying text.

<sup>140</sup> *See supra* notes 99–111 and accompanying text.

handle LGB claims with proper sensitivity.<sup>141</sup> Canadian law professor Nicole LaViolette proposed an LGBT Competency Training model that revolves around three subjects: (1) growing awareness and combatting preconceived notions surrounding LGBT individuals; (2) gaining knowledge about country of origin information and legal norms; and (3) developing skills for interacting with LGBT applicants.<sup>142</sup> Such training can combat several of the perceived problems in LGB asylum credibility determinations. Research indicates that adjudicators often make credibility determinations based on whether applicants' narratives line up with what they believe to know about sexual orientation, and so training on awareness and appropriate attitudes will at least allow adjudicators to compare applicants' narratives with unbiased information.<sup>143</sup>

Furthermore, LGB asylum applicants are commonly faced with a plethora of psychological issues that can make the retelling of their histories especially difficult.<sup>144</sup> Because of these issues, it is particularly important that adjudicators avoid reliance on demeanor when making credibility determinations in LGB asylum applications. Instead, adjudicators should treat applicants with sensitivity and respect, allowing applicants to feel safe disclosing their identities.<sup>145</sup> Translators should also receive such training, especially because applicants may face even greater difficulties speaking of their sexual identities to someone they associate with their countries of origin or cultures. The UNHCR directed that specialized training be provided for adjudicators, interviewers, interpreters, and legal representatives.<sup>146</sup> However, LaViolette acknowledges that cultural competency training will be of little use if other systemic problems in the refugee determination system are not also addressed, and so training in cultural competency should accompany other reforms to the credibility determination process, such as implementation of the DSSH method.<sup>147</sup>

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<sup>141</sup> See Nicole LaViolette, *Overcoming Problems With Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?*, in FLEEING HOMOPHOBIA 193–94 (Thomas Spijkerboer ed., 2013) [hereinafter LaViolette, *Overcoming Problems*].

<sup>142</sup> *Id.* at 199.

<sup>143</sup> Middelkoop, *Normativity and Credibility*, *supra* note 22, at 167.

<sup>144</sup> These psychological issues commonly include a reluctance to reveal sexual orientation as the basis of the claim, the experience of concealment strategies, the impact of shame and depression on the applicants' abilities to recall, and the experience of sexual assault. Berg & Millbank, *supra* note 23, at 198; Shidlo & Ahola, *supra* note 115, at 9.

<sup>145</sup> Berg & Millbank, *supra* note 23, at 198.

<sup>146</sup> Guidelines on International Protection No. 9, *supra* note 10, ¶ 60(iv).

<sup>147</sup> See LaViolette, *Overcoming Problems*, *supra* note 141, at 207.



## CONCLUSION

Effective remedies to the problems identified above must involve a flexible system that allows adjudicators a wide range of discretion. Any attempt to limit the discretion of adjudicators would likely fail to accommodate for the special needs of legitimate LGB refugees and open the asylum system to abuse and manipulation. As noted above, LGB asylum applicants often carry psychological<sup>148</sup> and self-identification<sup>149</sup> issues with them, which may make their applications for asylum different and more sensitive than other asylum applications.<sup>150</sup> Adjudicators may need a wide level of discretion to be able to discern the applicant's affiliation with the PSG.<sup>151</sup> The use of a completely objective method, such as a questionnaire, would likely be taken advantage of by those who could deduce the "correct" answers and recite them in order to gain residency.<sup>152</sup> However, as evidenced by the problems noted above, the discretion exercised by asylum adjudicators must be guided by appropriate methods and understandings.

The ECJ's opinion in *ABC* is extremely disappointing in that it fails to provide guidance to states that are unsure of how best to conduct credibility determinations of LGB asylum applicants. States should therefore look to advocates and scholars for help. Many countries have already created policies based on the work of advocates that encourage sensitive handling of these determinations, such as many countries' incorporation of the DSSH Method.<sup>153</sup> However, adjudicators should exercise extreme caution not to generalize or make assumptions about applicants further than the DSSH method does, especially in regards to the shame element. This Comment recommends that adjudicators only consider the shame element when an applicant voluntarily expresses it. Alongside this revised version of the DSSH Method, an emphasis

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<sup>148</sup> See *supra* notes 112–23, 137 and accompanying text.

<sup>149</sup> See *supra* notes 70–72 and accompanying text.

<sup>150</sup> For instance, while an applicant for asylum based on religious or political persecution may be expected to allege his or her religious or political affiliation during his or her first asylum application and consistently thereafter, the same rules should not apply to asylum applicants struggling with their sexual identities. Joined Cases C-148/13 to C-150/13, *A, B, & C v. Staatssecretaris van Veiligheid en Justitie (ABC)*, ¶ 69 (July 17, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CC0148>; see also Berg & Millbank, *supra* note 23, at 196 (noting the distinct difficulties faced by asylum applicants who are claiming membership in a PSG based on sexual orientation).

<sup>151</sup> See Berg & Millbank, *supra* note 23, at 217 (advocating for an "open and sensitive" approach to conducting credibility determinations).

<sup>152</sup> Chelvan, *From ABC to DSSH*, *supra* note 10. Chelvan notes that a questionnaire has been proposed before the UNHCR, but is strongly opposed by himself and other advocates. *Id.*

<sup>153</sup> See *Internationally Recognised*, *supra* note 12.

on open-ended questioning, a cessation to the use of stereotypes in credibility determinations, and system-wide cultural competency and sensitivity training, could substantially reduce the risk of adjudicators both infringing upon applicants' rights under the Fundamental Charter and making faulty credibility determinations. Although the ECJ regrettably did not set forth more limiting guidelines for EU member states to follow, states that adopt the policy changes recommended by this Comment can achieve greater success in complying with European law when making accurate credibility determinations for LGB asylum applicants.

As important as it is for adjudicators and other officials to focus on the appropriate factors in making credibility determinations for LGB applicants, advocates and applicants must not forget that it is ultimately the burden of the applicant's legal counsel to protect applicants from unfair or invasive inquiries. Counsel must help applicants create a cohesive and convincing narrative of sexual identity as early as possible in the claim process, as consistency of testimony throughout the application process is especially important.<sup>154</sup> Furthermore, these narratives should clearly and convincingly portray applicants' identities as recognized reactions to "oppressive social forces."<sup>155</sup> No one is in a better position than counsel to maintain a safe and respectful environment during the adjudication process, as he or she should be able to keep in check any reliance by adjudicators on inappropriate inquiries.<sup>156</sup>

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<sup>154</sup> Berg & Millbank, *supra* note 23, at 196.

<sup>155</sup> *Id.* at 216.

<sup>156</sup> *Id.* at 199.

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