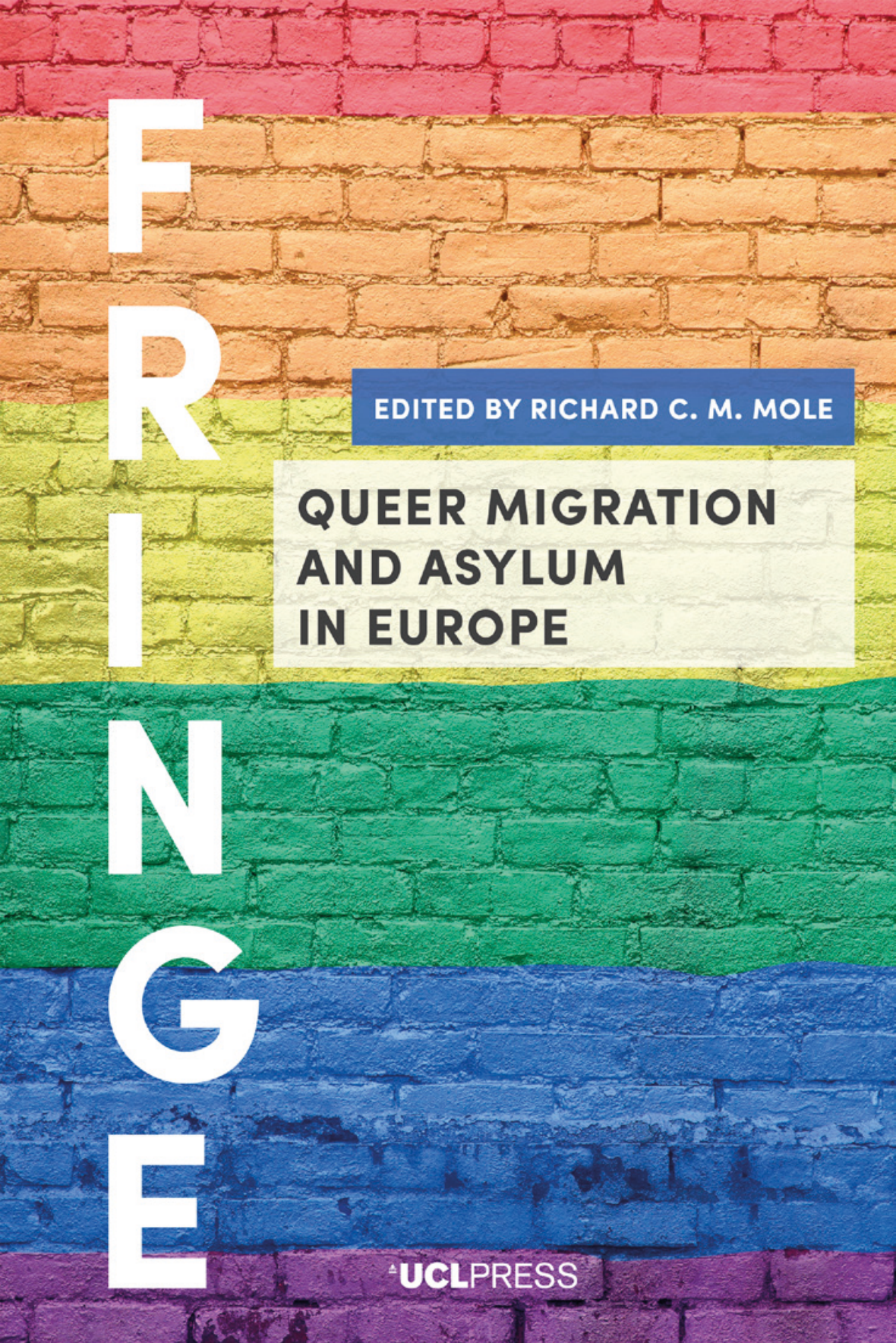
FRINGE
EDITED BY RICHARD C. M. MOLE
QUEER MIGRATION AND ASYLUM IN EUROPE
UCLPRESS

5
An exercise in detachment: the Council of Europe and sexual minority asylum claims

Nuno Ferreira

Introduction

Both key regional organisations in Europe – the European Union (EU) and the Council of Europe (CoE) – have played an increasingly significant role in moulding current asylum law in Europe.[1] The EU now has a fully fledged, reasonably sophisticated asylum policy, constituted by a range of legal instruments and jurisprudence covering all key aspects of asylum claims (Peers 2016). This body of law and policy has a direct and explicit impact on sexual minority asylum claims (SMACs) (Ferreira 2018).[2] Although the activity of the CoE in the field of asylum is considerably scattered and patchy compared to the EU's, the CoE has nevertheless gradually produced an important body of law and policy that a ects SMACs. This is mostly because of the work of the European Court of Human Rights (the Strasbourg Court).

I will consider how the CoE has contributed to shaping the current European legal and policy framework relating to SMACs. While there is already academic work that comprehensively analyses this theme in the context of the EU and the Court of Justice of the EU (CJEU) (Ferreira 2018), that is not the case in relation to the CoE. My focus in this chapter will be, in particular, on how the jurisprudence of the Strasbourg Court has dealt with SMACs. Similarly to the general situation in relation to the Strasbourg jurisprudence on sexual orientation (Johnson 2013), the CoE policy and the Strasbourg jurisprudence have a significant influence on how domestic authorities address SMACs, so it is critical to address this

gap in the academic literature and develop a thorough understanding of the framework developed in the context of the CoE on this matter. Enforcement issues will fall outside the scope of this chapter.

Through this work, I wish to contribute to a growing body of literature that adopts a queer perspective on the activity of the Strasbourg Court. Inspired by an extensive body of queer literature that explores the sociocultural nature, diversity and fluidity of gender and sexuality (for example Butler 1990; Sedgwick 2008) and uses 'queer' as a tool of critique in the field of migration (Fernandez 2017), I add my voice to those that o er a queer deconstructive reading of human rights discourse to challenge the lack of universality of sexuality rights and foster emancipation (see, for example, Gonzalez-Salzberg 2019; Langlois 2018). While acknowledging that merely granting rights will not achieve su ciently radical change for sexual minorities from a queer perspective, one cannot but *also* demand the recognition of rights as at least *part* of the solution (Langlois 2018). In addition to a queer perspective, it is important to consider an intersectional perspective. Building on the work of intersectional scholars such as Crenshaw (1989) and Yuval-Davis (2006), which requires us to ponder the range of individuals' characteristics and their interactions in order to understand people's social and political experiences, I will consider how the Strasbourg Court can o er a holistic analysis of SMAC applications in order to vindicate applicants' rights and challenge injustice.

The key argument put forward in this chapter is that, despite some isolated positive developments, the CoE in general and the Strasbourg Court in particular are failing SMAC applicants. The jurisprudence of the Strasbourg Court shows an astonishing degree of deference to member states' policies and decision-making in this field, thus e ectively not upholding the European Convention on Human Rights (ECHR) and betraying the applicants' rights. This deference creates a worrying detachment from the su ering and risks to which SMAC applicants are exposed when the Court denies their claims, something that has been argued in relation to the Strasbourg jurisprudence on migration in general as well (Dembour 2015). This argument will be substantiated throughout this chapter through an analysis of the relevant policy documents and numerous examples drawn from the jurisprudence in question. The significance of this analysis thus lies mainly in the identification of the shortcomings of the CoE's policy and the Strasbourg Court's jurisprudence in this field, which will allow commentators, policy-makers and decision-makers to gain a systematic and critical understanding of this field and plan their response accordingly.

I will proceed by delineating in the next section the role of the CoE, and the Strasbourg Court in particular, in developing both asylum and sexual orientation law at a European level, albeit by adopting lines of direction that are essentially divergent. The third section, 'The sexual minority asylum jurisprudence of the Strasbourg Court', explores the Strasbourg jurisprudence on SMACs, by o ering an overview and a summary assessment of the relevant decisions. Next, 'Exposing the skeletons in the Court's closet' explores three key themes that emerge in that jurisprudence, namely the threshold for violation of ECHR articles, the rules of evidence and credibility assessment, and how the Court deals with intersecting characteristics and sociocultural factors. The final section summarises why the CoE, and the Strasbourg Court in particular, should deal more forcefully with these claims.

Asylum and sexual orientation in the Council of Europe: resisting the meeting of the roads?

All CoE member states are bound by the 1951 Refugee Convention,[3] but not all are bound by the 1967 Protocol,[4] which extends the geographical scope of the 1951 Convention beyond Europe and removes its temporal restriction to pre-1951 events. Moreover, the CoE itself is not bound by the Refugee Convention or its Protocol and does not have a fully fledged policy on asylum matters. Nonetheless, the CoE has acquired a progressively significant role in the field of asylum. Despite the absence of an asylum policy as such, several of its bodies have taken a noteworthy role in this field. For example, in 2005 the CoE's Parliamentary Assembly warned domestic asylum authorities about the need to implement an e cient asylum system without jeopardising the standards in the Refugee Convention and its Protocol and the ECHR and its protocols.[5] Furthermore, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) produces guidelines on the treatment of migrants and asylum claimants, which are a valuable tool to advocate for better conditions at a domestic level (Danisi 2009). The Committee has also urged CoE member states to use detention only as a measure of last resort and to provide detainees with adequate conditions (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2017), which is directly consequential for asylum claimants.

The Strasbourg Court, above all, along with the now extinct European Commission of Human Rights,[6] has developed a strong line

of jurisprudence that applies the ECHR to asylum claimants, despite the ECHR not possessing any norm explicitly related to asylum. In short, although the Strasbourg Court does not take decisions that consider the final outcome of asylum claims as such, it does decide on the violation of ECHR articles that may protect asylum claimants. In doing so, the Court engages in a 'balancing exercise between the e ective protection of human rights, and the Contracting States' autonomy to regulate migration and refugee flows' (Buchinger & Steinkellner 2010, 421). The Strasbourg Court o ers asylum claimants protection mostly on the basis of Articles 3 ECHR (prohibition of torture)[7] and, to a lesser extent, 2 ECHR (right to life).[8] In the Court's own words:

> its case-law has found responsibility attaching to Contracting States in respect of expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render e ective in practice … Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and e ective enforcement of all the rights and freedoms set out in the Convention.[9]

The Court may, nevertheless, also consider violations of Articles 4 (prohibition of slavery and forced labour),[10] 5 (right to liberty and security),[11] 8 (right to respect for private and family life)[12] and 13 (right to an e ective remedy)[13] of the ECHR, if the asylum claimant has su ered or risks su ering a flagrant denial of these rights in the CoE host country. The Court will not, however, entertain claims based on Article 6 (right to a fair trial), because it only applies to civil and criminal matters, asylum (and migration) being neither. Most important, the Court not only limits itself for the most part to considering Articles 2 and 3 ECHR violations, which restricts immensely the scope of rights asylum claimants may claim (Dembour 2015), but it also adopts an excessively high threshold for finding a violation of these articles by requiring that they be 'systematically' violated (see the subsection 'A bird's-eye view' below). This is the cornerstone of the detachment Strasbourg adopts in relation to asylum claimants. Moreover, jurisprudence is also in tension with the intersectional approach adopted in this analysis, because asylum applicants whose particular combination of characteristics may expose them to greater levels of violence and persecution may not see

their experiences fully acknowledged or their rights vindicated in such broad-brush, excessive requirement of 'systematic' violation of Articles 2 or 3 ECHR. The greatest indictment in this respect comes from the fact that applicants have come to find United Nations (UN) bodies, particularly the Commission Against Torture, more e ective in staying removals of asylum claimants than the Strasbourg Court (CDDH & DH-SYSC 2019, 100), despite the widely known shortcomings of the UN human rights system. Undoubtedly, the CoE needs to further refine its legal and policy framework on asylum and render it more responsive to the needs, interests and rights of the individuals a ected. This will be illustrated by the analysis of SMAC jurisprudence in subsequent sections.

In parallel, the CoE has also developed a rich body of jurisprudence on sexual orientation but this has so far not influenced the SMAC jurisprudence of the Court. Despite some legitimate criticism (see, for example, Ammaturo 2017), the CoE has been active in facilitating what has been termed the 'law of small change' in relation to sexual orientation matters: slowly but steadily, there has been progress, from decriminalisation of homosexual activity to same-sex marriage and same-sex adoption (Waaldijk 2003). Indeed, the CoE has contributed considerably to such progress, including by making some positive changes at a domestic level. Yet the legal framework of the CoE has been slow in tackling the violation of sexual orientation-related rights, which have been increasingly recognised at the domestic and international levels (Human Rights Council 2016; 'Yogyakarta Principles'[14] 2007), thus revealing an insu ciently queer reading of the ECHR.

Although the ECHR does not contain a stand-alone non-discrimination clause,[15] the Strasbourg Court has developed a non-discrimination jurisprudence that also protects sexual minorities. This has included the use of Article 8 ECHR on the right to family and private life, often in combination with Article 14 ECHR, to prohibit the criminalisation of homosexuality,[16] preclude bans on homosexuals in the armed forces,[17] eliminate discrimination in relation to the age of sexual consent on grounds of sexual orientation,[18] condemn discrimination against same-sex couples in relation to tenancy rights,[19] protect the parental rights of homosexual fathers,[20] recognise that same-sex relationships are a form of 'family life'[21] and safeguard the family reunification rights of same-sex couples.[22]

The work of the Strasbourg Court has thus been increasingly supportive of sexual minorities' legal claims and this has been welcomed by activists and community groups. As van der Vleuten states,

'LGBTI [lesbian, gay, bisexual, trans and intersex] activists have been empowered vis-à-vis their governments by their access to the European courts when access to the national political arena was blocked, and … the ECJ [CJEU] and, to a lesser extent, the ECtHR [Strasbourg Court] have been empowered by LGBTI activism' (van der Vleuten 2014, 119). It may be the case that the Strasbourg Court has not been su ciently progressive in relation to all sexual minority matters and the case of SMACs may in fact be one such matter, as the jurisprudence analysis below will show. Nonetheless, the Strasbourg Court has been found to be more proactive than the CJEU in relation to sexual minorities, to the extent that the CJEU tends only to o er protection to sexual minority claims when the Strasbourg Court has already initiated that legal direction (Wintemute 2015).[23] In this regard, Ammaturo importantly points out that human rights frameworks inform a sense of European exceptionalism in relation to sex, sexuality and gender, which contributes to a 'European sexual and gendered citizenship' that has at its core the recognition of LGBTIQ+ (lesbian, gay, bisexual, trans, intersex, queer and other) rights in the European political community (Ammaturo 2017, 100). Consequently, Europe is no longer just a 'geo-political area and becomes a prescriptive and normative idea, almost an aspiration' (Ammaturo 2017, 100). And yet, homonationalist agendas attempt to instrumentalise advancements on LGBTIQ+ rights for xenophobic and racist purposes (Bracke 2012; Mole 2017), and the Court's jurisprudence on sexual minorities has contributed to the construction of an '*essentialised*, *privatised*, *victimised* and *respectable* "homosexual", simultaneously de-politicising, normativising and domesticating the "homosexual subject"' (Ammaturo 2018, 576; emphasis in original).

There undoubtedly remains much work to be done in the context of the CoE to ensure that asylum claimants are able to vindicate their right to international protection, and much could still be done to improve how sexual minorities are treated and recognised as fully fledged members of society. From a queer theoretical perspective, the Court's jurisprudence is clearly still a long way from adequately acknowledging and respecting human sexual and gender variety and fluidity. Moreover, asylum claimants are re-victimised by Strasbourg's detachment from their needs, interests and rights. The snapshot above suggests that Strasbourg has become an increasingly 'pro-LGBT' court, but 'anti-migrant' as well. This might explain the hesitant and often inconsistent way the CoE, in general, and the Strasbourg Court, in particular, have dealt with SMACs so far, as will now be explored.

The sexual minority asylum jurisprudence of the Strasbourg Court

It has been clear for several years in the context of CoE asylum law and policy that SMACs deserve legal protection. For example, the CoE Committee of Ministers has called on member states to fulfil their international obligations in relation to SMACs:

> Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.[24]

The European Commission of Human Rights (which until 1998 acted as scrutiniser of claims before they were allowed to reach the Court) and the Strasbourg Court have had a growing number of opportunities over the years to establish a position in relation to SMACs.[25] This jurisprudence is quantitatively summarised in Figure 5.1.[26]

Amongst the 23 decisions that have been identified, the great majority – 20 (87 per cent) – have been of inadmissibility (including

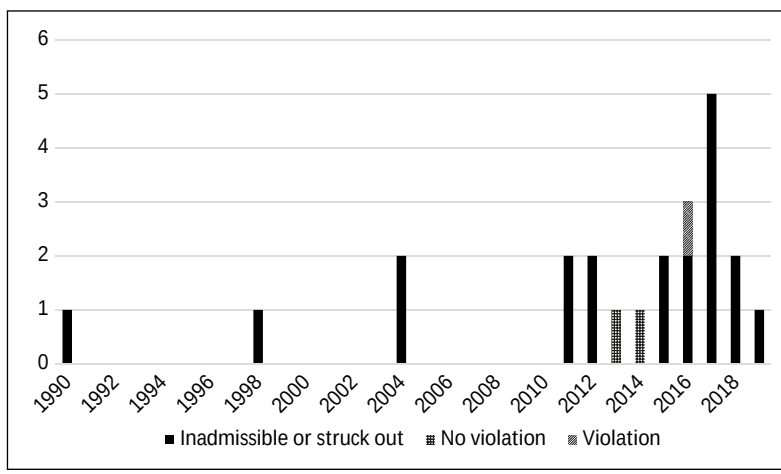

Figure 5.1 Jurisprudence of the Strasbourg Court on sexual minority asylum claims, 1990–2019. The figure sets out the number of sexual minority asylum cases per year and their outcomes. Source: author

applications found to be manifestly ill-founded) or striking out,[27] two (9 per cent) have been of no violation of an ECHR article and only one (4 per cent) has been of violation of an ECHR article. These figures alone suggest a reluctance on the part of the Court to support sexual minority applicants claiming asylum. The figures also suggest a growing number of relevant decisions over time, with figures increasing since 2015, which tallies with the growing body of scholarly, NGO and media discussion on this theme.[28] A qualitative analysis of these decisions, however, tells us much more: it presents a severely inadequate picture from a queer intersectional perspective.

A bird's-eye view

The first time the Strasbourg Court decided on a case involving a SMAC was in 1990, in *B. v United Kingdom*, when a gay Cypriot man claimed his deportation to the Turkish Republic of Northern Cyprus (TRNC) would constitute a violation of Articles 8, 13 and 14 ECHR in the light of the criminalisation of same-sex acts in TRNC and the intimate relationship the applicant had developed with a British citizen in the meantime.[29] On this occasion, the Court found the application inadmissible for being manifestly ill-founded. Almost a decade later, in 1998, the Commission again dealt with a SMAC in *Shahram Sobhani v Sweden*, where an Iranian gay man who applied for asylum in Sweden on grounds of his homosexuality saw his claim denied.[30] While his application to the Commission for violation of Articles 2, 3 and 8 ECHR was being considered, the Swedish government quashed the expulsion order and granted the applicant a permanent residence permit, thus leading the claimant to withdraw his application and the application to be struck out by the Commission.

These two cases set a leitmotif: ever since, the Court has for the most part found applications related to SMACs inadmissible for being manifestly ill-founded or has struck them out. For example, *F. v United Kingdom*[31] and *I.I.N. v the Netherlands*,[32] both involving Iranian gay men, were found manifestly ill-founded, as well as *A.N. v France*, involving a Senegalese gay man,[33] and *M.B. v the Netherlands*, involving a Guinean gay man.[34] The Court has also found inadmissible the application in the interesting *H.A. and H.A. v Norway* case, involving two Iranian brothers with asylum claims on multiple grounds (religion and sexual orientation). In this case, sexual orientation was a perceived characteristic of the applicant.[35] Although the Court also found the application manifestly ill-founded in *I.K. v Switzerland*,[36] based on the domestic authorities' negative assessment of the applicant's credibility, this decision seems to

signal a change in rhetoric: the Court acknowledged sexual orientation as a fundamental characteristic, talked about the need to be sensitive in the assessment of applicants' credibility and asserted the inappropriateness of 'concealment reasoning' in asylum claims (see 'Exposing the skeletons in the Court's closet' for further discussion). At any rate, the outcome remained negative, which suggests there is still a long way to go until the Court is ready to truly protect the rights of applicants in the case of SMACs.

Several applications have been struck out on the basis that national authorities had in the meantime taken measures that addressed the applicant's claim, such as suspending a return order in *K.N. and Others v France*,[37] granting an asylum-based residence permit in *A.S.B. v the Netherlands*,[38] conceding a continuous residence permit for work for one year, with the possibility of requesting a renewal, in *A.E. v Finland*,[39] agreeing to re-examine the asylum claim in *M.B. v Spain*,[40] accepting a fresh asylum claim in *A.T. v Sweden*,[41] ordering that the claim be reassessed in *E.S. v Spain*,[42] and granting a residence permit to the applicant in *A.R.B. v the Netherlands*.[43]

On a few occasions, the Court has also struck out applications because of the applicants having lost contact with their legal representative, such as in *R.A. v France*,[44] involving a Pakistani gay man, and *D.B.N. v United Kingdom*,[45] involving the first lesbian asylum claimant to file a case with the Strasbourg Court. On other occasions, applications were struck out owing to the lack of a reply from the applicant to the observations submitted by the respondent State and third parties, as in *M.T. v France*, involving a gay Cameroonian man.[46] In a di erent context, the Court has also struck out the application in *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v Russia*, which referred to an Uzbek gay man detained in Moscow.[47] What set this case apart from all other SMAC applications before Strasbourg is that the applicant was a publicly known journalist, who regularly contributed to a weekly newspaper with national coverage – *Novaya Gazeta* – and who had dealt with a wide array of issues, including LGBTIQ+ rights. After several months in detention in Russia, the applicant was allowed to travel to Germany, where authorities granted him asylum. On this account, the Court struck out the Article 3 claim as well as considering the Article 5 claim inadmissible.

The Court has only considered admissible three SMAC-related applications, and two of these led to a finding of no violation of an ECHR article. The first was the decision in *M.K.N. v Sweden*, in which the Court finally recognised that SMACs fall within the remit of the ECHR.[48] Although the Strasbourg Court accepted the importance of

a ording the benefit of the doubt to asylum claimants, it sided with the Swedish authorities regarding the possibility of internal relocation and the negative credibility assessment. The Court thus held that returning the claimant to Iraq did not constitute a violation of Article 3 ECHR. The second one was the infamous decision in *M.E. v Sweden*,[49] in which the Court had to deal with the case of a Libyan asylum claimant in a same-sex relationship in Sweden, who had been required to return to Libya to obtain a family reunification visa. Although the applicant had been the target of death threats from his family for having married someone of the same sex, the Strasbourg Court found that the requirement that the claimant be 'discreet' about his sexuality (e ectively 'concealing' it) for a period of time in Libya was not a violation of Article 3 ECHR. This decision was severely criticised in a powerful dissenting opinion by Judge Power-Forde, who stated: 'The majority's conclusion in this case does not "fit" the current state of International and European law on this important question of fundamental human rights. … The reasoning is flawed and unconvincing.' While this decision was being referred to the Court's Grand Chamber, the Swedish Migration Board decided to grant the applicant a permanent residence permit because of the deterioration of conditions in Libya, leading the Court to strike out the case.[50]

The only finding of a violation of an ECHR article in a SMAC-related application came with *O.M. v Hungary*,[51] in which the Strasbourg Court dealt with the case of an Iranian gay man who was detained for two months in Hungary and then granted refugee status. Here, the Court found that there had been a violation of Article 5 ECHR, especially in view of the authorities' disregard for the particular vulnerability of O.M. during his detention, and awarded the claimant compensation. The positive decision in *O.M. v Hungary* had given hope of a Court more sensitive towards SMACs. Nonetheless, what has followed is a long string of SMAC applications either being held inadmissible or struck out, with no single finding of violation of an ECHR right ever since, quickly dashing any such hopes of a more supportive Court. Furthermore, *O.M. v Hungary* did not relate to the asylum claim itself, so there is e ectively no finding of a violation of an ECHR article in relation to a SMAC as such.

A summary assessment

Overall, the body of Strasbourg jurisprudence that has developed around SMACs indicates an insu cient willingness to protect these applicants from persecution. Even decisions significant for introducing positive developments, such as the recognition in *M.K.N. v Sweden* that SMACs

fall within the remit of Article 3 ECHR, reinforce the image of a Court unsympathetic towards SMACs. One might attribute such results to the fact that the asylum claims found credible by domestic authorities are decided positively at domestic level, and only the ones that are not found credible reach Strasbourg. Yet that does not justify the substantive decisions across all the jurisprudence discussed above. Moreover, this image of an unsympathetic Court – or 'static and unresponsive', in the words of Falcetta and Johnson – becomes even more apparent when one contrasts this restrictive line of jurisprudence with the judgments the Court has produced in relation to cases involving sexual orientation and migrants' residence issues (Falcetta & Johnson 2018, 215). All this reinforces the idea of a Court detached from the su ering of SMAC applicants, thus dehumanising them.

As Ammaturo points out, 'If there were a genuine interest in defending individuals – either citizens or non-citizens – from human rights abuses, stories of structural violence or harassment would be enough to grant protection, without the applicants having to demonstrate a threat of death or an extreme punishment' (Ammaturo 2017, 57). In none of the decisions discussed here is there any reference to the Yogyakarta Principles and only in one case – *I.K. v Switzerland* – is there a reference to the UNHCR's guidelines on refugee claims based on sexual orientation or gender identity (UNHCR 2012). This practically inexistent consideration of international standard-setting documents in this field reinforces the lack of willingness from the Strasbourg Court to engage fully with the scope of rights of SMAC applicants, especially considering that the Court regularly refers to external sources in other types of claims.[52] If the Court were open to genuinely considering such external sources, this would go some way to address the concerns raised by a queer intersectional perspective, by recognising and engaging with the variety of rights, characteristics and experiences of sexual minorities.

The increasingly frequent references by the parties and the Strasbourg Court to the jurisprudence of the CJEU could, in theory, translate into better outcomes for SMAC applicants. The CJEU has slowly developed a body of SMAC jurisprudence that, despite room for improvement, does possess many positive elements (Ferreira 2018). Moreover, although the relationship between the CJEU and Strasbourg Court has not always been clear or mutually supportive, there are plenty of examples of positive judicial dialogue (Rackow 2016). Yet, in practice, the CJEU jurisprudence has been used either to reinforce the argumentation in favour of a negative outcome or to dot negative argumentation with some positive references to the legal protection a orded

to the applicants. As an example of the former, in *I.K. v Switzerland* the CJEU's decision in *X, Y and Z* is only alluded to by the Swiss authorities to support the conclusion that the applicant's claim was unfounded.[53] As an example of the latter, in *A.N. v France* the Court acknowledged that the third parties intervening in the case referred to the decision in *X, Y and Z* to highlight the wrongness of the 'discretion argument', but the Court still concluded that the application was manifestly ill-founded on other grounds. Similarly, in *M.B. v the Netherlands* the Court referred to the CJEU decisions in *X, Y and Z* and *A, B and C*, drawing some positive elements from these cases for the applicant, but nevertheless again found the application to be manifestly ill-founded on other grounds.[54] Finally, the initial reference to *X, Y and Z* in the Court's first decision in *M.E. v Sweden* was ignored when the Court subsequently imposed an obligation on the applicant to conceal his sexuality upon return. The fact that the majority agreed on this point is stunning, as the CJEU's decision in *X, Y and Z* could not have been clearer about there being no room for the 'discretion argument' in the asylum procedure. This deviation from a positive feature in *X, Y and Z* indirectly weakened the asylum system in Europe, by undermining the CJEU's authority and the persuasiveness of its decisions. This tension may be a mere reflection of the often fraught relationship between the CJEU and Strasbourg (including in the field of asylum), and of the heavily politicised debates that a ect these Courts, such as the debate about the EU's accession to the ECHR (Rackow 2016). When the consequences include a potential danger to an applicant's life, the Strasbourg Court should be able to rise to the occasion and protect human rights above all.

Another noticeable and disappointing feature in this body of Strasbourg jurisprudence is the apparent strategy of the member states to solve, delay or revisit the applicant's claim for international protection in an obvious attempt to pre-empt negative decisions from the Court or simply lead the Court to strike out the application. The long list of cases (partially or completely) struck out on account of the respondent state's decision to somehow revisit its refusal of international protection – 10 out of the 23 analysed – is clearly suggestive of that.[55] Specific examples can be found in *A.E. v Finland*, for example: the Finnish authorities avoided a substantive decision from the Court by granting to the applicant a continuous residence permit for work for one year, with the possibility of requesting a renewal. This not only led to the Court striking out the application, but crucially also overlooks the fact that the applicant's life remained in limbo and the Finnish authorities might very well deny the renewal of the residence permit for work. Similarly, in *M.B. v Spain*,

the Spanish authorities decided to reopen the administrative procedure and re-examine the asylum claim in question while the Court was analysing the application, so the Court struck out the application. Although this decision is perfectly legitimate in the light of the Court's rules and its jurisprudence in such circumstances, it has been lamented for missing the opportunity to provide greater clarity on the issues it raised (ILGA-Europe 2017). A third example can be seen in *A.T. v Sweden*, in which the Swedish authorities considered the expulsion order statute-barred and accepted a fresh asylum claim while the Court was analysing the original claim, which led to the Court's decision to strike out the application. In a slightly different scenario, but with similar consequences, Russia escaped condemnation in *Nurmatov (Ali Feruz) v Russia* by letting the applicant travel to Germany, where authorities granted him asylum. While it is fortunate that the applicant is now in safety, it is lamentable that once again the Court was deprived (or deprived itself) of the possibility of analysing the substance of the claim. The most recent example of this strategy can be seen in *A.R.B. v the Netherlands*, in which the Netherlands granted a residence permit to the applicant, which led to the Court striking out the case.

One may believe that such a state strategy is legitimate and that the Court should not be criticised for simply using the ECHR rules to manage its workload as effectively as possible. Yet, Article 37 ECHR also states that the Court 'shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires' and that it 'may decide to restore an application to its list of cases if it considers that the circumstances justify such a course'. The strategy of these states not only affects migrants more generally but also seriously undermines applicants' human rights (Dembour 2015, 325). In the light of the vulnerable and precarious position in which these applicants are left by states in these circumstances, the Court would be not only entitled, but also required, not to strike out several of the applications mentioned above, for the sake of effectively protecting the rights of the applicants. In this process, the Court also disregards the particular characteristics of the applicants in these cases and likewise the fact that the Court's refusal to analyse the substance of the applications may leave them even more vulnerable. An intersectional approach to these cases is thus in order.

Overall, we are faced with a disappointing body of jurisprudence from the Strasbourg Court, which can be criticised on a range of grounds and is severely lacking from a queer intersectional perspective. In the next section, three further key areas of criticism are analysed, which

will render more evident the flaws and the scope for improvement of the decisions in question.

Exposing the skeletons in the Court's closet

The Strasbourg Court does not apply the Refugee Convention, so it is not directly concerned with ensuring the fulfilment of requirements such as 'demonstrating a fear of persecution', membership of a 'particular social group', 'credibility' or lack of 'internal relocation alternative' (UNHCR 2019). Instead, the Court analyses such international protection claims from the prism of the ECHR. Such analysis – as carried out in the Strasbourg SMAC jurisprudence so far – entails many 'skeletons' that need to be exposed.

The threshold for violation of ECHR articles

Instead of determining whether there is a 'risk of persecution' under the Refugee Convention, the Court is concerned with determining whether there is a risk of violation of an ECHR right upon the return of the applicant to their country of origin. As mentioned above, however, in this context the Court is generally only concerned with possible violations of Articles 2 and 3 ECHR, and only more rarely with violations of other ECHR articles. To carry out this assessment, the Court often refers to the information submitted by the parties in relation to the situation in the applicant's country of origin. The analysis of the quality of such information will serve as a springboard for this section. The analysis will then move to the restrictive use of the ECHR, the high threshold adopted by the Court to find a violation and the way the Court has dealt with the notion of 'discretion'.

To carry out their assessment of international protection claims, national authorities are expected to rely on precise and up-to-date country of origin information (COI) and information regarding countries through which the claimant may have transited. Despite the lack of relevant COI on sexual minorities, asylum claimants may well be victims of persecution warranting international protection, as the information gathered in relation to the country of origin, 'first country of asylum' and 'third countries' often omits elements regarding sexual minorities. Based on COI, national authorities often adopt lists of 'safe countries', which are seen as countries from where one would generally not expect to see a 'legitimate' asylum claim. This has been a notion widely criticised by

both scholars and civil society for undermining the right to international protection (Costello 2016; ECRE 2016). Furthermore, the very notion of a 'safe country' is in tension with an intersectional approach to asylum claims, which requires an individual consideration of each claimant's circumstances and is not compatible with wholesale analyses of countries of origin. The Strasbourg jurisprudence has, positively, adopted a highly critical view of the mechanistic way in which asylum authorities use the notion of 'safe country' (be it country of origin or third country/country of passage). In *Ilias and Ahmed*, relating to Hungarian border procedures, the Court reiterated that the use of this notion needs to be carefully scrutinised against Article 3 ECHR.[56] To this purpose, public authorities cannot simply rely on a list of 'safe countries' and expect asylum claimants to rebut that legal presumption of 'safety': it is 'unfair and excessive' for the public authorities to lay the whole burden of proof on asylum claimants and not carry out any work of assessment of the risk of violation of Article 3 ECHR in case of refoulement. The Court thus ascertained that 'it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources' (para. 118).

On a less positive note, however, the Court does not o er the full power of the ECHR and its jurisprudence to asylum claimants. For example, in *F. v United Kingdom*, the Court oddly asserted that, despite all the evidence it had received about the treatment of gay men in Iran, it had not been proven that returning the applicant to Iran would entail treatment falling within the scope of Article 8 ECHR. The Court blatantly downplayed the risk of criminal punishment for homosexual conduct and asserted that returning the applicant to Iran would not engage Article 8 ECHR, let alone constitute a violation of that norm.[57] The Court adopted a similar approach in subsequent cases, such as *M.E. v Sweden*. This is at odds with the Strasbourg jurisprudence on 'sodomy laws' that criminalised same-sex conduct in many countries across Europe and that were finally held to have been a violation of human rights law since the 1980s by the Strasbourg Court in seminal cases such as *Dudgeon v UK*,[58] *Norris v Ireland*[59] and *Modinos v Cyprus*.[60] While in these cases the mere existence of 'sodomy laws' in a member state (even if not enforced) was considered a violation of Article 8 ECHR, in relation to SMAC applications the Court does not believe Article 8 ECHR is engaged at all by 'sodomy laws' that may well be enforced. For this reason, Judge De Gaetano used his separate opinion in *M.E. v Sweden* to criticise the Court's reliance on *X, Y and Z* and its tolerance of laws criminalising homosexual acts. More recently, in *I.K. v Switzerland*, the applicant had also invoked a violation

of Article 14 ECHR, but the Court brushed that aside by asserting that the substance of the claim had already been analysed from the perspective of Article 3 ECHR, thus circumventing any analysis of Article 14 ECHR in the context of asylum. Foreign queer bodies are blatantly dehumanised, in a sort of legalised erasure of humanity, with the alleged blessing of established legal doctrinal principles.

What transpires evidently is that international protection claimants can only rely on a very limited scope of ECHR protection. While nationals of CoE member states can expect to benefit from the full scope of the ECHR while they remain within their jurisdiction (unless they are subject to extradition),[61] migrants in general should expect a more limited scope of protection (Dembour 2015). People seeking asylum, in particular, should generally not expect to benefit from more than the protection of Articles 2 and 3 when it comes to analysing the risks they may face upon return to their countries of origin. In the words of Spijkerboer, with this sort of decision the Court is e ectively asserting that 'some fundamental rights are, actually, not fundamental because facilitating their violation by removal is not in violation of these rights' (Spijkerboer 2018, 228). Although one may say that Strasbourg is not responsible for the state of human rights across the globe, this application of double standards on the basis of one's citizenship status sits uneasily with the universality of human rights, has rightly been criticised by commentators (Jansen 2019, 133), and a ects SMACs in particularly acute ways.

Even if one limits oneself to relying on Articles 2 and 3 ECHR, it is striking how the Strasbourg Court applies these articles to SMACs on the basis of an extremely high threshold, thus overlooking the absolute nature of these norms. For example, in both *F. v United Kingdom* and *I.I.N. v the Netherlands*, the Court ignored the possibility of prosecution for consensual and private homosexual relationships, the under-reporting of such instances, and the reported instances of criminal punishment of homosexual conduct. In *I.I.N. v the Netherlands*, in particular, the Strasbourg Court considered a range of materials submitted as evidence, including a UNHCR position paper which stated:

> In view of the multiplicity of executions and lashings, it cannot be excluded the victims thereof include persons being punished – on grounds of homosexuality – by death or lashing as provided for on the Iranian Criminal Code. Against this background, it cannot be asserted with certainty that the criminal law provisions on homosexuality only have a theoretical significance.

Yet, similarly to *F. v United Kingdom*, the Court found the application manifestly ill-founded. In both *F. v United Kingdom* and *I.I.N. v the Netherlands*, gay Iranian asylum claimants conformed to the Western, popular notion of a 'gay man' and described the violence they had su ered in their home country. This 'hypervisible Iranian queer' (Shakhsari 2012) is someone who engages to as great a degree as one can expect with the asylum system and addresses all the requirements one may be expected to fulfil in asylum claims. And yet that was not enough, as the Strasbourg Court overlooked their humanity and dismissed their claims, denying the risk of cruel or inhuman punishment upon their return to Iran.

The same approach was to be adopted in subsequent decisions. In *M.E. v Sweden*, for example, although the applicant had been the target of death threats from his family for having married someone of the same sex in Sweden, the Court denied his application. This decision was widely criticised for disregarding the fact that, independently of whether the criminal penalties for homosexuality in Libya were enforced or not, 'a hostile attitude towards anyone suspected of being homosexual permeated local culture', instances of massive violence against gay men had been reported, and all diplomatic representations in Libya had been closed down (Falcetta 2015). The decision itself referred to – but remained uninfluenced by – o cial reports by international organisations and domestic authorities confirming violence against civilians, active extremist groups, continued arbitrary detention of thousands of persons outside state control, and persecution of homosexuals. Again, a queer foreign body is the victim of a violent process of dehumanisation, betraying an acutely detached Court.

More recently, in *A.N. v France*, involving a Muslim gay Senegalese man, the Court determined that, although same-sex conduct is criminalised in Senegal, with a prison sentence of up to five years, and there are on average ten convictions each year on this basis, the enforcement of this norm was not 'systematic'. The Court pursued the same line of argumentation in *M.B. v the Netherlands*, involving a gay man from Guinea, where – according to the Dutch authorities' own o cial country guidance report – 'there are deeply rooted social, religious and cultural taboos with respect to homosexuality'. Despite NGO and Dutch authorities' own reports indicating the opposite, the Court found that the Guinean criminal o ence of same-sex conduct was not 'systematically applied'. 'Systematically' implies that the Court intends to cover all or practically all instances of violation of the law, which is unreasonable: it e ectively means that no criminal norm in any system is enforced in a systematic way, as there are always instances where criminally punishable

conducts are not prosecuted for the most various reasons. Furthermore, this line of argumentation overlooks the widespread dangerous societal, structural and institutional e ects that the mere criminalisation of same-sex conduct, even when the prohibition is not actively enforced by public authorities, can have on the well-being and protection of sexual minorities, including the facilitation of blackmail, extortion, severe discrimination and other forms of serious harm (Phillips 2009; UNHCR 2012, para. 26).

The unreasonably high threshold of the Court in these cases is thus excruciatingly obvious and is in contradiction with the standards of the UN bodies, which have asserted that 'inconsistencies and ambiguities' in particular cases 'are not of a nature as to undermine the reality of the feared risks'[62] and that the fact that domestic authorities 'are not actively persecuting homosexuals does not rule out that such prosecution can occur'.[63] Moreover, such a high threshold is also arguably in contradiction with the Court's own jurisprudence, to the extent that, in these cases, the Court should be considering whether there is a 'real risk' of even a *single* violation of Articles 2 or 3 ECHR, rather than whether there is a 'systematic application' of norms that violate ECHR rights. Crucially, this jurisprudence ignores the need to adopt an intersectional approach to SMACs and neglects how SMAC applicants' particular range of characteristics and specific socio-economic context may a ect potential violations of Articles 2 and 3.

The Court's focus on the way such criminal o ences are enforced can, furthermore, be denounced as hypocritical: while in relation to (heterosexual) women asylum claimants the Court is only concerned with whether there are laws in place to protect women from ill-treatment irrespective of whether those norms are applied in practice (Peroni 2018, 353), when it comes to SMACs the Court does the opposite and is only concerned with signs of lack of enforcement of laws criminalising same-sex conduct irrespective of whether or not those laws still cause harm even when not enforced. What is clear, then, is that the Court is not concerned with any actual harm the applicants may risk su ering but rather with finding more or less formulaic methods of denying the applications. Crucially, there is a growing movement to consider the criminalisation of same-sex conduct between consenting adults to be a violation of Article 3 ECHR in itself, owing to the degrading and dehumanising nature of these criminal o ences (Danisi 2015, 298–300; Johnson & Falcetta 2018).

The Strasbourg jurisprudence on SMACs has also touched on the idea that applicants may be returned to their countries of origin and be

'discreet' about their sexuality (e ectively concealing it), so as to avoid any harm coming their way. In *M.K.N. v Sweden*, the Strasbourg Court had already hinted at sympathising with this argument when it denied the applicant's claim, perhaps influenced by the Swedish government's argument that, as the claimant intended to go on living with his wife, there was no risk of him demonstrating his sexual orientation upon his return – and thus he would remain 'discreet'. Although such a 'discretion' or 'concealment' argument or requirement was widely used across Europe for many years, in 2013 the CJEU condemned this idea beyond doubt in *X, Y and Z*. Yet, somewhat anachronistically, the Strasbourg Court's decision in *M.E. v Sweden* retained the 'discretion requirement' as appropriate, even if for a relatively short period of time, and thus found no violation of Article 3 ECHR under these circumstances. Although the Swedish authorities subsequently granted the applicant a permanent residence permit, the harm had been done: the Court had o ered legitimacy to the 'discretion requirement' at a time when most European domestic jurisdictions had abandoned it, and this was rightly criticised by commentators (Fraser 2014; Steendam 2014). In the light of the eradication of the 'discretion requirement' in most of its forms from most of the European domestic jurisdictions, one could legitimately expect a di erent position from the Strasbourg Court in subsequent, similar cases. That is what happened in *I.K. v Switzerland*, in which the Court acknowledged that there was no room for discretion in relation to such a fundamental aspect of one's identity and conscience. And yet the outcome was negative for the applicant. The Court again neglects SMAC applicants' individual composite of characteristics and how it may expose them to violence and persecution. Ultimately, this makes one wonder when rhetoric will translate into genuine queer rights vindication.

Rules of evidence and assessment of credibility

SMACs are notoriously di cult to prove in any jurisdiction (Jansen & Spijkerboer 2011). As with any other asylum claim, the success of SMACs is fundamentally dependent on the evidentiary standards adopted and the credibility assessment carried out by the decision-maker. As many scholars have already pointed out, a 'culture of disbelief' pervades some domestic asylum authorities, such as the Home O ce in the UK (Millbank 2009; Souter 2011). Even more worryingly, the Strasbourg Court adopts a dangerously hands-o approach to the scrutiny of the credibility assessment carried out by domestic authorities, leaving applicants at the mercy of often hostile domestic authorities. Although the Court is

admittedly constrained by its own statute and procedural rules, such as admissibility criteria (Article 35 ECHR) and striking-out rules (Article 37 ECHR), there is scope to scrutinise more thoroughly member states' rules of evidence and assessment of credibility.

The Strasbourg jurisprudence's leitmotif in this field is deference towards domestic authorities, something recognised by the Court's judges themselves and justified on the basis of the Court's subsidiary role and limited tools (Ravarani 2017, 3–4). This deference is blatant in the decisions subscribing to negative credibility assessments. Clear examples can be found in relation to the UK and French domestic authorities. In *F. v United Kingdom*, the domestic authorities questioned F.'s credibility in relation to the length of time he spent in prison and his nationality. They also queried why he had not claimed asylum in Turkey. On appeal, the UK authorities reiterated the assessment of lack of credibility. The Court also chose to accept the assessment of lack of credibility of the domestic authorities, thus siding with the 'culture of disbelief' of the UK asylum authorities. In *A.N. v France*, the Court also subscribed to the French authorities' assessment of the facts, thus accepting the 'verdict' of lack of credibility. Although the Court acknowledged the difficulty of proving SMACs owing to the personal nature of the matters at hand, it sided with the French government to reiterate the insufficiency of the evidence submitted by the applicant. Deference – and detachment – once again prevailed.

Further examples of such deference to the negative assessments of credibility carried out by domestic authorities can be found in Strasbourg jurisprudence, such as *M.E. v Sweden*, *M.B. v Spain*, *E.S. v Spain* and *I.K. v Switzerland*. Even when the Court rhetorically highlights that the credibility assessment has to be carried out in an individual and delicate manner, as it asserted in *I.K. v Switzerland*, deference prevails and the domestic authority's negative credibility assessment stands. A particularly crass example of such excessive deference can be seen in *M.B. v the Netherlands*, in which the Court deferred to the Dutch authorities' assessment of the applicant's credibility, even though the Dutch authorities expected that the applicant would be able to state the number of people involved in a mob attack against him and the number of police officers who arrived afterwards. It is submitted that it would have been 'incredible' if the applicant had been able to point out the exact number of such attackers and police officers, as it is highly unlikely that an individual would be able to count the number of people beating up or detaining them. Moreover, the Court shows no sign of reflecting on the possible influence of individual mental health and trauma, or local

cultural or social factors, on the accounts of applicants that may appear incredible to European decision-makers, although such impact has been analysed and evidenced at length (Bögner, Herlihy & Brewin 2007). On the contrary, the Court is too easily convinced by the domestic authorities' preoccupation with apparent inconsistencies or oddities.[64]

The principle of the benefit of the doubt – a principle whose importance in asylum adjudication is highlighted in the UNHCR guidance (UNHCR 2019) – is ultimately ignored by both domestic authorities and the Strasbourg Court, thus unlawfully depriving SMAC applicants of a key legal tool. A striking example can be seen in *M.K.N. v Sweden*, in which, despite all the evidence submitted by the applicant, the Swedish Migration Board claimed that M.K.N.'s account was not credible. The Migration Court reiterated this assessment of lack of credibility owing to the late disclosure of his sexuality (see the subsection 'Intersecting characteristics and sociocultural factors', below). Before the Strasbourg Court, M.K.N. claimed to have provided a reasonable explanation for the late disclosure and asked to be given the benefit of the doubt. The Strasbourg Court confirmed the importance of a ording the benefit of the doubt to asylum claimants but also agreed with the Swedish authorities regarding the possibility of internal relocation and the credibility assessment, in particular in relation to the claimant's homosexual relationship. In the end, the Court refused to give the claimant the benefit of the doubt, thus again deferring to the credibility assessment of the domestic authorities. The same approach by the Court can be seen in the first decision in *M.E. v Sweden*.

The Court thus seems willing to accept member states' choices as to which aspects of asylum claimants' testimonies matter, and how they should matter, without o ering domestic authorities any critical comments, positive guidance or admonition for the clearly inadequate application of rules on evidence and findings on credibility. Both member states and the Strasbourg Court are accomplices in this violence caused to foreign queer bodies in search of international protection. It is thus apt to ask: Who's afraid of the benefit of the doubt?

Intersecting characteristics and sociocultural factors

Besides analysing the risk of violation of an ECHR article upon return (see 'The threshold for violation of ECHR articles'), and the overall credibility of the applicant ('Rules of evidence and assessment of credibility'), the Court is often called upon to consider a range of other legal and social aspects relevant to asylum claims that are intertwined with a range of individual characteristics and sociocultural factors. How the Court deals

with these other aspects (including in the light of COI, discussed in 'The threshold for violation of ECHR articles') has an impact on how the Court analyses both the risk of violation of an ECHR article upon return and the credibility of the applicant. It is thus crucial to consider those as well and to bring to fruition an intersectional approach to the Court's SMAC jurisprudence.

One such aspect is the 'internal relocation alternative', i.e., an individual seeking asylum being able to return to their country of origin and relocate within it to escape the risk of persecution. In the light of how widespread discrimination and violence against sexual minorities can be in the countries of origin of most SMAC applicants, 'internal relocation' is rarely available to them (UNHCR 2012, paras 51–6). In *M.K.N. v Sweden*, the Strasbourg Court uncritically endorsed the Swedish authorities' assertion that the Christian religious beliefs of the Iraqi claimant – who had had a homosexual relationship in Iraq and had been discovered – would allow him to relocate to the Kurdistan region. Similarly, in *A.N. v France*, the applicant – a Muslim man who had been the victim of blackmail, physically assaulted by rioters and held captive and violently assaulted by relatives – submitted evidence that sexual minorities had to move residence regularly in Senegal to avoid being found out, but the French government insisted that internal relocation was realistic and the Court simply referred back to the domestic assessment of the facts, without showing any interest in questioning the reasonableness of internal relocation in Senegal.

Another aspect of SMAC applicants' experiences that can have a negative impact on the success of their claims is the 'late disclosure' of one's sexuality. The reality is that SMAC applicants often do not know that their sexual orientation can be of relevance for the purposes of obtaining international protection and, even if they do, many do not know how to structure their narratives or that they should include all the elements that may possess relevance to a European decision-maker. Most importantly, many SMAC applicants will not feel comfortable – or may even feel utterly mortified for religious, cultural or personal reasons – at the thought of discussing their sexual orientation with a complete stranger, in what is often a hostile environment. The Strasbourg Court's decision in *M.K.N. v Sweden* is a good example of how asylum authorities fail to grasp the di culties a sexual minority asylum claimant may have in disclosing their past experiences. In this case, the claimant's account of his past homosexual relationship was denied credibility for having been reported late, although the late disclosure could be justified by the fact that the claimant had an opposite-sex spouse, had children

and had lived in a strongly conservative and unstable country a ected by religious conflicts. M.K.N. himself attributed the late disclosure of this element of his account to not knowing that homosexuality was (socially and legally) accepted in Sweden. The Court, however, chose to disregard the di culties involved in disclosing to authorities one's past homosexual relationships, even in such complex and adverse circumstances. Similarly, in *M.E. v Sweden*, the Court chose to side with the Swedish authorities in their assessment of lack of credibility on account of the late disclosure of M.E.'s sexuality. More recently, however, the CJEU asserted in *A, B and C* that delays in disclosing one's sexuality should not automatically be held against asylum claimants to harm their credibility. One can only hope that this will prove valuable in guiding domestic authorities towards not placing excessive importance on late disclosures.[65]

More generally, the Court fails to grasp the complexity of applicants' lives and sociocultural backgrounds and reduces them to 'siloed' identities that can fit neatly into domestic asylum systems and the ECHR system as envisaged by European mindsets. In *I.I.N. v the Netherlands*, for example, the gay Iranian asylum claimant had come into contact with the Iranian authorities not only because of his homosexuality but also because of his participation in protests. Yet his political activism only merits a brief mention amongst the facts reported and is ignored in the Court's analysis. Similarly, in *M.K.N. v Sweden*, although the applicant had an opposite-sex spouse, had children and risked persecution on grounds of his sexuality, religious beliefs and (relatively good) economic condition, the Court paid no heed to the 'messiness' of the applicant's account and simply relied on the Swedish authorities' negative credibility assessment, focusing on only one of the applicant's characteristics – his sexuality. Generally, one can find passing references to some of the applicants' characteristics or circumstances: the applicant in *M.E. v Sweden* fearing that the Libyan diaspora in Sweden would pass the news about his same-sex marriage to Libya; the applicant in *A.N. v France* being gay, Muslim and afraid of discrimination from his diaspora community; or the gay male applicant in *M.B. v the Netherlands* not knowing many details about his partner, perhaps owing to the clandestine nature of their relationship in a society oppressive towards sexual minorities.

Yet, disappointingly, the Court only mentions these aspects but never addresses or analyses them to any extent as the significant sociocultural dynamics and identifiers that they are or allows them to have any positive bearing on the outcome of the case. It would have been particularly interesting in *M.B. v Spain* – involving a lesbian woman of a particular ethnicity that was at the origin of her exposure to human

rights violations – to see how the Court would deal with issues of criminalisation and credibility in a context where ethnicity, gender and sexuality intersect. Similarly, the decision in *H.A. and H.A.* – where one of the brothers feared persecution on the basis of both religion and sexual orientation – would have been an excellent opportunity to engage with the way in which religion and sexuality may potentiate persecution and human rights violations, but the Court – worryingly – opted to dismiss that matter with a very terse analysis of the applicant's concerns, despite the widely known severe treatment of gay (or just perceived as gay) men in Iran (Mendos 2019).

Strasbourg's overall lacklustre approach to SMACs and the richness of these applicants' lives can ultimately dissuade applicants from pursuing their claims, with potentially terrible effects on their lives, aggravated in cases where specific combinations of characteristics render claimants particularly vulnerable to gender and sexual oppression. Consciously pursuing a queer intersectional approach to these cases can support better decision-making in Strasbourg, and we can legitimately expect more from the Court in terms of how it handles such complex lives and applications.

Which way forward for the European sexual minority asylum framework?

The CoE, and in particular the Strasbourg Court, have undoubtedly contributed to many positive developments for sexual minorities across Europe. Yet, in relation to SMACs, the current inadequacies are conspicuous. Although many of these inadequacies may seem necessary by-products of the structure and functioning rules of the CoE and the Court, it is realistic to expect a fairer treatment of SMACs. Both quantitative and qualitative analyses of the Strasbourg jurisprudence on SMACs clearly reveal the unwillingness of the Court to genuinely and respectfully engage with these applicants' accounts and rights. Sporadic references to more positive CJEU decisions in this field have so far not led to any progress in Strasbourg. Worse, member states have been successful in strategically prompting the Court to strike out applications by solving, delaying or revisiting applicants' claims. This leaves applicants in precarious situations and circumvents jurisprudential developments in this field. Whether the Court adopts this approach to avoid antagonising member states, to respect their margin of appreciation, to manage its workload, to avoid opening the 'floodgates' to this type of claim, or for

any other reason, it needs to change its course to honour its mission and preserve the humanity of these claimants, even if that may well mean 'exporting' the Convention's values and applying them to seven billion people (Ravarani 2017, 4). Foreign queer bodies have human rights as well.

To vindicate the rights of SMAC applicants and foster judgments better informed by a queer intersectional perspective, the Strasbourg Court needs to improve its jurisprudence on several levels. First, the Court needs to apply the full range of ECHR articles (in particular Articles 8 and 14) to these claims when analysing the risks the applicants will encounter if they are returned to their country of origin. The Court also needs to lower the current threshold at which a risk becomes so severe as to be incompatible with the ECHR. States would still retain considerable agency to deport individuals with no human rights claims under a newly reduced threshold for deeming a risk 'severe enough' to be incompatible with the ECHR. In short, this would not mean 'opening the floodgates' to any challenge to deportation orders, because some leeway to deport individuals would remain.

Second, the Court needs to stop deferring to the 'culture of disbelief' engrained in many domestic authorities and start taking the principle of the benefit of the doubt seriously and hold domestic authorities against an appropriate standard of proof in these cases. If this means – as some may argue – that a small number of 'fake claims' succeed, then this is a reasonable price to pay for robust and fair international protection and human rights systems. Third, the Court needs to immerse itself in the applicants' whole stories and consider seriously all the individual characteristics, identifiers and sociocultural factors involved in each case. This means adopting an intersectional approach to deal in a more culturally and socially appropriate way with issues such as assessing whether there is any 'internal relocation alternative' and whether the 'late disclosure' of one's sexuality should have any bearing on an applicant's claim. Although this may at first seem to require further resources, it can in e ect be pursued by making use of quality training materials and COI already in existence.

Essentially, it is submitted that the Court has so far failed to do justice to SMAC applicants by detaching itself from the violence to which they are submitted in their countries of origin and in Europe. The Court has repeatedly ignored the complexity and richness of applicants' accounts and tended to operate within the limited parameters of narrow legal readings of the ECHR and the Court's relationships with the member states. This does a disservice to the applicants' claims and leads to unfair

outcomes. If the Strasbourg Court were to become more sensitive to a queer intersectional approach to SMAC applications, better justice would be done.

Acknowledgements

This contribution has been produced within the context of the project 'Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA' (http://www.sogica.org). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 677693). The author wishes to thank Marie-Benedicte Dembour, Kanstantsin Dzehtsiarou, Richard Mole, Moira Dustin, Nina Held, Carmelo Danisi, Stephanie Berry, Gianluca Gentili, Melody Greaves and Lisa Harrington for the constructive critique they o ered on earlier drafts of this contribution.

Notes

1. Despite their di erent legal and technical meanings, the expressions 'asylum', 'refuge' and 'international protection' will be used somewhat interchangeably throughout this text for convenience.
2. The expression 'sexual minorities' will be used in this chapter to refer to non-heterosexual persons. The expression 'sexual orientation' will also be used to refer to people's sexuality. I acknowledge that not everyone I wish to refer to may identify as a member of a 'sexual minority' or see the matters discussed as a matter of 'sexual orientation', but I will use these expressions for practical reasons. The words 'homosexual' and 'homosexuality' will also be used; despite being increasingly disfavoured and replaced with the word 'gay' in English-speaking contexts, they are still very much used in judicial decisions, in policy documents and in other languages, so they will be used here without any negative connotation. Much of the discussion in this chapter also relates to or a ects gender identity asylum claims, but because the Strasbourg Court has so far only dealt with one application related to gender identity asylum, such applications will fall outside the scope of this contribution. The application in question related to a transsexual Iranian refugee in Hungary, already granted international protection who claimed a violation of Article 8 ECHR for having been denied a change of legal status of name and gender. The Court found in favour of the applicant and awarded non-pecuniary damages: *Jafarizad Barenji Rana v Hungary*, Application no. 40888/17, 16 July 2020.
3. UN General Assembly, 'Convention Relating to the Status of Refugees', 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
4. UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
5. Parliamentary Assembly of the Council of Europe, *Accelerated asylum procedures in Council of Europe member states*, text adopted by the Assembly on 7 October 2005 (32nd Sitting).
6. The European Commission of Human Rights was a body of the Council of Europe that assisted the Strasbourg Court until 1998 in determining whether applications were admissible, reaching friendly settlements and producing statements of facts and opinions on whether a violation had occurred. This Commission ceased to exist with the coming into force of Protocol No. 11 to the ECHR, which, amongst other things, introduced direct access by individuals to the Court: *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental*

Freedoms, Restructuring the Control Machinery Established Thereby, Strasbourg, 11 May 1994, European Treaty Series – No. 155.

7. For example, *Chahal v the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996.
8. *Bahaddar v the Netherlands*, Application no. 25894/94, 19 February 1998.
9. *F. v United Kingdom*, Application no. 17341/03, 22 June 2004 (further discussed in section 'A bird's-eye view').
10. *H.I. v Switzerland*, Application no. 69720/16, 14 December 2017.
11. For example, *Khlaifia and Others v Italy*, Application no. 16483/12, 15 December 2016 (Judgment of the Grand Chamber); *O.M. v Hungary*, Application no. 9912/15, 5 July 2016 (discussed in section 'A bird's-eye view').
12. *B.A.C. v Greece*, Application no. 11981/15, 13 October 2016.
13. *G.R. v the Netherlands*, Application no. 22251/07, 10 January 2012.
14. An updated version, 'The Yogyakarta Principles plus 10 (YP+10)' (2017) is available at: http://www.yogyakartaprinciples.org/ (accessed 22 August 2020).
15. Article 14 ECHR refers exclusively to discrimination in relation to one of the rights in the ECHR. The 2000 Protocol No. 12 to the ECHR (ETS No. 177), which came into force in 2005, does contain a self-standing non-discrimination provision but has so far only been ratified by 20 out of the 47 CoE member states.
16. *Dudgeon v UK*, Application no. 7525/76, 22 October 1981; *Norris v Ireland*, Application no. 10581/83, 26 October 1988; *Modinos v Cyprus*, Application no. 15070/89, 22 April 1993.
17. *Smith and Grady v UK*, Applications nos 33985/96 and 33986/96, 27 September 1999.
18. *L. and V. v Austria*, Applications nos 39392/98 and 39829/98, 9 January 2003.
19. *Karner v Austria*, Application no. 40016/98, 24 July 2003.
20. *Salgueiro da Silva Mouta v Portugal*, Application no. 33290/96, 21 December 1999.
21. *Schalk and Kopf v Austria*, Application no. 30141/04, 24 June 2010.
22. *Pajić v Croatia*, Application no. 68453/13, 23 February 2016; *Taddeucci and McCall v Italy*, Application no. 51362/09, 30 June 2016.
23. Exceptions to this can be found in the CJEU's jurisprudence on, for example, access to marriage and discrimination, as can be seen in C-267/12, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, and C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, 5 June 2018, ECLI:EU:C:2018:385. For a discussion of this jurisprudence, see Danisi, Dustin and Ferreira 2019.
24. 'Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity', adopted on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.
25. For a more extensive chronological narrative of this jurisprudence, see Ferreira 2019. For a quick overview, including information regarding the applicants, main legal bases and key outcomes, see the tables of European jurisprudence at Ferreira 2020.
26. This jurisprudence has been identified through a search in the Court's database HUDOC (http://hudoc.echr.coe.int/), scholarly literature and NGO publications. Figures relate to date of decisions and were correct at 21 May 2019. Only cases already decided have been included; applications lodged but not yet decided have not been included. *M.E. v Sweden* has been included twice, as it has led to two decisions from the Court, although the first one did not become a final decision. The only selection criterion used was that the case must involve – even if not as its main feature – an asylum claim related to the applicant's sexual orientation. The decision in *Ayegh v Sweden*, Application no. 4701/05, 7 November 2006, was thus excluded, as this case involves same-sex sexual acts (the applicant's son being raped and abused by his school headmaster in Iran) but not the sexual orientation of the applicant herself.
27. See Article 35 ECHR, which establishes the criteria for the Court to consider an application admissible and deal with it, and Article 37 ECHR, which determines the circumstances under which the Court may at any stage of the proceedings decide to strike an application out of its list of cases.
28. See, for example, the database and social media available via www.sogica.org.
29. *B. v United Kingdom*, Application no. 16106/90, 10 February 1990.
30. *Shahram Sobhani v Sweden*, Application no. 32999/96, 10 July 1998.
31. *F. v United Kingdom*, Application no. 17341/03, 22 June 2004.
32. *I.I.N. v the Netherlands*, Application no. 2035/04, 9 December 2004.
33. *A.N. v France*, Application no. 12956/15, 19 April 2016.

34. *M.B. v the Netherlands*, Application no. 63890/16, 21 December 2017.
35. *H.A. and H.A. v Norway*, Application no 56167/16, 3 January 2017.
36. *I.K. v Switzerland*, Application no. 21417/17, 19 December 2017.
37. *K.N. and Others v France*, Application no. 47129/09, 19 June 2012. This case stands out as the only 'Dublin return' case amongst the Strasbourg SMAC jurisprudence. See 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', OJ L 180, 29.6.2013, pp. 31–59.
38. *A.S.B. v the Netherlands*, Application no. 4854/12, 10 July 2012.
39. *A.E. v Finland*, Application no. 30953/11, 22 September 2015.
40. *M.B. v Spain*, Application no. 15109/15, 13 December 2016.
41. *A.T. v Sweden*, Application no. 78701/14, 25 April 2017.
42. *E.S. v Spain*, Application no 13273/16, 19 October 2017.
43. *A.R.B. v the Netherlands*, Application no. 8108/18, 17 January 2019.
44. *R.A. v France*, Application no. 49718/09, 8 February 2011.
45. *D.B.N. v United Kingdom*, Application no. 26550/10, 31 May 2011.
46. *M.T. v France*, Application no. 61145/16, 27 March 2018.
47. *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v Russia*, Application no. 56368/17, 2 October 2018.
48. *M.K.N. v Sweden*, Application no. 72413/10, 27 June 2013.
49. *M.E. v Sweden*, Application no. 71398/12, 26 June 2014.
50. *M.E. v Sweden*, Application no. 71398/12, 8 April 2015.
51. *O.M. v Hungary*, Application no. 9912/15, 5 July 2016.
52. For example, the Court has referred to World Health Organization guidelines in *Makshakov v Russia*, Application no. 52526/07, 24 May 2016, and *Petukhov v Ukraine (No. 2)*, Application no. 41216/13, 12 March 2019.
53. Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.
54. Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406.
55. *K.N. and Others v France*, *A.S.B. v the Netherlands*, *M.E. v Sweden* (Grand Chamber), *A.E. v Finland*, *M.B. v Spain*, *A.T. v Sweden*, *E.S. v Spain*, *M.T. v France*, *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v Russia*, and *A.R.B. v the Netherlands*.
56. *Ilias and Ahmed v Hungary*, Application no. 47287/15, 14 March 2017, paras 112–13, 118 and 124.
57. Although the Strasbourg Court was not, in these cases, dealing with the notion of 'persecution' as such – as there is no right to asylum as such in the ECHR – it is interesting to note that the Strasbourg jurisprudence somehow mirrors the assertion of the CJEU in *X, Y and Z* that the criminalisation of same-sex conduct does not in itself constitute an act of persecution. This runs against the views of scholars and NGOs alike (ICJ – International Commission of Jurists 2014; Jansen and Spijkerboer 2011).
58. *Dudgeon v the United Kingdom*, Application no. 7525/76, 22 October 1981.
59. *Norris v Ireland*, Application no. 10581/83, 26 October 1988.
60. *Modinos v Cyprus*, Application no. 15070/89, 22 April 1993.
61. See, for example, *Soering v the United Kingdom*, Application no. 14038/88, 7 July 1989.
62. *M.I. v Sweden*, Communication No. 2149/2012, Human Rights Committee, views adopted by the Committee at its 108th session (8–26 July 2013), 25 July 2013, para. 7.5, in a case relating to a lesbian claimant from Bangladesh, where legislation criminalising same-sex conduct 'in itself fosters the stigmatization of LGTB individuals and constitutes an obstacle to the investigation and sanction of acts of persecution against these persons'.
63. *Mondal v Sweden*, CAT/C/46/D/338/2008, UN Committee Against Torture (CAT), 7 July 2011, para. 7.3, regarding a homosexual Bangladeshi man.
64. Rather astonishingly, the Court's deference to domestic authorities even extends to the Court being more concerned with applying domestic law than with applying the ECHR, as in *M.E. v Sweden* (para. 85).
65. See, for example, the decision of the Italian Supreme Court: *Corte di cassazione*, *ordinanza* n. 4522/15.

References

Ammaturo, Francesca Romana. 2017. *European Sexual Citizenship: Human rights, bodies and identities*. Cham: Palgrave Macmillan.

Ammaturo, Francesca Romana. 2018. 'The Council of Europe and the creation of LGBT identities through language and discourse: A critical analysis of case law and institutional practices', *International Journal of Human Rights* 23:575–95. https://doi.org/10.1080/13642987.2018.1540413.

Bögner, Diana, Jane Herlihy and Chris R. Brewin. 2007. 'Impact of sexual violence on disclosure during Home O ce interviews', *British Journal of Psychiatry: The Journal of Mental Science* 191:75–81. https://doi.org/10.1192/bjp.bp.106.030262.

Bracke, Sarah. 2012. 'From "saving women" to "saving gays": Rescue narratives and their dis/continuities', *European Journal of Women's Studies* 19:237–52. https://doi.org/10.1177/1350506811435032.

Buchinger, Kerstin and Astrid Steinkellner. 2010. 'Litigation before the European Court of Human Rights and domestic implementation: Does the European Convention promote the rights of immigrants and asylum seekers?', *European Public Law* 16:419–35.

Butler, Judith. 1990. *Gender Trouble: Feminism and the subversion of identity*. New York and London: Routledge.

CDDH (Steering Committee for Human Rights) and DH-SYSC (Committee of Experts on the System of the European Convention on Human Rights). 2019. 'Draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order as adopted by the DH-SYSC in its 5th meeting (15–18 October 2019)'. Council of Europe. Available at: https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/168098ae3d (accessed 3 March 2020).

Costello, Cathryn. 2016. 'Safe country? Says who?', *International Journal of Refugee Law* 28:601–22. https://doi.org/10.1093/ijrl/eew042.

Crenshaw, Kimberlé. 1989. 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum* (1):139–68. https://doi.org/10.4324/9780429500480-5.

Danisi, Carmelo. 2009. 'Preventing torture and controlling irregular immigration: The role of the European Committee for the Prevention of Torture and its activity in Italy', *Essex Human Rights Review* 6:151–76.

Danisi, Carmelo. 2015. *Tutela dei diritti umani, non discriminazione e orientamento sessuale*. Naples: Editoriale Scientifica.

Danisi, Carmelo, Moira Dustin and Nuno Ferreira. 2019. 'Queering Brexit: What's in Brexit for sexual and gender minorities?' In *Gender and Queer Perspectives on Brexit* (Gender and Politics), edited by Moira Dustin, Nuno Ferreira and Susan Millns, 239–72. Cham: Palgrave Macmillan.

Dembour, Marie-Bénédicte. 2015. *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American counterpoint*. Oxford: Oxford University Press.

ECRE (European Council on Refugees and Exiles). 2016. 'ECRE comments on the Commission proposal for an Asylum Procedures Regulation COM(2016) 467'. Available at: http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf (accessed 3 March 2020).

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 2017. '26th general report of the CPT: 1 January–31 December 2016'. Council of Europe. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168070af7a&utm_ (accessed 3 March 2020).

Falcetta, Silvia. 2015. 'M.E. v Sweden'. ECHR Sexual Orientation Blog. 2015. Available at: http://echrso.blogspot.co.uk/2015/04/me-v-sweden-guest-post-by-silvia.html (accessed 3 March 2020).

Falcetta, Silvia and Paul Johnson. 2018. 'Migration, sexual orientation, and the European Convention on Human Rights', *Journal of Immigration, Asylum and Nationality Law* 32:210–31.

Fernandez, Bina. 2017. 'Queer border crossers: Pragmatic complicities, indiscretions and subversions'. In *Queering International Law: Possibilities, alliances, complicities, risks*, edited by Dianne Otto, 193–212. Abingdon: Routledge.

Ferreira, Nuno. 2018. 'Reforming the Common European Asylum System: Enough rainbow for queer asylum seekers?', *GenIUS: Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere (Special Issue on SOGI Asylum)* (2):25–42.

Ferreira, Nuno. 2019. 'Sexual minority asylum claimants in the jurisprudence of the Strasbourg Court: A chronology', SOGICA/University of Sussex, 3 May. Available at: www.sogica.org/database/ferreira-sexual-minority-asylum-claimants-in-the-jurisprudence-of-the-strasbourg-court-2019/ (accessed 22 August 2020).

Ferreira, Nuno. 2020. 'SOGICA – Tables of European SOGI asylum jurisprudence', SOGICA/University of Sussex, 16 July. Available at: https://www.sogica.org/database/ferreira-sogica-tables-of-european-sogi-asylum-jurisprudence-2020/ (accessed 22 August 2020).

Fraser, Matthew. 2014. 'LGBTI asylum seekers: Discord between the European courts?', *EDAL* (European Database of Asylum Law), 25 July.

Gonzalez-Salzberg, Damian A. 2019. *Sexuality and Transsexuality under the European Convention on Human Rights: A queer reading of human rights law*. Portland, OR: Hart Publishing.

Human Rights Council. 2016. 'Resolution adopted by the Human Rights Council on 30 June 2016: Protection against violence and discrimination based on sexual orientation and gender identity' (A/HRC/RES/32/2). Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2 (accessed 3 March 2020).

ICJ (International Commission of Jurists). 2014. 'X, Y and Z: A glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v Minister voor Immigratie en Asiel*'. International Commission of Jurists (ICJ).

ILGA-Europe. 2017. 'Update from Strasbourg – M.B. v Spain asylum case struck out'. 19 January. Available at: http://ilga-europe.org/resources/news/latest-news/update-strasbourg-mb-v-spain-asylum-case-struck-out (accessed 30 June 2020).

Jansen, Sabine. 2019. 'Pride or shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments'. Amsterdam: COC Netherlands. Available at: https://www.coc.nl/wp-content/uploads/2019/01/Pride-or-Shame-LGBTI-asylum-in-the-Netherlands.pdf (accessed 3 March 2020).

Jansen, Sabine and Thomas Spijkerboer. 2011. 'Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe'. Amsterdam: Vrije Universiteit Amsterdam. Available at: https://www.refworld.org/docid/4ebba7852.html (accessed 22 August 2020).

Johnson, Paul. 2013. *Homosexuality and the European Court of Human Rights*. Abingdon: Routledge.

Johnson, Paul and Silvia Falcetta. 2018. 'Sexual orientation discrimination and Article 3 of the European Convention on Human Rights: Developing the protection of sexual minorities', *European Law Review* 43:167–85.

Langlois, Anthony J. 2018. 'Review article: Curiosity, paradox and dissatisfaction: Queer analyses of human rights', *Millennium* 47:153–65. https://doi.org/10.1177/0305829818783262.

Mendos, Lucas Ramón. 2019. *State-Sponsored Homophobia 2019: Global legislation overview update*. Geneva: ILGA World. Available at: https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf (accessed 22 August 2020).

Millbank, Jenni. 2009. '"The ring of truth": A case study of credibility assessment in particular social group refugee determinations', *International Journal of Refugee Law* 21:1–33. https://doi.org/10.1093/ijrl/een040.

Mole, Richard C. M. 2017. 'Homonationalism: Resisting nationalist co-optation of sexual diversity', *Sexualities* 20:660–2. https://doi.org/10.1177/1363460716645800.

Peers, Steve. 2016. *EU Justice and Home A airs Law. Volume I: EU Immigration and Asylum Law* (4th edn). Oxford: Oxford University Press.

Peroni, Lourdes. 2018. 'The protection of women asylum seekers under the European Convention on Human Rights: Unearthing the gendered roots of harm', *Human Rights Law Review* 18:347–70. https://doi.org/10.1093/hrlr/ngy005.

Phillips, Oliver. 2009. 'Blackmail in Zimbabwe: Troubling narratives of sexuality and human rights', *International Journal of Human Rights* 13:345–64. https://doi.org/10.1080/13642980902758192.

Rackow, Julia. 2016. 'Strasbourg and Luxembourg: A dialogue between law and politics'. *Geneva Jean Monnet Working Papers* 22/2016.

Ravarani, Georges. 2017. 'Assessment of the credibility of asylum-seekers: The burden of proof and the limits of the ECHR's examination'. European Court of Human Rights. Available at: https://www.echr.coe.int/Documents/Speech_20170127_Ravarani_JY_ENG.pdf (accessed 3 March 2020).

Sedgwick, Eve Kosofsky. 2008. *Epistemology of the Closet* (updated with a new preface). Berkeley and Los Angeles: University of California Press.

Shakhsari, Sima. 2012. 'From homoerotics of exile to homopolitics of diaspora: Cyberspace, the war on terror, and the hypervisible Iranian queer', *Journal of Middle East Women's Studies* 8:14–40. https://doi.org/10.2979/jmiddeastwomstud.8.3.14.

Souter, James. 2011. 'A culture of disbelief or denial? Critiquing refugee status determination in the United Kingdom', *Oxford Monitor of Forced Migration* 1:48–59.

Spijkerboer, Thomas. 2018. 'Gender, sexuality, asylum and European human rights', *Law and Critique* 29:221–39. https://doi.org/10.1007/s10978-017-9219-2.

Steendam, Sander. 2014. 'M.E. v. Sweden: Back to the closet', *Strasbourg Observers* (blog). 28 July. Available at: https://strasbourgobservers.com/2014/07/28/m-e-v-sweden-back-to-the-closet/ (accessed 3 March 2020).

UNHCR. 2012. 'Guidelines on international protection no. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (HCR/GIP/12/01). Available at: http://www.refworld.org/docid/50348afc2.html (accessed 3 March 2020).

UNHCR. 2019. 'Handbook on procedures and criteria for determining refugee status and Guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees'. Geneva: UNHCR. Available at: https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (accessed 22 August 2020).

van der Vleuten, Anna. 2014. 'Transnational LGBTI activism and the European courts: Constructing the idea of Europe'. In *LGBT Activism and the Making of Europe: A rainbow Europe?* (Gender and Politics), edited by Phillip M. Ayoub and David Paternotte, 119–44. Abingdon: Palgrave Macmillan.

Waaldijk, Kees. 2003. 'Others may follow: The introduction of marriage, quasi- marriage, and semi-marriage for same-sex couples in European countries', *New England Law Review* 38:569–89.

Wintemute, Robert. 2015. 'In extending human rights, which European court is substantively "braver" and procedurally "fitter"? The example of sexual orientation and gender identity discrimination'. In *Fundamental Rights in the EU: A matter for two courts*, edited by Sonia Morano-Foadi and Lucy Vickers, 179–200. Oxford: Hart Publishing.

'The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity'. 2007. Available at: https://www.refworld.org/pdfid/48244e602.pdf (accessed 22 March 2020).

Yuval-Davis, Nira. 2006. 'Intersectionality and feminist politics', *European Journal of Women's Studies* 13:193–209. https://doi.org/10.1177/1350506806065752.